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HAWAII DEPARTMENT OF TRANSPORTATION 2019 AVAILABILITY AND DISPARITY STUDY Final Availability and Disparity Study Report



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**Final Availability and Disparity Study Report
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EXECUTIVE SUMMARY.

2019 HDOT Availability and Disparity Study

Keen Independent Research LLC

The Hawaii Department of Transportation (HDOT) operates the Federal Disadvantaged Business Enterprise (DBE) Program to assist DBEs on contracts that use U.S. Department of Transportation (USDOT) funds. HDOT must set overall annual goals for participation of DBEs in those contracts.

An overall DBE goal expresses the percentage of contract dollars HDOT might expect to go to DBEs if there were a level playing field for those companies when competing for that work. HDOT sets unique goals for contracts funded by the:

- Federal Highway Administration (FHWA);
- Federal Transit Administration (FTA); and
- Federal Aviation Administration (FAA), by individual airport.

HDOT must also set goals for participation of Airport Concessions DBEs (ACDBEs) in its airport concessions.

Regulations in 49 CFR Part 26 and other USDOT guidance direct how an agency sets an overall DBE goal.¹ The process includes two steps: (1) developing a “base figure,” and (2) considering “step 2” adjustments. HDOT must also project the portion of each overall goal that it will meet through race-neutral means and any remaining portion to be met through DBE contract goals.

Similarly, regulations in 49 CFR Part 23 and other USDOT guidance outline how an agency sets an overall goal for ACDBE participation in its airport concessions and how to project the portion of the goal it will meet through race-neutral means.

HDOT retained Keen Independent Research (Keen Independent) to conduct the 2019 Availability and Disparity Study. The study team published a preliminary Availability Study and held public meetings about that study in summer 2019.

- That report included results for overall DBE goals for FHWA-funded contracts and FAA-funded contracts at Honolulu International Airport and Kahului Airport.
- In August 2019, HDOT submitted overall DBE goals to FHWA and to FAA (for Honolulu and for Kahului airports) for a three-year period starting October 1, 2019.² When the goals were submitted, HDOT reported they might be revised based on more information in the full Availability and Disparity Study report.

¹ Most DBEs are minority- or women-owned firms. If a white male-owned firm demonstrates both social and economic disadvantage and meets other federal certification requirements, it can also be DBE. See 49 CFR Part 26.67(d).

² HDOT also prepared an ACDBE goal for Molokai Airport.

This new Availability and Disparity Study report expands on the information in the Availability Study report, including:

- Revised overall DBE goals for FHWA-funded contracts;
- Revised overall DBE goals for FAA-funded contracts at Honolulu and Kahului airports;
- Overall DBE goals for contracts funded by the FTA, FAA-funded contracts at other airports, and airport concessions (regarding the Airport Concessions DBE Program);
- Comparison of the utilization and availability of minority- and women-owned firms for HDOT's transportation contracts and airport concessions;
- Projections of the portion of the goals that can be achieved through neutral means (including updated projections for FHWA-funded contracts and FAA-funded contracts at Honolulu and Kahului airports); and
- Changes in DBE and ACDBE program operation that HDOT might consider.

Background

At the start of this study, HDOT's current overall DBE goals were:

- 29.05 percent for FHWA-funded contracts statewide;
- 8.69 percent for FTA-funded contracts; and
- 11.12 percent to 29.00 percent for FAA-funded contracts at HDOT airports (varies by airport).

HDOT has used DBE contract goals and race-neutral measures to try to reach those overall DBE goals. As discussed in detail in this report, actual DBE participation has been below the goals. HDOT also has overall goals for ACDBE participation at its airports.

Availability and Disparity Study Analyses and Results for USDOT-Funded Contracts

To conduct the analyses in this study, Keen Independent:

- Compiled data on thousands of HDOT's past USDOT-funded contracts and subcontracts awarded from July 2011 through June 2016. (Keen Independent used the FHWA-, FTA- and FAA-funded contracts during the July 2011–June 2016 study period as indications of the mix of contracts during the time periods covered by future goals.)
- Determined that Hawaii was the relevant geographic market area for HDOT transportation contracts. (Firms with Hawaii locations received 95 percent of FHWA-funded contract dollars, 100 percent of FTA-funded contract dollars and 90 percent of FAA-funded contract dollars.)

- Identified 31 different types of work that accounted for most of the dollars of HDOT’s FHWA-, FTA- and FAA-funded prime contracts and subcontracts. These 31 types of construction, goods and services represented a very large share of the dollars of FHWA-, FTA- and FAA-funded contracts (96%, 94% and 86%, respectively).
- Surveyed thousands of companies in Hawaii performing work in those 31 subindustries to identify businesses available for HDOT contracts. About 57 percent of available businesses were minority- or women-owned (MBEs and WBEs).
- Using the survey data, calculated the number of MBEs and WBEs and total number of firms available for each past HDOT contract and subcontract given its type, size and location (i.e., an availability analysis for each contract).
- Dollar-weighted the results of the availability analyses for each contract to determine overall availability for FHWA- and FTA-funded contracts and for FAA-funded contracts at each airport.
- Determined which minority- and women-owned firms were certified as DBEs or could be counted as “potential DBEs.” Potential DBEs are MBEs and WBEs that are below revenue limits for DBE certification, except for those that had graduated from the DBE Program, had certification applications denied, or indicated that they were not eligible or not interested in DBE certification in the study team’s follow-up research.

Availability analyses for FHWA-, FTA- and FAA-funded contracts. Figure ES-1 presents the results of the dollar-weighted availability analysis for FHWA- and FTA-funded contracts. The first row indicates MBE/WBE availability, deductions for non-DBEs are made in the second row and the final row shows the results for current and potential DBEs. These dollar-weighted availability results for current and potential DBEs constitute the “base figure” for HDOT’s overall DBE goals for FHWA- and FTA-funded contracts (17.26% and 14.6%, respectively). The base figure for FHWA-funded contracts is revised from the preliminary results in the 2019 Availability Study based on new information about firms that should be counted as potential DBEs.

Figure ES-1.

Overall dollar-weighted availability estimates for current and potential DBEs for FHWA- and FTA-funded contracts

Calculation of base figure	FHWA	FTA
Total MBE/WBE	52.97 %	48.86 %
Less firms that graduated from the DBE Program or denied DBE certification in recent years or exceed revenue limits	<u>35.71</u>	<u>34.23</u>
Subtotal	17.26 %	14.63 %
Plus white male-owned DBEs	<u>--</u>	<u>--</u>
Current and potential DBEs	17.26 %	14.63 %

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

Source: Keen Independent availability analysis.

Keen Independent performed similar calculations to determine the base figures for future overall DBE goals for FAA-funded contracts at each HDOT airport. (Note that results for Honolulu and Kahului airports are revised from those presented in the July 2019 Availability Study report based on new information about potential DBEs.)

Figure ES-2.

Overall dollar-weighted availability estimates for current and potential DBEs for FAA-funded contracts at HDOT airports

Calculation of base figure	Honolulu International Airport	Kahului Airport	Kona International Airport	Hilo International Airport	Lihue Airport	Molokai Airport	Lanai Airport
Total MBE/WBE	51.54 %	58.78 %	28.92 %	46.68 %	41.05 %	43.46 %	44.99 %
Less firms that graduated from the DBE Program or denied DBE certification in recent years or exceed revenue limits	44.78	30.65	16.26	31.04	32.21	32.34	33.65
Subtotal	6.76 %	28.13 %	12.66 %	15.64 %	8.84 %	11.12 %	11.34 %
Plus white male-owned DBEs	--	--	--	--	--	--	--
Current and potential DBEs	6.76 %	28.13 %	12.66 %	15.64 %	8.84 %	11.12 %	11.34 %

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

Source: Keen Independent availability analysis.

The base figures represent the anticipated level of DBE participation from analysis of USDOT-funded contracts from July 2011 through June 2016. If the future mix of types, sizes and locations of projects were substantially different, it might affect the base figure for those contracts.

Potential Adjustments to Calculate the Overall DBE Goals

HDOT must consider potential adjustments to the base figure as part of determining its overall annual DBE goals for FHWA-, FTA- and FAA-funded contracts. HDOT must also project the portion of its overall goals it expects to meet through “neutral means,” which includes strategies to encourage small business participation in its contracts. With certain restrictions, federal regulations provide for any unmet portion of an overall DBE goal to be met through use of DBE contract goals.

Potential step 2 adjustments. Federal regulations require agencies to consider potential step 2 adjustments to their base figures when they determine overall DBE goals. Adjustments can be upward or downward. Factors to be considered are:

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

³ 49 CFR Section 26.45.

HDOT should review the information presented in the full Availability and Disparity Study report when considering whether to make an adjustment. Some possibilities are provided below.

Potential downward step 2 adjustment. USDOT’s “Tips for Goal-Setting” states that agencies should examine data on past DBE participation on their USDOT-funded contracts as an indication of current capacity of DBEs to perform work. USDOT suggests taking one-half of the difference between the base figure and this measure of current capacity to calculate this step 2 adjustment. The second column of Figure ES-3 shows these results.

No step 2 adjustment. The third column of Figure 3 presents results if no step 2 adjustment is made.

Potential upward step 2 adjustment. Keen Independent identified disparities in business ownership for people of color and women in Hawaii’s construction and engineering industries. But for these disparities, availability of minority- and women-owned firms would be higher (see Chapter 7 of the full Availability and Disparity Study report). The fourth column of Figure ES-3 reflects an adjustment for the underrepresentation of minority- and women-owned firms in Hawaii.

Results. Figure ES-3 summarizes the goals if HDOT chose to adjust its goals or make no adjustment.

The first column shows HDOT’s overall DBE goals and neutral projections for FHWA- and FTA-funded contracts at the start of the study.

Figure ES-3.

Information for HDOT consideration concerning potential overall DBE goals and projections of race-neutral participation for FHWA- and FTA-funded contracts

Component of overall DBE goal	Current or previous goal	New goal projection		
		Downward adjustment	Base figure	Upward adjustment
FHWA				
Overall goal	29.05 %	11.00 %	17.26 %	31.47 %
Neutral projection	- 0.26	- 11.00	- 17.26	- 31.47
Race-conscious projection	28.79 %	0.00 %	0.00 %	0.00 %
FTA				
Overall goal	8.69 %	7.37 %	14.63 %	28.11 %
Neutral projection	- 0.00	- 7.37	- 14.63	- 28.11
Race-conscious projection	8.69 %	0.00 %	0.00 %	0.00 %

Source: Keen Independent analysis.

Figure ES-4 provides possible overall DBE goals and projections for FAA-funded contracts at HDOT airports.

Figure ES-4.

Information for HDOT consideration concerning potential overall DBE goals and projections of race-neutral participation for FAA-funded contracts at HDOT airports

Component of overall DBE goal	Current or previous goal	New goal projection		
		Downward adjustment	Base figure	Upward adjustment
Honolulu International Airport				
Overall goal	24.40 %	3.94 %	6.76 %	14.27 %
Neutral projection	- 4.19	- 3.94	- 6.76	- 14.27
Race-conscious projection	20.21 %	0.00 %	0.00 %	0.00 %
Kahului Airport				
Overall goal	21.70 %	14.07 %	28.13 %	46.17 %
Neutral projection	- 11.00	- 14.07	- 28.13	- 46.17
Race-conscious projection	10.70 %	0.00 %	0.00 %	0.00 %
Kona International Airport				
Overall goal	22.00 %	6.33 %	12.66 %	27.97 %
Neutral projection	- 11.00	- 6.33	- 12.66	- 27.97
Race-conscious projection	11.00 %	0.00 %	0.00 %	0.00 %
Hilo International Airport				
Overall goal	21.00 %	7.82 %	15.64 %	32.06 %
Neutral projection	- 10.00	- 7.82	- 15.64	- 32.06
Race-conscious projection	11.00 %	0.00 %	0.00 %	0.00 %
Lihue Airport				
Overall goal	29.00 %	4.42 %	8.84 %	16.60 %
Neutral projection	- 14.00	- 4.42	- 8.84	- 16.60
Race-conscious projection	15.00 %	0.00 %	0.00 %	0.00 %
Molokai Airport				
Overall goal	21.00 %	5.56 %	11.12 %	19.73 %
Neutral projection	- 10.00	- 5.56	- 11.12	- 19.73
Race-conscious projection	11.00 %	0.00 %	0.00 %	0.00 %
Lanai Airport				
Overall goal	21.00 %	5.67 %	11.34 %	21.79 %
Neutral projection	- 10.00	- 5.67	- 11.34	- 21.79
Race-conscious projection	11.00 %	0.00 %	0.00 %	0.00 %

Source: Keen Independent analysis.

Portion of the overall DBE goals to be met through neutral measures. When developing an overall DBE goal, agencies such as HDOT must also project the portion they expect to meet through (a) race- and gender-neutral means, and (b) race- and gender-conscious programs (if any). Race- and gender-neutral measures include initiatives that encourage the participation of all small businesses and are not limited to minority- or women-owned firms or DBEs.

Agencies must determine whether they can meet their overall DBE goals solely through neutral means or whether race- and gender-conscious measures — such as DBE contract goals — are also needed. One of the factors to consider is past DBE and overall MBE/WBE participation in past USDOT-funded contracts.

Overall utilization of minority- and women-owned firms on FHWA-, FTA- and FAA-funded contracts. Figure ES-5 presents MBE/WBE utilization (as a percentage of total dollars) on HDOT transportation-related contracts awarded during the study period. Results are for 1,680 HDOT prime contracts and subcontracts that involved FHWA, FTA or FAA funds. The darker portion of the bar presents the utilization of MBE/WBEs that were DBE-certified and the middle portion presents the participation of potential DBEs (MBE/WBEs that appear that they could be DBE-certified).

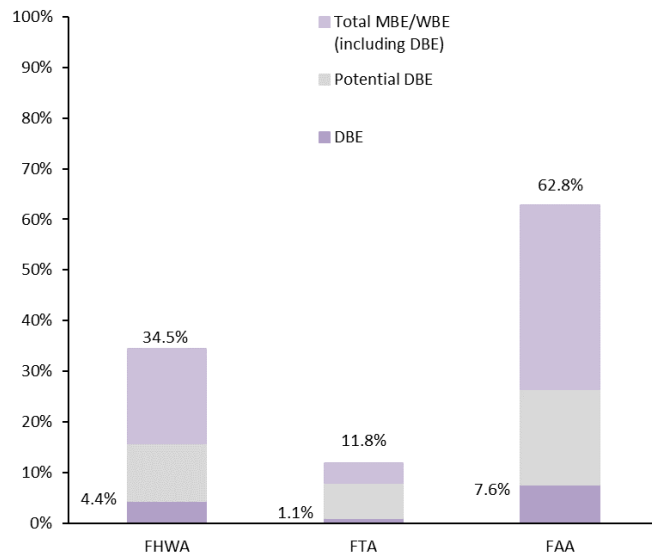
Figure ES-5 shows utilization of minority- and women-owned firms of 34.5 percent, 11.8 percent and 62.8 percent for FHWA-, FTA- and FAA-funded contracts. The participation of minority- and women-owned firms was substantially greater than results for just DBE-certified businesses.

Some of the utilized MBE/WBEs are eligible to be certified as DBEs but have not done so. Keen Independent estimated that these potential DBEs obtained 11.3 percent of FHWA-funded contract dollars and 6.9 percent of FTA-funded contract dollars. Combined, DBE and potential DBE participation was 15.7 percent for FHWA-funded contracts and 8.0 percent for FTA-funded contracts. For FAA-funded contracts, potential DBEs were 11.3 percent of total utilization. Combined DBE and potential DBE participation on FAA-funded contracts was 18.9 percent.

Figure ES-5.
MBE/WBE and DBE share of prime contract/subcontract dollars for HDOT FHWA-, FTA- and FAA-funded transportation contracts, July 2011–June 2016

Note:
 Dark portion of bar is certified DBE utilization. Middle portion of the bar is potential DBE utilization.
 Number of contracts/subcontracts analyzed is 1,680.

Source:
 Keen Independent from data on HDOT and local government contracts July 2011–June 2016.



Comparisons of the utilization and availability of minority- and women-owned firms on FHWA-, FTA- and FAA-funded contracts. Keen Independent compared the share of contract dollars going to MBE/WBEs overall and by racial/ethnic and gender group with what might be expected based on the availability analysis. Results of these disparity analyses are examined in Chapters 5 and 6.

A brief summary of the disparity results is as follows:

- For FHWA-funded contracts, utilization of MBE/WBEs was below what might be expected based on the availability of firms to perform that work. However, there was no disparity for the group of firms owned by Asian Pacific Americans, Native Hawaiians and Pacific Islanders. (HDOT applied DBE contract goals to many of these projects.)
- Utilization of minority- and women-owned firms on FTA-funded was below what might be expected from the availability analysis. Among MBE/WBEs, there were disparities for each racial, ethnic and gender group. (HDOT did not apply DBE contract goals to FTA-funded contracts during the study period.)
- Utilization of minority- and women-owned firms exceeded what might be expected from the availability analysis for FAA-funded contracts. There were disparities, however, for minority- and women-owned businesses that were not owned by Asian Pacific Americans, Native Hawaiians or Pacific Islanders. (HDOT applied DBE contract goals for some of these projects.)

The full report also examines DBE and MBE/WBE participation on past contracts without DBE contract goals (see discussion of FHWA- and FAA-funded contracts without goals in Chapter 6). That participation was about the same or higher as the utilization shown in Figure ES-5. Therefore, DBE contract goals may not have increased the overall participation of minority- and women-owned firms in FHWA and FAA-funded contracts.

Potential new SBE program. If HDOT's overall DBE goals for FHWA-, FTA- and FAA-funded contracts are in the range of the base figures shown in Figures ES-3 and ES-4, HDOT might consider a new SBE Program as a means of achieving those goals. This program would replace HDOT's use of DBE contract goals with SBE contract goals. It would also encourage SBE participation as prime contractors on small HDOT contracts. Reasons for considering a new SBE program include the following.

- About 94 percent of the businesses available for HDOT's USDOT-funded contracts are within the federal small business size limit based on the revenue they reported in the availability survey for this study. Of those small businesses, 59 percent are minority- or women-owned.
- All firms currently certified as DBEs in Hawaii would automatically qualify as SBEs.

- In the in-depth interviews in this study, a number of firms commented on the preponderance of business owners of color and women business owners in the Hawaii transportation contracting market. Some minority and female business owners reported that DBE contract goals are not needed. For example, the Filipino American female owner of a professional services firm stated, “[DBE certification] was not necessary after a while. If you look at the rules ... everyone is pretty much a minority here.”
- Because people of color and women are 88 percent of the workforce in Hawaii, social disadvantages for minorities and women compared with nonminorities and men may occur in different ways than on the Mainland. An SBE Program might better tailor operation of the Federal DBE Program to achieve success in removing barriers for socially and economically disadvantaged businesses in this demographically unique state.
- Many current firms eligible to be certified as DBEs have not done so, any stigma concerning certification as a “disadvantaged business” would not arise for small business certification.
- HDOT already has a system to set SBE contract goals because it currently sets DBE contract goals. The same firms currently eligible to count toward the goals would still be available to count toward the goals as SBEs.
- Federal regulations and state law allow HDOT to limit bidding on small contracts to SBE prime contractors and consultants. This feature of the SBE Program is only possible because it is available to SBEs rather than just DBEs.
- HDOT would continue technical assistance and other assistance to DBEs.
- A further reason HDOT could meet future overall DBE goals through neutral means is that there is already considerable participation of MBE/WBEs possibly eligible for DBE certification. With outreach and additional reasons to become certified, such as small contracts reserved for bidding by SBEs, a new SBE Program could encourage these firms to become certified as SBEs (and automatically as DBEs). This would immediately increase reported DBE participation for HDOT’s contracts as many of these minority- and women-owned firms already receive HDOT work.

For example, potential DBEs obtained 11.3 percent of HDOT’s FHWA-funded contract dollars during the study period. If these firms had been DBE-certified, overall DBE participation on FHWA-funded contracts would have been 15.7 percent, which is close to an overall DBE goal in the range of 17.26 percent.

HDOT should consider all of the information in the report and other sources when deciding on any future use of DBE contract goals.

Additional information in the Availability and Disparity Study pertinent to the DBE Program.

Keen Independent also analyzed whether there was a level playing field for minority- and women-owned firms in the Hawaii transportation construction and engineering marketplace.

Based on Census data, surveys, in-depth interviews and other information, results indicate that the playing field is not level for minority- and women-owned businesses. HDOT assistance to MBE/WBEs through an SBE Program or other initiatives continues to be needed.

The full report explains research methods and what is shown from analysis of quantitative and qualitative information.

Overall ACDBE Goals for HDOT Airport Concessions

Because the FAA provides funds for its airports, HDOT must operate the Federal ACDBE Program, including setting three-year goals for ACDBE participation in its airport concessions. Federal regulations require separate goals for (1) non-car rental concessions and (2) car rental concessions. As with DBE goals for airport FAA-funded contracts, HDOT must set individual ACDBE goals specific to each airport, which ranged from 1 percent to 15 percent for non-car rental concessions at the time of this report. For most of its airports, HDOT has a goal of 1 percent for car rental concessions. Lanai Airport has no revenue-generating concessions and therefore HDOT is not required to set ACDBE goals for that airport.⁴

Establishing base figures for non-car rental concessions. As with calculating overall DBE goals, determining a base figure is the first step to calculating an overall annual goal for ACDBE participation in airport concessions.

- Keen Independent conducted a statewide survey of firms providing the types of goods and services involved in airport concessions. The study team determined whether firms were interested in airport concessions on which islands. This allowed the study team to build a database of firms interested in different types of airport concessions at each airport in Hawaii and identify those that are current or potential ACDBEs. The survey also asked if the firm was minority- or women-owned.
- The study team determined availability for each type of concession at each airport by dividing the number of ACDBEs by the total number of firms available for that concession on that island. For example, if there were 50 current or potential ACDBEs out of 100 firms determined to be available for a particular type of airport concession on that island, the calculation would be $50 \div 100 = 50\%$.
- After determining the percentage of the gross receipts that might be generated by an ACDBE for each type of concession or individual concession agreement at an airport, Keen Independent added the ACDBE projections and divided that sum by the total projected gross receipts for all concessions at the airport. These calculations are described in detail in Chapter 13 of this report.
- Keen Independent took into account current long-term concessions that would still be in place at an airport during the time of the future goal.

⁴ HDOT does not anticipate having any revenue-generating concessions at Lanai Airport for FFY 2020 through FFY 2022, so ACDBE goals will not be needed for this period.

Based on those analyses, Keen Independent calculated the following overall availability figures for each airport's ACDBE participation:

- Honolulu International Airport: 7.72 percent;
- Kahului Airport: 12.25 percent;
- Kona International Airport: 10.52 percent;
- Hilo International Airport: 17.89 percent;
- Lihue Airport: 10.00 percent; and
- Molokai Airport: 0.00 percent.

Potential adjustments to calculate the overall ACDBE goal for each airport. As with the Federal DBE Program, HDOT must consider potential step 2 adjustments to its base figures when it determines its overall annual ACDBE goals.

- The second column of Figure ES-6 presents results if no adjustment to the base figure is made.
- The third column of Figure ES-6 shows the goals if HDOT made a step 2 adjustment based on actual ACDBE participation in recent years (similar to the types of step 2 adjustments for DBE goals shown in Figures ES-3 and ES-4.⁵

Portion of ACDBE goals to be met through neutral measures. As with calculating DBE goals, HDOT must project the portion of ACDBE goal it expects to meet through (a) race- and gender-neutral means, and (b) race- and gender-conscious programs (if any).

Results of the utilization and disparity analyses. Chapter 6 of this report examines utilization of minority- and women-owned firms as concessionaires on agreements with and without ACDBE contract goals. For airport concessions contracts without goals, participation of minority- and women-owned firms was much higher than those where ACDBE goals applied.

HDOT should review the information about utilization and availability of minority- and women-owned firms for airport concessions in Chapters 5 and 6 when considering the extent to which it can meet its overall ACDBE goals through neutral measures. HDOT should also examine and analysis of marketplace conditions presented in Chapter 7 and Appendices E through J, as well as other information it may have.

⁵ For Hilo Airport, the base figure was equivalent to median ACDBE participation for FFY 2014 through FFY 2018, so no adjustment was needed. For Molokai Airport both the base figure and median past ACDBE participation are 0 percent, so no base figure adjustment is needed based on demonstrated capacity of ACDBEs.

Figure ES-6.

Information for HDOT consideration concerning potential overall ACDBE goals and projections of race-neutral participation for FAA-funded contracts at HDOT airports

Component of overall DBE goal	Current or previous goal	New goal projection	
		Base figure	With step 2 adjustment
Honolulu International Airport			
Overall goal	7.00 %	7.72 %	7.82 %
Neutral projection	- 1.00	- 7.72	- 7.82
Race-conscious projection	6.00 %	0.00 %	0.00 %
Kahului Airport			
Overall goal	13.00 %	12.25 %	11.99 %
Neutral projection	- 1.00	- 12.25	- 11.99
Race-conscious projection	12.00 %	0.00 %	0.00 %
Kona International Airport			
Overall goal	11.00 %	10.52 %	6.02 %
Neutral projection	- 11.00	- 10.52	- 6.02
Race-conscious projection	0.00 %	0.00 %	0.00 %
Hilo International Airport			
Overall goal	15.00 %	17.89 %	N/A
Neutral projection	- 9.00	- 17.89	N/A
Race-conscious projection	6.00 %	0.00 %	N/A
Lihue Airport			
Overall goal	11.00 %	10.00 %	9.88 %
Neutral projection	- 11.00	- 10.00	- 9.88
Race-conscious projection	0.00 %	0.00 %	0.00 %
Molokai Airport			
Overall goal	1.00 %	1.00 %	N/A
Neutral projection	- 1.00	- 1.00	N/A
Race-conscious projection	0.00 %	0.00 %	N/A

Source: Keen Independent analysis.

New small business goals program for concessions. If HDOT’s goals are in the range presented in Figure ES-6, it might be appropriate for HDOT to design and promote a new Airport Concessions Small Business Enterprise (ACSBE) goals program for individual airport concessions to achieve its overall ACDBE goals.

- In this program, HDOT would set ACSBE goals instead of ACDBE goals for certain concessions agreements. Monitoring of ACSBE participation for those agreements would follow what is now done for ACDBEs.
- HDOT would certify firms as ACSBEs in the same way it certifies companies as ACDBEs, except they would not need to be owned and controlled by minorities or women. All current ACDBEs in Hawaii would automatically qualify as ACSBEs.

An ACSBE concessions goals program for HDOT airports might be effective in encouraging minority- and women-owned business participation if it were widely promoted in advance of new concessions agreements, coupled with further unbundling of HDOT's concessions agreements and technical assistance for current and potential ACDBEs.

Figure ES-6 presents projections of neutral participation if HDOT were to operate a solely race-neutral ACDBE program.

Establishing ACDBE Goals and Projections for Airport Car Rental Concessions

Because HDOT reported that there are no ACDBEs available to perform car rental concessions in Hawaii, it has set goals of 1 percent or less for each airport for each of the years studied.

Base figure analysis. As there are no ACDBEs that provide airport car rental services in Hawaii, HDOT has attempted to reach these goals through purchases of goods and services from DBEs. HDOT typically sets overall goals of 1 percent for car rental concessions.

Potential step 2 adjustments. HDOT has reported no ACDBE or DBE participation related to airport car rental concessions in recent years and HDOT reports no ACDBE availability for airport car rental concessions in the state. There is no information in the Availability and Disparity Study that would indicate any step 2 adjustment for HDOT's ACDBE goals for car rental concessions at HDOT airports.

Keen Independent did identify availability of small minority- and women-owned businesses that supply a wide range of goods and services in Hawaii. There is information from the study to expect some ACDBE participation in supplying those goods and services to car rental concessions at HDOT airports. However, the study team did not receive comprehensive data on goods and services purchases by airport car rental concessions that would allow quantification of these goals.

Projection of neutral attainment. If HDOT strongly encouraged car rental concessions to reach out to DBEs and encourage their current minority- and women-owned suppliers and service providers to become DBE-certified, it could likely achieve all of its goals related to car rental concessions solely through neutral means.

Public Participation Process

Keen Independent and HDOT implemented an extensive public participation process as part of the 2019 Availability and Disparity Study, which continues through completion of the full report.

Activities through December 2019. Public participation from the beginning of the study through December 2019 included the following:

- An External Stakeholder Group that met with the study team and HDOT;
- A study website that posted information from the beginning of the study as well as a telephone hotline and dedicated email address for anyone wishing to comment, including after release of the draft Availability Study report on summer 2019;

- Surveys of company owners and managers to provide information about their businesses and any perceived barriers in the marketplace; and
- In-depth personal interviews with business owners, trade associations and others throughout the state.

Through these methods, the study team received information from more than 190 businesses and other groups across Hawaii.

Keen Independent published a draft report for public comment before finalizing the July 2019 Availability Study report. In July 2019, HDOT held public meetings concerning the draft Availability Study report and the preliminary overall DBE goals that HDOT proposed to FHWA and FAA. Keen Independent presented study results at each meeting. In addition to providing verbal comments at the public meetings/focus groups, the public was able to review the draft report and proposed DBE goals and give feedback through the study website, via email and through regular mail.

Keen Independent incorporated information from the public meetings/focus groups into the final Availability Study report. In addition, HDOT reviewed this information when finalizing its proposed overall DBE goals calculations for submission to FHWA and FAA in August 2019.

Activities related to the draft 2019 Availability and Disparity Study report, revised DBE goals and proposed new overall DBE and ACDBE goals. Before finalizing the Availability and Disparity Study report, Keen Independent published a draft report for public comment. The study team distributed the draft report and HDOT published its proposed overall DBE and ACDBE goals in early February 2020. The public was able to provide input through the following means:

- a. In person or via video conference at a February 24, 2020 meeting;
- b. Online at www.keenindependent.com/hdotdisparitystudy2019;
- c. Via email at HDOTdisparitystudy2019@keenindependent.com; or
- d. Through regular mail to HDOT Office of Civil Rights, 200 Rodgers Boulevard, Honolulu, HI 96819.

HDOT held a public meeting concerning the study and its proposed goals on February 24, 2020. The meeting was held in person in Honolulu and via remote viewing at district offices on Maui, Kauai and Hawaii Island.

Keen Independent incorporated into the final report feedback received through mid-March (including at the public meeting). Keen Independent and HDOT then prepared final documents for submission to USDOT concerning HDOT's proposed overall DBE goals for FHWA-, FTA- and FAA-funded contracts and overall goals for participation of ACDBEs at HDOT airports.

CHAPTER 1.

Introduction

The federal government requires state and local governments to operate the Federal Disadvantaged Business Enterprise (DBE) Program if they receive U.S. Department of Transportation (USDOT) funds for transportation projects. The Hawaii Department of Transportation (HDOT) receives USDOT funds for transportation-related work from the Federal Highway Administration (FHWA), Federal Transit Administration (FTA) and Federal Aviation Administration (FAA). HDOT has operated some version of the Federal DBE Program for many years.

- Every three years, HDOT must set overall goals for participation of DBEs in its USDOT-funded contracts, expressed as the percentage of contract dollars that HDOT would expect to go to DBEs absent the effects of discrimination. HDOT must also plan for how it will reach these goals.
- Agencies receiving FAA funds must operate the Federal Airport Concessions Disadvantaged Business Enterprise (ACDBE) Program for airports above a certain size. HDOT must set goals for ACDBE participation in its airport concessions.

These contracts and concessions are the focus of the 2019 Availability and Disparity Study.

HDOT retained Keen Independent Research (Keen Independent) to conduct the 2019 Availability and Disparity Study. The study team published a preliminary Availability Study and held public meetings about that study in summer 2019.

- The July 2019 Availability Study included information about overall DBE goals for FHWA-funded contracts and FAA-funded contracts at Honolulu International Airport and Kahului Airport. In August 2019, HDOT submitted overall DBE goals to FHWA and to FAA (for Honolulu and for Kahului airports) for a three-year period starting October 1, 2019. When the goals were submitted, HDOT reported they might be revised based on more information in the full Availability and Disparity Study report. This report provides those results.
- The Availability and Disparity Study report also provides information about overall DBE goals for FTA-funded contracts and for FAA-funded contracts at HDOT's other airports. In addition, the report presents information about ACDBE goals at HDOT airports.
- HDOT must also indicate to FHWA, FTA and FAA how it plans to meet its overall DBE and ACDBE goals. The Availability and Disparity Study provides information for HDOT to determine whether to meet all of its overall DBE and ACDBE goals through race- and gender-neutral means or whether a portion of each goal needs to be met through DBE or ACDBE contract goals. The July 2019 Availability Study only had preliminary results pertaining to future operation of the DBE and ACDBE programs.

The balance of Chapter 1:

- A. Introduces the study team;
- B. Provides background on the Federal DBE Program;
- C. Outlines the analyses in the 2019 Availability and Disparity Study and describes where results appear in the report;
- D. Summarizes the public participation process in the 2019 Availability and Disparity Study; and
- E. Describes opportunities for public comment for the draft Availability and Disparity Study report, HDOT's proposed DBE and ACDBE goals, and HDOT's planned methods to achieve those goals.

A. Study Team

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

As shown in Figure 1-1 on the following page, Spire Hawaii, Pauline Worsham Marketing, Abaci Research & Consulting and Donaldson Enterprises performed in-depth interviews and outreach as part of the study. Spire Hawaii also conducted onsite contract data collection at HDOT offices and contacted non-certified minority- and women-owned firms about whether they might qualify for and be interested in DBE certification. Customer Research International (CRI) performed telephone surveys with business owners and managers that identified firms available for HDOT contracts. These five team members are minority- and/or women-owned firms.

Keen Independent worked closely with HDOT staff throughout the study.

Figure 1-1.
2019 Availability and Disparity Study team

Firm	Location	Team leader	Responsibilities
Keen Independent Research LLC, prime consultant	Denver, CO Phoenix, AZ	David Keen Principal	All study phases
Holland & Knight LLP	Atlanta, GA	Keith Wiener Partner	Legal framework
Spire Hawaii LLP	Honolulu, HI	Rodney Lee Executive Vice-President	Data collection, in-depth interviews
Pauline Worsham Marketing	Honolulu, HI	Pauline Worsham President	In-depth interviews, outreach and public forums
Abaci Research & Consulting LLC	Bastrop, TX	Kim Stewart President	Data collection, In-depth interviews
Donaldson Enterprises	Washougal, WA	Suzanne Donaldson President	In-depth interviews
Customer Research International	San Marcos, TX	Sanjay Vrudhula President	Availability telephone interviews

B. Federal DBE Program

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

Federal regulations located at Title 49 Code of Federal Regulations (CFR) Part 26 direct how state and local governments must operate the Federal DBE Program.¹ If necessary, the Program allows state and local agencies to use DBE contract goals, which HDOT currently sets on certain FHWA-, FTA- and FAA-funded contracts. When awarding those contracts, HDOT considers whether or not a bidder or proposer meets the DBE goal set for a contract or has shown adequate good faith efforts to do so. (HDOT only recently began setting DBE contract goals on FTA-funded contracts and did not set contract goals on those contracts during the study period.)

¹ 49 CFR Part 26 http://www.ecfr.gov/cgi-bin/text-idx?tpl=/ecfrbrowse/Title49/49cfr26_main_02.tpl

The Federal DBE Program also applies to local governments that receive USDOT funds as a subrecipient of HDOT. When agencies such as the City and County of Honolulu directly receive USDOT funds, they are responsible for determining overall DBE goals and how they will implement the Federal DBE Program.

Key Program elements. The Federal DBE Program includes the following elements.

Setting an overall goal for DBE participation. HDOT must develop an overall annual goal for DBE participation in its USDOT-funded contracts. These overall goals cover a three-year period. For example, HDOT set an overall DBE goal for FHWA-funded contracts that started on October 1, 2019 that pertains to contracts through September 30, 2022 (e.g., FFY 2020 through FFY 2022).

The Federal DBE Program sets forth the steps an agency must follow in establishing its goal, including development of a “base figure” and consideration of possible “step 2” adjustments to the goal.² For FHWA-funded contracts for the federal fiscal year (FFY) ending September 30, 2019, HDOT had a 29.05 percent overall DBE goal. The overall DBE goal for FAA-funded contracts was 24.40 percent for Honolulu International Airport and 21.70 percent for Kahului Airport (FFY also ending September 30, 2019).

HDOT’s overall goal for DBE participation is aspirational. An agency’s failure to meet an annual DBE goal does not automatically cause any USDOT penalties unless that agency fails to administer the DBE Program in good faith. However, if an agency does not meet its overall DBE goal, federal regulations require it to analyze the reasons for any shortfall and develop a corrective action plan to meet the goal in the next fiscal year.³

Establishing the portion of the overall DBE goal to be met through neutral means. Regulations governing operation of the Federal DBE Program allow for state and local governments to operate the program without the use or with limited use of race- or gender-based measures such as DBE contract goals. According to program regulations 49 CFR Section 26.51, a state or local agency must meet the maximum feasible portion of its overall goal for DBE participation through “race-neutral means.”

Race-neutral program measures include removing barriers to participation and promoting use of small businesses. The Federal DBE Program requires agencies such as HDOT to develop programs to assist small businesses.⁴ For example, small business preference programs, including reserving contracts on which only small businesses can bid, are allowable under the Federal DBE Program. Setting small business enterprise (SBE) contract goals on USDOT-funded contracts is another example of a neutral measure.

If an agency can meet its goal solely through race-neutral means, it must not use race-conscious program elements. The Federal DBE Program requires that an agency project the portion of its overall DBE goal that it will meet through neutral measures and the portion, if any, to be met through race-conscious measures such as DBE contract goals. USDOT has outlined a number of

² 49 CFR Section 26.45.

³ 49 CFR Section 26.47.

⁴ 49 CFR Section 26.39.

factors for an agency to consider when making that determination.⁵ Some state DOTs and other agencies operate a 100 percent race- and gender-neutral program and do not apply DBE contract goals. Other state DOTs project that they will meet their overall DBE goal through a combination of race-neutral and race-conscious measures.

The 2019 Availability and Disparity Study provides information for HDOT to make these projections for each set of overall DBE and ACDBE goals (Chapters 8 through 13).

Determining whether all racial/ethnic/gender groups will be eligible for race- or gender-conscious elements of the Federal DBE Program. To be certified as a DBE or an ACDBE, the firm's owner must be both socially and economically disadvantaged. Under the Federal DBE Program and the ACDBE Program, the following racial, ethnic and gender groups can be presumed to be socially disadvantaged:

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

To be economically disadvantaged, a company must be below an overall revenue limit and an industry-specific limit, and its firm owner(s) must be below personal net worth limits.⁶ White male-owned firms and other ethnicities not listed above can also meet the federal certification requirements and be certified as DBEs if they demonstrate that they are both socially and economically disadvantaged, as described in 49 CFR Part 26.67(d).

HDOT's past waiver for FHWA-funded contracts. In July 2012, after HDOT's previous disparity study, HDOT requested and received a waiver from USDOT to limit participation in the contract goals program for FHWA-funded contracts to:

- DBEs owned by Native Americans (including Native Hawaiians), Hispanic Americans and African Americans; and
- DBEs owned by women.

⁵ See Chapters 8 through 13 of this report for an in-depth discussion of these factors.

⁶ 49 CFR 26 Subpart D provides certification requirements. There is a gross receipts limit (currently not more than a \$23.98 million annual three-year average revenue, and lower limits for certain lines of business) and a personal net worth limit (currently \$1.32 million excluding equity in the business and primary personal residence) that firms and firm owners must fall below to be able to be certified as a DBE. <http://www.ecfr.gov/cgi-bin/text-idx?SID=5423bdfc26e2255aef5fb43e3f450a13&node=49:1.0.1.1.20.4&rgn=div6>. Under 49 CFR Section 26.67(b), a certifying agency may consider other factors to determine if an individual is able to accumulate substantial wealth, in which certification is denied (annual gross income of the owner and whether the fair market value of the owner's assets exceed \$6 million are two such factors that may be considered).

Only DBEs in the above groups were able to count toward meeting an assigned DBE contract goal. Any DBE, including those owned by Asian American men, could participate in other aspects of the Federal DBE Program. HDOT counted utilization of other DBEs toward its overall DBE goal.

This waiver was valid for FFY 2013 through FFY 2015. After expiration of the waiver from USDOT, HDOT returned to allowing all DBEs to be eligible to meet contract goals.

HDOT past waiver for FAA-funded contracts. In July 2014, the FAA approved a similar HDOT waiver request for FAA-funded contracts, which allowed HDOT's Airports Division to utilize race-conscious goals for ethnic groups and women towards meeting DBE contract goals.

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

- A number of courts have held the Federal DBE Program to be constitutional, as discussed in Chapter 2 and Appendix B of this report.
- State transportation departments in California, Illinois, Minnesota, Montana and Nebraska successfully defended their operation of the Federal DBE Program, as have certain local government agencies. In 2005, the Washington State Department of Transportation was not able to successfully defend its operation of the Federal DBE Program. (See Chapter 2 and Appendix B.)

The Ninth Circuit Court of Appeals examined the methodology and results of the disparity study David Keen directed for the California Department of Transportation (Caltrans) in *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation*. As discussed in more detail in Chapter 2 and Appendix B, the Ninth Circuit favorably reviewed the methodology and the quantitative and qualitative information provided in the disparity study and determined that the information justified Caltrans' operation of the Federal DBE Program. Keen Independent's methodology in HDOT's 2019 Availability and Disparity Study is very similar to what the court favorably reviewed in the Caltrans case.

The 2019 Availability and Disparity Study also includes certain enhancements to the disparity study methodology compared to what was employed in HDOT's previous studies, in accordance with the more recent 2013 Ninth Circuit review of Mr. Keen's methodology for a Caltrans disparity study.

C. Analyses Performed in the 2019 Availability and Disparity Study Report and Location of Results

Figure 1-2 on the following page outlines the chapters in the 2019 Availability and Disparity Study.

Figure 1-2.
Chapters in 2019 Availability and Disparity Study report

Chapter	Description of 2019 Availability and Disparity Study report chapters
ES. Executive Summary	Brief summary of study results
1. Introduction	Study purpose, study team and overview of analyses
2. Legal Framework	Summary of Federal DBE Program regulations and relevant court decisions
3. HDOT Transportation Contracts	How the study team collected HDOT contract data and defined the geographic area and transportation contracting and concessions industries
4. Availability Analysis	Methodology and results regarding availability of minority- and women-owned firms and other businesses for HDOT contracts and subcontracts
5. Utilization and Disparity Analysis	Comparison of utilization and availability of minority- and women-owned firms (disparity analysis)
6. Exploration of MBE/WBE and DBE/ACDBE Utilization	Further examination of disparity results to determine if any disparities can be explained by neutral factors
7. Marketplace Conditions	Summary of quantitative and qualitative information about the Hawaii transportation contracting marketplace
8. Overall Annual DBE Goal and Projections for FHWA-funded Contracts	Information to review when setting a three-year overall DBE goal, including consideration of a “step 2 adjustment,” as well as determining the portion of the overall DBE goal to be met through neutral means
9. Overall Annual DBE Goal and Projections for FTA-funded Contracts	See above
10. Overall Annual DBE Goal and Projections for FAA-funded Contracts at Large and Medium Hubs	See above
11. Overall Annual DBE Goal and Projections for FAA-funded Contracts at Small Hub Airports	See above
12. Overall Annual DBE Goal and Projections for FAA-funded Contracts at Non-hub Airports	See above
13. Overall Annual DBE Goal and Projections for Concessions at HDOT Airports	Information to review when setting three-year overall ACDBE goals, including consideration of a “step 2 adjustment,” as well as determining the portion of the overall ACDBE goal to be met through neutral means

The following briefly describes where to find specific information in the 2019 Availability and Disparity Study report.

Definition of terms. Appendix A provides explanations of acronyms and definitions of key terms used in the study.

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

Collection of prime contract and subcontract information for past USDOT-funded contracts.

The study team collected information about past FHWA-, FTA- and FAA-funded contracts awarded by HDOT from July 2011 through June 2016. Chapter 3 outlines the data collection process and describes these contract data and Appendix C provides additional documentation.

Analysis of local marketplace conditions. The study team examined quantitative and qualitative information relevant to the Hawaii transportation contracting industry. Chapter 7 synthesizes quantitative information about local marketplace conditions. In accordance with USDOT guidance, Keen Independent analyzed:

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

Appendices E through I provide supporting information.

Chapter 7 also summarizes analysis of qualitative information, including results of in-depth personal interviews and focus groups with business owners, airport concessionaires and trade associations as well as comments from business owners and managers provided through online and telephone surveys. Combined, Keen Independent received input from more than 170 businesses and other groups through this effort.

The study team collected public input on the Availability Study as part of the public comment period extending from late June through late July 2019 and conducted additional focus groups with businesses as part of the July 2019 public meetings. Appendix J of this report summarizes comments received and provides detailed analysis of this qualitative information.

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

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

Keen Independent's availability analysis generates benchmarks to use when assessing HDOT's utilization of minority- and women-owned firms in the full Availability and Disparity Study. The availability results also provide information for HDOT to consider when setting its overall annual goal for DBE participation on FHWA- and FAA-funded contracts.

Chapter 4 presents overall availability results for FHWA-, FTA- and FAA-funded contracts and airport concessions. Chapter 4 is organized as follows:

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

Information for overall DBE goals and DBE Program operation for USDOT-funded contracts.

Five report chapters provide information pertaining to overall DBE goals for FHWA-, FTA- and FAA-funded contracts. Keen Independent also analyzed whether all or a portion of the overall DBE goals can be met through neutral means.

- Chapter 8 provides Keen Independent's analysis for a revised overall DBE goal for FHWA-funded contracts for October 1, 2019 through September 30, 2022 (FFY 2020 through FFY 2022). Newly updated results will be helpful to HDOT as it refines its previously submitted overall DBE goal for FHWA-funded contracts for these three federal fiscal years.
- Chapter 9 provides information relevant to HDOT's overall DBE goal for its FTA-funded contracts.
- Chapter 10 presents similar information for HDOT's overall DBE goals for FAA-funded contracts and Honolulu International Airport and for Kahului Airport. This chapter updates information provided in the July 2019 Availability Study.
- Chapter 11 provides similar information for HDOT's small hub airports (Kona, Hilo and Lihue).
- Chapter 12 presents results regarding overall DBE goals and neutral projections for HDOT's non-hub airports (Molokai and Lanai airports).

Information for overall ACDBE goals and ACDBE Program operation for USDOT-funded contracts. Chapter 13 reviews information about ACDBE goals and projections for each of HDOT's airports.

Utilization and disparity analyses. The July 2019 Availability Study did not include analysis of HDOT utilization of minority- and women-owned firms or any comparisons of utilization and availability. Chapters 5 and 6 of the Availability and Disparity Study report provide these results.

D. Public Participation in the 2019 Availability and Disparity Study

Keen Independent and HDOT implemented an extensive public participation process as part of the 2019 Availability and Disparity Study. These activities included:

- An External Stakeholder Group that met with the study team and HDOT at key junctures of the study process.
- A study website that posted information from the beginning of the study.
- A telephone hotline and dedicated email address for anyone wishing to comment.
- Opportunities for company owners and managers to provide information about their businesses and any perceived barriers in the marketplace. The study team successfully reached thousands of businesses through online surveys and telephone surveys conducted in 2018.
- In-depth personal interviews and focus groups with business owners, trade associations and others throughout the state.
- In-person public meetings on Oahu, Kauai, Maui and Hawaii in July 2019 and an additional public meeting in February 2020 (in-person on Oahu and through remote viewing on Kauai, Maui and Hawaii).

Through these methods, the study team has received input from more than 190 businesses and other groups across Hawaii.

E. Public Comment Process for the Draft 2019 Availability and Disparity Study Report and HDOT DBE and ACDBE Goals and Projections

Keen Independent published a draft report for public comment before finalizing the July 2019 Availability Study report. In July 2019, HDOT held public meetings concerning the draft Availability Study report and the preliminary overall DBE goals that HDOT proposed to FHWA and FAA. Keen Independent presented study results at each meeting.

In addition to providing verbal comments at the public meetings and focus groups, the public was able to review the draft report and proposed DBE goals and give feedback through the study website, via email and through regular mail. Keen Independent incorporated information from the public meetings and focus groups into the final Availability Study report.

Before finalizing the full Availability and Disparity Study report, Keen Independent also published a draft report for public comment. The study team distributed the draft report and HDOT published its proposed overall DBE and ACDBE goals in early February 2020. The public was able to provide input through the following means:

- a. In person or via video conference at a February 24, 2020 meeting;
- b. Online at www.keenindependent.com/hdotdisparitystudy2019;
- c. Via email at HDOTdisparitystudy2019@keenindependent.com; or
- d. Through regular mail to HDOT Office of Civil Rights, 200 Rodgers Boulevard, Honolulu, HI 96819.

The February 24, 2020 public meeting concerning the study and HDOT's proposed methods for meeting those goals was held in person in Honolulu and via remote viewing at district offices on Maui, Kauai and Hawaii Island.

Comments received at the public meeting and through other communications through mid-March 2020 was reviewed and incorporated into the final report. Keen Independent and HDOT then prepared final documents for USDOT concerning HDOT's proposed overall DBE goals for FHWA-, FTA- and FAA-funded contracts and overall goals for participation of ACDBEs at HDOT airports.

CHAPTER 2.

Legal Framework

The legal framework for the Availability and Disparity Study is based on applicable regulations for the Federal DBE Program and Federal ACDBE Program and other sources, including the Official USDOT Guidance, court decisions related to the Federal DBE Program and relevant court decisions concerning challenges to minority- and women-owned business programs. The applicable federal regulations are located at Title 49 Code of Federal Regulations (CFR) Part 26 for the Federal DBE Program and 49 CFR Part 23 for the Federal ACDBE Program.

Since the 1980s, there have been lawsuits challenging the constitutionality of the Federal DBE Program and individual state and local agencies' implementation of the Program. Figure 2-1 on the following page provides an overview of some of the recent legal challenges. To summarize:

- The Federal DBE Program has been upheld as valid and constitutional.
- For the most part, state DOTs have been successful in defending against legal challenges. *Western States Paving Company*, however, was successful in challenging the Washington State Department of Transportation's implementation of the Federal DBE Program.
- Many state and local agencies, especially those in the West (i.e., states within the Ninth Circuit), made adjustments in their implementation of the Federal DBE Program to comply with the United States Ninth Circuit Court of Appeals decision in the *Western States Paving* case, and in accordance with the Official USDOT Guidance issued after the decision.
- The Ninth Circuit Court of Appeals held in *AGC, San Diego Chapter v. California DOT* that California Department of Transportation's implementation of the Federal DBE Program was valid and complied with the decision in *Western States Paving*.

Each of the lawsuits identified in Figure 2-1 involves state DOT implementation of the Federal DBE Program for USDOT-funded contracts. Appendix B summarizes and analyzes court decisions regarding challenges to validity and constitutionality of the Federal DBE Program and local and state government implementation of the Federal DBE Program.

Individual companies and trade associations have also challenged the constitutionality of state or local government MBE/WBE programs related to non-federally-funded contracts (including state programs in California, Illinois, Montana, North Carolina, Oklahoma, Ohio, Tennessee and Florida). Appendix B of this report provides a detailed analysis of relevant legal decisions and federal regulations.

Figure 2-1.

Legal challenges to state DOT implementation of the Federal DBE Program

State	Successfully defended implementation of Federal DBE Program	Unsuccessfully defended implementation of Federal DBE Program	Challenge not addressed or dismissed
Arizona	<i>Braunstein v. Arizona DOT</i> ¹		
California	<i>Associated General Contractors of America, San Diego Chapter v. California DOT</i> ²		
Colorado			<i>Adarand Constructors, Inc. v. Slater</i> ³
Illinois	<i>Northern Contracting, Inc. v. State of Illinois</i> ⁴ <i>Midwest Fence Corp. v. United States DOT, Illinois DOT, et al.</i> ⁵ <i>Dunnet Bay Construction Company v. Borggren, Illinois DOT, et al.</i> ⁶		
Minnesota	<i>Sherbrooke Turf, Inc. v. Minnesota Department of Transportation</i> ⁷ <i>Geyer Signal, Inc. v. Minnesota DOT, U.S. DOT, Federal Highway Administration, et al.</i> ⁸		
Montana	<i>M.K. Weeden Construction v. State of Montana, Montana Department of Transportation, et al.</i> ¹⁰	<i>Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.</i> ⁹	<i>Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.</i> ⁹
Nebraska	<i>Gross Seed Company v. Nebraska Department of Roads</i> ¹¹		
Washington		<i>Western States Paving Co., v. Washington State DOT</i> ¹²	
<p>¹ <i>Braunstein v. Arizona DOT</i>, 683 F.3d 1177 (9th Cir. 2012). ² <i>Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.</i>, 713 F. 3d 1187, 2013 WL 1607239 (9th Cir. April 16, 2013). ³ <i>Adarand Constructors, Inc. v. Slater</i>, 228 F.3d 1147 (10th Cir. 2000) cert. granted then dismissed as improvidently granted sub nom. <i>Adarand Constructors, Inc. v. Mineta</i>, 532 U.S. 941, 534 U.S. 103 (2001). ⁴ <i>Northern Contracting, Inc. v. Illinois</i>, 473 F.3d 715 (7th Cir. 2007). ⁵ <i>Midwest Fence Corporation v. U.S. Department of Transportation, Illinois Department of Transportation, Illinois State Toll Highway Authority</i>, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016), cert. denied, 2017 WL 497345 (2017). ⁶ <i>Dunnet Bay Construction Company v. Borggren, Illinois DOT, et al.</i>, 799 F.3d 676, 2015 WL 4934560 (7th Cir. 2015), cert. denied, <i>Dunnet Bay Construction Co. v. Blankenhorn, Randall S., et al.</i>, 2016 WL 193809 (Oct. 3, 2016). ⁷ <i>Sherbrooke Turf, Inc. v. Minnesota DOT, and Gross Seed Company v. Nebraska Department of Roads</i>, 345 F.3d 964 (8th Cir. 2003), cert. denied, 541 U.S. 1041 (2004). ⁸ <i>Geyer Signal, Inc., et al. v. Minnesota DOT, U.S. DOT, Federal Highway Administration, et al.</i>, 2014 WL 1309092 (D. Minn. March 31, 2014). ⁹ <i>Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.</i>, 2017 WL 2179120 (9th Cir. May 16, 2017), Memorandum opinion, (not for publication) United States Court of Appeals for the Ninth Circuit, May 16, 2017, Docket Nos. 14-26097 and 15-35003, dismissing in part, reversing in part and remanding the U.S. District Court decision at 2014 WL 6686734 (D. Mont. Nov. 26, 2014). ¹⁰ <i>M.K. Weeden Construction v. State of Montana, Montana Dept. of Transportation, et al.</i>, 2013 WL 4774517 (D. Mont.) (September 4, 2013). ¹¹ <i>Gross Seed Company v. Nebraska Department of Roads</i>, 345 F.3d 964 (8th Cir. 2003), cert. denied, 541 U.S. 1041. ¹² <i>Western States Paving Co. v. Washington State DOT</i>, 407 F.3d 983 (9th Cir. 2005), cert. denied, 546 U.S. 1170 (2006). See Appendix B for complete discussion of these cases.</p>			

The legal challenges have focused on implementation of race-, ethnic- and gender-conscious program measures such as DBE contract goals. This is important background for the 2019 Availability and Disparity Study.

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

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

A. The Federal DBE Program

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

- **Setting overall goals for DBE participation.** (49 CFR Section 26.45)
- **Meeting the maximum feasible portion of the overall DBE goal through race- and gender-neutral means.** (49 CFR Section 26.51)
 - Race- and gender-neutral measures include removing barriers to the participation of businesses in general or promoting the participation of small or emerging businesses.¹
 - If an agency can meet its overall DBE goal solely through race-, ethnic- and gender-neutral means, it must not use race-, ethnic- and gender-conscious measures as part of its implementation of the Federal DBE Program.
- **Appropriate use of race-, ethnic- and gender-conscious measures, such as contract-specific DBE goals.** (49 CFR Section 26.51)
 - Because these measures are based on the race or gender of business owners, use of these measures must satisfy stringent court imposed legal and regulatory standards in order to be legally valid.²
 - Measures such as DBE quotas are prohibited; DBE set-asides may only be used in limited and extreme circumstances (49 CFR Section 26.43).
 - Some state DOTs have restricted eligibility to participate in DBE contract goals programs to certain racial, ethnic and gender groups based on the evidence of discrimination in the state’s transportation contracting industry. HDOT’s operation of the contract goals program for substantially underutilized DBEs at the time of this report is one example.

¹ Note that all use of the term “race- and gender-neutral” refers to “race-, ethnic- and gender-neutral” in this report.

² Certain Federal Courts of Appeal, including the Ninth Circuit Court of Appeals, apply the “intermediate scrutiny” standard to gender-conscious programs. Appendix B describes the intermediate scrutiny standard in detail.

Figure 2-2 summarizes approaches that state DOTs use to implement the Federal DBE Program:

- All state DOTs set an overall goal for DBE participation.
- All state DOTs use certain race-neutral measures to encourage DBE participation.
- Many state DOTs use race- and gender-conscious measures such as DBE contract goals to help meet their overall DBE goal.
- Some state DOTs limit participation in race-, ethnic- and gender-conscious measures such as DBE contract goals to those DBE groups for which there is sufficient evidence of discrimination in the state transportation contracting industry (sometimes called “underutilized DBE” or “UDBE” contract goals programs). Implementation of such contract goals programs requires approval of a waiver from USDOT.³ In past years, HDOT implemented a UDBE contract goals program but now includes all DBEs as eligible to meet contract goals.
- At present, some states operate a solely neutral program.

Because an individual state DOT sometimes adjusts how it implements the Program, the examples discussed in this Chapter might change after release of this report.

Figure 2-2.

Examples of state DOT implementation of the Federal DBE Program

	Race- and gender-conscious measures					
	Set overall DBE goal	Neutral measures*	DBE contract goals	DBE set-asides	Eligible DBEs	Examples
1. Combination of neutral and race- and gender-conscious measures	Yes	Yes	Yes	No	All firms that are certified as DBEs	Most state DOTs
2. DBE set-asides	Yes	Yes	Yes	Yes	All firms that are certified as DBEs	No state DOTs at time of report
3. Underutilized DBE (UDBE) contract goals	Yes	Yes	Yes Only UDBEs count toward meeting contract goals	No	Only underutilized DBE groups	HDOT and Oregon, Washington, California and Colorado DOTs in past
4. Entirely race- and gender-neutral program	Yes	Yes	No	No	No contract goals	Montana, Idaho and Florida DOTs at present
*Examples: outreach, technical assistance, removing barriers to bidding, small business enterprise programs.						

³ 49 CFR Section 26.15.

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

In addition to USDOT-funded contracts, HDOT and other agencies award transportation contracts that are solely funded through state or local sources. The Federal DBE Program does not apply to those contracts.

Some state DOTs and other agencies throughout the country operate minority- and women-owned business programs for their non-federally-funded contracts. As examples, the North Carolina Department of Transportation and the Indiana Department of Transportation operate MBE/WBE programs that are similar to the Federal DBE Program.

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

The U.S. Supreme Court has established that government contracting programs with race-conscious measures must satisfy the “strict scrutiny” standard of constitutional review. Two key U.S. Supreme Court cases 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;⁴ and
- The 2005 decision in *Adarand Constructors, Inc. v. Peña*, which established the same standard of review for federal race-conscious programs.⁵

As described in detail in Appendix B, the strict scrutiny standard is very difficult for a government entity to meet. The strict scrutiny standard establishes a stringent threshold for evaluating the legality of race-conscious programs. Under the strict scrutiny standard, a governmental entity must have a strong basis in evidence that:

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

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

Constitutionality of the Federal DBE Program. The Federal DBE Program has been held to be constitutional “on its face” in legal challenges to date, although a court may still find that some individual agencies implementing the program fail to meet this legal standard in their implementation of the Program.

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

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

Appendix B discusses a number of important legal decisions in detail, including *AGC, San Diego Chapter v. California DOT*,⁶ *Dunnet Bay Construction Co. v. Borggren, Illinois DOT*,⁷ *Northern Contracting, Inc. v. Illinois DOT*,⁸ *Sherbrooke Turf, Inc. v. Minn DOT*,⁹ *Gross Seed v. Nebraska Department of Roads, Western States Paving Co. v. Washington State DOT, Adarand Constructors, Inc. v. Slater*,¹⁰ *M.K. Weeden Construction v. State of Montana, Montana Department of Transportation, et al.*,¹¹ *Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.*¹² and *Midwest Fence Corp. v. United States DOT, Illinois DOT, et al.*¹³

The 2005 Ninth Circuit Court of Appeals decision in *Western States Paving Co. v. Washington State DOT* is important for the HDOT study, as Hawaii is within the jurisdiction of the Ninth Circuit.

- The Court upheld the constitutionality of the Federal DBE Program.
- However, because the Ninth Circuit found that the Washington State DOT failed to show its implementation of the Federal DBE Program to be narrowly tailored, its operation of the Program was not constitutional.

After that ruling, state departments of transportation within the Ninth Circuit operated entirely race-, ethnic- and gender-neutral programs until studies could be completed to provide information that would allow them to implement the Federal DBE Program in a narrowly tailored manner.¹⁴

Following *Western States Paving*, the USDOT, in particular for agencies implementing the Federal DBE Program in states within the jurisdiction of the Ninth Circuit Court of Appeals, recommended the use of disparity studies by recipients of federal financial assistance to examine whether or not there is evidence of discrimination and its effects, and how remedies might be narrowly tailored in developing their DBE Program to comply with the Federal DBE Program.¹⁵

⁶ 713 F. 3d 1187 (9th Cir. 2013).

⁷ *Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al.*, 799 F.3d 676, 2015 WL 4934560 (7th Cir. 2015) cert. denied, 2016 WL 193809 (2016); *Dunnet Bay Construction Co. v. Illinois DOT, et al.* 2014 WL 552213 (C. D. Ill. 2014), affirmed in *Dunnet Bay*, 2015 WL 4934560 (7th Cir. 2015).

⁸ 473 F.3d 715 (7th Cir. 2007).

⁹ 345 F.3d 964 (8th Cir. 2003), cert. denied, 541 U.S. 1041 (2004).

¹⁰ *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).

¹¹ *M.K. Weeden Construction* 2013 WL 4774517 (D. Mont. 2013).

¹² *Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.*, 2017 WL 2179120 (9th Cir. 2017), Memorandum opinion, (not for publication) United States Court of Appeals for the Ninth Circuit, May 16, 2017, dismissing in part, reversing in part and remanding the U.S. District Court decision at 2014 WL 6686734 (D. Mont. 2014).

¹³ *Midwest Fence Corporation v. U.S. Department of Transportation, Illinois Department of Transportation, Illinois State Toll Highway Authority*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016), cert. denied, 2017 WL 497345 (2017).

¹⁴ Disparity studies have been conducted for state DOTs in each Ninth Circuit state — Alaska, Hawaii, Washington, Idaho, Montana, Oregon, California, Nevada and Arizona — as well as many local transit agencies and some airports in those states.

¹⁵ 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.

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 26.¹⁶ The USDOT's Guidance provides that recipients should consider evidence of discrimination and its effects.¹⁷

The USDOT's Guidance is recognized by the federal regulations as “valid, and express the official positions and views of the Department of Transportation”¹⁸ for states in the Ninth Circuit.

The first court review of an agency's implementation of the Federal DBE Program in the Ninth Circuit after the *Western States Paving* decision was in *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.* The Ninth Circuit held Caltrans' implementation of the Federal DBE Program to be constitutional, which is of particular significance to this study (see Appendix B).¹⁹

In *M.K. Weeden*, Montana upheld the validity of the MDT DBE Program implementing the Federal DBE Program.²⁰

Constitutionality of state and local MBE/WBE programs. In addition to the Federal DBE Program, some state and local government minority business enterprise programs have been found to meet the strict scrutiny standard. Appendix B discusses the successful defense of state and local race- and ethnic-conscious MBE/WBE programs, including *Concrete Works of Colorado v. City and County of Denver* and *H.B. Rowe Company, Inc. v. W. Lyndo Tippet, North Carolina Department of Transportation, et al.* (upheld in part),^{21, 22} and *Kossman Contracting Co., Inc. v. City of Houston* (upheld in part).²³

Summary. Court decisions regarding challenges to the Federal DBE Program and its implementation and to state and local MBE/WBE programs are instructive to the methodology Keen Independent uses in the Availability and Disparity Study and how agencies such as HDOT should interpret the results.

¹⁶ USDOT Guidance, available at http://www.fhwa.dot.gov/civilrights/dbe_memo_a5.htm (January 2006)

¹⁷ *Id.*

¹⁸ *Id.*, 49 CFR § 26.9; *See*, 49 CFR § 23.13.

¹⁹ *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, 713 F.3d 1187 (9th Cir. 2013).

²⁰ *M.K. Weeden Construction* 2013 WL 4774517 (D. Mont. 2013).

²¹ *Concrete Works of Colorado v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003), *cert. denied*, 540 U.S. 1027 (2003).

²² Program upheld with regard to African American- and Native American-owned subcontractors but held invalid for inclusion of other groups. *H.B. Rowe Company, Inc. v. W. Lyndo Tippet, North Carolina Department of Transportation, et al.*; 615 F.3d 233 (4th Cir. 2010).

²³ *Kossman Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. March 22, 2016) (upheld Houston's MBE/WBE Program with regard to minority- and women-owned businesses, but held invalid as to inclusion of Native American owned businesses).

CHAPTER 3.

HDOT Transportation Contracts

Many components of the 2019 Availability and Disparity Study require HDOT contract and subcontract data as building blocks for the analysis. When designing the availability research, for example, it is important to understand the geographic area from which HDOT draws contractors and consultants, and the types of work involved in HDOT transportation contracts.

HDOT provided the Keen Independent study team transportation contract information for the July 2011 through June 2016 study period. Chapter 3 describes the study team’s process for compiling and merging these data. Chapter 3 consists of four parts:

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

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

A. Overview of HDOT Transportation Contracts

HDOT uses funds from the Federal Highway Administration (FHWA), Federal Transit Administration (FTA) and Federal Aviation Administration (FAA) to award construction, engineering and other contracts to build and maintain transportation projects. The 2019 Availability and Disparity Study also includes contracts awarded by local agencies using USDOT funds passed through HDOT (such as county federal aid projects). It also encompasses analysis of airport concessions gross receipts. Examples of transportation construction and engineering contracts include the following:

- Construction projects include building new highway segments and interchanges, resurfacing roads and runways, building and improving bridges, maintaining and improving ferry harbors and terminals, and constructing and improving buildings at airports.
- Engineering-related work includes design and management of projects, planning and environmental studies, surveying and other transportation-related consulting services.¹

¹ Throughout the report, Keen Independent discusses construction and engineering-related contracts based on type of work performed, not based on HDOT contracting department or HDOT data source.

In total, the study team examined about \$1.2 billion in construction, engineering and other contracts and \$5.0 billion in airport concessionaire gross receipts over the study period (this amount includes \$3.3 billion in rental car services). A single HDOT project can involve many types of businesses, as described below.

Prime contracts, subcontracts, trucking and materials supply. A typical construction project includes a prime contractor and one or more subcontractors. Trucking companies and materials suppliers are often involved in construction projects as well.

Many HDOT projects have an engineering phase prior to construction that requires work performed by engineering companies and related firms. The engineering prime consultant retains the specialized subconsultants needed to complete these contracts.

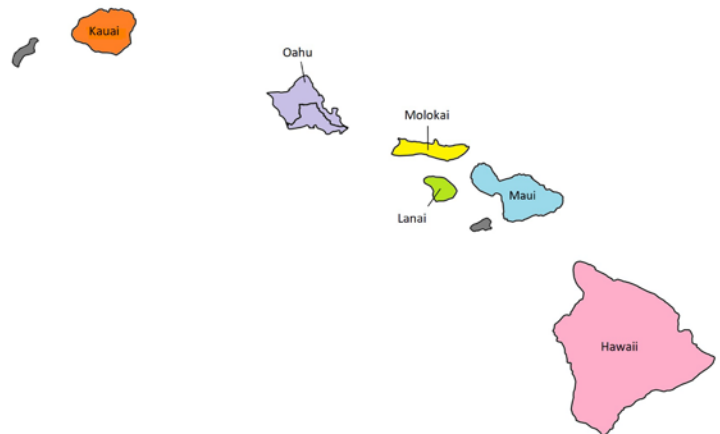
For both construction and engineering contracts, Keen Independent separated the contract dollars going to subcontractors (and truckers and suppliers) from the dollars retained by the prime contractor. Keen Independent calculated the total dollars going to the prime contractor by subtracting subcontractor, trucker and supplier dollars from the total contract value.

Transportation-related contracts. The study focused on transportation construction and engineering contracts, including the acquisition of real property, as well as airport concessions contracts. The study team excluded any contracts to not-for-profit entities or government agencies.

Regions. Based on HDOT and industry input, Keen Independent examined geographic location of contracts based on the six islands of Hawaii that account for most of the population, as shown in Figure 3-1. The region for a contract corresponds to the physical location of the project, not the address of the contractor.

Keen Independent coded statewide assignments and work not in a single physical location as “statewide.”

Figure 3-1.
Study regions



B. Collection and Analysis of HDOT Contract Data

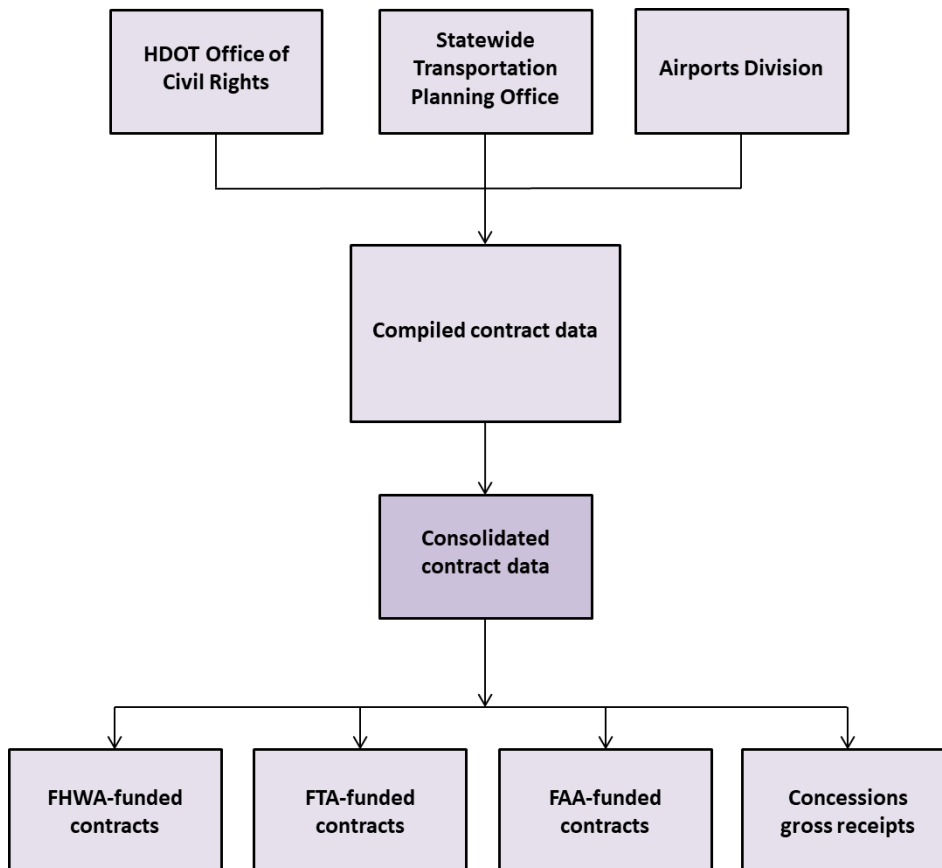
As shown in Figure 3-2, Keen Independent collected data on HDOT's contracts from multiple sources. Data for HDOT construction and engineering contracts came from different offices depending on federal funding source. The Office of Civil Rights collected information about FHWA-funded contracts and county federal aid projects, the Statewide Transportation Planning Office produced data for FTA-funded contracts and the Airports Division provided data for FAA-funded contracts and airport concessions gross receipts.

HDOT contract records include information about award date, dollars, location (specific island), general description of the work, whether or not the contract was USDOT-funded, and whether DBE contract goals applied. Keen Independent used consistent methods to collect information on USDOT-funded contracts.

Keen Independent merged contracts from different sources into one database, which the study team reviewed for duplicate records and then separated by funding source.

Figure 3-2.

Collection of HDOT contract data



Study period. Keen Independent examined contracts awarded in the five years between July 1, 2011 and June 30, 2016.

- **Study period start date.** Because Keen Independent aimed to use five years of contract data, the utilization analysis began with contracts awarded in July 2011.
- **Study period end date.** Keen Independent followed HDOT suggestion to end the study period on June 30, 2016, the last complete fiscal year before the study RFP was issued.

Awarded amount versus payment amounts. Keen Independent collected and analyzed data on awarded amounts for each contract in most cases.

Definition of USDOT-funded contracts. When there was any amount of FHWA, FTA or FAA funding expected for a contract, HDOT treated that contract as USDOT-funded. Keen Independent examined all airport concessions reported by HDOT.

Limitations concerning contract data. As discussed in Appendix C, HDOT collects data for contracts and subcontracts. HDOT was not able to identify all subcontracts for USDOT-funded contracts. Because data on all subcontracts, including for non-DBEs, was not routinely compiled and recorded by HDOT throughout the study period, some of this information had to come from project managers and from prime contractors. Keen Independent was able to collect subcontract data for 90 percent of FHWA and FTA contracts and 85 percent of FAA contracts dollars (based on dollars of those contracts).

In addition, prime contractors do not always use subcontracts to procure certain services such as trucking or to acquire supplies. For these types of work, much of the information in the HDOT data is for DBEs used to meet a contract goal. Keen Independent treated these trucking and supplier procurements by the prime contractor as “subcontracts” in the results of the utilization analyses.

C. Types of Work Involved in HDOT Contracts

Keen Independent’s analysis included 1,680 transportation-related contracts totaling \$1.1 billion over the July 2011 through June 2016 study period. Figure 3-3 presents the number and dollar value of contracts in USDOT-funded contracts.

Figure 3-3.
Number and dollars of HDOT transportation contracts and subcontracts,
July 2011–June 2016

	Number of contracts	Dollars (in millions)
FHWA-funded	1,291	\$ 815
FTA-funded	47	32
FAA-funded	342	258
Total	1,680	\$ 1,105

Note: Numbers may not add due to rounding

Source: Keen Independent from HDOT contract data.

The study team coded types of work involved in each prime contract and subcontract based upon data in HDOT contract records and, as a supplement, information about the primary line of business of the firm performing the work. Keen Independent developed the work types based in part on the work type descriptions used by HDOT as well as Dun & Bradstreet, the leading commercial provider of business information in the United States.

The study team also reviewed airport concessions gross receipts for \$5.0 billion (this amount includes \$3.3 billion for rental car service).

Contract dollars by type of work. Figures 3-4 through 3-7 on the following pages present information about contract dollars for 31 different types of prime contract and subcontract work. Dollars for prime contracts are based on the contract dollars retained (i.e., not subcontracted out) by the prime contractor or prime consultant.

When prime contracts and subcontracts pertained to multiple types of work, Keen Independent coded the entire work element based on what appeared to be the predominant type of work in the contract or subcontract. For example, if a subcontract included fencing and landscaping, and it appeared that the work was predominantly fencing, the entire subcontract was coded as fencing.² Similarly, when a more specialized activity could not be identified as the primary area of work, these contracts were classified as general road construction and widening, or bridge and elevated highway construction, as appropriate. Additionally, types of work that did not fit into the specific categories listed were included in “other construction,” “other professional services,” “other concessions” or “other goods and services,” as appropriate. Together, these “other” categories comprised about 4 percent of total FHWA-funded contract dollars, 7 percent of FTA-funded contract dollars and 14 percent of FAA-funded contract dollars.

Contract dollars by type of work for FHWA-funded contracts. FHWA-funded contracts include significant dollars towards road construction and asphalt paving work. As shown in Figure 3-4, general road construction and widening and asphalt, concrete or other paving account about 58 percent of FHWA-funded prime contract and subcontract dollars.

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

Figure 3-4.

HDOT FHWA-funded transportation prime contract and subcontract dollars by type of work, July 2011–June 2016

Type of work	Dollars (1,000s)	Percent
General road construction and widening	\$ 247,108	30.3 %
Asphalt, concrete or other paving	230,385	28.3
Architecture and engineering	75,345	9.2
Electrical work including lighting and signals	48,317	5.9
Bridge and elevated highway construction	43,184	5.3
Office and public building construction	24,347	3.0
Steel work	16,661	2.0
Asphalt, concrete and other paving materials	13,883	1.7
Construction management	11,958	1.5
Installation of guardrails, fencing or signs	10,734	1.3
Striping or pavement marking	8,596	1.1
Other concrete work	8,539	1.0
Excavation, site prep, grading and drainage	8,166	1.0
Concrete flatwork (including sidewalk, curb and gutter)	6,849	0.8
Plumbing, heating and air conditioning	6,424	0.8
Inspection and testing	4,688	0.6
Pavement surface treatment (such as sealing)	4,649	0.6
Landscaping and related work including erosion control	4,152	0.5
Temporary traffic control	2,545	0.3
Trucking and hauling	2,228	0.3
Aggregate materials supply	1,235	0.2
Transportation planning	624	0.1
Roofing	554	0.1
Environmental consulting	398	0.0
Surveying and mapping	396	0.0
Wrecking and demolition	298	0.0
Petroleum and petroleum products	26	0.0
Steel supply	0	0.0
Other - Construction	19,408	2.4
Other - Goods and other services	7,416	0.9
Other - Professional services	5,877	0.7
Total	\$ 814,992	100.0 %

Source: Keen Independent from HDOT contract data.

As shown in Figure 3-4, the top four general types of work account for about 74 percent of HDOT FHWA-funded transportation contract dollars.

- General road construction and widening accounted for \$247 million of FHWA-funded prime contracts and subcontracts, or 30 percent of the total.
- Asphalt, concrete and other paving accounted for \$230 million or 28 percent of FHWA-funded prime contracts and subcontracts. (Note that a prime contract or subcontract coded as general road construction and widening work could include asphalt paving but was entirely coded as road construction because it appeared to include a broad set of work types, or the description of the work was not specific to asphalt paving.)
- Engineering work accounted for the third largest dollar volume of FHWA-funded work (\$75 million or 9.2% of the total).
- Prime contracts and subcontracts for electrical work including lighting and signals accounted for about \$48 million of FHWA-funded contracts, including prime contracts and subcontracts. This work area accounted for about 6 percent of FHWA-funded contract dollars examined.

Contract dollars by type of work for FTA-funded contracts. As shown in Figure 3-5, harbor dredging and pier construction combined for 81 percent of FTA-funded contract dollars.

Figure 3-5.

Dollars of HDOT FTA-funded prime contracts and subcontracts by type of work, July 2011–June 2016

Type of work	Dollars (1,000s)	Percent
Harbor dredging	\$ 15,608	48.6 %
Pier construction	10,392	32.4
Construction management	1,637	5.1
Architecture and engineering	1,262	3.9
Environmental consulting	313	1.0
Wrecking and demolition	300	0.9
Plumbing, heating and air conditioning	136	0.4
Office and public building construction	106	0.3
Electrical work including lighting and signals	106	0.3
Installation of guardrails, fencing or signs	96	0.3
Inspection and testing	25	0.1
Other - Construction	12	0.0
Other - Professional services	2,095	6.5
Total	\$ 32,087	100.0 %

Source: Keen Independent from HDOT contract data.

Contract dollars by type of work for FAA-funded contracts. Figure 3-6 presents information about HDOT’s FAA-funded prime contracts and subcontracts. Results encompass FAA-funded contracts at Honolulu International Airport, Kahului Airport, Kona International Airport, Hilo International Airport, Lihue Airport, Molokai Airport and Lanai Airport.

As shown, much of the work is related to airport runway construction and paving.

Figure 3-6.
Dollars of HDOT FAA-funded prime contracts and subcontracts by type of work, July 2011–June 2016

Type of work	Dollars (1,000s)	Percent
Airport runway construction and paving	\$ 104,423	40.5 %
Office and public building construction	25,429	9.9
Architecture and engineering	15,186	5.9
Electrical work including lighting and signals	14,937	5.8
Bridge and elevated highway construction	7,868	3.1
Striping or pavement marking	7,311	2.8
Construction management	7,017	2.7
Roofing	6,324	2.5
Plumbing, heating and air conditioning	5,438	2.1
Wrecking and demolition	4,809	1.9
Steel work	4,454	1.7
Other Concrete Work	2,637	1.0
Steel supply	2,155	0.8
Installation of guardrails, fencing or signs	2,010	0.8
Asphalt, concrete or other paving	2,004	0.8
Inspection and testing	1,825	0.7
Excavation, site prep, grading and drainage	1,745	0.7
Surveying and mapping	1,730	0.7
Transportation planning	1,708	0.7
Pavement surface treatment (such as sealing)	1,498	0.6
Landscaping and related work including erosion control	816	0.3
Trucking and hauling	609	0.2
Environmental consulting	511	0.2
Other - Construction	31,451	12.2
Other - Goods and other services	817	0.3
Other - Professional services	3,154	1.2
Total	\$ 257,867	100.0 %

Source: Keen Independent from HDOT contract data.

Contract dollars by type of work for airport concessions estimated gross receipts. Figure 3-7 presents information about concessions gross receipts across HDOT airports. The top three types of concessions account for 94 percent of airport concessions gross sales.

- Car rental services accounted for \$3.3 billion of airport concessions gross sales, or 65 percent of the total;
- Gift, novelty and souvenir shops accounted for another \$905 million of concessions gross sales, or 18 percent of the total; and
- Eating places generated \$507 million in concessions revenue, or 10 percent of the total.

Figure 3-7.
Airport concessions revenue at HDOT airports by type of concession,
July 2011–June 2016

Type of work	Dollars (1,000s)	Percent
Rental cars	\$ 3,264,531	65.4 %
Gift and news shops	906,372	18.2
Eating places	507,474	10.2
Automobile parking	169,660	3.4
Flower and lei shops	79,707	1.6
Foreign currency exchange	44,931	0.9
Coin-operated service machines	9,308	0.2
Other concessions	9,575	0.2
Total	\$ 4,991,558	100.0 %

Source: Keen Independent from HDOT contract data.

D. Location of Businesses Performing HDOT Work

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

- For each prime contractor and subcontractor, Keen Independent determined whether the company had a business establishment in Hawaii based upon HDOT vendor records and additional research.
- Keen Independent then added the dollars for firms with Hawaii locations and compared the total with that for companies with no establishments within Hawaii.

Based upon analysis of HDOT projects from July 2011 through June 2016, firms with locations in Hawaii obtained about 98 percent of USDOT-funded transportation contract dollars. Results for FHWA-, FTA- and FAA-funded contracts are shown in Figure 3-8, along with results for airport concessions revenue.

These percentages are consistent with definition of relevant geographic market area as reviewed by courts (see Appendix B).

Figure 3-8.
Dollars of HDOT transportation prime contracts and subcontracts by location of firm, July 2011–June 2016

	FHWA-funded	FTA-funded	FAA-funded	Concessions
Dollars (in millions)				
Hawaii	\$ 775	\$ 32	\$ 233	\$ 1,723
Out of market area	10	0	14	4
Location unknown	30	0	11	0
Total	\$ 815	\$ 32	\$ 258	\$ 1,727
Percent of total dollars				
Hawaii	95.0 %	100.0 %	90.3 %	99.8 %
Out of market area	1.3	0.0	5.5	0.2
Location unknown	3.7	0.0	4.2	0.0
Total	100.0 %	100.0 %	100.0 %	100.0 %

Note: Numbers may not add due to rounding.

Source: Keen Independent from HDOT contract data.

Based on this information, Keen Independent determined that the state of Hawaii is the relevant geographic market area for HDOT transportation contracting and for airport concessions. Therefore, Keen Independent’s availability analysis focused on firms with locations in the state. The quantitative and qualitative analyses of marketplace conditions in Chapter 7 also focused on the state.

CHAPTER 4.

Availability Analysis

Keen Independent analyzed the availability of minority- and women-owned business enterprises (MBE/WBEs) that are ready, willing and able to perform HDOT prime contracts and subcontracts. These availability results are used as benchmarks when Keen Independent compares utilization and availability in the disparity analyses (Chapters 5 and 6).

The study team also determined the availability of firms that are currently certified as DBEs or appear to meet the eligibility for certification. HDOT can use these results when determining its overall goals for DBE participation in USDOT-funded contracts.

- In August 2019, HDOT submitted DBE goals to the Federal Highway Administration (FHWA) for its statewide highway construction and engineering contracts and to Federal Aviation Administration (FAA) for its contracts at Honolulu International Airport and Kahului Airport. HDOT prepared those goals based on information in Keen Independent's July 2019 Availability Study. This new Availability and Disparity Study report presents refined availability information for HDOT if it chooses to update these overall DBE goals.
- The study also provides information for HDOT to set overall DBE goals for its FTA-funded contracts as well as its FAA-funded contracts at other airports.
- In addition, the Availability and Disparity Study includes availability analyses for airport concessions that will help HDOT set overall ACDBE goals for its airports.
- Preliminary analyses of ACDBE goals for Lanai and Molokai airports were determined in June 2019 (0% at both airports), which were addressed in separate Goal and Methodology documents. The ACDBE goals for those airports do not change based on the results of the Availability and Disparity Study report.

Chapter 4 describes the study team's availability analysis in seven parts:

- A. Purpose of the availability analysis;
- B. Definitions of MBEs, WBEs, certified DBEs, potential DBEs and majority-owned businesses;
- C. Information collected about available businesses;
- D. Businesses included in the availability databases;
- E. MBE/WBE availability calculations on a contract-by-contract basis;
- F. Availability results for MBE/WBEs; and
- G. Availability results for current and potential DBEs and ACDBEs.

Appendix D provides supporting information.

A. Purpose of the Availability Analysis

In this report, Keen Independent examined the availability of minority- and women-owned firms for transportation contracts to develop the base figure for HDOT's overall DBE goals for USDOT-funded contracts. The study team also uses the availability figures as benchmarks in the disparity analysis.

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

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

This analysis is conducted for firms owned by racial, ethnic and gender group to determine whether disparities exist and, if so, the groups affected. Chapter 5 presents these utilization, availability and disparity results.

2. Base figure for HDOT's overall DBE goals. As part of its operation of the Federal DBE Program, HDOT must establish an overall goal for DBE participation in its United States Department of Transportation (USDOT)-funded contracts.

- The 2019 Availability and Disparity Study examines information for HDOT to consider if it refines its three-year goals that began October 1, 2019 for its FHWA-funded contracts and FAA-funded contracts for certain airports.
- The report also presents information to help HDOT determine overall DBE goals for its FTA-funded contracts as well as FAA-funded contracts at its other airports.
- Finally, availability results to help HDOT set ACDBE goals for airport concessions are also provided in this report.

HDOT must follow regulations in 49 CFR Section 26.45(c) to determine these overall DBE goals. It must start by calculating a “base figure” for each overall DBE goal, as explained in detail in Part G of this chapter.

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

Separate base figures were calculated for FHWA- and FTA-funded contracts and for FAA-funded contracts at each airport (and for ACDBE goals).

The balance of Chapter 4 explains each step in determining the availability benchmarks and the base figure for HDOT’s overall DBE goals, beginning with definitions of terms.

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

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

MBE/WBEs. “MBE/WBEs” refers to minority- and women-owned firms, regardless of whether the companies are certified. Keen Independent used definition for minority or female ownership that correspond to regulations for the Federal DBE Program.

For purposes of this study, Keen Independent grouped people of color in a slightly different way than the groupings in 49 CFR Section 26.5. To accurately analyze the unique multi-racial and ethnic background of Hawaii’s population, the study team examined availability for business owned by:

- African Americans;
- Asian Pacific Americans, Native Hawaiians or Pacific Islanders;
- Hispanic Americans, including people of Portuguese background;
- American Indians or Alaska Natives;
- Subcontinent Asian Americans; and
- Non-Hispanic white women.

For the HDOT study, Keen Independent grouped business owned by Native Hawaiians with those owned by Asian Pacific Americans and Pacific Islanders rather than with American Indians and Alaska Natives. This reflects U.S. Census data that shows many Native Hawaiians also identifying as Asian Pacific Americans or Pacific Islanders, and vice-versa. Other groupings listed above follow those in 49 CFR Section 26.5. The grouping of Native Hawaiians with Asian Pacific Americans and Pacific Islanders does not affect the availability results for DBEs or ACDBEs in the Availability and Disparity Study.

Because Keen Independent determined prior to the survey that businesses owned by Asian Pacific Americans, Native Hawaiians and Pacific Islanders are collectively the largest set of businesses in Hawaii, the study team collected more detailed ownership information for these firms.

- The availability survey asked respondents to identify whether companies were owned by Chinese Americans, Filipino Americans, Japanese Americans, Korean Americans, Pacific Islanders and other Asian Pacific Americans, or by Native Hawaiians.¹
- Also, many people in Hawaii identify with more than one racial and ethnic group. For that reason, the survey asked to specify which group “would the owner most closely identify with.” (Keen Independent was able to examine U.S. Census data for non-exclusive racial/ethnic groupings for some of the analyses in Chapter 7.)

Availability analysis at this level of race/ethnic detail is not necessary for setting overall DBE goals, but does contribute to the disparity analyses in other chapters of this report.

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

Certified DBEs. Certified DBEs are businesses that are certified as such through the HDOT Office of Civil Rights (OCR), which means that they:

- Are owned and controlled by one or more individuals who are presumed to be both socially and economically disadvantaged according to 49 CFR Part 26;² and
- Have met the gross revenue and personal net worth requirements described in 49 CFR Part 26.

¹ For purposes of this report, Keen Independent followed current U.S. Bureau of the Census groupings of race and ethnicity, which no longer includes data for Native Hawaiians with people who are American Indian and Alaska Native. This report includes analyses that combine Native Hawaiians and Pacific Islanders with Asian Americans and analyses that disaggregate results for individual groups. Groupings do not affect the availability analysis or setting overall DBE goals.

² The Federal DBE Program specifies that African Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, Subcontinent Asian Americans, women of any race or ethnicity, and any additional groups whose members are designated as socially and economically disadvantaged by the Small Business Administration are presumed to be disadvantaged.

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

The study team examined the availability of potential DBEs to help HDOT calculate the base figure for its overall DBE goals for USDOT-funded contracts. Figure 4-1 provides further explanation of Keen Independent’s definition of potential DBEs.

Keen Independent obtained information from HDOT’s Office of Civil Rights to identify firms that, in recent years, had been denied DBE certification from the DBE Program or had graduated from the Program (and had not been recertified).

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

- In the utilization and availability analyses, the study team coded each business as minority-, women- or majority-owned.
- Majority-owned businesses included any non-Hispanic white male-owned businesses that were certified as DBEs (there were none).

Figure 4-1.

Definition of potential DBEs

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

- MBE/WBEs that had graduated from the DBE Program and not been recertified, or were de-certified;
- MBE/WBEs that are not currently DBE-certified that had applied for certification and had been denied;
- MBE/WBEs not currently DBE-certified that appear to have exceeded the three-year average annual revenue limits for DBE certification for their line of business;
- Firms indicating in follow-up interviews performed by HDOT that they were over the revenue or personal net worth limits or otherwise would not meet certification requirements;
- Firms indicating in HDOT interviews that they were not interested in DBE certification; and
- MBE/WBEs not responding to HDOT’s request for follow-up.

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

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

C. Information Collected about Available Businesses

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

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

Keen Independent’s method of examining availability is sometimes referred to as a “custom census” and has been accepted in federal court. Figure 4-2 summarizes characteristics of Keen Independent’s approach to examining availability.

Overview of availability interviews. The study team conducted telephone interviews with business owners and managers to identify businesses that were possibly available for HDOT transportation prime contracts and subcontracts. Figure 4-3 on the following page summarizes the process for identifying businesses, contacting them and completing interviews.

Keen Independent began by compiling lists of business establishments that: (a) previously identified themselves to HDOT as interested in learning about future work by being prequalified for certain types of work or being on bidding lists; or (b) Dun & Bradstreet/Hoovers identified in certain transportation contracting-related subindustries in Hawaii.³ Using these data sources, the study team created a list of possibly available businesses that might be ready, willing and able to perform transportation-related construction and engineering work for HDOT.

The study team then contacted these firms to determine whether they were actually available for HDOT work, and if so, what types, sizes and locations of work. Surveys began in September 2018 and were completed in early December 2018.

Figure 4-2. Summary of the strengths of Keen Independent’s “custom census” approach

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

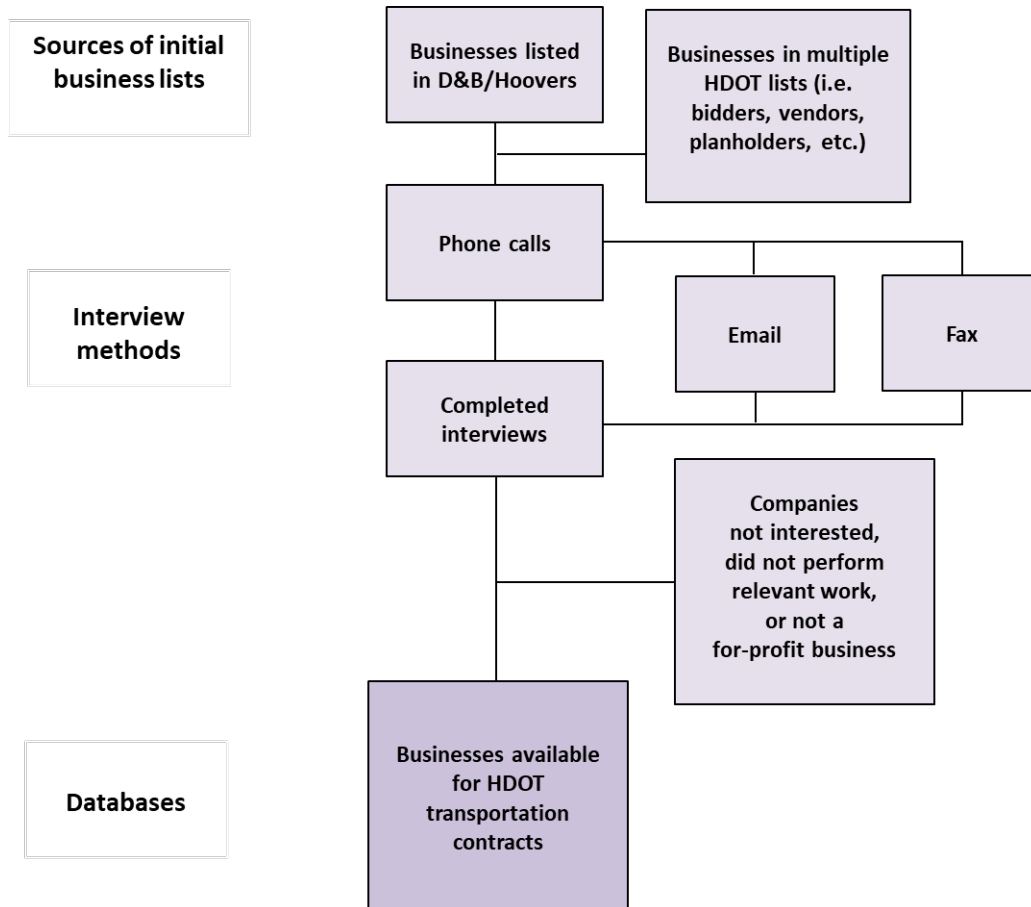
For example, the Keen Independent analysis included discussions with businesses about interest in HDOT and local government work, whether they had bid on or performed similar work in the past, contract role and geographic locations of their work — items not included in some of the previous court-reviewed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

³ D&B’s Hoover’s database is accepted as the most comprehensive and complete source of business listings in the nation. Keen Independent collected information about all business establishments listed under 8-digit work specialization codes (as developed by D&B) that were most related to the transportation contracts that HDOT awarded during the study period.

Telephone surveys. Figure 4-3 outlines the availability survey process.

- The study team contacted firms by telephone to ask them to participate in the surveys.
- Some firms completed surveys when first contacted. For firms that did not immediately respond, the study team executed intensive follow-up over many weeks.
- When interviews spoke with a business representative who did not speak English, they called back to try to complete the interview with someone who could speak English.
- Businesses could also learn about the availability survey or complete the survey via other methods such as fax or email.

Figure 4-3.
Availability interview process



Information collected in availability interviews. Interview questions covered many topics about each organization. Businesses were asked about the following:

- Status as a private business (as opposed to a public agency or not-for-profit organization);
- Status as a subsidiary or branch of another company;
- Types of transportation contract work performed, from asphalt paving to temporary traffic control for construction and from design engineering to surveying for engineering-related work (Figures 3-4 through 3-6 in Chapter 3 provide lists of work categories included in the interviews);
- Qualifications and interest in performing transportation-related work for HDOT;
- Qualifications and interest in performing transportation-related work as a prime contractor or subcontractor;
- Past work in Hawaii as a prime contractor or subcontractor;
- Ability to work on specific islands in Hawaii: Oahu, Kauai, Maui, Hawaii Island, Lanai and Molokai;
- Largest prime contract or subcontract bid on or performed in Hawaii in the previous seven years;
- Year of establishment; and
- Race/ethnicity and gender of ownership.

Appendix D provides the availability interview instrument used for construction-related businesses.

Screening of firms for the availability database. The study team asked business owners and managers several questions concerning the types of work that their companies performed, their past bidding history, and their qualifications and interest in working on contracts for HDOT, among other topics.

Keen Independent considered businesses to be potentially available for HDOT transportation prime contracts or subcontracts if they reported possessing all of the following characteristics:

- a. Being a private business (as opposed to a public agency or not-for-profit organization);
- b. Having bid on or performed transportation-related prime contracts or subcontracts in Hawaii in the previous seven years; and
- c. Qualifications for and interest in work for HDOT and/or for local governments.⁴

⁴ For HDOT work, separate interview questions were asked about prime contract work and subcontract work.

D. Businesses Included in the Availability Database

Data from the availability surveys allowed Keen Independent to develop a representative depiction of businesses that are qualified and interested in transportation construction and engineering-related work as well as HDOT airport concessions contracts. For these types of work, the study team counted the number of businesses using mutually exclusive and non-mutually exclusive racial definitions.

Transportation construction and engineering-related businesses. Figure 4-4 presents the number of businesses that the study team included in the availability database for each racial/ethnic and gender group. The study team’s research identified 304 businesses reporting that they were available for specific transportation contracts that HDOT awarded during the study period. Of those businesses, 174 (57.2%) were minority- or women-owned including 126 (41.4%) that were Asian Pacific American-owned, Native Hawaiian-owned or Pacific Islander-owned.

Figure 4-4.
Number of transportation construction and engineering-related businesses included in the availability database for HDOT contracts

Note:
Numbers rounded to nearest tenth of 1 percent. Percentages may not add to totals due to rounding. Does not include airport concessions firms.

Source:
Keen Independent availability analysis.

Race/ethnicity and gender	Number of firms	Percent of firms
African American-owned	5	1.6 %
Asian Pacific American, Native Hawaiian or Pacific Islander-owned	126	41.4
Hispanic American-owned	18	5.9
American Indian or Alaska Native-owned	2	0.7
Subcontinent Asian American-owned	10	3.3
Total MBE	161	53.0 %
WBE (white women-owned)	13	4.3
Total MBE/WBE	174	57.2 %
Total majority-owned firms	130	42.8
Total firms	304	100.0 %

For Asian Pacific American-, Native Hawaiian- and Pacific Islander-owned businesses, Figure 4-5 presents results by subgroup. Of the 304 businesses identified in the availability database, 57 (18.8%) were Japanese American-owned, 31 (10.2%) were Native Hawaiian-owned and 19 (6.3%) were Chinese American-owned. Although Filipino Americans comprise a relatively large portion of Hawaii’s population, businesses owned by Filipino Americans comprised only 2.6 percent of companies available for HDOT transportation construction and engineering-related contracts. (Business ownership rates by group are discussed in Chapter 7 and Appendix F.)

Figure 4-5.
Number of businesses included in the availability database identified as Asian Pacific American-, Native Hawaiian- or Pacific Islander-owned

Note:
Numbers do not add to totals due to rounding and non-mutually exclusive race and ethnicity definitions. Does not include airport concessions businesses.

Race/ethnicity and gender	Number of firms	Percent of firms
Chinese American-owned	19	6.3 %
Filipino American-owned	8	2.6
Japanese American-owned	57	18.8
Korean American-owned	5	1.6
Native Hawaiian-owned	31	10.2
Pacific Islander-owned	4	1.3
Other Asian Pacific American-owned	2	0.7
Total Asian Pacific American-, Native Hawaiian- and Pacific Islander-owned	126	41.4 %

Source:
Keen Independent availability analysis.

Data from the availability interviews allowed Keen Independent to develop a representative depiction of businesses that are qualified and interested in the largest areas of HDOT transportation-related work, but it should not be considered an exhaustive list of every business that could potentially participate in HDOT contracts. Appendix D provides a detailed discussion of this issue.

Airport concessions businesses. Figure 4-6 presents the number of businesses that the study team included in the availability database for each racial/ethnic and gender group. The study team’s research identified 160 businesses reporting that they were available for specific types of concessions at HDOT airports. Of those businesses, 120 (75%) were minority- or women-owned.

Figure 4-6.
Number of airport concessions firms included in the availability database for HDOT contracts

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

Source:
Keen Independent availability analysis.

Race/ethnicity and gender	Number of firms	Percent of firms
African American-owned	7	4.4 %
Asian Pacific American, Native Hawaiian or Pacific Islander-owned	77	48.1
Hispanic American-owned	8	5.0
American Indian or Alaska Native-owned	2	1.3
Subcontinent Asian American-owned	9	5.6
Total MBE	103	64.4 %
WBE (white women-owned)	17	10.6
Total MBE/WBE	120	75.0 %
Total majority-owned firms	40	25.0
Total firms	160	100.0 %

For Asian Pacific American-, Native Hawaiian- and Pacific Islander-owned businesses, Figure 4-7 presents results for concessions firms by subgroup. Of the 160 businesses identified in the availability database, 19 were Japanese American-owned and 19 were Native Hawaiian-owned (each 11.9% of the total) and 13 (8.1%) were Chinese American-owned. Filipino American-owned firms comprised 3.1 percent of companies available for HDOT airport concessions contracts. (Business ownership rates by group are discussed in Chapter 7 and Appendix F.)

Figure 4-7.
Number of airport concessions firms included in the availability database identified as Asian Pacific American-, Native Hawaiian- or Pacific Islander-owned

Race/ethnicity and gender	Number of firms	Percent of firms
Chinese American-owned	13	8.1 %
Filipino American-owned	5	3.1
Japanese American-owned	19	11.9
Korean American-owned	5	3.1
Native Hawaiian-owned	19	11.9
Pacific Islander-owned	4	2.5
Other Asian Pacific American-owned	12	7.5
Total Asian Pacific American-, Native Hawaiian- and Pacific Islander-owned	77	48.1 %

Note:
 Numbers do not add to totals due to rounding and non-mutually exclusive race and ethnicity definitions.

Source:
 Keen Independent availability analysis.

Data from the availability interviews allowed Keen Independent to develop a representative depiction of businesses that are qualified and interested in HDOT airport concessions, but it should not be considered an exhaustive list of every business that could potentially participate in airport concessions. Appendix D provides a detailed discussion of this issue.

E. MBE/WBE Availability Calculations on a Contract-by-Contract Basis

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

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

Steps to calculating availability. Only a portion of the businesses in the availability database were considered potentially available for any given HDOT construction or engineering prime contract or subcontract (referred to collectively as “contract elements”). The study team first examined the characteristics of each specific contract element, including type of work, location of work, contract size and contract date. The study team then identified businesses in the availability database that perform work of that type, in that location, of that size, in that role (i.e., prime contractor or subcontractor) and that were in business in the year that the contract element was awarded.

Steps to the availability calculations. The study team identified the specific characteristics of each of the 1,680 HDOT USDOT-funded prime contracts and subcontracts included in the utilization analysis. The study team then took the following steps to calculate availability for each contract element:

1. For each contract element, the study team identified businesses in the availability database that reported that they:
 - ▶ Are qualified and interested in performing transportation-related work in that particular role, for that specific type of work, for that particular type of agency or had actually performed work in that role based on contract data for the study period;
 - ▶ Indicated in the interview that they had performed work in that particular role (prime or sub) in Hawaii within the past seven years (or had done so based on contract data for the study period);
 - ▶ Are able to do work in that geographic location (or had done so based on contract data for the study period);
 - ▶ Had bid on or performed work of that size in Hawaii in the past seven years (or had done so based on contract data for the study period); and
 - ▶ Were in business in the year that the contract or task order was awarded.
2. For the specific contract element, the study team then counted the number of MBEs (by race/ethnicity), WBEs and majority-owned businesses among all businesses in the availability database that met the criteria specified in step 1 above.
3. The study team translated the numeric availability of businesses for the contract element into percentage availability (as described in Figure 4-8).

The study team repeated those steps for each contract element examined that were FHWA-funded (in total), FTA-funded and FAA-funded (by airport). The study team multiplied the percentage availability for each contract element by the dollars associated with the contract element, added results across all contract elements, and divided by the total dollars for all contract elements. These calculations produced a dollar-weighted estimate of overall availability of MBE/WBEs for FHWA-, FTA- and FAA-funded contracts (by funding source, and for FAA, by airport). Figure 4-8 provides an example of how the study team calculated availability for a specific subcontract in the study period.

Special considerations for supply contracts. When calculating availability for a particular type of materials supplies, Keen Independent counted as available all firms supplying those materials that reported qualifications for and interest in that work for HDOT and indicated that they could provide supplies in the pertinent region of the state. Bid capacity was not considered in these calculations.

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

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

Figure 4-8.
Example of an availability calculation

One of the subcontracts examined was for electrical work (\$122,812) on a 2012 Federal Aviation Administration-funded contract for Honolulu International Airport. To determine the number of MBE/WBEs and majority-owned firms available for that subcontract, the study team identified businesses in the availability database that:

- a. Were in business in 2012;
- b. Indicated that they performed electrical work on transportation-related projects;
- c. Reported working or bidding on subcontracts in Hawaii in the past seven years;
- d. Reported bidding on work of similar or greater size in the past seven years;
- e. Reported ability to perform work on Oahu; and
- f. Reported qualifications and interest in working as a subcontractor on local government transportation projects.

There were 24 businesses in the availability database that met those criteria. Of those businesses, 17 were MBEs or WBEs. Therefore, MBE/WBE availability for the subcontract was 71 percent (i.e., $17/24 = 71\%$).

The weight applied to this contract was $\$122,812 \div \$119 \text{ million} = 0.1\%$ (equal to its share of total FAA-funded contract dollars for Honolulu International Airport). Keen Independent repeated this process for each prime contract and subcontract.

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

For instance, if 90 percent of your contract dollars will be spent on heavy construction and 10 percent on trucking, you should weight your calculation of the relative availability of firms by the same percentages.⁵

The study team took type of work into account by examining 31 different subindustries related to transportation construction, engineering and related purchases as part of estimating availability for HDOT work. (See Chapter 3 for more discussion of these subindustries.)

Keen Independent’s approach accounts for qualifications and interest in transportation-related prime contract and subcontract work. The study team collected information on whether businesses are qualified and interested in working as prime contractors, subcontractors or both on HDOT transportation work, in addition to the consideration of several other factors related to prime contracts and subcontracts (e.g., contract types, sizes and locations):

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

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

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

⁵ USDOT. Tips for Goal-Setting in the Federal Disadvantaged Enterprise (DBE) Program as updated June 25, 2013 <http://www.dot.gov/osdbu/disadvantaged-business-enterprise/tips-goal-setting-disadvantaged-business-enterprise>

Keen Independent’s approach accounts for the geographic location of the work. The study team determined the location where work was performed for HDOT contracts (Oahu, Kauai, Maui, Hawaii Island, Lanai and Molokai).

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

F. Availability Results

Keen Independent used the custom census approach described above to estimate the availability of MBE/WBEs and majority-owned businesses for USDOT-funded prime contracts and subcontracts that HDOT awarded during the study period. The study team also estimated availability separately for contracts funded by FHWA and FTA. Keen Independent also calculated availability for FAA-funded contracts overall and for each HDOT airport

Figure 4-9 presents overall dollar-weighted availability estimates by MBE/WBE group for HDOT’s FHWA-, FTA- and FAA-funded contracts. For example, weighted availability figures for minority- and women-owned firms are:

- 52.97 percent for FHWA-funded contracts;
- 48.86 percent for FTA-funded contracts; and
- 46.65 percent for FAA-funded contracts across all airports.

These results are lower than the percentage of available firms that are MBE/WBE (57%) shown in Figure 4-4.

Figure 4-9.

Overall dollar-weighted availability estimates for MBE/WBEs for HDOT FHWA-, FTA- and FAA-funded contracts, July 2011–June 2016

	FHWA	FTA	FAA
African American	0.65 %	0.05 %	0.87 %
Asian Pacific American, Native Hawaiian or Pacific Islander	26.05	16.96	18.10
Hispanic American	2.53	0.88	1.62
American Indian or Alaska Native	2.74	5.03	1.13
Subcontinent Asian American	6.20	0.64	9.83
Total MBE	38.17 %	23.56 %	31.55 %
WBE (white women-owned)	14.80	25.31	15.08
Total MBE/WBE	52.97 %	48.86 %	46.65 %

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

Source: Keen Independent availability analysis.

Figure 4-10 provides MBE/WBE availability results for FAA-funded contracts at each HDOT airport. Availability varies by airport because of the different mix of FAA-funded projects and because MBE/WBE availability varies by island.

Figure 4-10.
Overall dollar-weighted availability estimates for MBE/WBEs for HDOT FAA-funded contracts at HDOT airports

	Honolulu International Airport	Kahului Airport	Kona International Airport	Hilo International Airport	Lihue Airport	Molokai Airport	Lanai Airport
African American	0.04 %	0.80 %	0.42 %	2.86 %	0.16 %	0.25 %	0.15 %
Asian Pacific American, Native Hawaiian or Pacific Islander	13.03	44.24	21.08	24.76	12.39	25.43	18.52
Hispanic American	1.21	5.00	1.78	1.88	1.25	5.72	3.61
American Indian or Alaska Native	0.83	1.01	0.84	2.26	0.76	1.19	0.80
Subcontinent Asian American	19.22	3.52	0.69	0.86	0.84	1.22	1.19
Total MBE	34.33 %	54.57 %	24.80 %	32.62 %	15.40 %	33.82 %	24.27 %
WBE (white women-owned)	17.21	4.21	4.12	14.06	25.65	9.64	20.72
Total MBE/WBE	51.54 %	58.78 %	28.92 %	46.68 %	41.05 %	43.46 %	44.99 %

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

Source: Keen Independent availability analysis.

Figure 4-11 presents overall MBE/WBE availability results for HDOT airport concessions contracts given the current mix of concessions at each airport and the firms indicating in the availability survey that they were qualified and interested in these opportunities. Results are for concessions other than car rentals (there are no ACDBEs available for airport car rental concessions based on HDOT information).

Figure 4-11.
Overall dollar-weighted availability estimates for MBE/WBEs for HDOT airport concessions

	Honolulu International Airport	Kahului Airport	Kona International Airport	Hilo International Airport	Lihue Airport	Molokai Airport	Lanai Airport
African American	12.61 %	7.79 %	1.45 %	1.45 %	7.31 %	8.33 %	0.00 %
Asian Pacific American, Native Hawaiian or Pacific Islander	38.58	46.18	61.80	37.44	34.09	55.62	0.00
Hispanic American	1.36	3.52	1.77	1.37	3.07	4.17	0.00
American Indian or Alaska Native	0.45	0.00	0.00	0.00	0.00	0.00	0.00
Subcontinent Asian American	12.61	1.72	0.39	0.27	1.17	4.50	0.00
Total MBE	65.61 %	59.21 %	65.41 %	40.53 %	45.64 %	72.62 %	0.00 %
WBE (white women-owned)	13.67	14.52	4.36	3.76	13.57	8.33	0.00
Total MBE/WBE	79.28 %	73.73 %	69.77 %	44.29 %	59.21 %	80.95 %	0.00 %

Note: Numbers may not add to totals due to rounding. Does not include car rental.

Source: Keen Independent availability analysis.

G. Availability Results for Current and Potential DBEs and ACDBEs

Establishing a base figure is the first step in calculating an overall goal for DBE participation in HDOT's USDOT-funded contracts. For the base figure for these contracts, calculations focus on potential DBEs (including currently certified DBEs).

Keen Independent's approach to calculating HDOT's base figure is consistent with:

- Court-reviewed methodologies in several states, including Washington, California, Illinois and Minnesota;
- Instructions in The Final Rule effective February 28, 2011 that outline revisions to the Federal DBE Program; and
- USDOT's "Tips for Goal-Setting in the Disadvantaged Business Enterprise (DBE) Program."

Base figure for USDOT-funded contracts. As discussed above, Keen Independent's availability analysis indicates that the dollar-weighted availability of minority- and women-owned firms for FHWA-funded contracts and for FAA-funded contracts at Honolulu International Airport and Kahului Airport are 52.97 percent, 51.54 percent and 58.78 percent, respectively.

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

Figure 4-12 on the following page provides the calculations to derive current/potential DBE availability when starting from the MBE/WBE availability figure.

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

- MBE/WBEs that in recent years graduated from the DBE Program or had applied for DBE or ACDBE certification in Hawaii and had been denied (based on information supplied by HDOT's Office of Civil Rights);
- MBE/WBEs in the availability survey reported having average annual revenue from the most recent three years (at the time of the 2018 survey) that exceeded the revenue limits for DBE certification for their subindustry (as of 2019) or for ACDBE certification, if a concessions firm; and
- MBE/WBEs which, upon follow-up research by HDOT and the study team, did not appear to be eligible or interested in becoming certified as a DBE. Because this additional research was conducted after the July 2019 Availability Study was published, it represents new information for use in setting overall DBE goals.

Together, removing these three categories of MBE/WBEs reduced the base figures by 35.71 percentage points for FHWA-funded contracts and by 34.23 percentage points for FTA-funded contracts. Base figures for other airports were also lower because of these adjustments.

Keen Independent then considered whether there were any white male-owned firms in the availability survey that were certified as DBEs. If so, they would be added to the availability calculation to determine a total base figure. As there were no certified DBEs in the availability database that were white male-owned, there was no addition of these firms in the base figure calculations.

Figure 4-12 shows these calculations to determine the base figure for FHWA- and FTA-funded contracts.

Figure 4-12.

Overall dollar-weighted availability estimates for current and potential DBEs for FHWA- and FTA-funded contracts

Calculation of base figure	FHWA	FTA
Total MBE/WBE	52.97 %	48.86 %
Less firms that graduated from the DBE Program or denied DBE certification in recent years or exceed revenue limits	<u>35.71</u>	<u>34.23</u>
Subtotal	17.26 %	14.63 %
Plus white male-owned DBEs	--	--
Current and potential DBEs	17.26 %	14.63 %

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

Source: Keen Independent availability analysis.

Figure 4-13 shows these calculations to determine the base figures for FAA-funded contracts at each HDOT airport.

Figure 4-13.

Overall dollar-weighted availability estimates for current and potential DBEs for FAA-funded contracts at HDOT airports

Calculation of base figure	Honolulu International Airport	Kahului Airport	Kona International Airport	Hilo International Airport	Lihue Airport	Molokai Airport	Lanai Airport
Total MBE/WBE	51.54 %	58.78 %	28.92 %	46.68 %	41.05 %	43.46 %	44.99 %
Less firms that graduated from the DBE Program or denied DBE certification in recent years or exceed revenue limits	<u>44.78</u>	<u>30.65</u>	<u>16.26</u>	<u>31.04</u>	<u>32.21</u>	<u>32.34</u>	<u>33.65</u>
Subtotal	6.76 %	28.13 %	12.66 %	15.64 %	8.84 %	11.12 %	11.34 %
Plus white male-owned DBEs	--	--	--	--	--	--	--
Current and potential DBEs	6.76 %	28.13 %	12.66 %	15.64 %	8.84 %	11.12 %	11.34 %

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

Source: Keen Independent availability analysis.

The base figures represent the level of anticipated DBE participation based on analysis of USDOT-funded contracts from July 2011 through June 2016. If HDOT’s mix of projects, including size and location, were to substantially change in future, it might affect the overall base figure for those contracts.

Dollar-weighted availability of current DBEs. Keen Independent also calculated the base figure if it only counted current DBEs. “Potential DBEs” are included in this analysis but counted as non-DBEs. If limited to currently certified DBEs, the base figures would be:

- 7.85 percent for FHWA-funded contracts;
- 11.10 percent for FTA-funded contracts;
- 3.12 percent for FAA-funded contracts at Honolulu International Airport;
- 8.28 percent for FAA-funded contracts at Kahului Airport;
- 5.01 percent for FAA-funded contracts at Kona International Airport;
- 8.41 percent for FAA-funded contracts at Hilo International Airport;
- 3.40 percent for FAA-funded contracts at Lihue Airport;
- 3.71 percent for FAA-funded contracts at Molokai Airport; and
- 3.52 percent for FAA-funded contracts at Lanai Airport.

Availability of current and potential ACDBEs for airport concessions. Keen Independent also calculated estimated availability of current and potential ACDBEs for each type of airport concession included in the study. Figure 4-14 provides the total percentage of firms available for each type of concession at each airport that are current or potential based on availability survey results. Base figures can be calculated from these data once the mix of existing and future concessions and their associated revenue are considered (see Chapter 13).

Figure 4-14.

Availability estimates of current and potential ACDBEs for HDOT airport concessions

	Honolulu International Airport	Kahului Airport	Kona International Airport	Hilo International Airport	Lihue Airport	Molokai Airport	Lanai Airport
Eating places	19.31 %	44.97 %	27.06 %	20.91 %	43.58 %	80.95 %	N/A
Gift and news shops	47.63	15.71	0.00	0.00	13.20	N/A	N/A
Flower and lei shops	3.82	N/A	42.30	22.04	2.28	0.00	N/A
Foreign currency exchange	0.00	N/A	N/A	N/A	N/A	N/A	N/A
Coin-operated service machines	0.00	N/A	N/A	N/A	N/A	N/A	N/A
Automobile parking	8.14	12.89	0.00	0.00	0.00	N/A	N/A
Other concessions	0.39	0.15	0.41	N/A	N/A	N/A	N/A

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

Source: Keen Independent availability analysis.

Additional steps before HDOT determines its overall DBE goals for USDOT-funded contracts and overall ACDBE goals for airport concessions. Starting in Chapter 8 for FHWA-funded contracts and continuing through Chapter 13 for airport concessions, HDOT must consider whether to make step 2 adjustments to these base figures as part of determining its overall DBE goals.

Step 2 adjustments can be upward or downward, and there is no requirement for HDOT to make an adjustment as long as it can explain the factors considered and why no adjustment was warranted. Each chapter starting with Chapter 8 provides examples of potential step 2 adjustments for HDOT review.

CHAPTER 5.

Utilization and Disparity Analysis

Keen Independent’s utilization analysis reports the percentage of HDOT transportation contract dollars going to minority- and women-owned firms. The disparity analysis compares that utilization with the participation of minority- and women-owned firms that might be expected based on the availability analysis. (Chapter 4 and Appendix D explain the availability analysis.) Keen Independent also examined utilization of minority- and women-owned firms in HDOT airport concessions.

Chapter 5 presents results of the utilization and disparity analysis in six parts:

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

A. Overview of the Utilization Analysis

Keen Independent examined the participation of minority- and women-owned firms on HDOT transportation contracts from July 2011 through June 2016. In total, Keen Independent’s utilization analysis included 1,680 contracts and subcontracts totaling \$1.1 billion over this time period, including FHWA-, FTA- and FAA-funded contracts. The study team also reviewed airport concessions gross receipts for \$5.0 billion (this amount includes \$3.3 billion for rental car services).

The study team collected information about HDOT projects as well as work awarded for local government projects that use funds administered through HDOT. Chapter 3 and Appendix C explain the methods used to collect these data and determine the racial, ethnic and gender ownership characteristics of individual firms.

To tailor the disparity study to the specific demographic characteristics of Hawaii, Keen Independent has included a breakdown of Asian Pacific American-, Native Hawaiian- and Pacific Islander-owned into further groups in order to better understand the disparity of the state.

Note that HDOT awards work through a variety of contract agreements; to simplify, the utilization analysis refers to all such work as “contracts.”¹

¹ Also, prime contractors, not HDOT or local agencies, “award” subcontracts to subcontractors. To streamline the discussion, HDOT and local agency “award” of contract elements is used here and throughout the report.

Calculation of “utilization.” The study team measured MBE/WBE “utilization” as the percentage of prime contract and subcontract dollars awarded to MBE/WBEs during the study period (see Figure 5-1). Keen Independent calculated MBE/WBE utilization for a group of contracts by dividing the contract dollars going to MBE/WBEs by the contract dollars for all firms.

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

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

Keen Independent’s analysis of MBE/WBE utilization goes beyond what HDOT currently reports to FHWA, FTA and FAA as explained below.

- **All MBE/WBEs, not just certified DBEs and ACDBEs.** Per USDOT regulations, HDOT’s Uniform Reports focus exclusively on certified DBEs and ACDBEs. Keen Independent’s utilization analyses examine the utilization of minority- and women-owned firms — not just the utilization of certified DBEs. The study team’s analysis includes the utilization of MBE/WBEs that may have once been DBE-certified and graduated (or let their certifications lapse) and the utilization of MBE/WBEs that have never been DBE-certified. (Keen Independent separately reports utilization of MBE/WBEs that were DBE-certified or ACDBE-certified during the study period.)
- **More complete contract information.** Through HDOT’s assistance during the disparity study, and as part of HDOT’s ongoing improvements to its contract data collection and reporting, the study team was able to analyze more complete data than HDOT had in its Uniform Reports, especially in the earlier part of the study period.

As a result, Keen Independent’s estimates of DBE and ACDBE participation during the study period differ from the overall DBE participation HDOT reported to FHWA, FTA and FAA over a similar time period. (Keen Independent’s estimate of percentage DBE participation is usually higher than what HDOT had reported.)

Figure 5-1.
Defining and measuring “utilization”

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

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

Information about MBE/WBE utilization is instructive on its own, but it is even more useful when it is compared with the utilization that might be expected based on the availability of MBE/WBEs for HDOT work. The study team presents such comparisons as part of the “disparity analysis” later in Chapter 5.

B. Overall MBE/WBE and DBE Utilization for FHWA-, FTA- and FAA-Funded Contracts

Figure 5-2 presents MBE/WBE utilization (as a percentage of total dollars) on HDOT transportation-related contracts awarded during the study period. Results are for 1,680 HDOT prime contracts and subcontracts that involved FHWA, FTA or FAA funds. The darker portion of the bar presents the utilization of MBE/WBEs that were DBE-certified and the middle portion presents the participation of potential DBEs (MBE/WBEs that appear that they could be DBE-certified).

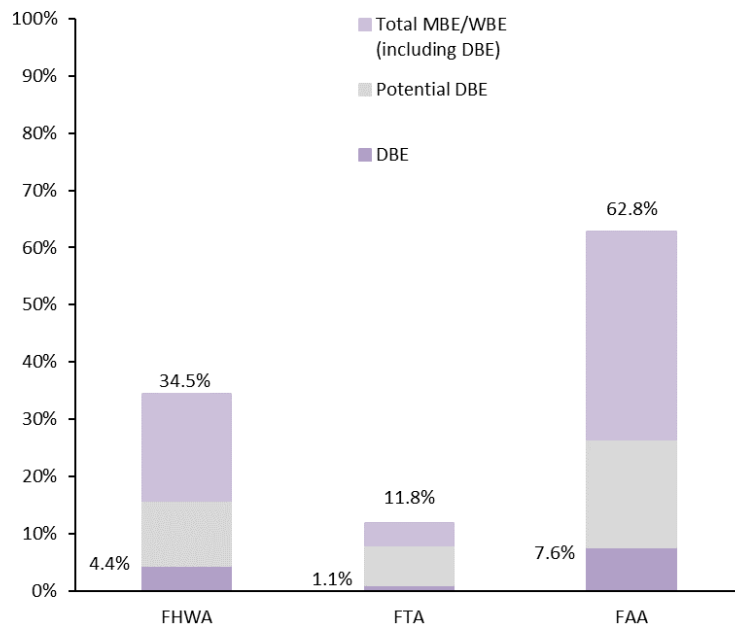
Figure ES-5 shows utilization of minority- and women-owned firms of 34.5 percent, 11.8 percent and 62.8 percent for FHWA-, FTA- and FAA-funded contracts. The participation of minority- and women-owned firms was substantially greater than results for just DBE-certified businesses.

Some of the utilized MBE/WBEs are eligible to be certified as DBEs but have not done so. Keen Independent estimated that these potential DBEs obtained 11.3 percent of FHWA-funded contract dollars and 6.9 percent of FTA-funded contract dollars. Combined, DBE and potential DBE participation was 15.7 percent for FHWA-funded contracts and 8.0 percent for FTA-funded contracts. For FAA-funded contracts, potential DBEs were 11.3 percent of total utilization. Combined DBE and potential DBE participation on FAA-funded contracts was 18.9 percent.

Figure 5-2.
MBE/WBE and DBE share of prime contract/subcontract dollars for HDOT FHWA-, FTA- and FAA-funded transportation contracts, July 2011–June 2016

Note:
Dark portion of bar is certified DBE utilization. Middle portion of the bar is potential DBE utilization.
Number of contracts/subcontracts analyzed is 1,680.

Source:
Keen Independent from data on HDOT and local government contracts July 2011–June 2016.



FHWA-funded contracts. Keen Independent examined 1,291 FHWA-funded prime contracts and subcontracts from July 2011 through June 2016. In total, there was \$815 million in contract dollars for these contracts, which accounted for most of the HDOT contract dollars examined in the study.²

HDOT set DBE contract goals on many FHWA-funded contracts during the study period, however most of the participation of minority- and women-owned firms were those not certified as DBEs. MBE/WBEs received about \$281 million, or 34 percent of HDOT FHWA-funded contract dollars during the study period. About \$36 million of contract dollars went to MBE/WBEs that were DBE-certified at the time of the contract (4.4% of total dollars). This is in the range of what HDOT reported to FHWA for these contracts.

FTA-funded contracts. Keen Independent identified \$32 million in FTA-funded contracts for the study period (47 prime contracts and subcontracts). FTA-funded work included \$15.6 million in harbor dredging contracts and \$10.3 million in pier construction contracts. MBE/WBEs received about \$3.8 million, or 11.8 percent of HDOT FTA-funded contract dollars during the study period. Because only \$0.3 million (1.7%) of FTA-funded contract dollars went to MBE/WBEs that were DBE-certified at the time of the contract, minority- and women-owned firms not certified as DBEs accounted for most of the overall MBE/WBE participation. DBE contract goals were not applied to these contracts during the study period.

The relative DBE participation indicated in Keen Independent's analysis is somewhat higher for FTA-funded contracts than reported by HDOT (0.3% based on awards).

FAA-funded contracts. The study team identified 342 FAA-funded contracts during the study period totaling \$258 million. MBE/WBEs received about \$162 million, or 63 percent of HDOT FAA-funded contract dollars during the study period. Only \$20 million (8%) of the contract dollars went to DBE-certified companies. Minority- and women-owned firms not certified as DBEs accounted for a large share of the overall MBE/WBE participation.

HDOT also provided the study team Uniform Reports for FAA-funded contracts for its airports for FFY 2012 through FFY 2016. These Uniform Reports indicated \$146 million in total FAA-funded contracts in these years and 1.9 percent participation of certified DBEs. Based on HDOT's DBE Program waiver request approved by FAA in July 2014, HDOT applies DBE contract goals to certain FAA-funded contracts, but only DBEs owned by underutilized DBEs are eligible to be counted to a DBE contract goal. These underutilized groups are African American-, Hispanic American-, Native American- and women-owned companies.

² Note that because HDOT and USDOT treat each contract with any FHWA dollars as "FHWA-funded," the study team did so as well.

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

This portion of Chapter 5 presents utilization results by race, ethnicity and gender ownership for HDOT FHWA-, FTA- and FAA-funded contracts. The top portion of each of the following tables examines results for minority- and women-owned firms regardless of whether they were DBE-certified. The bottom part of each table focuses on dollars going to certified DBEs and to non-DBEs (even if the non-DBE firm was minority- or female-owned and just not DBE-certified). For each set of contracts, the figures show:

- Total number of prime contracts and subcontracts awarded to firms in that group (e.g. 26 FHWA-funded prime contracts and subcontracts to white women-owned firms as shown in the top portion of Figure 5-3);
- Combined dollars of prime contracts and subcontracts going to the group (e.g., \$8,657,000 to white women-owned firms in Figure 5-3); and
- The percentage of combined contract dollars for the group (e.g., white women-owned firms received 1.06% of total FHWA-funded contract dollars, which is also provided in Figure 5-3).

In each table, Asian Pacific American-, Native Hawaiian- and Pacific Islander-owned companies account for most of the utilization of minority- and women-owned companies on HDOT's federally funded contracts.

FHWA-funded contracts. Figure 5-3 provides detailed results for FHWA-funded contracts. For each MBE/WBE group, most participation was firms not certified as DBEs.

- Asian Pacific American-, Native Hawaiian- and Pacific Islander-owned firms received \$257 million, about one-third of the HDOT FHWA-funded contract dollars.
- Hispanic American-owned companies received about 1 percent of FHWA-funded contract dollars.
- White women-owned companies also obtained about 1 percent of the dollars of FHWA-funded contracts.
- All other MBE/WBE groups received less than 1 percent of HDOT FHWA-funded contract dollars.

Figure 5-3.

MBE/WBE and DBE share of HDOT prime contracts and subcontracts for FHWA-funded contracts, July 2011–June 2016

	Number of procurements*	\$1,000s	Percent of dollars
MBE/WBEs			
African American	11	\$ 931	0.11 %
Asian Pacific American, Native Hawaiian or Pacific Islander	474	256,727	31.50
Hispanic American	38	8,991	1.10
American Indian or Alaska Native	3	0	0.00
Subcontinent Asian American	3	5,662	0.69
Total MBE	527	\$ 272,311	33.41 %
WBE (white women-owned)	26	8,657	1.06
Total MBE/WBE	553	\$ 280,968	34.47 %
Total majority-owned	738	534,024	65.53
Total firms	1,291	\$ 814,992	100.00 %
DBEs			
African American	2	\$ 745	0.09 %
Asian Pacific American, Native Hawaiian or Pacific Islander	199	29,939	3.67
Hispanic American	24	5,092	0.62
American Indian or Alaska Native	3	0	0.00
Subcontinent Asian American	0	0	0.00
Total MBE	228	\$ 35,777	4.39 %
WBE (white women-owned)	6	390	0.05
White male-owned DBE	0	0	0.00
Total DBE certified	234	\$ 36,166	4.44 %
Non-DBE	1,057	778,826	95.56
Total firms	1,291	\$ 814,992	100.00 %

Note: *Number of prime contracts and subcontracts.

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

Source: Keen Independent from data on HDOT and local government contracts July 2011–June 2016.

Figure 5-4 describes the subgroups of Asian Pacific American-, Native Hawaiian- and other Pacific Islander- owned firms receiving work on HDOT FHWA-funded contracts. Businesses owned by Native Hawaiians, Chinese Americans and Japanese Americans obtained much of the work going to MBEs. Very little of this work, however, went to firms certified as DBEs.

Companies owned by Filipino Americans, Korean Americans, Pacific Islanders, other Asian Pacific Americans and Asian Pacific Americans for which ethnicity could not be identified also received work on FHWA-funded contracts. Combined, these groups obtained about 4 percent of FHWA-funded contract dollars. About 1 percentage point of that participation was firms certified as DBEs.

Figure 5-4.
Asian Pacific American, Native Hawaiian and Pacific Islander share of HDOT prime contracts and subcontracts for FHWA-funded contracts, July 2011–June 2016

	Number of procurements*	\$1,000s	Percent of dollars
MBEs			
Chinese American	83	\$ 66,351	8.14 %
Filipino American	18	2,532	0.31
Japanese American	137	65,909	8.09
Korean American	8	19,075	2.34
Other Asian Pacific American	1	59	0.01
Native Hawaiian	186	89,818	11.02
Pacific Islander	1	165	0.02
Unknown Asian Pacific American	40	12,817	1.57
Subtotal	474	\$ 256,727	31.50 %
Other firms	817	558,266	68.50
Total firms	1,291	\$ 814,992	100.00 %
DBEs			
Chinese American	8	\$ 2,314	0.28 %
Filipino American	14	1,840	0.23
Japanese American	39	3,556	0.44
Korean American	2	5	0.00
Other Asian Pacific American	0	0	0.00
Native Hawaiian	113	16,484	2.02
Pacific Islander	0	0	0.00
Unknown Asian Pacific American	23	5,740	0.70
Subtotal	199	\$ 29,939	3.67 %
Other firms	1,092	785,053	96.33
Total firms	1,291	\$ 814,992	100.00 %

Note: *Number of prime contracts and subcontracts.

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

Source: Keen Independent from data on HDOT and local government contracts July 2011–June 2016.

FTA-funded contracts. Figure 5-5 further examines HDOT’s utilization of MBE/WBEs and DBEs on its FTA-funded contracts for July 2011 through June 2016. Asian Pacific American-, Native Hawaiian- and Pacific Islander-owned firms received about 12 percent of FTA-funded contract dollars and Hispanic American-owned businesses received 0.1 percent of those contract dollars.

Figure 5-5.
MBE/WBE and DBE share of HDOT prime contracts and subcontracts for FTA-funded contracts, July 2011–June 2016

	Number of procurements*	\$1,000s	Percent of dollars
MBE/WBEs			
African American	0	\$ 0	0.00 %
Asian Pacific American, Native Hawaiian or Pacific Islander	21	3,746	11.67
Hispanic American	2	44	0.14
American Indian or Alaska Native	0	0	0.00
Subcontinent Asian American	0	0	0.00
Total MBE	23	\$ 3,790	11.81 %
WBE (white women-owned)	1	0	0.00
Total MBE/WBE	24	\$ 3,790	11.81 %
Total majority-owned	23	28,297	88.19
Total firms	47	\$ 32,087	100.00 %
DBEs			
African American	0	\$ 0	0.00 %
Asian Pacific American, Native Hawaiian or Pacific Islander	7	344	1.07
Hispanic American	0	0	0.00
American Indian or Alaska Native	0	0	0.00
Subcontinent Asian American	0	0	0.00
Total MBE	7	\$ 344	1.07 %
WBE (white women-owned)	0	0	0.00
White male-owned DBE	0	0	0.00
Total DBE certified	7	\$ 344	1.07 %
Non-DBE	40	31,743	98.93
Total firms	47	\$ 32,087	100.00 %

Note: *Number of prime contracts and subcontracts.
Numbers rounded to nearest tenth of 1 percent. Numbers may not add to totals due to rounding.

Source: Keen Independent from data on HDOT and local government contracts July 2011–June 2016.

Of FTA-funded contract dollars going to Asian Pacific American-, Native Hawaiian- and Pacific Islander-owned firms, most went to Japanese American-owned firms. The remaining 1 percent was split between Chinese American-, Filipino American-, Native Hawaiian- and Unknown Asian Pacific American-owned businesses. Figure 5-6 provides these results.

Figure 5-6.

Asian Pacific American, Native Hawaiian and Pacific Islander share of prime contracts and subcontracts for FTA-funded contracts, July 2011–June 2016

	Number of procurements*	\$1,000s	Percent of dollars
MBEs			
Chinese American	2	\$ 9	0.03 %
Filipino American	2	96	0.30
Japanese American	12	3,407	10.62
Korean American	0	0	0.00
Other Asian Pacific American	0	0	0.00
Native Hawaiian	3	112	0.35
Pacific Islander	0	0	0.00
Unknown Asian Pacific American	2	122	0.38
Subtotal	21	\$ 3,746	11.67 %
Other firms	26	28,342	88.33
Total firms	47	\$ 32,087	100.00 %
DBEs			
Chinese American	1	\$ 9	0.03 %
Filipino American	2	96	0.30
Japanese American	1	12	0.04
Korean American	0	0	0.00
Other Asian Pacific American	0	0	0.00
Native Hawaiian	2	106	0.33
Pacific Islander	0	0	0.00
Unknown Asian Pacific American	1	122	0.38
Subtotal	7	\$ 344	1.07 %
Other firms	40	31,743	98.93
Total firms	47	\$ 32,087	100.00 %

Note: *Number of prime contracts and subcontracts.

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

Source: Keen Independent from data on HDOT and local government contracts July 2011–June 2016.

FAA-funded contracts. Keen Independent examined 342 FAA-funded contracts totaling \$258 million from July 2011 through June 2016. Figure 5-7 shows that Asian Pacific American-, Native Hawaiian- and Pacific Islander-owned businesses received 62 percent of the total contract dollars. Most of the participation of this group of firms were companies that were not DBE-certified. Combined, firms owned by other minority groups or by white women received about 1 percent of total FAA-funded contract dollars.

Figure 5-7.

MBE/WBE and DBE share of HDOT prime contracts and subcontracts for FAA-funded contracts, July 2011–June 2016

	Number of procurements*	\$1,000s	Percent of dollars
MBE/WBEs			
African American	0	\$ 0	0.00 %
Asian Pacific American, Native Hawaiian or Pacific Islander	157	158,601	61.51
Hispanic American	8	1,163	0.45
American Indian or Alaska Native	2	282	0.11
Subcontinent Asian American	0	0	0.00
Total MBE	167	\$ 160,047	62.07 %
WBE (white women-owned)	14	1,795	0.70
Total MBE/WBE	181	\$ 161,842	62.76 %
Total majority-owned	161	96,025	37.24
Total firms	342	\$ 257,867	100.00 %
DBEs			
African American	0	\$ 0	0.00 %
Asian Pacific American, Native Hawaiian or Pacific Islander	23	19,119	7.41
Hispanic American	1	305	0.12
American Indian or Alaska Native	1	132	0.05
Subcontinent Asian American	0	0	0.00
Total MBE	25	\$ 19,556	7.58 %
WBE (white women-owned)	0	0	0.00
White male-owned DBE	0	0	0.00
Total DBE certified firms	25	\$ 19,556	7.58 %
Non-DBE	317	238,311	92.42
Total firms	342	\$ 257,867	100.00 %

Note: *Number of prime contracts and subcontracts.

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

Source: Keen Independent from data on HDOT and local government contracts July 2011–June 2016.

Figure 5-8 further explores participation in FAA-funded contracts among groups within the Asian Pacific American-, Native American- and Pacific Islander-owned businesses. Native Hawaiian-owned businesses received 32 percent of total contract dollars. Japanese American- and Korean American-owned firms received 11 percent and 8 percent of total FAA-funded contract dollars, respectively. The Asian Pacific American-owned companies for which ethnicity could not be identified accounted for 8 percent of total FAA-funded contract dollars.

Figure 5-8.
Asian Pacific American, Native Hawaiian and Pacific Islander share of HDOT prime contracts and subcontracts for FAA-funded contracts, July 2011–June 2016

	Number of procurements*	\$1,000s	Percent of dollars
MBEs			
Chinese American	21	\$ 6,053	2.35 %
Filipino American	6	101	0.04
Japanese American	77	28,050	10.88
Korean American	6	21,384	8.29
Other Asian Pacific American	0	0	0.00
Native Hawaiian	35	82,941	32.16
Pacific Islander	0	0	0.00
Unknown Asian Pacific American	12	20,072	7.78
Subtotal	157	\$ 158,601	61.51 %
Other firms	185	99,265	38.49
Total firms	342	\$ 257,867	100.00 %
DBEs			
Chinese American	2	\$ 1,407	0.55 %
Filipino American	4	21	0.01
Japanese American	4	1,224	0.47
Korean American	0	0	0.00
Other Asian Pacific American	0	0	0.00
Native Hawaiian	7	570	0.22
Pacific Islander	0	0	0.00
Unknown Asian Pacific American	6	15,899	6.17
Subtotal	23	\$ 19,119	7.41 %
Other firms	319	238,747	92.59
Total firms	342	\$ 257,867	100.00 %

Note: *Number of prime contracts and subcontracts.

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

Source: Keen Independent from data on HDOT and local government contracts July 2011–June 2016.

D. Overall MBE/WBE Utilization in Airport Concessions

Keen Independent also examined the share of gross airport concessions revenue going to minority- and women-owned firms at HDOT airports. Keen Independent examined 711 airport concessions contracts and subcontracts from July 2011 through June 2016. In total, there was \$5 billion in concessions revenue.

The utilization, availability and disparity analyses examined do not include car rentals. Keen Independent was informed that there are no available ACDBE car rental companies in Hawaii, so these types of concessions were not included in the study.

MBE/WBEs received about \$242 million (14%) of HDOT airport concessions revenue during the study period. About \$176 million (10%) of MBE/WBE concessions revenue went to minority- and women-owned firms that were certified as ACDBEs. (Note that HDOT operated the ACDBE Program for its airport concessions during the study period.)

Figure 5-9 presents detailed information for minority- and women-owned firms (top portion of the table) and certified ACDBEs (bottom portion of the table) for airport concessions revenue.

Figure 5-9 shows:

- Total number of concessions agreements (including sub-agreements) awarded to the group (e.g. 69 concessions agreements for white women-owned firms);
- Combined concessions revenue going to the group (e.g., \$62,682,000 to white women-owned firms); and
- The percentage of combined contract dollars for the group (e.g., white women-owned firms received 3.63% of total FHWA-funded contract dollars).

As shown in the top portion of Figure 5-9 for airport concessions contracts, firms owned by Asian Pacific Americans, Native Hawaiians or Pacific Islanders accounted for 6.81 percent of total concessions revenue (\$118 million). For the remaining minority-owned firms, Hispanic American-owned firms accounted for 3.53 percent of revenue (\$61 million) and African American-owned firms received 0.06 percent (\$1 million) of concessions revenue.

Most of the revenue going to white women-, Hispanic American- and African American-owned concessionaires went to firms certified as ACDBEs. Regarding Asian Pacific American-, Native Hawaiian- or Pacific Islander-owned concessionaires, about one-half of the revenue went to firms certified as ACDBEs.

Figure 5-9.

MBE/WBE and ACDBE share of HDOT airport concessions revenue, July 2011–June 2016

	Number of concessions agreements*	\$1,000s	Percent of dollars
MBE/WBEs			
African American	6	\$ 1,053	0.06 %
Asian Pacific American, Native Hawaiian or Pacific Islander	117	117,618	6.81
Hispanic American	37	60,896	3.53
American Indian or Alaska Native	0	0	0.00
Subcontinent Asian American	0	0	0.00
Total MBE	160	\$ 179,567	10.40 %
WBE (white women-owned)	69	62,682	3.63
Total MBE/WBE	229	\$ 242,249	14.03 %
Total majority-owned	270	1,484,778	85.97
Total firms	499	\$ 1,727,027	100.00 %
ACDBEs			
African American	6	\$ 1,053	0.06 %
Asian Pacific American, Native Hawaiian or Pacific Islander	42	63,291	3.66
Hispanic American	19	60,229	3.49
American Indian or Alaska Native	0	0	0.00
Subcontinent Asian American	0	0	0.00
Total MBE	67	\$ 124,572	7.21 %
WBE (white women-owned)	48	51,850	3.00
White male-owned ACDBE	0	0	0.00
Total ACDBE certified firms	115	\$ 176,422	10.22 %
Non-ACDBE	384	1,550,605	89.78
Total firms	499	\$ 1,727,027	100.00 %

Note: *Number of concessions and subconcessionaire agreements. Each year of a concessions or subconcessions agreement is counted as one agreement.

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

Source: Keen Independent from data on HDOT and local government contracts July 2011–June 2016.

Figure 5-10 shows that Native Hawaiian-owned businesses received about 3 percent of total concessions revenue, followed by Chinese American-owned businesses (2%). About 1 percent of total concessions revenue went to Japanese American-owned businesses and Asian Pacific American-owned companies for which ethnicity could not be identified.

Figure 5-10.

Asian Pacific American, Native Hawaiian and Pacific Islander share of HDOT airport concessions revenue, July 2011–June 2016

	Number of concessions agreements*	\$1,000s	Percent of dollars
MBEs			
Chinese American	11	\$ 38,743	2.24 %
Filipino American	0	0	0.00
Japanese American	14	10,809	0.63
Korean American	6	268	0.02
Other Asian Pacific American	0	0	0.00
Native Hawaiian	73	56,463	3.27
Pacific Islander	0	0	0.00
Unknown Asian Pacific American	13	11,335	0.66
Subtotal	117	\$ 117,618	6.81 %
Other firms	382	1,609,409	93.19
Total firms	499	\$ 1,727,027	100.00 %
ACDBEs			
Chinese American	11	\$ 38,743	2.24 %
Filipino American	0	0	0.00
Japanese American	6	10,675	0.62
Korean American	0	0	0.00
Other Asian Pacific American	0	0	0.00
Native Hawaiian	12	2,538	0.15
Pacific Islander	0	0	0.00
Unknown Asian Pacific American	13	11,335	0.66
Subtotal	42	\$ 63,291	3.66 %
Other firms	457	1,663,736	96.34
Total firms	499	\$ 1,727,027	100.00 %

Note: *Number of concessions and subconcessionaire agreements. Each year of a concessions or subconcessions agreement is counted as one agreement.

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

Source: Keen Independent from data on HDOT and local government contracts July 2011–June 2016.

E. Disparity Analysis for HDOT Contracts and Concessions

To conduct the disparity analysis, Keen Independent compared the actual utilization of MBE/WBEs on HDOT and local government transportation prime contracts and subcontracts with the percentage of contract dollars that MBE/WBEs might be expected to receive based on their availability for that work. (Availability is also referred to as the “utilization benchmark.”) Keen Independent made those comparisons for individual MBE/WBE groups. Chapter 4 explains how the study team developed benchmarks from the availability data.

To make results directly comparable, Keen Independent expressed both utilization and availability as percentages of the total dollars associated with a particular set of contracts (e.g., 5% utilization compared with 4% availability). Keen Independent then calculated a “disparity index” to easily compare utilization and availability results among MBE/WBE groups and across different sets of contracts.

- A disparity index of “100” indicates an exact match between actual utilization and what might be expected based on MBE/WBE availability for a specific set of contracts (often referred to as “parity”).
- A disparity index of less than 100 may indicate a disparity between utilization and availability, and disparities of less than 80 in this report are described as “substantial.”³

Figure 5-11 describes how Keen Independent calculated disparity indices.

Results for minority- and women-owned firms on FHWA-funded contracts. For HDOT FHWA-funded contracts for the study period, there were disparities between the utilization and availability of white women-owned firms and each group of minority-owned firms except for Asian Pacific American-, Native Hawaiian- and Pacific Islander-owned businesses.

Figure 5-11.
Calculation of disparity indices

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

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

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

³ Some courts deem a disparity index below 80 as being “substantial” and have accepted it as evidence of adverse impacts against MBE/WBEs. For example, see *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, ___ F.3d ___, 2013 WL 1607239 (9th Cir. April 16, 2013); *Rothe Development Corp v. U.S. Dept of Defense*, 545 F.3d 1023, 1041; *Eng’g Contractors Ass’n of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d at 914, 923 (11th Circuit 1997); *Concrete Works of Colo., Inc. v. City and County of Denver*, 36 F.3d 1513, 1524 (10th Cir. 1994). Also see Appendix B for additional discussion.

For example, white women-owned firms received 1.06 percent of FHWA-funded contract dollars. This utilization was below what might be expected from the availability analysis — 14.08 percent. The resulting disparity index for WBEs is 7 (1.06% divided by 14.80% times 100).

Minority-owned firms received 33 percent of HDOT contract dollars, a result that was also below what might be expected from the availability analysis — 38 percent. Results in Figure 5-12, however, show substantial disparities for African American-, Hispanic American-, American Indian- and Alaska Native-, and Subcontinent Asian American-owned companies. These disparities occurred even with HDOT application of DBE contract goals during the study period. There was no disparity for the group of businesses owned by Asian Pacific Americans, Native Hawaiians or Pacific Islanders.

Figure 5-12.
MBE/WBE utilization and availability for HDOT FHWA-funded contracts, July 2011–June 2016

	Utilization	Availability	Disparity index
African American	0.11 %	0.65 %	18
Asian Pacific American, Native Hawaiian or Pacific Islander	31.50	26.05	121
Hispanic American	1.10	2.53	44
American Indian or Alaska Native	0.00	2.74	0
Subcontinent Asian American	0.69	6.20	11
Total MBE	33.41 %	38.17 %	88
WBE (white women-owned)	1.06	14.80	7
Total MBE/WBE	34.47 %	52.97 %	65
Total majority-owned	65.53	47.03	139
Total firms	100.00 %	100.00 %	

Note: Number of contracts/subcontracts analyzed is 1,291.

Source: Keen Independent disparity analysis for HDOT and local government contracts.

Figure 5-13 examines utilization and availability for FHWA-funded contracts for business owned by specific ethnic groups within the broad set of Asian Pacific American-, Native Hawaiian- and Pacific Islander-owned companies. Utilization exceeded availability for Native Hawaiian-, Chinese American- and Korean American-owned companies. Utilization for Korean American-owned companies (2.34%) was more than 10 times what was anticipated based on the availability of Korean American-owned companies for this work, which is why the disparity index for this group is more than 1,000.

There were substantial disparities for each of the other groups in Figure 5-13.⁴

⁴ Note that the study team could not identify the ethnicity of the owners for firms accounting for 1.57 percent of HDOT’s FHWA-funded contract dollars. If there were perfect information about ownership, this 1.57 percent would be distributed across the results for each of the ethnic groups in Figure 5-14. As the unknown ethnicity of ownership was more than one firm, it is unlikely that all of the utilization would add to the reported results for any single ethnic groups. However, even if all of this potential utilization were added to a single ethnic group in Figure 5-14, it would not affect the finding of “disparity” or “no disparity” for that group except for businesses owned by Pacific Islanders.

Figure 5-13.

Asian Pacific American, Native Hawaiian and Pacific Islander utilization and availability for HDOT FHWA-funded contracts, July 2011–June 2016

	Utilization	Availability	Disparity index
Chinese American	8.14 %	6.15 %	132
Filipino American	0.31	2.76	11
Japanese American	8.09	14.91	54
Korean American	2.34	0.12	999+
Native Hawaiian	11.02	1.86	593
Other Asian Pacific	0.01	0.17	4
Pacific Islander	0.02	0.08	26
Unknown Asian Pacific American	1.57	0.00	N/A
Total Asian Pacific American, Native Hawaiian and Pacific Islander	31.50 %	26.05 %	121
Other firms	68.50	73.95	
Total	100.00 %	100.00 %	

Note: Number of contracts/subcontracts analyzed is 1,291.

Source: Keen Independent disparity analysis for HDOT and local government contracts.

Results for minority- and women-owned firms on FTA-funded contracts. Minority-owned firms received 12 percent of FTA-funded contract dollars, below the 24 percent expected from the availability analysis. There were no white women-owned firms that received FTA-funded contracts. Therefore, there were substantial disparities for both MBEs and WBEs on FTA-funded contracts (no DBE contract goals applied). Figure 5-14 examines these results, followed by more detailed results for Asian American-, Native Hawaiian- and Pacific Islander-owned businesses in Figure 5-15.

Figure 5-14.

MBE/WBE utilization and availability for HDOT FTA-funded contracts, July 2011–June 2016

	Utilization	Availability	Disparity index
African American	0.00 %	0.05 %	0
Asian Pacific American, Native Hawaiian or Pacific Islander	11.67	16.96	69
Hispanic American	0.14	0.88	16
American Indian or Alaska Native	0.00	5.03	0
Subcontinent Asian American	0.00	0.64	0
Total MBE	11.81 %	23.56 %	50
WBE (white women-owned)	0.00	25.31	0
Total MBE/WBE	11.81 %	48.87 %	24
Total majority-owned	88.19	51.13	172
Total firms	100.00 %	100.00 %	

Note: Number of contracts/subcontracts analyzed is 47.

Source: Keen Independent disparity analysis for HDOT and local government contracts.

Except for Filipino Americans, there were substantial disparities for FTA-funded contracts for each group of businesses owned by Asian Pacific Americans, Native Hawaiians and Pacific Islanders.

Figure 5-15.

Asian Pacific American, Native Hawaiian and Pacific Islander utilization and availability for HDOT FTA-funded contracts, July 2011–June 2016

	Utilization	Availability	Disparity index
Chinese American	0.03 %	1.62 %	2
Filipino American	0.30	0.29	105
Japanese American	10.62	14.33	74
Korean American	0.00	0.01	0
Native Hawaiian	0.35	0.54	65
Other Asian Pacific	0.00	0.01	0
Pacific Islander	0.00	0.17	0
Unknown Asian Pacific American	0.38	0.00	N/A
Total Asian Pacific American, Native Hawaiian and Pacific Islander	11.67 %	16.96 %	69
Other firms	88.33	83.04	
Total	100.00 %	100.00 %	

Note: Number of contracts/subcontracts analyzed is 47.

Source: Keen Independent disparity analysis for HDOT and local government contracts.

Results for minority- and women-owned firms on FAA-funded contracts. For HDOT’s FAA-funded contracts, there were substantial disparities for each MBE/WBE group except for Asian Pacific American-, Native Hawaiian- and Pacific Islander-owned companies (see Figure 5-16).

Figure 5-16.

MBE/WBE utilization and availability for HDOT FAA-funded contracts, July 2011–June 2016

	Utilization	Availability	Disparity index
African American	0.00 %	0.87 %	0
Asian Pacific American, Native Hawaiian or Pacific Islander	61.51	18.10	340
Hispanic American	0.45	1.62	28
American Indian or Alaska Native	0.11	1.13	10
Subcontinent Asian American	0.00	9.83	0
Total MBE	62.06 %	31.55 %	197
WBE (white women-owned)	0.70	15.08	5
Total MBE/WBE	62.76 %	46.63 %	135
Total majority-owned	37.24	53.37	70
Total firms	100.00 %	100.00 %	

Note: Number of contracts/subcontracts analyzed is 342.

Source: Keen Independent disparity analysis for HDOT and local government contracts.

Figure 5-17 provides further detail for the utilization and availability of Asian Pacific American-, Native Hawaiian- and Pacific Islander-owned businesses for FAA-funded contracts. Utilization exceeded availability for businesses owned by each ethnic group except for Filipino Americans and Pacific Islanders.⁵

Figure 5-17.

Asian Pacific American, Native Hawaiian and Pacific Islander utilization and availability for HDOT FAA-funded contracts, July 2011–June 2016

	Utilization	Availability	Disparity index
Chinese American	2.35 %	1.80 %	130
Filipino American	0.04	1.55	3
Japanese American	10.88	10.87	100
Korean American	8.29	0.16	999+
Native Hawaiian	32.16	3.31	972
Other Asian Pacific	0.00	0.30	0
Pacific Islander	0.00	0.10	0
Unknown Asian Pacific American	7.78	0.00	N/A
Total Asian Pacific American, Native Hawaiian and Pacific Islander	61.51 %	18.10 %	340
Other firms	38.49	81.90	
Total	100.00 %	100.00 %	

Note: Number of contracts/subcontracts analyzed is 342.

Source: Keen Independent disparity analysis for HDOT and local government contracts.

Results for minority- and women-owned firms on airport non-car rental concessions

agreements. Both minority-owned companies and white women-owned firms received substantially less airport concessions revenue than might be expected given the availability of MBEs and WBEs for those concessions. Figure 5-18 shows these results.

- Minority-owned firms received 10 percent of HDOT airport concessions revenue, below what might be expected from the availability analysis (64%).
- White women-owned firms received about 4 percent of airport concessions revenue. This utilization was below what might be expected from the availability analysis (13%).

Disparities occurred even though HDOT operated the ACDBE Program at its airports.

The only MBE group not showing underutilization as concessionaires was Hispanic American-owned firms. Almost all of the participation of Hispanic American-owned concessionaires was ACDBE-certified companies.

⁵ The results indicated that the disparity result identified for those two groups could change, however, if the ethnicity of the “unknown Asian Pacific American” businesses were known and were one of those groups.

Figure 5-18.

MBE/WBE utilization and availability for non-car rental airport concessions contracts, July 2011–June 2016

	Utilization	Availability	Disparity index
African American	0.06 %	11.51 %	1
Asian Pacific American, Native Hawaiian or Pacific Islander	6.81	39.88	17
Hispanic American	3.53	1.66	212
American Indian or Alaska Native	0.00	0.37	0
Subcontinent Asian American	0.00	10.62	0
Total MBE	10.40 %	64.04 %	16
WBE (white women-owned)	3.63	13.40	27
Total MBE/WBE	14.03 %	77.44 %	18
Total majority-owned	85.97	22.56	381
Total firms	100.00 %	100.00 %	

Note: Number of concession/subconcession agreements analyzed is 499.
Each year of a concessions or subconcessions agreement is counted as one agreement.

Source: Keen Independent disparity analysis for HDOT and local government contracts.

Figure 5-19 provides further detail for the availability and utilization of Asian Pacific American-, Native Hawaiian- and Pacific Islander-owned concessionaires. Each subgroup in this study experienced a substantial disparity between concessions revenue received and what might be expected based on their availability for airport concessions.

Figure 5-19.

Asian Pacific American, Native Hawaiian and Pacific Islander utilization and availability for airport concessions contracts, July 2011–June 2016

	Utilization	Availability	Disparity index
Chinese American	2.24 %	12.46 %	18
Filipino American	0.00	1.02	0
Japanese American	0.63	7.25	9
Korean American	0.02	1.24	1
Native Hawaiian	3.27	14.62	22
Other Asian Pacific	0.00	2.51	0
Pacific Islander	0.00	0.77	0
Unknown Asian Pacific American	0.66	0.00	N/A
Total Asian Pacific American, Native Hawaiian and Pacific Islander	6.81 %	39.88 %	17
Other firms	93.19	60.12	
Total	100.00 %	100.00 %	

Note: Number of contracts/subcontracts analyzed is 499.
Each year of a concessions or subconcessions agreement is counted as one agreement.

Source: Keen Independent disparity analysis for HDOT and local government contracts.

Utilization and disparity results for other sets of HDOT contracts. Chapter 6 examines utilization results for subsets of HDOT contracts to further explore factors behind the disparities identified in Chapter 5.

F. Statistical Significance of Disparity Analysis Results

Testing for statistical significance relates to testing the degree to which a researcher can reject “random chance” as an explanation for any observed differences. Random chance in data sampling is the factor that researchers consider most in determining the statistical significance of results. The study team attempted to reach each firm in the relevant geographic market area identified as possibly doing business within relevant subindustries (as described in Chapter 4), mitigating many of the concerns associated with random chance in data sampling as they may relate to Keen Independent’s availability analysis. The utilization analysis attempted to represent a complete “population” of contracts. Therefore, one might consider any disparity identified when comparing overall utilization with availability to be “statistically significant.”

Figure 5-20 explains the high level of statistical confidence in the utilization and availability results. As outlined on the next page, the study team also used a sophisticated statistical simulation tool to further examine statistical significance of disparity results.

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

Monte Carlo analysis was a useful tool for the study team to use for statistical significance testing in the disparity study, because there were many individual chances at winning HDOT and local agency transportation prime contracts and subcontracts during the study period, each with a different payoff.

Figure 5-20.

Confidence intervals for availability and utilization measures

Keen Independent conducted telephone interviews with 1,101 transportation-related business establishments and 961 concessions-related business establishments — a number of completed interviews that might be considered large enough to be treated as a “population,” not a sample.

However, if the results are treated as a sample, the reported 51.47 percent representation of MBE/WBEs among transportation-related firms is accurate within about +/- 2.4 percentage points and the reported 77.44 percent representation of MBE/WBEs among concessions-related firms is accurate within about +/- 2.1 percentage points. By comparison, many survey results for proportions reported in the popular press are accurate within +/- 5 percentage points. (Keen Independent applied a 95 percent confidence level and the finite population correction factor when determining these confidence intervals.)

Keen Independent attempted to collect data for all relevant HDOT and local government transportation construction and engineering-related contracts and airport concessions during the study period and no confidence interval calculation applies for the utilization results.

Figure 5-21 describes Keen Independent’s use of Monte Carlo analysis.

Results. Figures 5-22 through 5-25 present the results from the Monte Carlo analysis as they relate to the statistical significance of disparity analysis results for MBEs and WBEs for all contracts.

FHWA-funded contracts. The Monte Carlo simulations did not produce utilization equal to or less than the observed utilization for WBEs in any of the 10,000 simulations for FHWA-funded contracts. Therefore, one can be confident that the disparity observed for white women-owned businesses in FHWA-funded contracts is not due to chance in contract awards.

Considering the observed disparities for minority-owned firms, the 10,000 Monte Carlo simulations replicated the observed disparities in FHWA-funded contracts enough times (1,119) that chance cannot be rejected as an explanation for the observed disparities for MBEs in these contracts.

Figure 5-22 on the following page shows the Monte Carlo results for MBEs and WBEs for FHWA-funded contracts.

It is important to note that this test may not be necessary to establish statistical significance of results (see discussion in Figure 5-20 and elsewhere in this chapter), and it may not be appropriate for very small populations of firms.⁶

Figure 5-21. Monte Carlo analysis

The study team began the Monte Carlo analysis by examining individual contract elements. For each contract element, Keen Independent’s availability database provided information on individual businesses that were available for that contract element, based on type of work, contractor role, contract size and location of the work.

The study team assumed that each available firm had an equal chance of “receiving” that contract element. For example, the odds of an MBE receiving that contract element were equal to the number of MBEs available for the contract element divided by the total number of firms available for the work. The Monte Carlo simulation then randomly chose a business from the pool of available businesses to “receive” that contract element.

The Monte Carlo simulation repeated the above process for all other elements in a particular set of contracts. The output of a single Monte Carlo simulation for all contract elements in the set represented simulated utilization of MBEs for that total of contract elements.

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

⁶ Even if there were zero utilization of a particular group, Monte Carlo simulation might not reject chance in contract awards as an explanation for that result if there were a small number of firms in that group or a small number of contracts and subcontracts included in the analysis. Results can also be affected by the size distribution of contracts and subcontracts.

Figure 5-22.

Monte Carlo results for MBEs and WBEs for HDOT FHWA-funded contracts, July 2011–June 2016

	MBE	WBE
Disparity Index	88	7
Utilization	33.41 %	1.06 %
Number of simulations less than or equal to observed utilization	1,119	0
Percentage of simulations less than or equal to observed utilization	11.19 %	0.00 %
Reject chance as an explanation	No	Yes

Source: Keen Independent from data on HDOT and local government FHWA-funded contracts, July 2011–June 2016.

FTA-funded contracts. Figure 5-23 shows results for MBE/WBEs for FTA-funded contracts. Primarily due to the relatively small number of FTA-funded contracts and subcontracts, chance in contract awards could not be rejected as a cause of the disparities for MBEs or for WBEs.

Figure 5-23.

Monte Carlo results for MBEs and WBEs for HDOT FTA-funded contracts, July 2011–June 2016

	MBE	WBE
Disparity Index	50	0
Utilization	11.81 %	0.00 %
Number of simulations less than or equal to observed utilization	1,366	1,025
Percentage of simulations less than or equal to observed utilization	13.36 %	10.25 %
Reject chance as an explanation	No	No

Source: Keen Independent from data on HDOT and local government FTA-funded contracts, July 2011–June 2016.

FAA-funded contracts. Figure 5-24 displays the Monte Carlo results for MBEs and WBEs for FAA-funded contracts.

- The Monte Carlo simulations did not produce utilization equal to or less than the observed utilization for WBEs in any of the 10,000 simulations for FAA-funded contracts. Therefore, one can be confident that the disparity for white women-owned businesses in FAA-funded contracts is not due to chance in contract awards.
- Because MBE utilization exceeded availability for FAA-funded contracts, Keen Independent did not perform Monte Carlo simulation for MBE participation in these contracts.

Figure 5-24.
Monte Carlo results for MBEs and WBEs for HDOT FAA-funded contracts,
July 2011–June 2016

	MBE	WBE
Disparity Index	197	5
Utilization	62.06 %	0.70 %
Number of simulations less than or equal to observed utilization	N/A	0
Percentage of simulations less than or equal to observed utilization	N/A	0.00 %
Reject chance as an explanation	N/A	Yes

Source: Keen Independent from data on HDOT and local government FAA-funded contracts, July 2011–June 2016.

Non-car rental airport concessions. Figure 5-25 displays the Monte Carlo results for MBEs and WBEs for airport concessions. Chance in awards of concession agreements can be rejected as the explanation for the disparities for both minority- and for white women-owned firms.

Figure 5-25.
 Monte Carlo results for MBEs and WBEs for HDOT non-car rental airport concessions agreements, July 2011–June 2016

	MBE	WBE
Disparity Index	16	27
Utilization	10.40 %	3.63 %
Number of simulations less than or equal to observed utilization	0	415
Percentage of simulations less than or equal to observed utilization	0.00 %	4.15 %
Reject chance as an explanation	Yes	Yes

Source: Keen Independent from data on HDOT airport concessions, July 2011–June 2016.

CHAPTER 6.

Further Exploration of MBE/WBE and DBE/ACDBE Utilization

Building upon the analysis presented in Chapter 5, Keen Independent further examined the utilization of minority- and women-owned firms for different types and locations of HDOT contracts. Chapter 6 also reports participation of DBEs and ACDBEs. Results focus on FHWA-, FTA-, FAA-funded contracts as well as airport concessions. Unless otherwise specified, results combine HDOT and LPA contracts.

Keen Independent presents results as follows:

- A. With and without DBE contract goals;
- B. Construction and engineering contracts;
- C. Prime contracts and subcontracts;
- D. Utilization on Oahu and all neighbor islands;
- E. Analysis of potential barriers to participation in HDOT construction prime contracts;
- F. Analysis of potential barriers to participation in HDOT engineering prime contracts;
- G. HDOT operation of the Federal DBE Program, including overconcentration analysis; and
- H. HDOT operation of the Federal ACDBE Program for airport concessions.

A. Contracts With and Without DBE Contract Goals

HDOT set DBE contract goals during different portions of the study period on some FHWA- and FAA-funded contracts as well as airport concessions agreements. For some of the study period, HDOT operated a contract goals program limited to underutilized DBEs (UDBEs), which did not count Asian Pacific American-owned DBEs toward the contract goals. HDOT did not include DBE contract goals on any FTA-funded contracts during the study period. (HDOT started setting DBE contract goals on FTA-funded contracts after the June 2016 end of the study period.)

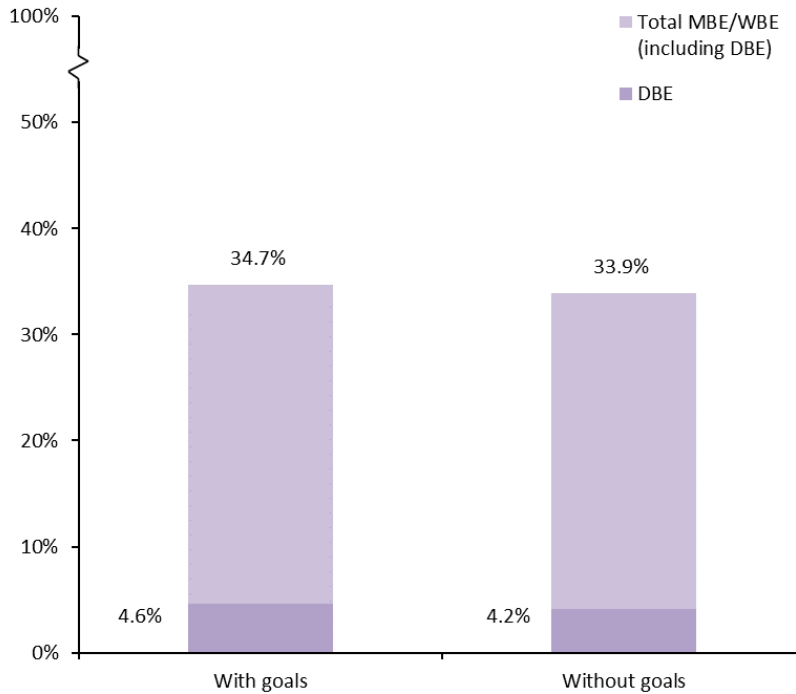
FHWA-funded contracts. Analysis of MBE/WBE and DBE participation on contracts with and without DBE contract goals begins with FHWA-funded contracts.

MBE/WBE and DBE utilization. Keen Independent examined the share of contract dollars going to minority- and women-owned firms (regardless of DBE-certification status) on FHWA-funded contracts with and without DBE contract goals. As shown in Figure 6-1, there was little difference in the overall utilization of MBE/WBEs for these two sets of contracts. With goals, MBE/WBE participation was about 35 percent compared with 34 percent without goals.

Figure 6-1 also presents utilization of certified DBEs in these contracts with and without goals. Again, there was little difference between the share of contract dollars going to DBEs on contracts that had goals (4.6%) and contracts that did not have goals (4.2%).

Most of the participation of minority- and women-owned firms on these contracts came from companies that were not certified as DBEs (see the top portion of each bar in Figure 6-1).

Figure 6-1.
MBE/WBE and DBE share of dollars for contracts with and without DBE contract goals for FHWA-funded contracts, July 2011–June 2016



Note: Dark portion of bar is certified DBE utilization.
Number of contracts/subcontracts analyzed is 774 with DBE contract goals and 517 without contract goals.

Source: Keen Independent from data on FHWA-funded prime contracts and subcontracts, July 2011–June 2016.

Figure 6-2 provides detailed utilization information for FHWA-funded contracts with and without goals for specific racial, ethnic and gender groups. For both types of contracts, Figure 6-2 shows the number of prime contracts and subcontracts awarded, contract dollars awarded and the percentage of contract dollars awarded to different groups of minority- and women-owned companies. Contracts going to all minority- and women-owned firms, regardless of whether they were DBE-certified, are counted in the top portion of Figure 6-2. The bottom portion of Figure 6-2 presents racial, ethnic and gender ownership for DBEs.

By each metric, the greatest participation on both sets of contracts was firms owned by Asian Pacific Americans, Native Hawaiians or Pacific Islanders. Of the \$548 million in FHWA-funded contracts that had DBE contract goals applied, \$178 million (32%) went to Asian Pacific American-, Native Hawaiian- or Pacific Islander-owned companies and \$12 million (2%) went to other minority- and women-owned firms. About 30 percent of the contract dollars for the \$267 million of FHWA-funded contracts without goals also went to Asian Pacific American-, Native Hawaiian- or Pacific Islander-owned businesses.

Figure 6-2.
MBE/WBE and DBE share of dollars for contracts with and without DBE contract goals for FHWA-funded contracts by specific racial groups, July 2011–June 2016

	With goals			Without goals		
	Number of procurements*	\$1,000s	Percent of dollars	Number of procurements*	\$1,000s	Percent of dollars
MBE/WBEs						
African American	8	\$ 873	0.2 %	3	\$ 59	0.0 %
Asian Pacific American, Native Hawaiian or Pacific Islander	317	177,539	32.4	157	79,188	29.6
Hispanic American	27	5,461	1.0	11	3,530	1.3
American Indian or Alaska Native	3	0	0.0	0	0	0.0
Subcontinent Asian American	0	0	0.0	3	5,662	2.1
Total MBE	355	\$ 183,872	33.6 %	174	\$ 88,439	33.1 %
WBE (white women-owned)	16	6,414	1.2	10	2,243	0.8
Total MBE/WBE	371	\$ 190,286	34.7 %	184	\$ 90,682	33.9 %
Total majority-owned	403	357,531	65.3	333	176,494	66.1
Total	774	\$ 547,817	100.0 %	517	\$ 267,176	100.0 %
DBEs						
African American	2	\$ 745	0.1 %	0	\$ 0	0.0 %
Asian Pacific American, Native Hawaiian or Pacific Islander	165	18,890	3.4	34	11,049	4.1
Hispanic American	21	5,037	0.9	3	55	0.0
American Indian or Alaska Native	3	0	0.0	0	0	0.0
Subcontinent Asian American	0	0	0.0	0	0	0.0
Total MBE	191	\$ 24,672	4.5 %	37	\$ 11,104	4.2 %
WBE (white women-owned)	5	\$ 390	0.1 %	1	\$ 0	0.0 %
White male-owned DBE	0	0	0.0	0	0	0.0
Total DBE-certified	196	\$ 25,062	4.6 %	38	\$ 11,104	4.2 %
Non-DBE	578	522,755	95.4	479	256,071	95.8
Total	774	\$ 547,817	100.0 %	517	\$ 267,176	100.0 %

Note: Number of contracts/subcontracts analyzed is 774 with DBE contract goals and 517 without contract goals.

Source: Keen Independent from data on FHWA-funded prime contracts and subcontracts, July 2011–June 2016.

Figure 6-3 further breaks out the utilization of Asian Pacific American-, Native Hawaiian- and Pacific Islander-owned companies on FHWA-funded contracts with and without goals.

- Filipino American- and Pacific Islander-owned companies combined received less than \$1 million of the contract dollars with goals and about \$2 million of the contract dollars without goals. This translates into utilization of 0.1 percent for contracts with goals and 0.8 percent for contracts without goals.
- With and without goals, Chinese American-, Japanese American-, Korean American- and Native Hawaiian-owned businesses were awarded the most FHWA-funded contract dollars.

Comparing results for all firms on the top of Figure 6-3 and certified DBEs on the bottom of Figure 6-3 shows that almost all MBE/WBE participation for Asian Pacific American-, Native Hawaiian- and Pacific Islander-owned companies was from firms that were not certified as DBEs.

Figure 6-3.

MBE/WBE and DBE share of dollars for contracts with and without DBE contract goals for FHWA-funded contracts by Asian Pacific American, Native Hawaiian and Pacific Islander groups, July 2011–June 2016

	With goals			Without goals		
	Number of procurements*	\$1,000s	Percent of dollars	Number of procurements*	\$1,000s	Percent of dollars
MBE/WBEs						
Chinese American	46	\$ 48,194	8.8 %	37	\$ 18,157	6.8 %
Filipino American	15	372	0.1	3	2,161	0.8
Japanese American	81	39,024	7.1	56	26,885	10.1
Korean American	2	11,663	2.1	6	7,413	2.8
Native Hawaiian	148	76,654	14.0	38	13,164	4.9
Other Asian Pacific American	0	0	0.0	1	59	0.0 %
Pacific Islander	1	165	0.0	0	0	0.0
Unknown Asian Pacific American	24	1,468	0.3	16	11,349	4.2
Total Asian Pacific American	317	\$ 177,539	32.4 %	157	\$ 79,188	29.6 %
Total non-Asian Pacific American	457	370,278	67.6	360	187,988	70.4
Total	774	\$ 547,817	100.0 %	517	\$ 267,176	100.0 %
DBEs						
Chinese American	5	\$ 700	0.1 %	3	\$ 1,614	0.6 %
Filipino American	12	319	0.1	2	1,520	0.6
Japanese American	31	1,717	0.3	8	1,839	0.7
Korean American	1	5	0.0	1	0	0.0
Native Hawaiian	100	14,957	2.7	13	1,527	0.6
Other Asian Pacific American	0	0	0.0	0	0	0.0
Pacific Islander	0	0	0.0	0	0	0.0
Unknown Asian Pacific American	16	1,191	0.2	7	4,549	1.7
Total Asian Pacific American	165	\$ 18,890	3.4 %	34	\$ 11,049	4.1 %
Total non-Asian Pacific American	609	528,927	96.6	483	256,126	95.9
Total	774	\$ 547,817	100.0 %	517	\$ 267,176	100.0 %

Note: Number of contracts/subcontracts analyzed is 774 with DBE contract goals and 517 without contract goals.

Source: Keen Independent from data on FHWA-funded prime contracts and subcontracts, July 2011–June 2016.

MBE/WBE utilization and availability. Figure 6-4 compares utilization and availability of minority- and women-owned businesses for FHWA-funded contracts with and without DBE contract goals.

With and without DBE contract goals, there were substantial disparities for firms owned by Hispanic Americans, American Indians and Alaska Natives, Subcontinent Asian Americans, and white women. There was also a disparity between the utilization and availability of African American-owned businesses on contracts without DBE contract goals. DBE contract goals had little positive effect on the overall utilization of these groups on FHWA-funded contracts based on these results.

Utilization of Asian Pacific American-, Native Hawaiian- and Pacific Islander-owned companies exceeded what might be expected based on availability of those firms for goals and non-goals contracts. (Note that the availability benchmarks in Figure 6-4 were calculated for goals and non-goals contracts based on the types, sizes and locations of work involved, which is why those availability estimates differ between goals and non-goals contracts.)

Figure 6-4.
MBE/WBE utilization and availability with and without DBE contract goals for FHWA-funded contracts by specific racial groups, July 2011–June 2016

	With goals			Without goals		
	Utilization	Availability	Disparity index	Utilization	Availability	Disparity index
African American	0.2 %	0.0 %	796	0.0 %	2.0 %	1
Asian Pacific American, Native Hawaiian or Pacific Islander	32.4	26.2	124	29.6	25.8	115
Hispanic American	1.0	2.7	37	1.3	2.2	61
American Indian or Alaska Native	0.0	2.3	0	0.0	3.7	0
Subcontinent Asian American	0.0	7.7	0	2.1	3.1	68
Total MBE	33.6 %	38.9 %	86	33.1 %	36.7 %	90
WBE (white women-owned)	1.2	14.9	8	0.8	14.6	6
Total MBE/WBE	34.7 %	53.8 %	65	33.9 %	51.3 %	66
Total majority-owned	65.3	46.2	141	66.1	48.7	136
Total	100.0 %	100.0 %		100.0 %	100.0 %	

Note: Number of contracts/subcontracts analyzed is 774 with DBE contract goals and 517 without contract goals.
 Number rounded to nearest tenth of 1 percent, numbers may not add to totals due to rounding.

Source: Keen Independent from data on FHWA-funded prime contracts and subcontracts, July 2011–June 2016.

Figure 6-5 shows detailed disparity results for Asian Pacific American-, Native Hawaiian- and Pacific Islander-owned businesses for FHWA-funded contracts with and without goals. There were substantial disparities in the utilization of firms owned by Filipino Americans, Japanese Americans, other Asian Pacific Americans and Pacific Islanders for both sets of contracts.

With or without goals, utilization of businesses owned by Chinese Americans, Korean Americans and Native Hawaiians exceeded what might be expected from the availability analysis.

Figure 6-5.

MBE/WBE utilization and availability with and without DBE contract goals for FHWA-funded contracts by Asian Pacific American, Native Hawaiian and Pacific Islander groups, July 2011–June 2016

	With goals			Without goals		
	Utilization	Availability	Disparity index	Utilization	Availability	Disparity index
Chinese American	8.8 %	7.7 %	114	6.8 %	3.0 %	226
Filipino American	0.1	3.3	2	0.8	1.7	46
Japanese American	7.1	13.3	53	10.1	18.2	55
Korean American	2.1	0.1	999+	2.8	0.3	999+
Native Hawaiian	14.0	1.7	835	4.9	2.2	221
Other Asian Pacific American	0.0	0.1	0	0.0	0.3	6
Pacific Islander	0.0	0.1	42	0.0	0.1	0
Unknown Asian Pacific American	0.3	N/A	N/A	4.2	N/A	N/A
Total Asian Pacific American, Native Hawaiian and Pacific Islander	32.4 %	26.2 %	124	29.6 %	25.8 %	115
Other firms	67.6	73.8		70.4	74.2	
Total	100.0 %	100.0 %		100.0 %	100.0 %	

Note: Number of contracts/subcontracts analyzed is 774 with DBE contract goals and 517 without contract goals. Number rounded to nearest tenth of 1 percent, numbers may not add to totals due to rounding.

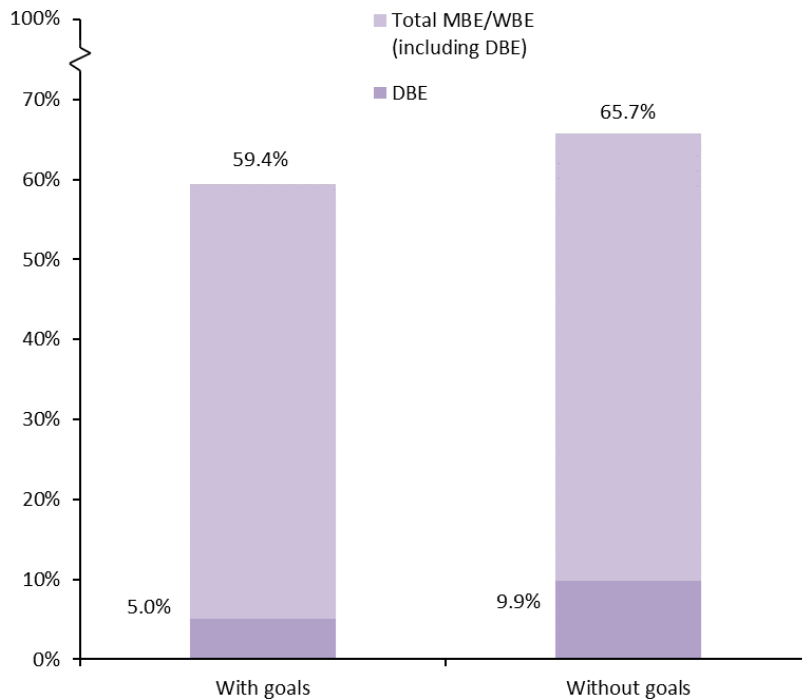
Source: Keen Independent from data on FHWA-funded prime contracts and subcontracts, July 2011–June 2016.

FTA-funded contracts. Chapter 5 analyzes FTA contracts without DBE contract goals (all such contracts in the study period). That analysis is not repeated here.

FAA-funded contracts. Keen Independent also analyzed MBE/WBE and DBE participation on FAA-funded contracts with and without DBE contract goals. The types of information in Figures 6-6 through 6-10 for FAA-funded contracts parallel that in Figures 6-1 through 6-5 for FHWA-funded contracts.

MBE/WBE and DBE utilization. Figure 6-6 shows the share of FAA-funded contract dollars that were awarded to minority- and women-owned businesses. On contracts with DBE goals, minority- and women-owned businesses received 59 percent of the contract dollars, 5 percentage points of which went to certified DBEs. On contracts without DBE goals, minority- and women-owned businesses received 66 percent of contract dollars, 10 percent of which went to certified DBEs.

Figure 6-6.
MBE/WBE and DBE share of dollars for contracts with and without DBE contract goals for FAA-funded contracts, July 2011–June 2016



Note: Dark portion of bar is certified DBE utilization.
 Number of contracts/subcontracts analyzed is 138 with DBE contract goals and 204 without contract goals.

Source: Keen Independent from data on FAA-funded prime contracts and subcontracts, July 2011–June 2016.

As shown in Figure 6-7, the high MBE/WBE participation on FAA-funded contracts with and without goals was due to work awarded to Asian Pacific American-, Native Hawaiian- and Pacific Islander-owned businesses (58% of contract dollars with goals and 65% without goals). Less than 1 percent of total contract dollars for contracts with goals and without goals was utilization of firms owned by white women or by all other minority groups.

For FAA-funded contracts with contract goals, DBEs accounted for 5 percent of total contract dollars. DBEs accounted for 10 percent of contract dollars for FAA-funded contracts without goals.

Figure 6-7.

MBE/WBE and DBE share of dollars for contracts with and without DBE contract goals for FAA-funded contracts by specific racial groups, July 2011–June 2016

	With goals			Without goals		
	Number of procurements*	\$1,000s	Percent of dollars	Number of procurements*	\$1,000s	Percent of dollars
MBE/WBEs						
African American	0	\$ 0	0.0 %	0	\$ 0	0.0 %
Asian Pacific American, Native Hawaiian or Pacific Islander	64	70,239	58.0	93	88,362	64.7
Hispanic American	2	323	0.3	6	840	0.6
American Indian or Alaska Native	2	282	0.2	0	0	0.0
Subcontinent Asian American	0	0	0.0	0	0	0.0
Total MBE	68	\$ 70,845	58.5 %	99	\$ 89,202	65.3 %
WBE (white women-owned)	4	1,141	0.9	10	654	0.5
Total MBE/WBE	72	\$ 71,986	59.4 %	109	\$ 89,856	65.7 %
Total majority-owned	66	49,204	40.6	95	46,821	34.3
Total	138	\$ 121,190	100.0 %	204	\$ 136,677	100.0 %
DBEs						
African American	0	\$ 0	0.0 %	0	\$ 0	0.0 %
Asian Pacific American, Native Hawaiian or Pacific Islander	18	5,659	4.7	5	13,460	9.8
Hispanic American	1	305	0.3	0	0	0.0
American Indian or Alaska Native	1	132	0.1	0	0	0.0
Subcontinent Asian American	0	0	0.0	0	0	0.0
Total MBE	20	\$ 6,096	5.0 %	5	\$ 13,460	9.8 %
WBE (white women-owned)	0	\$ 0	0.0 %	0	\$ 0	0.0 %
White male-owned DBE	0	0	0.0	0	0	0.0
Total DBE-certified	20	\$ 6,096	5.0 %	5	\$ 13,460	9.8 %
Non-DBE	118	115,094	95.0	199	123,217	90.2
Total	138	\$ 121,190	100.0 %	204	\$ 136,677	100.0 %

Note: Number of contracts/subcontracts analyzed is 138 with DBE contract goals and 204 without contract goals.

Source: Keen Independent from data on FAA-funded prime contracts and subcontracts, July 2011–June 2016.

Figure 6-8 further breaks down FAA-funded contract dollars among firms owned by Asian Pacific Americans, Native Hawaiians and Pacific Islanders. Among FAA-funded contracts with and without goals, Native Hawaiian-owned businesses, Japanese American-owned companies and Korean American-owned firms received most of the contract dollars. Asian Pacific American-owned firms for which ethnicity could not be determined accounted for some of the participation as well.

Figure 6-8.
 MBE/WBE and DBE share of dollars for contracts with and without DBE contract goals for FAA-funded contracts by Asian Pacific American, Native Hawaiian and Pacific Islander groups, July 2011–June 2016

	With goals			Without goals		
	Number of procurements*	\$1,000s	Percent of dollars	Number of procurements*	\$1,000s	Percent of dollars
MBE/WBEs						
Chinese American	7	\$ 3,992	3.3 %	14	\$ 2,062	1.5 %
Filipino American	4	21	0.0	2	80	0.1
Japanese American	23	13,375	11.0	54	14,675	10.7
Korean American	2	9,669	8.0	4	11,715	8.6
Native Hawaiian	21	38,121	31.5	14	44,820	32.8
Other Asian Pacific American	0	0	0.0	0	0	0.0
Pacific Islander	0	0	0.0	0	0	0.0
Unknown Asian Pacific American	7	5,061	4.2	5	15,011	11.0
Total Asian Pacific American	64	\$ 70,239	58.0 %	93	\$ 88,362	64.7 %
Total non-Asian Pacific American	74	50,950	42.0	111	48,315	35.3
Total	138	\$ 121,190	100.0 %	204	\$ 136,677	100.0 %
DBEs						
Chinese American	2	\$ 1,407	1.2 %	0	\$ 0	0.0 %
Filipino American	4	21	0.0	0	0	0.0
Japanese American	3	1,066	0.9	1	158	0.1
Korean American	0	0	0.0	0	0	0.0
Native Hawaiian	5	561	0.5	2	8	0.0
Other Asian Pacific American	0	0	0.0	0	0	0.0
Pacific Islander	0	0	0.0	0	0	0.0
Unknown Asian Pacific American	4	2,605	2.1	2	13,294	10.8
Total Asian Pacific American	18	\$ 5,659	4.7 %	5	\$ 13,460	10.9 %
Total non-Asian Pacific American	120	115,531	95.3	199	123,217	100.0
Total	138	\$ 121,190	100.0 %	204	\$ 136,677	110.9 %

Note: Number of contracts/subcontracts analyzed is 138 with DBE contract goals and 204 without contract goals.

Source: Keen Independent from data on FAA-funded prime contracts and subcontracts, July 2011–June 2016.

MBE/WBE utilization and availability. Figure 6-9 compares the utilization and availability of minority- and women-owned firms on FAA-funded contracts with and without DBE contract goals. There were substantial disparities for each group except for companies owned by Asian Pacific Americans, Native Hawaiians and Pacific Islanders.

Figure 6-9.

MBE/WBE utilization and availability with and without DBE contract goals for FAA-funded contracts by specific racial groups, July 2011–June 2016

	With goals			Without goals		
	Utilization	Availability	Disparity index	Utilization	Availability	Disparity index
African American	0.0 %	1.3 %	0	0.0 %	0.5 %	0
Asian Pacific American, Native Hawaiian or Pacific Islander	58.0	16.4	354	64.7	19.6	329
Hispanic American	0.3	1.3	20	0.6	1.9	32
American Indian or Alaska Native	0.2	1.1	21	0.0	1.1	0
Subcontinent Asian American	0.0	8.7	0	0.0	10.9	0
Total MBE	58.5 %	28.8 %	203	65.3 %	34.0 %	192
WBE (white women-owned)	0.9	18.0	5	0.5	12.5	4
Total MBE/WBE	59.4 %	46.8 %	127	65.7 %	46.5 %	141
Total majority-owned	40.6	53.2	76	34.3	53.5	64
Total	100.0 %	100.0 %		100.0 %	100.0 %	

Note: Number of contracts/subcontracts analyzed is 138 with DBE contract goals and 204 without contract goals. Number rounded to nearest tenth of 1 percent, numbers may not add to totals due to rounding.

Source: Keen Independent from data on FAA-funded prime contracts and subcontracts, July 2011–June 2016.

As shown in Figure 6-10, the utilization of Korean American- and Native Hawaiian-owned businesses exceeded availability for contracts with goals and without goals. There were disparities for other groups.

Figure 6-10.

MBE/WBE utilization and availability with and without DBE contract goals for FAA-funded contracts by Asian Pacific American, Native Hawaiian and Pacific Islander groups, July 2011–June 2016

	With goals			Without goals		
	Utilization	Availability	Disparity index	Utilization	Availability	Disparity index
Chinese American	3.3 %	1.1 %	311	1.5 %	2.5 %	61
Filipino American	0.0	1.9	1	0.1	1.3	5
Japanese American	11.0	8.5	131	10.7	13.0	82
Korean American	8.0	0.3	999+	8.6	0.0	999+
Native Hawaiian	31.5	4.2	747	32.8	2.5	999+
Other Asian Pacific American	0.0	0.4	0	0.0	0.2	0
Pacific Islander	0.0	0.1	0	0.0	0.1	0
Unknown Asian Pacific American	4.2	N/A	N/A	11.0	N/A	N/A
Total Asian Pacific American, Native Hawaiian and Pacific Islander	58.0 %	16.4 %	354	64.7 %	19.7 %	329
Other firms	42.0	83.6		35.3	80.4	
Total	100.0 %	100.0 %		100.0 %	100.0 %	

Note: Number of contracts/subcontracts analyzed is 138 with DBE contract goals and 204 without contract goals. Number rounded to nearest tenth of 1 percent, numbers may not add to totals due to rounding.

Source: Keen Independent from data on FAA-funded prime contracts and subcontracts, July 2011–June 2016.

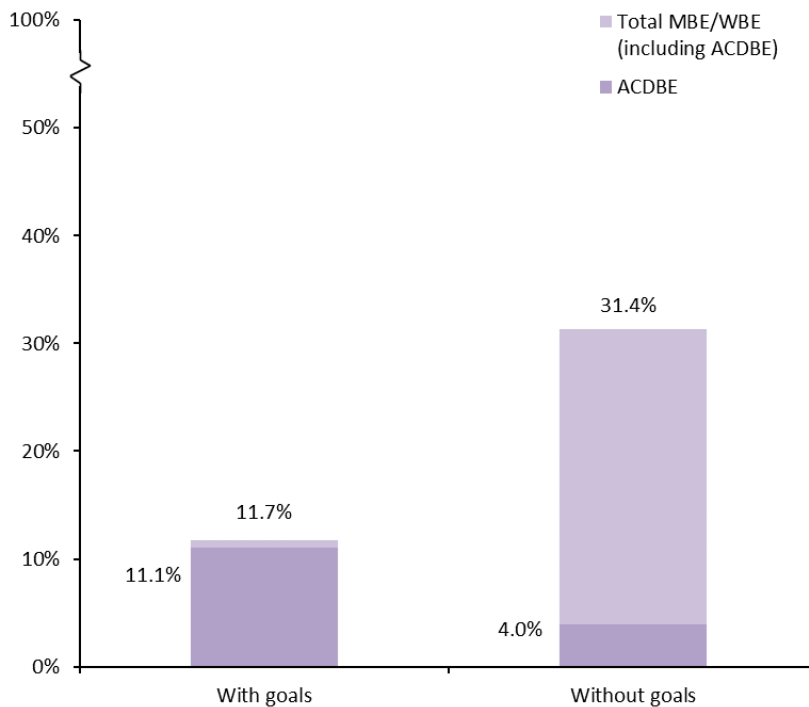
Airport concessions. Keen Independent also analyzed the share of airport concessions revenue going to minority- and women-owned firms (including firms certified as ACDBEs). This analysis does not include car rental concessions.

MBE/WBE and ACDBE utilization. Although each HDOT airport receiving FAA-funds is required to develop and report overall goals for ACDBEs in their concessions, not all airports applied ACDBE goals to their concession operations (i.e., they operated the program solely through neutral means). Airports on Lanai and Molokai did not have ACDBE goals for concessions agreements during the study period. Other airports had ACDBE goals for certain concessions agreements (mainly agreements with master concessionaires) but not others.

For HDOT airport concessions agreements with ACDBE goals, minority- and women-owned businesses received 12 percent of concessions revenue, mostly going to certified ACDBEs. For airports concessions agreements without goals, minority- and women-owned businesses received 31 percent of concessions revenue, 4 percentage points of which went to certified ACDBEs.

Figure 6-11 presents these results.

Figure 6-11.
MBE/WBE and DBE share of HDOT non-car rental airport concessions revenue for agreements with and without ACDBE goals, July 2011–June 2016



Note: Dark portion of bar is certified ACDBE utilization.
 Number of master/subconcessionaire agreements analyzed is 162 with ACDBE contract goals and 337 without contract goals.

Source: Keen Independent from data on HDOT and LPA USDOT-funded prime contracts and subcontracts, July 2011–June 2016.

Figure 6-12 shows the number of airport concessions agreements and dollars of revenue (including subconcessionaires) for MBE/WBEs by race, ethnicity and gender for concessions agreements with and without goals. In terms of total dollars, most of the concessions revenue was through subconcessions on agreements with ACDBE goals. MBE/WBE concessionaire revenue for these agreements went primarily to Asian Pacific American-, Native Hawaiian- and Pacific Islander-owned businesses, Hispanic American-owned firms and white women-owned companies, nearly all of which were ACDBE-certified. Almost all of the revenue for MBE/WBEs for agreements without goals went to Asian Pacific American-, Native Hawaiian- or Pacific Islander-owned concessionaires.

Figure 6-12.

MBE/WBE and ACDBE share of HDOT non-car rental airport concessions revenue for agreements with and without contract goals by race and gender, July 2011–June 2016

	With goals			Without goals		
	Number of concessions agreements*	\$1,000s	Percent of dollars	Number of concessions agreements*	\$1,000s	Percent of dollars
MBE/WBEs						
African American	6	\$ 1,053	0.1 %	0	\$ 0	0.0 %
Asian Pacific American, Native Hawaiian or Pacific Islander	31	62,223	4.1	86	55,396	27.2
Hispanic American	19	60,229	4.0	18	667	0.3
American Indian or Alaska Native	0	0	0.0	0	0	0.0
Subcontinent Asian American	0	0	0.0	0	0	0.0
Total MBE	56	\$ 123,504	8.1 %	104	\$ 56,063	27.5 %
WBE (white women-owned)	37	54,867	3.6	32	7,815	3.8
Total MBE/WBE	93	\$ 178,371	11.7 %	136	\$ 63,878	31.4 %
Total majority-owned	69	1,344,929	88.3	201	139,849	68.6
Total	162	\$ 1,523,300	100.0 %	337	\$ 203,727	100.0 %
ACDBEs						
African American	6	\$ 1,053	0.1 %	0	\$ 0	0.0 %
Asian Pacific American, Native Hawaiian or Pacific Islander	31	62,223	4.1	11	1,068	0.5
Hispanic American	19	60,229	4.0	0	0	0.0
American Indian or Alaska Native	0	0	0.0	0	0	0.0
Subcontinent Asian American	0	0	0.0	0	0	0.0
Total MBE	56	\$ 123,504	8.1 %	11	\$ 1,068	0.5 %
WBE (white women-owned)	30	\$ 44,854	2.9 %	18	\$ 6,996	3.4 %
White male-owned DBE	0	0	0.0	0	0	0.0
Total ACDBE-certified firms	86	\$ 168,358	11.1 %	29	\$ 8,064	4.0 %
Non-ACDBE	76	1,354,942	88.9	308	195,663	96.0
Total firms	162	\$ 1,523,300	100.0 %	337	\$ 203,727	100.0 %

Note: Number of concession/subconcession agreements analyzed is 162 with ACDBE contract goals and 337 without contract goals. Each year of a concessions or subconcessions agreement is counted as one agreement.

Source: Keen Independent data on airport concessions prime contracts and subcontracts, July 2011–June 2016.

Figure 6-13 shows airport concessions revenue for different groups among businesses owned by Asian Pacific Americans, Native Hawaiians and Pacific Islanders. For agreements with ACDBE goals, Chinese American-owned concessionaires received the largest share of revenue (2.5%). For concessions agreements without goals, Native Hawaiian-owned firms (26.8%) received the largest share of concessions revenue.

Figure 6-13.

MBE/WBE and ACDBE share of HDOT airport non-car rental concessions revenue for agreements with and without contract goals for Asian Pacific American, Native Hawaiian and Pacific Islander groups, July 2011–June 2016

	With goals			Without goals		
	Number of concessions agreements*	\$1,000s	Percent of dollars	Number of concessions agreements*	\$1,000s	Percent of dollars
MBE/WBEs						
Chinese American	11	\$ 38,743	2.5 %	0	\$ 0	0.0 %
Filipino American	0	0	0.0	0	0	0.0
Japanese American	6	10,675	0.7	8	134	0.1
Korean American	0	0	0.0	6	268	0.1
Native Hawaiian	7	1,962	0.1	66	54,502	26.8
Other Asian Pacific American	0	0	0.0	6	492	0.2
Pacific Islander	0	0	0.0	0	0	0.0
Unknown Asian Pacific American	7	10,843	0.7	0	0	0.0
Total Asian Pacific American	31	\$ 62,223	4.1 %	86	\$ 55,396	27.2 %
Total non-Asian Pacific American	131	1,461,078	95.9	251	148,331	72.8
Total	162	\$ 1,523,300	100.0 %	337	\$ 203,727	100.0 %
ACDBEs						
Chinese American	11	\$ 38,743	2.5 %	0	\$ 0	0.0 %
Filipino American	0	0	0.0	0	0	0.0
Japanese American	6	10,675	0.7	0	0	0.0
Korean American	0	0	0.0	0	0	0.0
Native Hawaiian	7	1,962	0.1	5	576	0.3
Other Asian Pacific American	0	0	0.0	0	0	0.0
Pacific Islander	0	0	0.0	0	0	0.0
Unknown Asian Pacific American	7	10,843	0.7	6	492	0.2
Total Asian Pacific American	31	\$ 62,223	4.1 %	11	\$ 1,068	0.5 %
Total non-Asian Pacific American	131	1,461,078	100.0	326	202,658	99.5
Total	162	\$ 1,523,300	100.0 %	337	\$ 203,727	100.0 %

Note: Number of concession and subconcession agreements analyzed is 162 with ACDBE contract goals and 337 without contract goals. Each year of a concessions or subconcessions agreement is counted as one agreement.

Source: Keen Independent data on airport concessions prime contracts and subcontracts, July 2011–June 2016.

MBE/WBE utilization and availability. Figure 6-14 compares utilization and availability for airport concessions by racial and gender group. For agreements with goals, each MBE/WBE group showed a substantial disparity except for Hispanic American-owned companies. For agreements without goals, there was a disparity for Asian Pacific American-, Native Hawaiian- and Pacific Islander-owned firms, no disparity for WBEs and little or no availability of firms from all other groups.

Figure 6-14.

MBE/WBE utilization and availability on non-car rental HDOT airport concessions agreements with and without ACDBE goals by racial and gender groups, July 2011–June 2016

	With goals			Without goals		
	Utilization	Availability	Disparity index	Utilization	Availability	Disparity index
African American	0.1 %	13.0 %	1	0.0 %	0.1 %	0
Asian Pacific American, Native Hawaiian or Pacific Islander	4.1	34.7	12	27.2	78.4	35
Hispanic American	4.0	1.9	211	0.3	0.0	N/A
American Indian or Alaska Native	0.0	0.4	0	0.0	0.0	N/A
Subcontinent Asian American	0.0	12.0	0	0.0	0.0	N/A
Total MBE	8.1 %	62.1 %	13	27.5 %	78.5 %	35
WBE (white women-owned)	3.6	15.2	24	3.8	0.2	999+
Total MBE/WBE	11.7 %	77.3 %	15	31.4 %	78.7 %	40
Total majority-owned	88.3	22.7	388	68.6	21.3	322
Total	100.0 %	100.0 %		100.0 %	100.0 %	

Note: Number of concession and subconcession agreements analyzed is 162 with ACDBE goals and 337 without contract goals.

Number rounded to nearest tenth of 1 percent, numbers may not add to totals due to rounding.

Source: Keen Independent data on airport concessions prime contracts and subcontracts, July 2011–June 2016.

For businesses owned by Asian Pacific Americans, Native Hawaiians and Pacific Islanders, there were disparities for each ethnic group for agreements with ACDBE goals. Without goals, there were disparities for each group except for Korean American- and Native Hawaiian-owned businesses.

Figure 6-15.

MBE/WBE utilization and availability on HDOT airport concessions agreements with and without ACDBE goals by Asian Pacific American, Native Hawaiian and Pacific Islander groups, July 2011–June 2016

	With goals			Without goals		
	Utilization	Availability	Disparity index	Utilization	Availability	Disparity index
Chinese American	2.5 %	4.6 %	55	0.0 %	71.1 %	0
Filipino American	0.0	1.2	0	0.0	0.0	0
Japanese American	0.7	8.0	9	0.1	1.6	4
Korean American	0.0	1.4	0	0.1	0.0	439
Native Hawaiian	0.1	2.7	5	26.8	1.3	999+
Other Asian Pacific American	0.0	16.0	0	0.2	4.3	6
Pacific Islander	0.0	0.9	0	0.0	0.0	0
Unknown Asian Pacific American	0.7	N/A	N/A	0.0	N/A	N/A
Total Asian Pacific American, Native Hawaiian and Pacific Islander	4.1 %	34.7 %	12	27.2 %	78.4 %	35
Other firms	95.9	65.3		72.8	21.6	
Total	100.0 %	100.0 %		100.0 %	100.0 %	

Note: Number of concession and subconcession agreements analyzed is 162 with ACDBE goals and 337 without contract goals.

Number rounded to nearest tenth of 1 percent, numbers may not add to totals due to rounding.

Source: Keen Independent data on airport concessions prime contracts and subcontracts, July 2011–June 2016.

B. Construction and Engineering Contracts

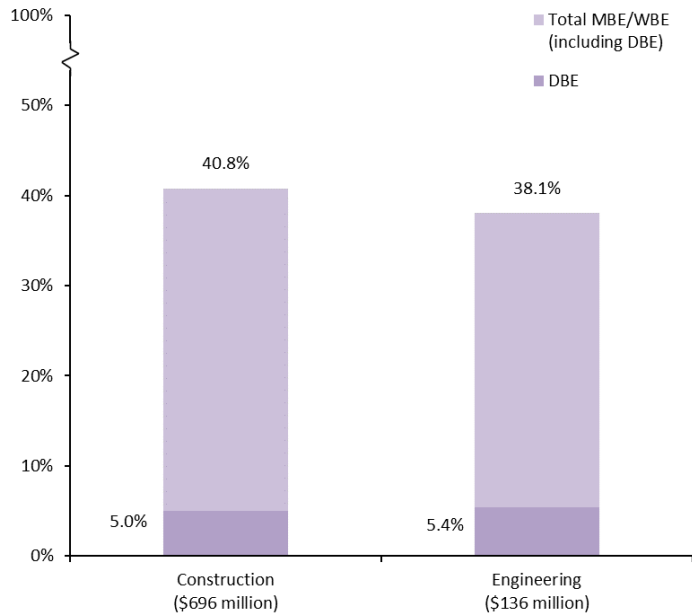
Keen Independent examined MBE/WBE utilization and availability for construction and engineering contracts that were FHWA-, FTA- or FAA-funded. MBE/WBE participation was about the same for construction contracts (about 41%) and engineering-related contracts (38%).

Participation of DBEs was similar on both construction and engineering contracts (about 5%). Figure 6-16 presents these results.

Figure 6-16.
MBE/WBE and DBE share of dollars
for construction and engineering
contracts, July 2011–June 2016

Note:
 Dark portion of bar is certified DBE utilization.
 Number of contracts/subcontracts analyzed is 1,371 for construction and 306 for engineering-related contracts.

Source:
 Keen Independent from data on HDOT and LPA FHWA-, FTA- and FAA-funded prime contracts and subcontracts, July 2011–June 2016.



C. Prime Contracts and Subcontracts

Keen Independent further examined MBE/WBE participation as prime contractors and as subcontractors on HDOT construction and engineering-related contracts. The study team’s analysis of prime contract dollars is based on dollars “retained” by the prime contractor (not subcontracted).

FHWA-funded contracts. Analysis of MBE/WBE and DBE participation as prime contractors and as subcontractors begins with FHWA-funded contracts.

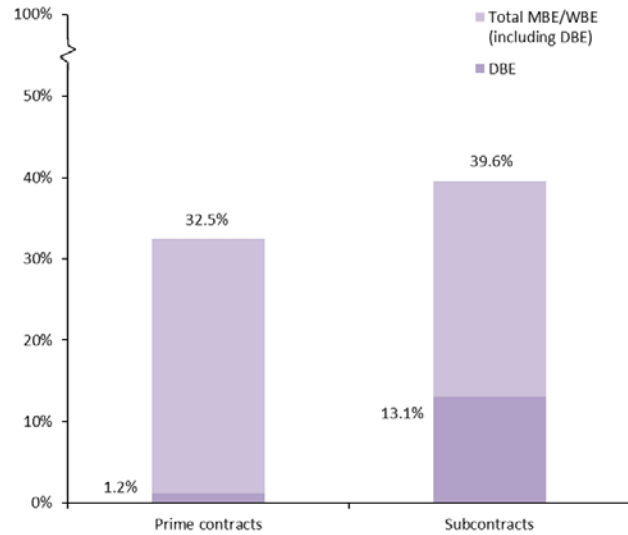
MBE/WBE and DBE utilization. Keen Independent examined the share of contract dollars going to minority- and women-owned firms as prime contractors and as subcontractors. Figure 6-17 shows that MBE/WBE participation was 39.6 percent for subcontracts, only somewhat higher than found for prime contracts (32.5%).

Of the 39.6 percent participation of minority- and women-owned firms in HDOT subcontractors, 13.1 percent were DBE certified firms. Certified DBEs accounted for 1.2 percent of the 32.5 percent of MBE/WBE utilization as prime contractors.

Figure 6-17.
 MBE/WBE share of dollars for prime contract and subcontract dollars for FHWA-funded construction and engineering contracts, July 2011–June 2016

Note:
 Dark portion of bar is certified DBE utilization.
 Number of procurements analyzed is 202 for prime contracts and 1,089 for subcontracts.

Source:
 Keen Independent from data on HDOT and LPA FHWA-funded prime contracts and subcontracts, July 2011–June 2016.



FTA-funded contracts. Keen Independent also examined MBE/WBE and DBE participation as prime contractors and as subcontractors for FTA-funded contracts.

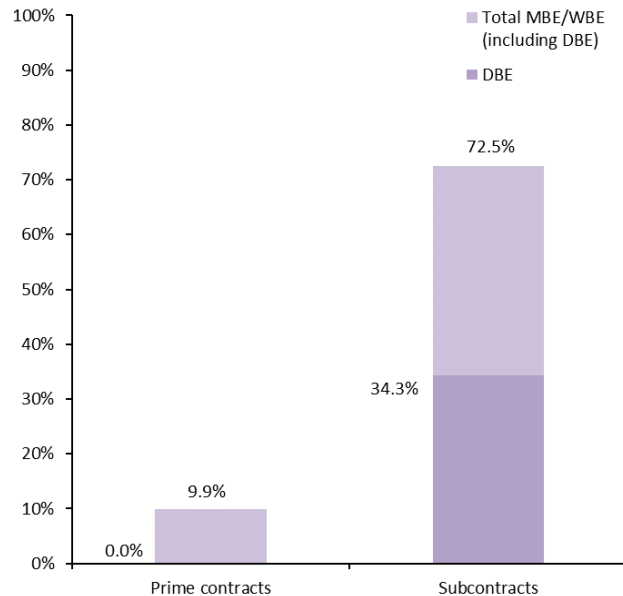
MBE/WBE and DBE utilization. Figure 6-18 shows that MBE/WBE participation was 72.5 percent for subcontracts, higher than found for prime contracts (9.9%).

Of the 72.5 percent participation of minority- and women-owned firms in HDOT subcontracts, DBE-certified firms accounted for 34.3 percentage points. (No DBE contract goals applied to FTA-funded contracts during the study period.) No certified-DBEs received FTA-funded prime contracts.

Figure 6-18.
 MBE/WBE share of dollars for prime contract and subcontract dollars for FTA-funded construction and engineering contracts, July 2011–June 2016

Note:
 Dark portion of bar is certified DBE utilization.
 Number of procurements analyzed is 14 for prime contracts and 33 for subcontracts.

Source:
 Keen Independent from data on HDOT FTA-funded prime contracts and subcontracts, July 2011–June 2016.



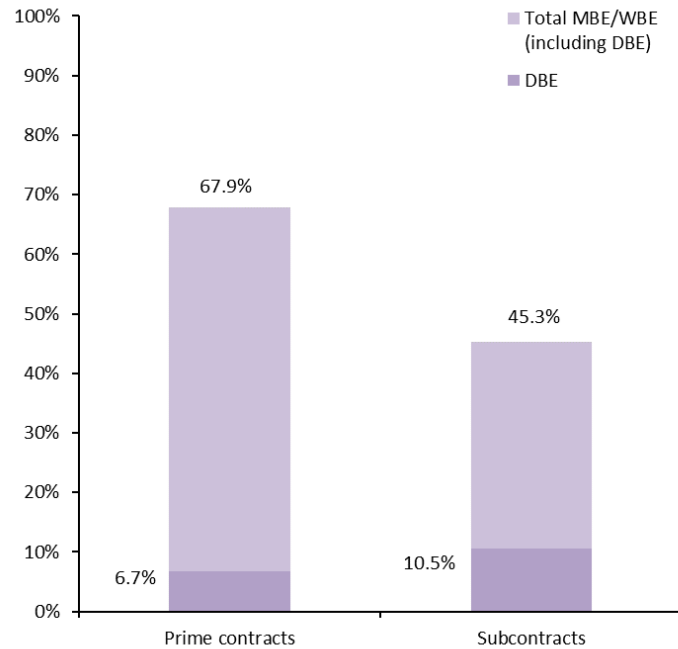
FAA-funded contracts. Figure 6-19 shows the share of FAA-funded contract dollars going to MBE/WBEs and DBEs as prime contractors and subcontractors for FAA-funded contracts.

MBE/WBE and DBE utilization. Minority- and women-owned businesses received 67.9 percent of the prime contract dollars, 6.7 percentage points of which went to certified DBEs. Minority- and women-owned businesses received 45.3 percent of the subcontract dollars, 10.5 percentage points of which was utilization of certified DBEs.

Figure 6-19.
MBE/WBE share of dollars for prime contract and subcontract dollars for FAA-funded construction and engineering contracts, July 2011–June 2016

Note:
 Dark portion of bar is certified DBE utilization.
 Number of procurements analyzed is 87 for prime contracts and 255 for subcontracts.

Source:
 Keen Independent from data on HDOT FAA-funded prime contracts and subcontracts, July 2011–June 2016.



Airport concessions. All of the non-goals airport concessions revenue for MBE/WBEs reported previously in this chapter was for firms that directly had concessions agreements with HDOT. Among agreements without goals (which excludes the master agreements at HDOT airports), minority- and women-owned companies received 31 percent of the concessions revenue.

From the data received from HDOT, it appears that all of the subconcessionaires listed were MBE/WBEs (and ACDBEs).

Summary. Overall, certified DBEs were awarded eight of the 202 FHWA-funded prime contracts and three of the 87 FAA-funded prime contracts from July 2011 through June 2016. MBE/WBE participation as prime contracts was considerably higher for these contracts. Certified DBEs were not awarded any of the 14 FTA-funded prime contracts in the study period.

MBE/WBEs received between 38, 45 and 72 percent of overall subcontract dollars, for FHWA-, FAA- and FTA-funded contracts, respectively. Most of this participation was from non-DBE-certified companies.

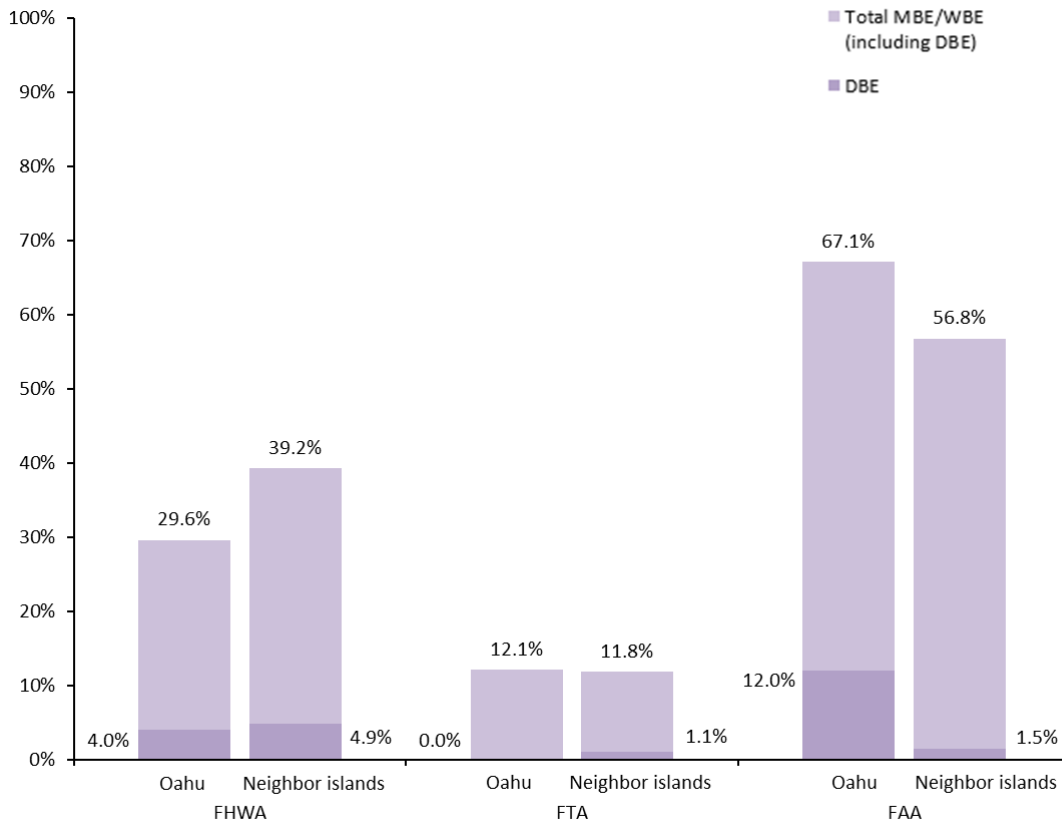
D. Utilization on Oahu and Neighbor Islands

Keen Independent compared MBE/WBE and DBE utilization for Oahu and the rest of the state combined (“neighbor islands”). Figure 6-20 includes all FHWA-, FTA- and FAA-funded contracts from July 2011 through June 2016.

- For FHWA-funded contracts, MBE/WBE utilization (39%) and DBE participation (5%) were higher for the neighbor islands than on Oahu.
- For FTA-funded contracts, MBE/WBE utilization was about 12 percent for both Oahu and the neighbor islands. DBE participation was 0 percent for Oahu and 1 percent for the neighbor islands.
- For FAA-funded contracts, MBE/WBE utilization was highest for Oahu (67%). DBE participation was also considerably higher for Oahu (12%).

Figure 6-20.

MBE/WBE and DBE share of dollars for FHWA-, FTA- and FAA-funded contracts on Oahu and neighbor islands, July 2011–June 2016

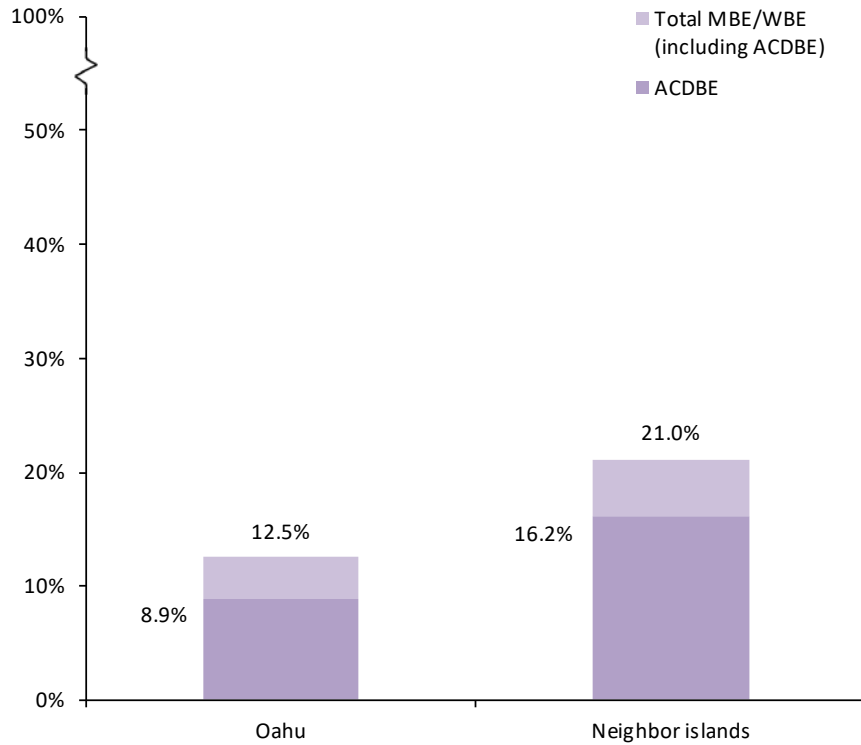


Note: Dark portion of bar is certified DBE utilization.

Source: Keen Independent from data on USDOT-funded prime contracts and subcontracts, July 2011–June 2016.

Figure 6-21 compares the share of airport concessions revenue going to MBE/WBEs and ACDBEs for Oahu (Honolulu International Airport) and neighbor islands (all other airports). The overall MBE/WBE share of airport concessions revenue (21%) was higher for neighbor islands compared to Oahu (13%). The share of airport concessions revenue going to ACDBEs was also higher for neighbor islands.

Figure 6-21.
MBE/WBE and ACDBE share of airport concessions revenue on Oahu and neighbor islands, July 2011–June 2016



Note: Dark portion of bar is certified DBE utilization.

Source: Keen Independent from data on airport concessions contracts and subcontracts, July 2011–June 2016.

E. Analysis of Potential Barriers to Participation in HDOT Construction Prime Contracts

Keen Independent further explored participation of minority- and women-owned firms as prime contractors on FHWA-funded construction and engineering contracts HDOT awarded during the July 2011 through June 2016 study period. The analysis begins with construction prime contracts followed by engineering contracts (see Part F of Chapter 6).

Utilization of MBE/WBEs and DBEs as prime contractors on HDOT FHWA-funded construction contracts. Minority- and women-owned firms won 44 percent of the 142 USDOT-funded construction prime contracts examined during the study period. (Based on headcount, 16.7 percent of firms available for HDOT construction prime contracts are MBE/WBEs).

MBE/WBEs received 33 percent of construction prime contract dollars, or \$165 million out of \$503 million of the dollars retained by prime contractors (i.e., not subcontracted). Of those contracts, four were awarded to firms certified as DBEs. DBE participation as prime contractors in HDOT FHWA-funded prime contracts was only \$2.6 million during the study period (0.5% of the total). MBE/WBE availability was 50 percent for prime construction contracts, resulting in a substantial disparity (disparity index of 65).

Utilization of MBE/WBEs and DBEs as prime contractors on HDOT large and small FHWA-funded construction contracts. Keen Independent examined the number and dollars of prime contracts going to MBE/WBEs and DBEs among large construction contracts (\$250,000 or more) and small construction contracts (less than \$250,000).

Large contracts. Of the 127 large FHWA-funded construction contracts reviewed, MBE/WBEs won 55 contracts. MBE/WBEs accounted for 33 percent of prime contractor dollars. The disparity index for MBE/WBEs was 65 for large construction prime contracts, indicating a substantial disparity.

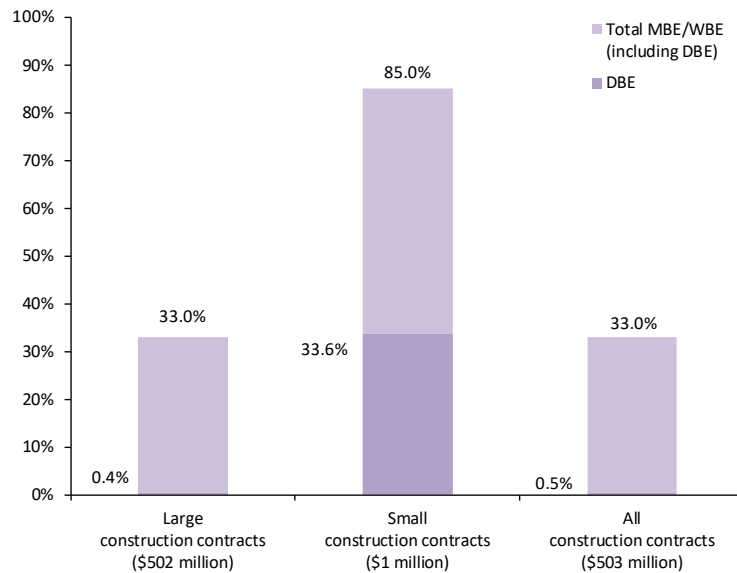
DBEs were awarded three of these large prime contracts (0.4% of dollars).

Small contracts. MBE/WBE prime contractors were awarded eight of the 15 FHWA-funded construction prime contracts less than \$250,000. MBE/WBEs received 85 percent of contract dollars, more than the 50 percent that might be anticipated based on the availability analysis.

Figure 6-22.
 MBE/WBE and DBE share of dollars of HDOT's large (\$250,000+) and small (less than \$250,000) FHWA-funded construction prime contracts, July 2011–June 2016

Note:
 Number of prime contracts analyzed is 127 for large contracts and 15 for small contracts.
 Number of prime contracts analyzed for all contracts is 142.

Source:
 Keen Independent Research from HDOT contract records.



State of Hawaii bid process for construction contracts. Hawaii generally awards construction contracts to lowest bidders (that are deemed responsive and responsible).

State code. Hawaii Revised Statutes (HRS) Chapter 103D and Hawaii Administrative Rules (HAR) Chapters 3-120 to 3-132 govern construction procurement. HDOT follows these requirements and other state law pertaining to construction contracts in its contracting practices.

Bonding. Bid security, performance bonds and payment bonds are typically required for prime contractors bidding on HDOT construction contracts.

Public notice of solicitation. If a construction contract value is greater than \$250,000, it must be awarded through a competitive bidding process. For competitive sealed bidding and competitive sealed proposals, public notice of solicitation to bid is required. Public notices must be publicized on a purchasing agency or provider internet site. Other optional methods to advertise a public notice of solicitation include newspaper publication, dissemination to a bidder's list and other methods that the procurement officer considers useful for publicizing the solicitation.

Electronic bidding. State of Hawaii uses HIePRO eProcurement system for electronic bidding on some construction contracts.

Analysis of bids on HDOT FWHA-funded construction contracts. Keen Independent analyzed bid information for a 10 percent random sample (20 contracts) of HDOT FWHA-funded construction contracts from July 2011 through June 2016 (see Appendix C for a description of this methodology). In total, 78 bids were submitted for these 20 contracts. MBEs submitted 43 of the 78 bids and one WBE submitted a bid, which matched or exceeded what would be expected for MBEs and from WBEs based on availability of firms for construction prime contracts.

Keen Independent also examined whether the bids submitted by MBEs and WBEs on HDOT construction contracts were equally likely to be a winning bid as a bid from a majority-owned firm. Bids submitted from MBEs were less likely to be the winning bid (19%) than majority-owned firms (34%).

Keen Independent further analyzed the “expected win rate” of MBEs and majority-owned firms given the number of bids submitted for each contract. (In other words, a firm submitting a bid on a contract that had a total of 10 bids had odds of 10 percent to win that contract.) This analysis suggests that MBEs could be expected to win 27 percent of the contracts they submit bids on, which is higher than the expected win rate for majority-owned firms (25%). However, MBEs only won 19 percent of the contracts they bid on while majority-owned firms won 34 percent of the contracts they bid on.

The results of this analysis suggest that MBE bids were less competitive than bids from majority-owned firms, which might warrant further analysis by HDOT. The number of bids from WBEs was insufficient to examine any results.

F. Analysis of Potential Barriers to Participation in HDOT Engineering Prime Contracts

Keen Independent also explored participation of minority- and women-owned firms as prime consultants in the 60 engineering-related HDOT FHWA-funded contracts during the study period.

Utilization of MBE/WBEs and DBEs as prime consultants on HDOT engineering-related contracts. Minority- and women-owned firms were awarded 32 of the engineering-related prime contracts during the study period, or about one half the total number of prime engineering-related contracts. MBE/WBEs comprised about 30 percent of firms available for HDOT engineering-related work as prime consultants.

About \$27 million in prime contract dollars (after deducting subcontracts) went to MBE/WBEs, which was 30 percent of total prime contract dollars for engineering-related contracts. The availability analysis for engineering-related prime contracts indicated that MBE/WBEs might be expected to receive 74 percent of those contract dollars. The disparity index was 43. All of the MBE/WBE participation came from minority-owned companies as no white women-owned engineering companies received an HDOT FHWA-funded engineering contract.

DBEs were awarded four engineering-related contracts (7% of the total). Figure 6-23 presents the utilization of MBE/WBEs and DBEs as prime consultants on engineering-related contracts.

Utilization of MBE/WBEs and DBEs as prime consultants on large and small engineering-related contracts. Keen Independent examined number and dollars of engineering-related prime contracts going to MBE/WBEs and DBEs for large contracts (\$100,000 or more) and small contracts (less than \$100,000) in FHWA-funded contracts.

Large contracts. Keen Independent identified 51 large engineering-related contracts and task orders; MBE/WBEs won 26 of them (51% of the total). MBE/WBEs accounted for 45 percent of prime contractor dollars. The disparity index for MBE/WBEs was 41 for large engineering-related prime contracts, a substantial disparity.

DBEs obtained 6 percent of the prime contract dollars for large engineering-related contracts.

Small contracts. MBE/WBEs received six small engineering-related contracts, one-quarter of the nine HDOT engineering-related prime contracts and task orders of less than \$100,000. MBE/WBEs received 56 percent of prime contract dollars.

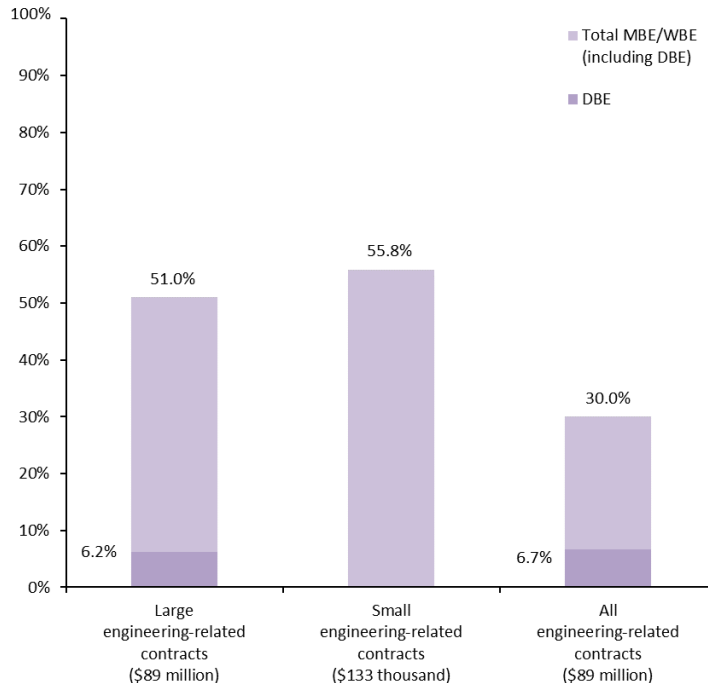
The 56 percent MBE/WBE utilization as prime consultants was somewhat less than the 67 percent availability for those contracts (disparity index of 87).

DBEs were not awarded any of those small engineering-related prime contracts and task orders.

Figure 6-23.
MBE/WBE and DBE participation as prime consultants in engineering-related contracts, July 2011–June 2016

Note:
 Number of prime contracts analyzed is 51 for large contracts and 9 for small contracts.
 Number of prime contracts analyzed for all contracts is 60.

Source:
 Source: Keen Independent Research from HDOT contract records.



State of Hawaii bid process for engineering contracts. Hawaii can award professional services contracts based in part on an evaluation of qualifications to perform that work. Keen Independent examined Hawaii professional services contracts’ bidding requirements, public notice of solicitation, limits for non-competitive procurement and bid process.

State code. HRS Section 103D-304 governs professional services procurement and HRS Chapter 464 discusses professional engineers, architects, surveyors and landscape architects. In addition, HRS Section 415A-2 provides a definition of professional services. HDOT follows these requirements and other state law pertaining to contracting practices for professional services contracts.

Bonding. Bonding is not required for professional services contracts.

Public notice of solicitation. Notice of solicitation is required for professional services contracts. Notice is provided as required for the type of procurement methodology used.

Qualified vendor list. If the procurement is conducted according to the procedures in HRS 103D-304, prior to the start of each fiscal year, staff from HDOT publishes a notice inviting persons engaged in providing professional services to submit current statements of qualifications and expressions of interest to the agency. The agency reviews the submissions and prepares a list of qualified firms to provide the services that the agency may need. The qualified vendor list is not applicable to professional service procurements conducted under procurement methodologies other than 103D-304, such as competitive sealed proposals.

Evaluation. The evaluation process required depends on the type of procurement methodology used. Each form of procurement methodology has its own evaluation requirements set by statute.

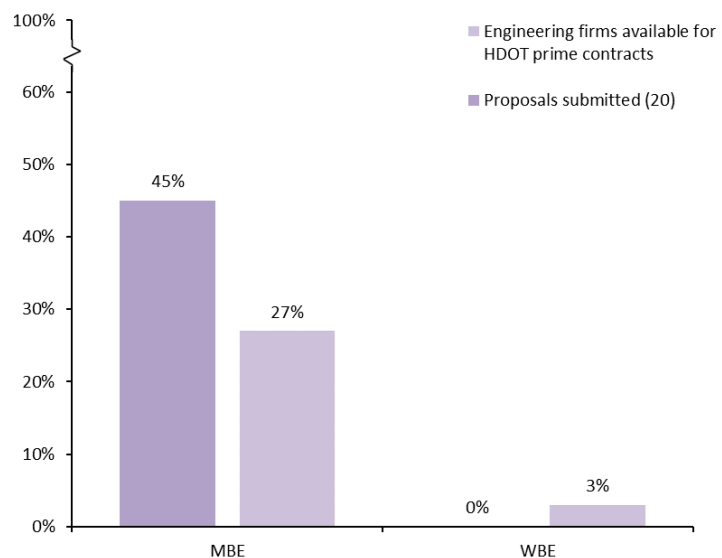
Analysis of proposals on HDOT engineering contracts. Keen Independent analyzed the relative number of proposals submitted by MBEs and WBEs for a 10 percent random sample of engineering-related contracts (five contracts) during the study period. Of the 20 proposals submitted, nine (45%) were submitted by MBEs and none were submitted by WBEs.

Based on the availability analysis, 27 percent of companies available for HDOT engineering contracts were MBEs and 3 percent were WBEs. The relative number of proposals from MBEs was higher than what might be expected from their relative availability for this work. Because of the small number of engineering contracts examined and relatively low availability of WBEs, it is not surprising that no proposals were submitted by WBEs. Figure 6-24 displays these results.

Figure 6-24.
MBE/WBE proposals as a share of total proposals submitted on a sample of HDOT engineering-related contracts

Note:
Based on analysis of 20 bids on 5 contracts randomly sampled within the July 2011–June 2016 study period.

Source:
Keen Independent Research from HDOT contract records.



Analysis of contract awards from this small random sample indicates that proposals from MBEs were more likely to result in contract awards than proposals submitted from majority-owned firms. There were too few WBEs available for HDOT engineering contracts to make any inferences about the lack of proposals from white women-owned firms.

G. HDOT Operation of the Federal DBE Program, Including Overconcentration Analysis

This part of Chapter 6 examines:

- HDOT's operation of the DBE contract goals program;
- Any overconcentration of DBEs;
- Participation of individual DBEs in HDOT contracts; and
- DBE participation as prime contractors.

DBE contract goals program. The Federal DBE Program provides for recipients of USDOT funds to set an overall goal for DBE participation and use DBE contract goals to meet any portion of their overall goal they do not project being able to meet using race-neutral means.¹ However, federal regulations direct those operating the program to reduce or eliminate the use of contract goals to ensure that they do not result in exceeding the overall goal.²

Because of the *Western States Paving* court decision in 2005 and subsequent guidance from USDOT, HDOT did not set DBE contract goals from January 2006 through fall 2008 (see Chapter 2 for further explanation). Since that time HDOT has set DBE contract goals for some of its USDOT-funded construction and engineering-related contracts. Only certain DBE groups have been eligible to meet those contract goals.

Following a disparity study performed in 2010, HDOT requested a waiver to allow for race-conscious goals for specific groups that the study identified as underutilized. In 2012, USDOT approved this waiver to be valid for FFY 2013–2015. HDOT projects funded by FHWA operated under this waiver for the appropriate fiscal years. In 2014, the Federal Aviation Administration (FAA) approved a similar waiver for HDOT's Airport Division.

The waiver for FHWA-funded contracts expired and FHWA required HDOT to stop implementing the waiver in 2017. Since that time, HDOT has included all DBEs as eligible to meet DBE contract goals for FHWA-funded contracts.

HDOT did not set DBE contract goals on FTA-funded contracts during the study period but has subsequently done so. DBE contract goals for FTA-funded contracts can be met by any DBE group.

¹ 49 CFR Section 26.51(d).

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

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

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

- Share of HDOT USDOT-funded contract dollars within a type of work going to DBEs;
- Distribution of DBE dollars on USDOT-funded contracts by work type; and
- Representation of DBEs among all firms available for specific types of contracts and subcontracts.

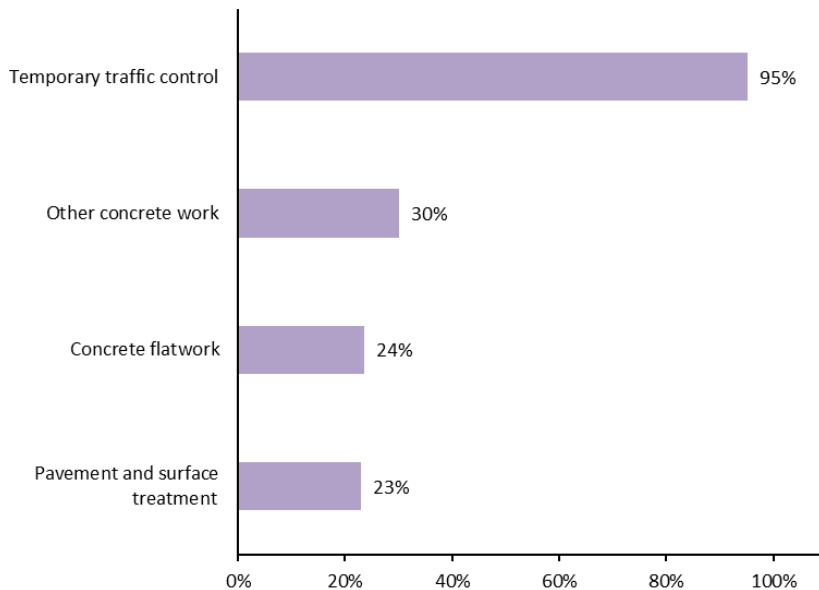
Share of HDOT contract dollars within a type of work going to DBEs. For each specific type of work examined in the study, the study team calculated the share of dollars going to DBE firms. Figure 6-25 depicts this for FHWA-, FAA- and FTA-funded contracts combined. It shows that DBEs accounted for more than 30 percent of the total work in four types of work.

Within the study period, 95 percent of HDOT traffic control dollars on USDOT-funded contracts went to DBEs based on information provided in HDOT contract data. DBEs’ share of concrete work dollars was 30 percent and 24 percent of concrete flatwork dollars went to DBEs. About 23 percent of pavement surface treatment work went to DBEs.

Figure 6-25.
DBE-certified share
of total contract dollars
on USDOT-funded
contracts,
July 2011–June 2016

Note:
Number of prime
contracts/subcontracts
analyzed is 1,680.

Source:
Keen Independent Research
from HDOT contract records.



Keen Independent also separately examined the share of work going to DBEs for contracts using FHWA, FTA and FAA funding. Of FHWA-funded contracts, 100 percent of wrecking and demolition contract dollars and 95 percent of temporary traffic control contract dollars went to DBEs. Additionally, DBEs received more than one-third of surveying and mapping and other concrete work contract dollars (43% and 39%, respectively). Figure 6-26 depicts these results.

Figure 6-26.
DBE-certified share
of total contract dollars
on FHWA-funded
contracts,
July 2011–June 2016

Note:
 Number of prime
 contracts/subcontracts
 analyzed is 1,291.

Source:
 Keen Independent Research
 from HDOT contract records.

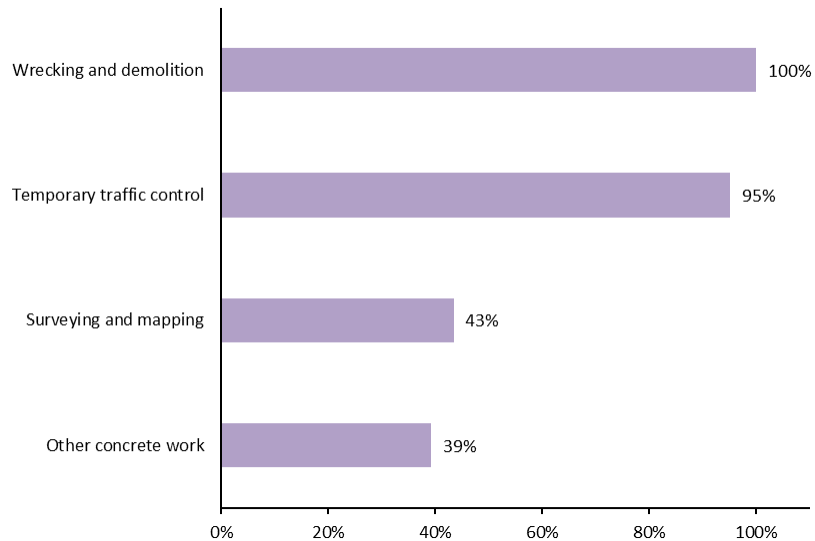
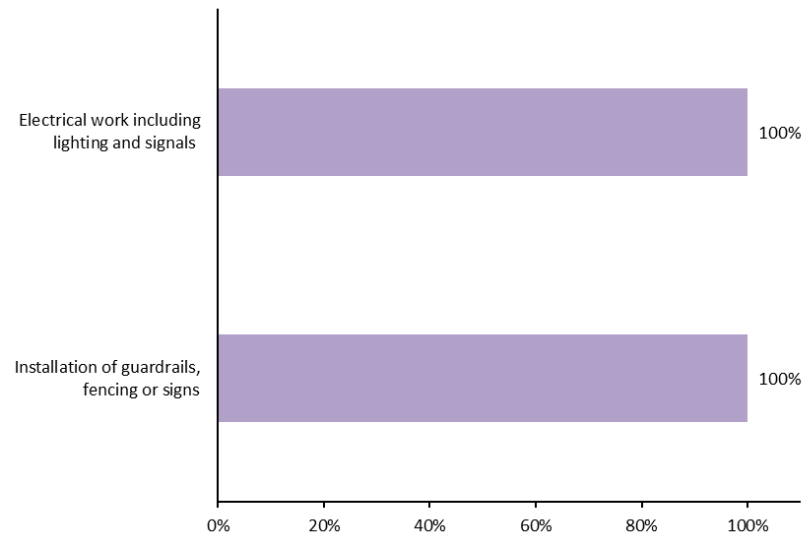


Figure 6-27 shows the share of specific types of FTA-funded work awarded to DBEs. DBEs received 100 percent of the contract dollars for electrical work and guardrails, fencing and signs. Neither of these two general types of work exhibited high DBE participation when FTA-funded contracts were combined with FHWA- and FAA-funded contracts. The result for FTA-funded contracts could be due to the relatively small number of projects receiving FTA funding.

Figure 6-27.
DBE-certified share of
total contract dollars on
FTA-funded contracts,
July 2011–June 2016

Note:
 Number of prime
 contracts/subcontracts
 analyzed is 47.

Source:
 Keen Independent Research
 from HDOT contract records.

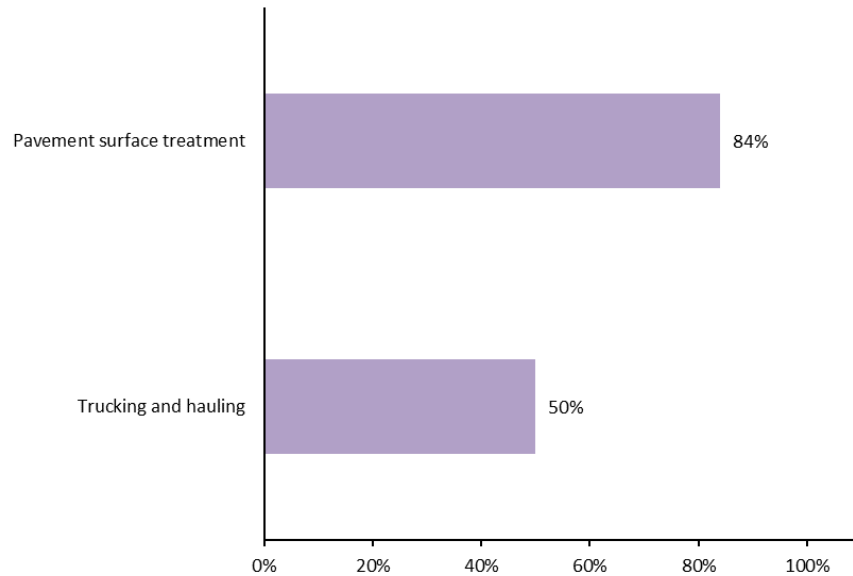


Turning to airport contracts, DBEs received 84 percent of pavement surface treatment contract dollars and 50 percent of trucking contract dollars for FAA-funded contracts, as depicted in Figure 6-28 below.

Figure 6-28.
DBE-certified share of
total contract dollars on
FAA-funded contracts,
July 2011–June 2016

Note:
 Number of prime
 contracts/subcontracts
 analyzed is 342.

Source:
 Keen Independent Research
 from HDOT contract records.



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

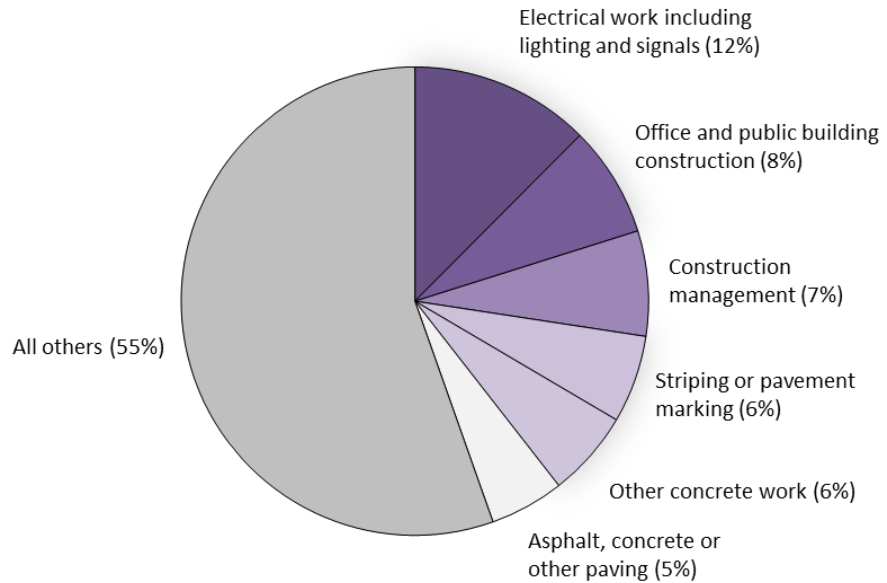
In the study period, for FHWA-, FTA- and FAA-funded contracts combined, there was more DBE participation in electrical work than any other type of work, however it accounted for only 12 percent of DBE participation. Office and public building construction represented 8 percent and construction management work made up 7 percent of DBE contract dollars, respectively. Ten other types of work individually represented between 1 and 6 percent of DBE dollars, indicating broad participation of DBE contract dollars across types of work.

Figure 6-29 presents these results.

Figure 6-29.
Total share of
DBE-certified contract
dollars by type of
work for USDOT-
funded contracts,
July 2011–June 2016

Note:
Number of DBE
contracts/subcontracts
awards analyzed is 266.

Source:
Keen Independent Research
from HDOT contract records.



Examining FHWA-funded contract dollars awarded to DBEs, 15 percent was related to electrical contracts or subcontracts, 11 percent was construction management contracts and 9 percent was for concrete work. As with USDOT-funded contract dollars overall, there was no one type of work that accounted for most of the DBE dollars on FHWA-funded contracts. Figure 6-30 below depicts these results.

Figure 6-30.
Total share of
DBE-certified contract
dollars on FHWA-
funded contracts,
July 2011–June 2016

Note:
Number of DBE
contracts/subcontracts
awards analyzed is 234.

Source:
Keen Independent Research
from HDOT contract records.

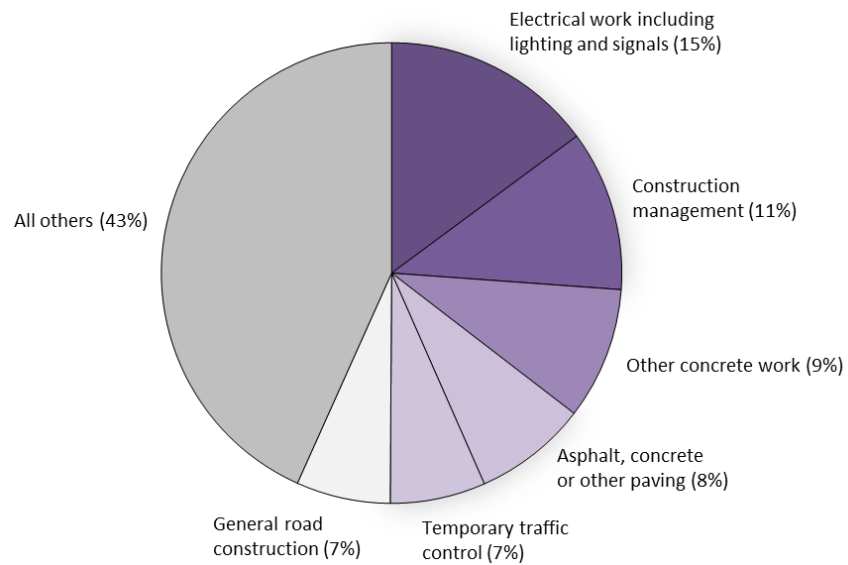
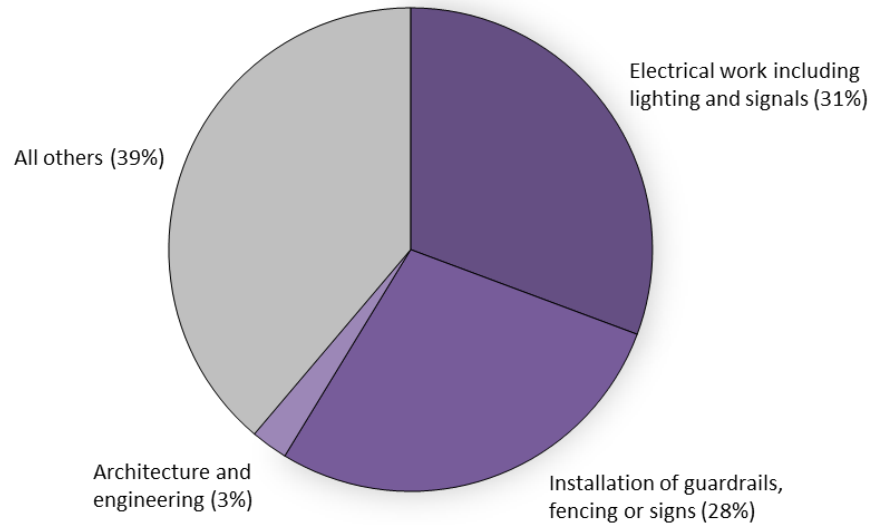


Figure 6-31 presents the proportion of DBE contract dollars for types of FTA-funded contracts. Because of the small number of FTA-funded contracts and subcontracts going to DBEs, a few types of work (electrical work and guardrail, fencing or sign installation) accounted for much of the DBE participation.

Figure 6-31.
Total share of DBE-certified contract dollars on FTA-funded contracts, July 2011–June 2016

Note:
 Number of DBE contracts/subcontracts awards analyzed is 7.

Source:
 Keen Independent Research from HDOT contract records.

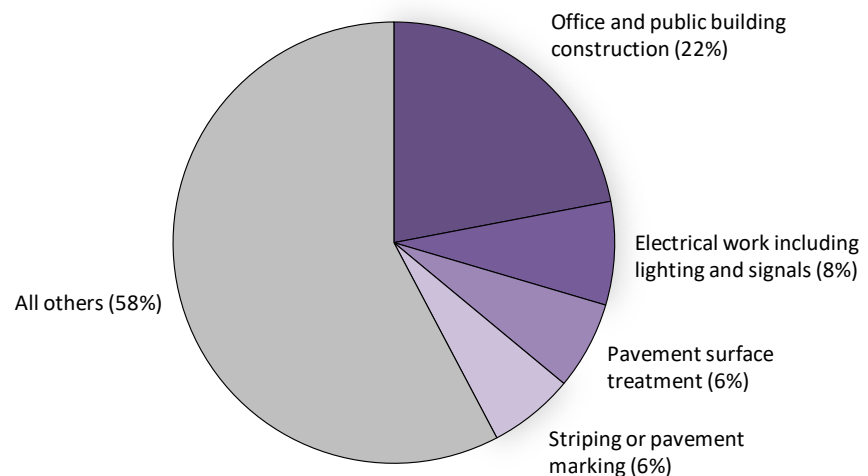


Finally, of all FAA-funded contract dollars awarded to DBEs, 22 percent was for office and public building construction contracts and the balance of the DBE dollars went to a wide variety of types of work. Figure 6-32 depicts these results.

Figure 6-32.
Total share of DBE-certified contract dollars on FAA-funded contracts, July 2011–June 2016

Note:
 Number of DBE contracts/subcontracts awards analyzed is 25.

Source:
 Keen Independent Research from HDOT contract records.



Representation of DBEs among firms available for particular types of contracts or subcontracts. Finally, Keen Independent analyzed whether DBEs accounted for a dominant share of firms available for particular types of contracts.

Based on firms in the availability database, there were 81 out of the 1,680 contracts and subcontracts where DBEs comprised more than 20 percent of available firms (between 20% and 30%). Keen Independent concludes there is no type of work for which DBEs account for a large share of firms available for contracts and subcontracts.

Summary. HDOT should continue to monitor types of work for temporary traffic control, which was the only type of work for which DBEs accounted for a large share of USDOT-funded contract dollars. However, even for traffic control work, DBEs did not account for a large share of companies in Hawaii available for that work. It does not appear that DBEs are overconcentrated in traffic control based on the analysis of firms in the Hawaii transportation contracting marketplace.

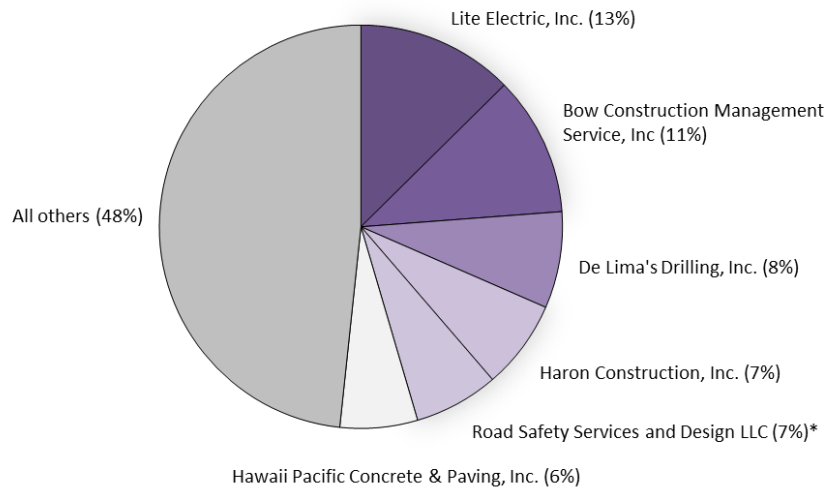
Participation of individual DBEs in HDOT contracts. Keen Independent analyzed the participation of individual DBEs in HDOT contracts to determine if DBE participation is broadly or narrowly distributed among DBE-certified companies.

Six DBEs accounted for about one-half of the total FHWA-funded contract dollars going to DBEs during the study period. One of these six firms was no longer DBE-certified at the time of this study.

Figure 6-33.
DBEs accounting for the most dollars of FHWA-funded contracts, July 2011–June 2016

Note:
Number of DBE contracts/subcontracts awards analyzed is 234.

Source:
Keen Independent Research from HDOT contract records.



*No longer DBE certified starting June 13, 2019.

Among FTA-funded contracts, five DBEs received contract dollars. The narrow distribution of FTA-funded contract dollars for just a few DBEs is largely because of the small number of FTA-funded contracts. Figure 6-34 below presents these results.

Figure 6-34.
DBEs accounting for the most dollars of FTA-funded contracts, July 2011–June 2016

Note:
Number of DBE contracts/subcontracts awards analyzed is 7.

Source:
Keen Independent Research from HDOT contract records.

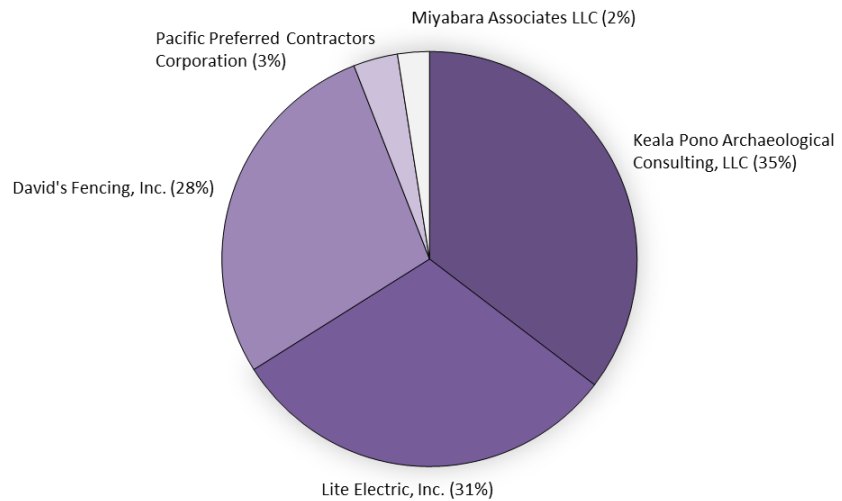
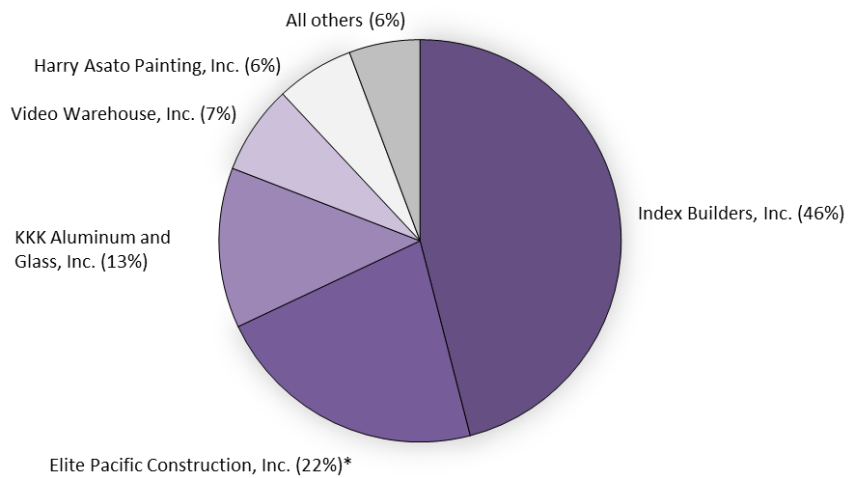


Figure 6-35 depicts the percentage of FAA-funded DBE contract dollars awarded to specific firms. Index Builders, Inc. received about one-half of FAA-funded contract dollars awarded to DBEs. The remaining contract dollars were awarded to eighteen different DBEs.

Figure 6-35.
DBEs accounting for the most dollars of FAA-funded contracts, July 2011–June 2016

Note:
Number of DBE contracts/subcontracts awards analyzed is 25.

Source:
Keen Independent Research from HDOT contract records.



*No longer DBE certified starting June 13, 2019.

H. HDOT Operation of the Federal ACDBE Program for Airport Concessions

HDOT has many different types of concessions and a large total volume of concessions revenue at Honolulu International Airport (\$298 million in non-car rental concessions in FFY 2018) and Kahului Airport (\$51 million in FFY 2018), but has more limited concessions at its other airports.

- At Honolulu International Airport and Kahului Airport, concessions include master agreements covering retail and food and beverage concessions as well as individual agreements for operations such as foreign currency services, business centers, advertising, internet, parking, vending machines, massage chairs, luggage carts and lockers, newsstands, florists and lei stands.
- Smaller airports may have a single restaurant, single food stand and a small number of retail establishments.

ACDBE goals. HDOT sets ACDBE goals for certain master concessions agreements at Honolulu International Airport, Kahului Airport, Kona International Airport, Hilo International Airport and Lihue Airport. ACDBE goals only pertain to retail, food and beverage and currency concessions agreements. HDOT has not applied goals to car rental concessions at any of its airports.

- At Honolulu International Airport, HDOT has ACDBE goals of 15 percent in its master concessions agreements with DFS Group and a goal of 10 percent in its master concessions agreement for food and beverage that Host International current holds. HDOT's concession agreement with Currency Services USA has an ACDBE goal of 4 percent.
- HDOT has similar ACDBE goals for its master retail (DFS) and food and beverage (Host) at Kahului Airport.
- Volume Services, Inc. has the food and beverage concession agreement at Kona International Airport, with a 10 percent ACDBE goal. Through 2018, the same company had the food and beverage concession at Hilo International Airport, with a 15 percent goal.
- At Lihue Airport, Host International has the master concession for food and beverage (15% goal) and Travel Traders of Hawaii has the master concession for retail (10% goal).

At HDOT's smaller airports, food and beverage concessions might be a single restaurant and one express take-out stand, with the ACDBE subconcessionaire operating the take-out or snack shop. Host International meets the ACDBE goal for its food and beverage concessions at Kahului and Lihue airports through joint ventures with ACDBEs at those airports.

MBE/WBE concessionaires when no goals. Outside of its master agreements, some of HDOT's concessions are directly with minority- and women-owned concessionaires. For example, HDOT had concessions agreements with ACDBEs for operations such as lei stands and internet service during the study period. There are also minority- and women-owned firms not certified as ACDBEs that have these concessions. As noted previously in this chapter, 31 percent of the revenue for concessions that were not master concessions went to minority- and women-owned concessionaires.

ACDBEs obtained concessions on restaurants, flowers, gift and novelty, internet and newsstand. ACBDEs also held different concessions at different airports during the study period.

CHAPTER 7.

Marketplace Conditions

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

As part of the Availability and Disparity Study, Keen Independent conducted quantitative and qualitative analyses of conditions in the Hawaii marketplace to examine whether barriers that Congress found on a national level also appear in Hawaii. The study team analyzed whether barriers exist in the Hawaii construction; engineering; and food, beverage and selected retail industries (“concessions industry”) for minorities, women, and MBE/WBEs, and whether such barriers might affect opportunities on HDOT and local agency transportation contracts.

Understanding current marketplace conditions is important as HDOT determines its overall goal for DBE participation in USDOT-funded contracts (and ACDBE participation in airport concessions) and projects the portion of its overall goals to be met through neutral means.

Keen Independent organized Chapter 7 to provide some of the historical context in which market conditions affecting minorities and women have evolved, as well as examine current conditions in the Hawaii marketplace:

- A. Composition of the Hawaii workforce and business owners;
- B. Entry and advancement;
- C. Business ownership;
- D. Access to capital;
- E. Success of businesses; and
- F. Summary.

Chapter 7 also summarizes input collected from more than 190 individuals representing businesses, trade associations and other groups throughout the state.

- The Keen Independent study team conducted in-depth personal interviews involving 59 businesses, trade associations and business assistance providers.
- The availability survey included open-ended questions about marketplace conditions. Keen Independent received comments from 105 survey respondents.

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

- The study team developed a website, an email address and dedicated telephone hotline for the study that asked any interested individuals to provide comments. Input received through these and other efforts is included as well. (Keen Independent received two comments via email.)
- HDOT also held public meetings and focus groups in Honolulu, Kahului, Lihue and Hilo and provided opportunities for comment on the draft 2019 Availability Study and the draft 2019 Availability and Disparity Study. Keen Independent incorporated this input into the final report.

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

A. Composition of the Hawaii Workforce and Business Owners

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

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

Racial and ethnic minority groups. Federal DBE Program regulations discuss minority-owned businesses in five groups — businesses owned by Black Americans,² Hispanic Americans, Native Americans (including American Indians, Alaska Natives and Native Hawaiians), Asian Pacific Americans and Subcontinent Asian Americans.³ In this study, firms not owned by minorities and women are referred to “majority-owned,” even though white men constitute about one-in-ten residents of Hawaii.

Keen Independent’s analysis of marketplace conditions in Hawaii generally follows these groupings of race and ethnicity, recognizing the unique demographic characteristics of the state:

- Asian Pacific Americans, Native Hawaiians and Pacific Islanders constitute 71 percent of the Hawaiian workforce, of which, the largest groups are Filipino Americans, Japanese Americans, Native Hawaiians and Chinese Americans (in that order).
- About 7 percent of the workforce reports race as African American, Subcontinent Asian American, American Indian or Alaska Native or their ethnicity as Hispanic (not including those who also identify as Asian Pacific American or Native Hawaiian).
- About 22 percent of the workforce in Hawaii reports race as “white alone.” (White men are just 12 percent of the Hawaii workforce.)

² “African Americans” is used instead of “Black Americans” throughout this study.

³ 49 CFR Section 26.5.

As described on the previous page, the predominant racial and ethnic group in Hawaii is people of Asian Pacific American, Native Hawaiian and/or Pacific Islander descent, often of multiple backgrounds within this group. Therefore, it was appropriate to combine employment data and information about businesses for Asian Pacific Americans, Native Hawaiians and Pacific Islanders. Furthermore, national Census data no longer combine economic and demographic statistics for Native Hawaiians with people who are American Indians or Alaska Native, and such a grouping is not appropriate for a study of business owners in Hawaii.

Many members of the military are stationed in Hawaii. Because the demographics of the civilian and the military workforce in Hawaii are very different, Keen Independent's analysis of the local workforce pertains to the civilian workforce.

One-quarter of Hawaii's population self-identify as more than one race,⁴ including most residents who identify as Native Hawaiian. To better account for the unique multi-racial and ethnic background of Hawaii's population, Keen Independent used two different race/ethnicity definitions where possible: non-mutually exclusive definitions and mutually exclusive definitions.

- Using non-mutually exclusive race definitions, individuals were included in each race category they identified.
- With mutually exclusive definitions, each individual was included in one race/ethnicity category (see Appendix I for more detail on the methodology for each race definition).

Finally, it is important to recognize that the Availability and Disparity Study, by necessity, does not capture the rich diversity within the racial and ethnic groups of Hawaii. There are several reasons for this.

- Data sources such as the American Community Survey (ACS) conducted by the U.S. Bureau of the Census do not provide sufficient sample sizes to describe economic conditions for business owners within each of the 14 major cultural groups found in State of Hawaii reports.⁵ For example, very small sample sizes in the ACS for Tongan or Guamanian/Chamorro in Hawaii make it difficult to describe outcomes for these cultural groups.
- When examining ACS and other data for business owners within specific industries, sample sizes become even smaller. For example, the ACS has data for only 58 owners of "concessions industry" firms who were not Asian Pacific American or Native Hawaiian (see Appendix H).
- Courts generally examine the evidence of discrimination for the major groups described in federal regulations for the Federal DBE Program without requiring more detailed information by subgroup (see Appendix B).

⁴ State of Hawaii Department of Business, Economic Development & Tourism. (2014). *Hawaii New Business Formation: An analysis of business birth, deaths, and survival rates*. Retrieved from State of Hawaii website: http://files.hawaii.gov/dbedt/economic/reports/new_bus.pdf

⁵ Ibid.

In sum, Chapter 7 and supporting appendices provide an overview of conditions for major racial and ethnic minority groups in Hawaii, and sometimes need to report results for minority-owned businesses in aggregate. These constraints do not affect the applicability of study results.

Women. The ACS, which is the source of much of the information in Chapter 7, reports data based on sex. Individuals in the availability survey and in-depth interviews self-identified gender, which was used in the analysis of female-owned businesses from these sources.

Note that analysis of availability survey results compares three groups of businesses: those owned by minorities (including men and women), those owned by white females and majority-owned firms. Keen Independent chose this approach in order to isolate any gender differences. In this chapter and supporting appendices, “WBEs” refers to white women-owned business enterprises (whether or not they are certified as such).

Representation of minorities and women within the Hawaii workforce. Analysis of ACS data allows Keen Independent to compare the representation of minorities and women among study industry business owners with a benchmark based on overall composition of the Hawaii workforce. Study industries are construction, engineering, and food, beverage and selected retail. The food, beverage and selected retail industry is also referred to as the “concessions industry” in this chapter and in supporting appendices as it most closely corresponds to the types of businesses involved in airport concessions, a major component of the study. (See Appendices E and F for more information.)

Racial and ethnic minorities. The study team examined the representation of minorities among workers and business owners in Hawaii based on 2012–2016 ACS data from the U.S. Bureau of the Census. The first column of Figure 7-1 on the next page presents demographic characteristics of the labor force as a whole. As shown, 78 percent of Hawaii workers were racial or ethnic minorities:

- Asian Pacific Americans, Native Hawaiians and Pacific Islanders were 71 percent;
- Hispanic Americans were 3 percent;
- African Americans were 2 percent;
- American Indian or Alaska Natives were 1 percent;
- Subcontinent Asian Americans were less than 1 percent; and
- Other minorities were 1 percent.

The ACS data also include information about whether an individual is a business owner. Figure 7-1 shows that in Hawaii, people of color were 59 percent of business owners in the construction, engineering and concessions industries. With the exception of Hispanic Americans, American Indian or Alaska Natives, and other minorities, each minority group made up a smaller share of business owners in these industries than what might be expected based on representation in the overall workforce.

Women. Figure 7-1 also reports the representation of women among all workers and study industry business owners in 2012 through 2016 in Hawaii. Women accounted for 48 percent of the Hawaii labor force and 21 percent of business owners in the study industries.

Figure 7-1.
Demographic distribution of the workforce and
study industry business owners in Hawaii, 2012–2016

State of Hawaii	Workforce in all industries	Business owners in study industries
Race/ethnicity		
Asian Pacific, Native Hawaiian or Pacific Islander	70.8 %	50.2 %
Hispanic American	3.2	4.1
African American	2.1	1.1
American Indian or Alaska Native	0.9	1.7
Subcontinent Asian American	0.2	0.1
Other minority	1.1	1.4
White	21.6	41.4
Total	100.0 %	100.0 %
Gender		
Female	47.9 %	21.0 %
Male	52.1	79.0
Total	100.0 %	100.0 %

Note: For workforce in all industries, n = 33,930.
For business owners in study industries, n = 831.
Only the civilian workforce is included in workforce calculations.

Source: Keen Independent Research from 2012–2016 ACS Public Use Microdata sample. The 2012–2016 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

B. Entry and Advancement

Studies throughout the United States have indicated that race and gender discrimination has affected the employment and advancement of certain groups in the construction and engineering industries. Hawaii has a different history concerning race than other states, but Figure 7-1 shows an imbalance between demographic characteristics of the overall workforce in Hawaii and business owners in study industries that may indicate lasting effects of racial discrimination. The study team therefore examined the representation of minorities and women among workers in construction and engineering as well as the concessions industry in Hawaii. In the construction industry, Keen Independent also analyzed the advancement of minorities and women into supervisory and managerial roles. Appendix E presents detailed results.

As summarized below, quantitative analyses of the Hawaii marketplace — based primarily on data from the 2000 U.S. Census and the 2012–2016 ACS — showed that, in general, certain minority groups and women appear to be underrepresented among workers in the Hawaii study industries. In addition, minorities and women appeared to face barriers regarding advancement to supervisory or managerial positions. Because individuals who form construction, engineering and concessions businesses tend to work in those industries before starting their own businesses, any barriers related to entry or advancement within the industry may prevent some minorities and women from starting businesses in those industries.

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

- People of color were 77 percent of construction workers in Hawaii, about the same as in the overall workforce.
- Fewer Asian Pacific Americans or Native Hawaiians worked in the Hawaii architecture and engineering (A&E) industry than what might be expected based on analyses of workers 25 and older with a four-year college degree. (Note that results for Asian Pacific Americans and Native Hawaiians include Pacific Islanders here and in the balance of this chapter.)
- Fewer African Americans worked in the construction, A&E or concessions industry in Hawaii compared with what might be expected based on representation in the overall Hawaii workforce.
- Women accounted for a very small portion of the Hawaii construction and A&E workforce compared with other industries as a whole.

Quantitative information concerning advancement in the Hawaii construction industry. Any barriers to advancement in the Hawaii construction industry may also affect the number of business owners among those groups. When Keen Independent examined advancement in the Hawaii construction industry, there were disparities for certain minority groups and women:

- People of color comprised a very large share of workers in some construction trades and a much smaller share in other trades. These differences did not appear to be associated with relative skill level associated with the trade.
- Most construction trades were nearly all male workers.
- Compared to nonminorities working in the construction industry, Asian Pacific Americans and Native Hawaiians were less likely to be supervisors or managers.
- Relatively fewer women than men working in construction were supervisors or managers.

Qualitative information about entry and advancement. Keen Independent collected qualitative information about entry and advancement in the Hawaii construction, engineering and concessions industries through in-depth personal interviews, availability interviews, public meetings and public comment processes as described at the beginning of Chapter 7.

Most business owners reported that they worked in the industry or a related industry before starting their businesses. Interviewees indicated that construction, engineering and concessions companies are typically started by individuals with connections to those industries. Therefore, the number of businesses owned today by people of color and women in construction, A&E and concessions in

Hawaii may be affected by barriers that exist in the Hawaii market to becoming employed or advancing in those industries.

Some interviewees described workplace conditions that are unfavorable to women and minorities in the Hawaii construction and professional services industries. As one example, a Native Hawaiian female owner of a DBE construction services firm described the industry as “male-dominated.” She added that women are perceived as not “capable of doing the job.”

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

- Typically, employment and advancement are preconditions to business ownership in the construction and engineering industries. Because certain minority groups and women appear to be underrepresented in the Hawaii construction, engineering and concessions industries — both in general and as supervisors and managers — it follows that such underrepresentation may reduce the number of minorities and women starting businesses, reducing overall MBE/WBE availability in the local transportation contracting industry.
- There is evidence that underrepresentation of certain minority groups and women in the Hawaii construction, engineering and concessions industries — particularly in supervisory and managerial roles — may perpetuate any beliefs or stereotypical attitudes that MBE/WBEs may not be as qualified as majority-owned businesses. Any such beliefs may also be making it more difficult for MBE/WBEs to win work in Hawaii, including work with HDOT and local agencies.

C. Business Ownership

National research and studies in other states have found that race, ethnicity and gender also affect opportunities for business ownership, even after accounting for race- and gender-neutral factors. Figure 7-2 summarizes how courts have used information from such studies — particularly from regression analyses — when considering the validity of an agency’s implementation of the Federal DBE Program.

Quantitative information about business ownership. The study team used U.S. Bureau of the Census data from 2012–2016 to examine whether there are differences in business ownership rates between minorities and nonminorities and between women and men in the Hawaii construction, A&E and concessions industries. In most cases, there were race and gender differences.

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

- Keen Independent’s regression models showed that Asian Pacific Americans and Native Hawaiians, other minorities and women working in the Hawaii construction industry were substantially less likely to own businesses than non-Hispanic whites and males, even after accounting for various personal characteristics including education, age and the ability to speak English. (Similar results were found for subgroups including Native Hawaiians, Chinese Americans, Filipino Americans and Japanese Americans, even after accounting for various other factors.)
- Asian Pacific Americans and Native Hawaiians working in the Hawaii architecture and engineering industry were less likely to own businesses after accounting for certain personal characteristics.

There were no statistically significant differences in business ownership rates for people of color and women in the regression model for the concessions industry. Appendix F presents detailed results from the quantitative analyses of business ownership rates.

Qualitative information about business ownership.

Keen Independent collected qualitative information about business ownership in the Hawaii construction, engineering and concessions industries through in-depth interviews, availability interviews, public meetings and other means.

Minority, women and white male owners of small businesses in the industry reported many of the same challenges. Many faced financial barriers at start-up and beyond.

Effects of disparities in business ownership rates for minorities and women on the transportation contracting industry.

The disparities in business ownership rates for certain minority groups and women in the construction, engineering and concessions industries mean that there are fewer minority- and women-owned firms in the transportation contracting marketplace than there would be if there were a level playing field for minorities and women in the Hawaii marketplace. Results suggest that the relative MBE/WBE availability for HDOT construction, engineering and concessions work may have been depressed. Compared with what they might be but for the effects of past discrimination, the availability benchmark for minority- and women-owned firms might be lower and the overall DBE goal might be lower when only considering current availability.

Figure 7-2. Use of regression analyses of business ownership in defense of the Federal DBE Program

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

D. Access to Capital

Access to capital represents one of the key factors that researchers have examined when studying business formation and success. Capital is required to start companies, so barriers accessing capital can affect the number of minorities and women who are able to start businesses. If race- or gender-based discrimination exists in capital markets, minorities and women may have difficulty acquiring the capital necessary to start or expand a business.

There is evidence that minorities and women face certain disadvantages in accessing the capital necessary to start, operate and expand businesses. In addition, minorities and women start business with less capital (based on national data). A number of studies have demonstrated that lower start-up capital adversely affects prospects for those businesses.

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

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

To examine the role of race/ethnicity and gender in capital markets, the study team analyzed data collected by the 2015 Annual Survey of Entrepreneurs (ASE) conducted by the U.S. Census Bureau, and reviewed analyses done using the Federal Reserve Board's Survey of Small Business Finances (SSBF). The ASE provides economic and demographic data of all businesses with employees with receipts of \$1,000 or more by ethnicity, race and gender. The SSBF, most recently conducted in 2003, contains information on loan denial and interest rates as well as anecdotal information from businesses with fewer than 500 employees. Data from the SSBF are only available at the regional level, not for individual states and have not been updated since that year.

Business loan approval rates. Analysis of SSBF data relating to business loan approval rates in the Pacific region in 2003 found:

- Twice as many minority- and women-owned small businesses were denied loans than white male-owned small businesses.
- There were statistically significant disparities in loan approval rates for African American-owned small businesses compared with similarly situated white-owned firms.⁶

⁶ NERA Economic Consulting. *The State of Minority- and Women-Owned Business Enterprise: Evidence from Hawai'i*. Report. October 18, 2010.

Similarly, 2015 data from the ASE indicate that white-owned employer businesses were more likely than minority-owned employer businesses to secure business loans from a bank or financial institution. Further analysis of ASE data show that white-owned employer businesses were less likely to report that access to financial capital negatively impacted the profitability of their business, when compared with minority-owned firms.

Applying for loans. Fear of loan denial can be a barrier to business credit in the same way that actual loan denial presents a barrier. Both the SSBF and the ASE include questions that gauge whether a business owner did not apply for a loan due to fear of loan denial.

Results from the SSBF indicate that, among small business owners who reported needing business loans, minority and female business owners in the Pacific region were substantially more likely than non-Hispanic white men to report that they did not apply due to fear of denial.⁷ Similarly, ASE data indicate that minority-owned employer businesses were more likely than white-owned businesses to avoid additional financing due to fear of non-approval by the lender.

Loan values and interest rates. Analysis of 2003 SSBF data on the average business loan values and interest rates paid by small businesses that received loans indicated:

- The mean value of approved loans for minority- and female-owned businesses in the Pacific region was substantially lower than for non-Hispanic white male-owned firms.
- There is some evidence that minority- and women-owned small businesses in the Pacific region paid higher interest rates on their business loans than white male-owned small businesses (however, the difference was not statistically significant). Such a disparity in interest rates is consistent with national data.

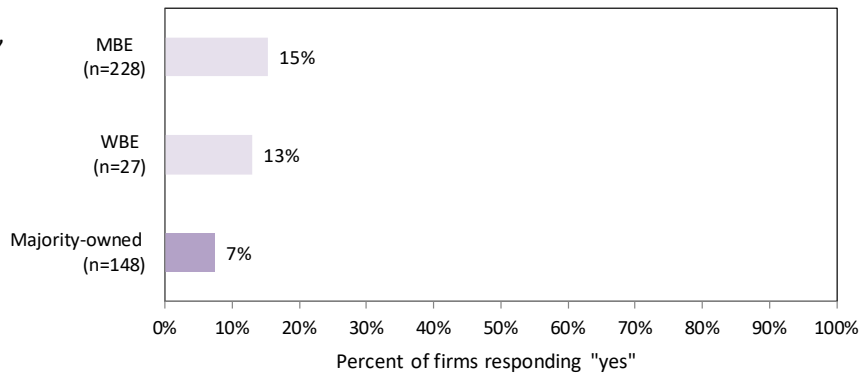
Experiences of MBEs, WBEs and majority-owned businesses in the Hawaii study industries. As part of availability surveys, the study team conducted in 2018, Keen Independent asked several questions related to potential barriers or difficulties in the local marketplace. The interviewer introduced these questions with the following: “Finally, we’re interested in whether your company has experienced barriers or difficulties associated with starting or expanding a business in your industry or with obtaining work. Think about your experiences within the past seven years as you answer these questions.”

The first question was, “Has your company experienced any difficulties in obtaining lines of credit or loans?” Minority- and women-owned firms were twice as likely as majority-owned firms to report that they had such difficulties. As shown in Figure 7-3 on the following page, 15 percent of MBEs and 13 percent of WBEs reported difficulties obtaining lines of credit or loans, compared with 7 percent for majority-owned firms.

These results appear to be consistent with the other data summarized in this chapter concerning greater difficulties concerning access to financing for minority- and women-owned firms.

⁷ *Ibid.*

Figure 7-3.
Percent responding “yes”
to, “Has your company
experienced any
difficulties in obtaining
lines of credit or loans?”
for MBEs, WBEs and
majority-owned firms in
all study industries



Source:
2018 Availability Interviews.

Quantitative information about homeownership and mortgage lending. Wealth created through homeownership can be an important source of funds to start or expand a business. Barriers to homeownership or home equity can affect business opportunities by limiting the availability of funds for new or expanding businesses. Home equity is especially important in Hawaii, which by many measures has had the highest average home prices of any state in the country.

Keen Independent analyzed 2012–2016 ACS data to determine if there were any differences in homeownership in Hawaii by racial and ethnic groups. The study team examined the potential impact of race and ethnicity on mortgage lending in Hawaii based on Home Mortgage Disclosure Act (HMDA) data for 2007,⁸ 2012 and 2017. Results from examination of these two data sources were as follows.

- **Homeownership rates.** Fewer African Americans; Hispanic Americans; and American Indians, Alaska Natives and other minorities in Hawaii owned homes compared with non-Hispanic whites, Asian Pacific Americans and Native Hawaiians.

African Americans; Hispanic Americans; and American Indians, Alaska Natives and other minorities who owned homes had lower median home values when compared with non-Hispanic whites, Asian Pacific Americans and Native Hawaiians.

- **Mortgage lending.** In 2012, high-income African Americans, Hispanic Americans and Native Hawaiian and other Pacific Islanders applying for home mortgages in Hawaii were more likely than high-income non-Hispanic whites to have their applications denied.

There is also evidence of past predatory mortgage lending through subprime loans that targeted African Americans, Native Americans, and Native Hawaiians and other Pacific Islanders in Hawaii.

⁸ Information regarding loan rates are not reported for all HMDA data. Instead, loan rates that meet certain criteria must be reported and are then included in the HMDA data. In 2008, the FFIEC adjusted the requirements outlining which HMDA data were required to report loan rates. The result of this change was that fewer loan rate data had to be reported. As such, Keen Independent’s analysis regarding loan rates utilized more complete HMDA data from 2007. (See Appendix I for more information about data sources.)

In conclusion, there is substantial quantitative evidence of disparities in homeownership and home mortgage lending for certain racial and ethnic minority groups in Hawaii. Any past discrimination against minority groups that affected the ability to purchase and stay in homes could have long-term impacts on the home equity available to start and expand businesses, the ability of minority business owners to access business credit, and access to bonding for construction business owners.

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

Business financing. Many firm owners reported that obtaining financing was important in establishing and growing their businesses (including financing for working capital and for equipment) and surviving poor market conditions.

- Small business owners and others indicated that access to financing was a major barrier, specifically when starting and first growing. Many also reported that obtaining financing continues to be a barrier for small businesses today. For example, a Filipino American co-owner of a DBE construction firm commented that obtaining a loan as a small company is “like pulling teeth.”
- Several representatives of business assistance organizations reported that access to capital is “a major challenge.” One interviewee commented, “It can be challenging to get money from the bank if you are just starting your business.” Another said that financing “is usually the greatest challenge” for small businesses.
- Some interviewees, including DBEs, reported that slow payment on contracts and subcontracts led to an increased need for business capital and financing. A representative of a business assistance association noted that slow payments affect small businesses the most because they are rarely able to cover the cost of unpaid work.

Some interviewees reported that it was more difficult for small businesses to obtain financing, but that barriers for minority- and women-owned small businesses were no different from other small businesses.

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

In order to obtain a bond, businesses must provide company history and evidence of financial strength to a bonding company. The bonding company uses this information to determine whether to issue a bond of a particular size. Consequently, any reduced access to capital may negatively impact the ability to obtain a bond. Bonding companies also use different ratios to calculate bonding capacity and they charge different rates based on a number of factors, which can affect the cost-competitiveness of a firm’s bids.

According to business owners and other individuals interviewed:

- Small businesses generally lack ability to bond larger jobs in the construction industry.
- Obtaining bonding and meeting bonding requirements are challenges for small businesses, especially at business start-up. For example, a Chinese American owner of a construction firm noted that his firm was limited to subcontract work due to low bonding capacity.

Effects of access to capital on the transportation contracting industry. Potential barriers associated with access to capital may affect business outcomes for DBEs.

- Well-capitalized businesses are, in general, more successful than other businesses.
- For HDOT and other public sector construction contracts, bonding is required to bid as a prime contractor. Interviewees report that these requirements affect subcontractors as well. Insurance also affects engineering-related prime consultants and subconsultants.
- A company must also have considerable working capital to complete an HDOT contract or subcontract, especially if there are delays in payment on that contract (which some businesses experience, according to the in-depth interviews).
- Obtaining business financing and bonding is more of a barrier to small businesses than large businesses. The effect of such barriers is to make it less likely that a small firm can expand or successfully pursue public sector work.
- To obtain bonding, a company must have financial strength. Any barriers to accessing capital can affect a company's ability to obtain a bond of a certain size.
- Personal net worth and financial history can affect access to business loans and bonding in Hawaii.

E. Success of Businesses

Keen Independent completed quantitative and qualitative analyses that assessed whether the success of MBE/WBEs differs from that of majority-owned businesses in the Hawaii transportation contracting industry. The study team examined business success in terms of participation in the public and private sector; relative bid capacity; business closure, expansion, and contraction; and business receipts and earnings. Appendix H provides details about these quantitative analyses of success of businesses. Keen Independent also collected and analyzed information from interviews with business owners and managers and others knowledgeable about the local contracting industry.

Quantitative analysis of business receipts and earnings. Keen Independent examined business earnings data for Hawaii construction and engineering-related industries from the U.S. Census Bureau, the Survey of Business Owners and the 2018 availability surveys conducted with Hawaii businesses.

- Many data sources indicated that minority- and women-owned firms had lower revenue than majority-owned firms. However, there were no major differences in revenue for MBE/WBE and majority-owned construction businesses in Hawaii in the availability survey.
- One data set the study team examined included personal characteristics of the business owner. Regression analyses using these data indicated that female business owners in the concessions industry had lower earnings than male owners after controlling for other factors.

Quantitative analysis of telephone survey results concerning potential barriers.

Keen Independent’s availability interviews with Hawaii businesses included questions about whether firms had experienced barriers or difficulties associated with starting or expanding a business. The availability interviews suggest that relatively more minority- and women-owned firms experience difficulties across a broad set of aspects of operating a business within the Hawaii transportation contracting industry.

Answers to questions concerning marketplace barriers in the availability survey indicated the relatively more MBE/WBEs than majority-owned firms in both the construction and engineering industries face the following barriers:

- Obtaining loans and lines of credit;
- Being prequalified for work (among engineering firms);
- Insurance requirements;
- Large project sizes;
- Learning about bid opportunities in the private sector as well as subcontracting opportunities; and
- Receiving payment from prime contractors and other customers.

Qualitative information about success of businesses in the Hawaii marketplace.

Keen Independent also collected qualitative information about success of businesses in the Hawaii transportation contracting industry through in-depth personal interviews, availability surveys, public meetings and other avenues.

Fluid employment size and types of work. Interviewees indicated that firms in the transportation contracting industry must continuously adapt their operations in response to market conditions. This flexibility includes the size of a company's permanent and temporary workforce, owned and leased equipment, the types of work they pursue and the islands on which they work.

- A number of interviewees indicated that they have changed the types of work they perform to meet market demand. For example, an owner of a DBE construction firm said that on her island "you can't just do concrete and that's it." She said that her firm adapts "based on the demand."
- Some firms indicated that increased bonding capacity allowed them to bid as a prime contractor in the public sector.

A few business owners described the construction industry as "cyclical." One owner commented, "Every seven to 10 years it goes up and down You need to survive that." He said that to survive the cyclical nature of the industry one must diversify their businesses. "Sometimes it's really slow and you go back to your bread and butter," noted another owner of a DBE construction firm.

Importance of business relationships. Existing relationships with customers and other contractors are important factors in finding opportunities to bid on work, according to most interviewees. One interviewee commented on "the ohana approach." He said that in addition to good business acumen, the "ability to support others" is important. Many commented on the importance of reputation and word-of-mouth recommendations. An owner of a DBE firm commented that strong relationships come naturally when providing quality service.

- One owner of a DBE firm said that a positive past experience with a firm is "definitely taken into consideration" when his company awards subcontracts. Another DBE firm reported that they have worked with the same general contractor for several decades.
- Prime contractors also take price into consideration when selecting a subcontractor. A representative of a business assistance organization stated that large construction firms work with smaller companies "if the price is right."
- Another interviewee said that prime contractors call the same subcontractors "over and over" due to established relationships and trust.

Most interviewees indicated positive perceptions of their firms' business relationships with other contractors. For example, one DBE firm owner reported that his firm's main prime contractor has always treated him well. Another interviewee stated, "We have really good relationships with most of our general contractors."

One interviewee commented that large construction firms like to work with smaller companies "if the price is right" and if HDOT "sets standards to use DBEs." A few interviewees had negative perceptions of contractor-subcontractor relationships. For example, a Native American female representative of a business assistance association indicated that untimely payment by primes is a common issue in contractor-subcontractor relationships.

Many interviewees reported the presence of “good ol’ boy” networks in Hawaii that affect the highway construction and engineering industries. Another noted that difficulties in the marketplace are not brought on by being a minority or women, but by “good ol’ boy” networks. Other insights include:

- A Japanese American female representative of a small business assistance organization reported that “the culture is different in Hawaii than it is on the mainland.” She added, “The major one is that the majority is minority here.”

Another representative of a business assistance organization reported of two “good ol’ boy” networks in Hawaii. He stated that one consists of those born on the islands while the other consists of non-locals.

- The Filipino American male co-owner of a DBE/WBE-certified construction firm reported that “good ol’ boy” networks discourage him from attempting to bid on certain projects.
- An African American male owner of a DBE firm said that while he doesn’t know if there is a “good ol’ boy” network in Hawaii, some industries have “just a few people that keep winning all the contracts.” He went on to comment, “How do they keep winning?”

Disadvantages for small businesses. Many business owners discussed financial challenges at business start-up and beyond. One DBE firm owner reported that her firm has faced challenges with “having enough money for finances [and] having customers that pay.”

- Small businesses including DBEs said that they faced issues with timely payment from prime contractors and public agencies, including HDOT. One interviewee commented that slow payment by HDOT “prevents [small firms] from wanting to do more work.”
- Access to financing can be affected by business size. Several firms reported difficulty when trying to secure bonding. For example, a construction firm owner said that much of her firm’s work requires bonding. She commented, “That was one of the biggest hurdles in the beginning, as a small company.”

In addition, many owners and managers of small businesses reported that finding or retaining qualified employees at business start-up was a challenge. A few commented that Hawaii’s low unemployment is a contributing factor. One DBE concessionaire reported that finding good employees is difficult at first. He indicated that there is a catch-22, saying, “A lot of people don’t want to get on board with a company until there’s a significant amount of payroll.”

Hawaii public agency contracting processes and requirements often put small businesses at a disadvantage when competing for public sector work. There was qualitative evidence that:

- It is more difficult for smaller firms to market, identify and pursue public contract opportunities. One interviewee described HDOT contracts as “not very well publicized.”
- Small construction businesses seeking prime contracting and subcontracting work face barriers due to public sector bonding requirements. An interviewee commented that, as a small business, bonding requirements were “one of the biggest hurdles in the beginning.”
- Excessive paperwork associated with public sector contracts is a burden for small businesses. Several interviewees described the paperwork as “redundant” and “heavy.”
- Large size and scope of public sector contracts and subcontracts limit the pool of small businesses able to bid. The Chinese American owner of a construction firm reported that some HDOT projects require a commitment of 12 months or longer. He commented that the logistics of working on these projects can be a “headache.”

Some interviewees indicated that women-owned firms might not have the same opportunities for growth or success as those owned by men.

Other comments about barriers include the following:

- Public agency screening of potential contractors and engineering firms through prequalification can be a barrier to working with public agencies according to interviewees. For example, one business representative reported that prequalification with HDOT requires past experience. He added that their prequalification requirements are “really narrow,” limiting the pool of contractors that do qualify.
- Slow payment or non-payment by owners or by prime contractors can be especially damaging to small businesses and represent a barrier to performing that work. Some interviewees reported that they do not have sufficient capital to wait to be paid when working on large contracts. One interviewee said that untimely payments affect his firm’s cash flow and their ability to make payments of their own. Another reported that late payments affect small firms the most because they’re rarely able to cover the cost for unpaid work.
- An owner of a professional services firm described public agencies’ payment processes as “bureaucratic.” Regarding untimely payment, another interviewee commented that funds for state work “just trickles on down.” She indicated that “everyone” is aware of the slow payment issue.

Evidence of stereotyping and other race and gender discrimination. In the in-depth interviews, availability surveys and other information the study team analyzed as part of the study, some interviewees indicated difficulties for businesses owned by minorities and women other than those associated with being a small business in general. For example, one owner of a DBE firm said both minorities and women have “historically ... been disenfranchised” in certain industries. Another business owner stated that he “can see why it’s a tough field for women.” He added that a lot of women tend to “drop out” of the industry and commented, “I don’t know how you overcome [it].” Another interviewee reported that there are biases against Native Hawaiians in the marketplace. He commented that Native Hawaiians are often excluded from “the table.”

Others, however, reported no knowledge of unfair treatment of firms owned by minorities or women. For example, one business owner, when asked if she experienced any barriers or unfair treatment as a minority or woman, stated, “No, I think if anything it’s just [being] a small business.” Another business owner described Hawaii as “a rare market” regarding its diverse nature. She added, “We don’t view different races like people on the mainland would.” Similarly, a Hispanic American male owner of a DBE professional services firm commented that in comparison to his former state, Hawaii is “much more inclusive” because of the “many different cultures ... working together.”

Challenges unique to Hawaii. Business owners and others reported on difficulties and challenges they face that are unique to the Hawaiian Islands.

- The Native Hawaiian female representative of a business assistance association reported that Hawaii Island does not have the same broadband capabilities as “Oahu or on the mainland.” She added, “Sometimes the lack of [internet] access can create a hardship for our companies.”
- The non-Hispanic white female owner of a DBE construction-related firm indicated that companies in Hawaii have a limited capacity for growth. She stated, “If my firm wasn’t in Hawaii and if it was elsewhere in the mainland, it wouldn’t be a 10 [person firm], it would be [an] over 100 [person] firm.”

Appendix J provides views from business owners and managers, trade association representatives and others who are knowledgeable about the Hawaii transportation contracting industry.

F. Summary

Hawaii is demographically unique compared with any other state in the country. The predominant cultural group is Asian Pacific Americans, Native Hawaiians and Pacific Islanders. Only 12 percent of the workforce is white men.

Even so, businesses owned by whites comprise a disproportionately large share of construction and engineering businesses, just one indicator that there is not a level playing field for people of color in these industries in Hawaii. But for racial and gender disparities in the rates of business ownership in Hawaii, substantially more of the firms in the transportation contracting industry would be minority- and women-owned companies.

Some of the data sources examined in the study indicated that businesses owned by people of color and women in Hawaii have lower revenue than companies owned by whites or men.

Data about marketplace barriers collected in the availability survey indicate that relatively more minority- and women-owned firms in the construction, engineering and concessions industries experience difficulties with certain barriers compared with majority-owned firms, including obtaining loans and lines of credit. These results suggest that relatively more minority- and women-owned firms are at a competitive disadvantage when competing for work or concessions opportunities in the Hawaii transportation industry.

CHAPTER 8.

Overall Annual DBE Goal and Projections for FHWA-Funded Contracts

As discussed in previous chapters, HDOT is required to set an overall annual goal for DBE participation in its FHWA-funded transportation contracts. Federal regulations govern how these goals are determined. Agencies such as HDOT must determine “the level of DBE participation you would expect absent the effects of discrimination.”¹ Goals are set for three-year periods.

The Final Rule effective February 28, 2011 revised requirements for goal-setting so that agencies that implement the Federal DBE Program only need to develop and submit overall annual DBE goals every three years. HDOT had an overall annual goal of 29.05 percent for FHWA-funded contracts for FFY 2017–FFY 2019 and proposed a new overall goal of 25.60 percent DBE goal for FFYs 2020 through 2022 for FHWA-funded contracts. HDOT will submit a revised goal for federal fiscal years 2020 through 2022 based on this disparity study.

HDOT will also submit a revised Goal and Methodology document to FHWA that presents its revised overall annual DBE goal for the next three fiscal years, supported by information about the steps used to develop the overall goal. Chapter 8 provides information for HDOT to consider when establishing this goal and projecting how much of the goal it expects to meet through race-neutral measures.

Chapter 8 is organized in four parts based on the process that 49 CFR Part 26.45 outlines for setting overall goals and projecting the portion to be met through neutral means:

- A. Establishing a base figure;
- B. Consideration of a step 2 adjustment;
- C. Projecting the portion of the overall DBE goal for FHWA-funded contracts to be met through neutral means; and
- D. Summary.

¹ 49 CFR Section 26.45(b).

A. Establishing a Base Figure

Establishing a base figure is the first step in calculating overall annual goals for DBE participation in HDOT's FHWA-funded transportation contracts.

As presented in Chapter 4, one might expect current and potential DBEs to receive 17.26 percent of HDOT FHWA-funded transportation contract dollars based on analysis of FHWA-funded contracts from July 2011 through June 2016 and current availability of firms to perform that work.²

HDOT might consider 17.26 percent as the base figure for its overall annual DBE goal if it anticipates that the types of FHWA-funded contracts that will be awarded in federal fiscal years 2020 through 2022 are, on balance, reasonably similar to the types of FHWA-funded contracts awarded during the July 2011 through June 2016 study period.

Chapter 4 explains the availability analysis that developed the base figure.

As point of reference, Keen Independent also calculated the base figure only counting currently certified DBEs. The base figure including only current DBEs is 7.85 percent.

B. Consideration of a Step 2 Adjustment

Per the Federal DBE Program, HDOT must consider potential step 2 adjustments to the base figure as part of determining its overall annual DBE goal for FHWA-funded contracts. HDOT must explain its consideration of possible step 2 adjustments in its Goal and Methodology document.

The Federal DBE Program outlines factors that an agency must consider when assessing whether to make any step 2 adjustments to its base figure:

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

Keen Independent completed an analysis of each of the above step 2 factors and was able to quantify the effect of certain factors on the base figure. Other information examined was not as easily quantifiable but is still relevant to HDOT as it determines whether to make any step 2 adjustments.

² As discussed in Chapter 4, potential DBEs include current DBEs and those MBE/WBEs that are DBE-certified or appear that they could be based on annual revenue limits described in 49 CFR Part 26.

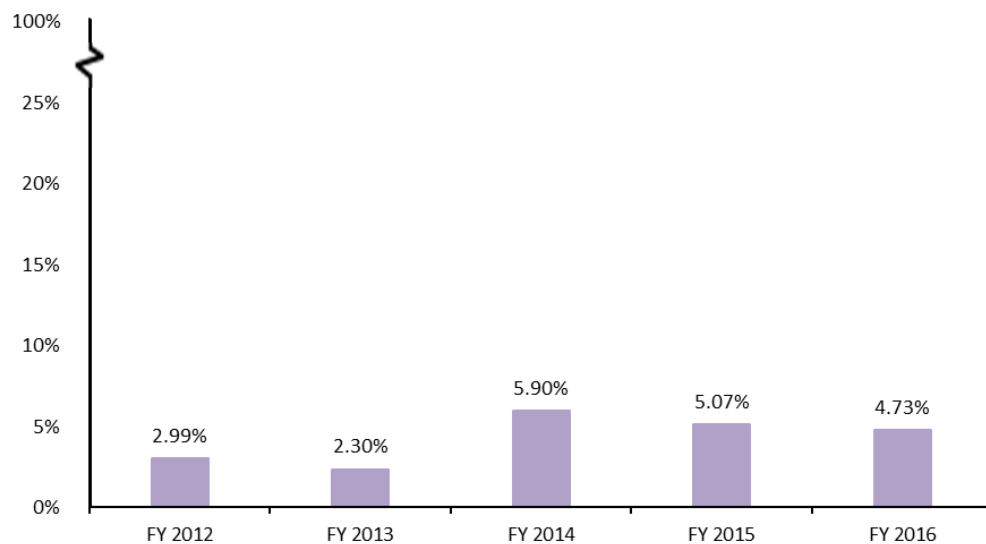
³ 49 CFR Section 26.45.

1. Current capacity of DBEs to perform work, as measured by the volume of work DBEs have performed in recent years. USDOT’s “Tips for Goal-Setting” suggests that agencies should examine data on past DBE participation on their USDOT-funded contracts in recent years (i.e., the percentage of contract dollars going to DBEs).

DBE participation based on HDOT Uniform Reports to FHWA. Based on commitments/awards data from HDOT Uniform Reports of DBE Awards or Commitments and Payments reported to FHWA, the median DBE participation from FFY 2013–FFY 2018 is 6.11 percent. This value suggests a possible downward step 2 adjustment based on this factor.

DBE participation based on Keen Independent utilization analysis for FHWA-funded contracts. Keen Independent’s analysis identified a median DBE participation of 4.73 percent⁴ on FHWA-funded contracts from FY 2012 through FY 2016 (as shown in Figure 8-1).

Figure 8-1.
DBE participation on FHWA-funded contracts based on
Keen Independent analysis, fiscal years 2012 through 2016



Source: Keen Independent based on FHWA-funded contracts for July 2011 through June 2016.

The median for the five fiscal years, 4.73 percent, indicates that HDOT might make a larger downward step 2 adjustment based on past DBE participation, as explained later in this chapter.

⁴ 4.73 percent is the halfway point between the five values for annual DBE participation.

2. Information related to employment, self-employment, education, training and unions.

Chapter 7 summarizes information about conditions in the Hawaii transportation contracting industry for minorities, women and MBE/WBEs. Detailed quantitative analyses of marketplace conditions in Hawaii are presented in Appendices E through H. Keen Independent's analyses indicate there are barriers that certain minority groups and women face related to entry and advancement in the Hawaii construction and engineering industries. Such barriers may affect the availability of MBE/WBEs to obtain and perform HDOT transportation contracts. There are also barriers to business ownership for those working in these industries.

It may not be possible to quantify all the cumulative effects that barriers may have had in depressing the availability of minority- and women-owned firms in the Hawaii transportation contracting industry, however, the effects of barriers in business ownership can be quantified, as explained below.

The study team used regression analyses to investigate whether race, ethnicity and gender affected rates of business ownership among workers in the Hawaii construction and engineering industries. The regression analyses allowed the study team to examine those effects while statistically controlling for various personal characteristics including education and age (Appendix F provides detailed results of the business ownership regression analyses).⁵

- Those analyses revealed that that Asian Pacific/Native Hawaiian and other minority groups were less likely than nonminorities to own construction businesses and that white women were less likely than white men to own construction firms, even after accounting for various race- and gender-neutral personal characteristics. Each of these disparities was statistically significant.
- In addition, there was a substantial, statistically significant disparity in firm ownership for Asian Pacific Americans and Native Hawaiians working in the Hawaii architecture and engineering industry.

Keen Independent analyzed the impact that barriers in business ownership would have on the base figure if Asian Pacific Americans and Native Hawaiians, and white women owned businesses at the same rate as similarly situated nonminorities and white men, respectively. This type of inquiry is sometimes referred to as a “but for” analysis because it estimates the availability of MBE/WBEs *but for* the effects of race- and gender-based discrimination.

Figure 8-2 calculates the impact on overall MBE/WBE availability, resulting in a possible upward adjustment of the base figure to 31.46 percent. The analysis included the same contracts that the study team analyzed to determine the base figure (i.e., FHWA-funded construction and engineering prime contracts and subcontracts that HDOT awarded from July 2011 through June 2016). Calculations are explained below.

⁵ The study team examined U.S. Census data on business ownership rates using methods similar to analyses examined in court cases involving state departments of transportation in California, Illinois and Minnesota.

Figure 8-2.

Potential step 2 adjustment considering disparities in the rates of business ownership

Current and potential DBEs	a. Current availability	b. Disparity index for business ownership	c. Availability after initial adjustment*	d. Availability after scaling to 100%	e. Components of overall DBE availability**
Construction					
Asian Pacific American, Native Hawaiian or Pacific Islander	5.34 %	30	17.80 %	15.06 %	
Other minorities	5.28	65	8.12	6.87	
White women	<u>1.30</u>	31	<u>4.19</u>	<u>3.55</u>	
Minorities and women	11.92 %	n/a	30.12 %	25.48 %	22.53 %
All other businesses	<u>88.08</u>	n/a	<u>88.08</u>	<u>74.52</u>	
Total firms	100.00 %	n/a	118.20 %	100.00 %	
Engineering and other subindustries					
Asian Pacific American, Native Hawaiian or Pacific Islander	51.12 %	38	134.53 %	73.35 %	
Other minorities	6.41	n/a	6.41	3.49	
White women	<u>0.42</u>	n/a	<u>0.42</u>	<u>0.23</u>	
Minorities and women	57.95 %	n/a	141.36 %	77.07 %	8.94 %
All other businesses	<u>42.05</u>	n/a	<u>42.05</u>	<u>22.93</u>	
Total firms	100.00 %	n/a	183.41 %	100.00 %	
Total for current and potential DBEs	17.26 %	n/a	n/a		31.46 %
Difference from base figure					14.21 %

Note: Numbers may not add to 100.00% due to rounding.

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

** Components of goal calculated as value after adjustment and scaling to 100% multiplied by percentage of total FHWA-funded contract dollars in that category (construction = 88.4%, engineering = 11.6%).

Source: Keen Independent based on FHWA-funded contracts for July 2011 through June 2016 and statistical analysis of U.S. Census Bureau American Community Survey data for Hawaii for 2012–2016.

The study team completed these “but for” analyses separately for construction and engineering contracts and then weighted the results based on the proportion of FHWA-funded contract dollars that HDOT awarded for construction and engineering for July 2011 through June 2016 (i.e., an 88.4% weight for construction and 11.6% weight for engineering). The rows and columns of Figure 8-2 present the following information from Keen Independent’s “but for” analyses:

- a. **Current availability.** Column (a) presents the current availability of MBE/WBEs by group for construction and for engineering and other subindustries. Each row presents the percentage availability for MBEs and WBEs. The current combined availability of MBE/WBEs for HDOT FHWA-funded transportation contracts for July 2011 through June 2016 is 17.26 percent, as shown in the bottom row of column (a).

- b. **Disparity indices for business ownership.** As presented in Appendix F, Asian Pacific Americans, Native Hawaiians and white women were significantly less likely to own construction firms than similarly situated nonminorities and white men, respectively. Keen Independent calculated simulated business ownership rates if those groups owned businesses at the same rate as nonminorities and white males who share similar personal characteristics. The study team then calculated a business ownership disparity index for each group by dividing the observed business ownership rate by the benchmark business ownership rate and then multiplying the result by 100.

Column (b) of Figure 8-2 presents disparity indices related to business ownership for the different racial/ethnic and gender groups. For example, as shown in column (b), Asian Pacific Americans, Native Hawaiians and Pacific Islanders own construction businesses at 30 percent of the rate that would be expected based on the simulated business ownership rates of white males who share similar personal characteristics. Appendix F explains how the study team calculated the disparity indices.

- c. **Availability after initial adjustment.** Column (c) presents availability estimates for MBEs and WBEs by industry after initially adjusting for statistically significant disparities in business ownership rates. The study team calculated those estimates by dividing the current availability in column (a) by the disparity index for business ownership in column (b) and then multiplying by 100.
- d. **Availability after scaling to 100%.** Column (d) shows adjusted availability estimates that were re-scaled so that the sum of the availability estimates equals 100 percent for each industry. The study team re-scaled the adjusted availability estimates by taking each group's adjusted availability estimate in column (c) and dividing it by the sum of availability estimates shown under "Total firms" in column (c) — and multiplying by 100. For example, the re-scaled availability estimate for Asian Pacific Americans, Native Hawaiians or Pacific Islanders shown for construction was calculated in the following way: $(17.80\% \div 118.20\%) \times 100 = 15.06\%$.
- e. **Components of overall DBE goal with upward adjustment.** Column (e) of Figure 8-2 shows the component of the total base figure attributed to the adjusted MBE and WBE availability for construction versus engineering and other subindustries. The study team calculated each component by taking the total availability estimate shown in column (d) for construction and for engineering/other — and multiplying it by the proportion of total FHWA-funded contract dollars in each industry (i.e., 88.4% for construction and 11.6% for engineering). For example, the study team used the 25.48 percent shown for MBE/WBE availability for construction firms in column (d) and multiplied it by 88.4 percent for a result of 22.53 percent. A similar weighting of MBE/WBE availability for engineering/other produced a value of 8.94 percent.

The values in column (e) were then summed to equal the overall base figure adjusted for barriers in business ownership, which is 31.46 percent as shown in the bottom of column (e).

Finally, Keen Independent calculated the difference between the “but for” MBE/WBE availability (31.46%) and the current availability (17.26%) to calculate the potential upward adjustment. This difference, and potential upward adjustment, is 14.21 percentage points (31.46% - 17.26% = 14.21%).

3. Any disparities in the ability of DBEs to get financing, bonding and insurance. Analysis of access to financing and bonding revealed quantitative and qualitative evidence of disadvantages for minorities, women and MBE/WBEs.

- Any barriers to obtaining financing and bonding might affect opportunities for minorities and women to successfully form and operate construction and engineering businesses in the Hawaii marketplace.
- If MBE/WBEs face barriers in obtaining financing and bonding, it would also place those businesses at a disadvantage in obtaining and performing HDOT construction and engineering prime contracts and subcontracts.

Note that financing and bonding are closely linked, as discussed in Chapter 7 and Appendix J.

There is also evidence that some firms cannot bid on certain public sector projects because they cannot afford the levels of insurance required by the agency.

The information about financing, bonding and insurance supports an upward step 2 adjustment in HDOT’s overall annual goal for DBE participation in FHWA-funded contracts.

4. Other factors. The Federal DBE Program suggests that federal aid recipients also examine “other factors” when determining whether to make any step 2 adjustments to their base figure.⁶

Among the “other factors” examined in this study was the success of MBE/WBEs relative to majority-owned businesses in the Hawaii marketplace. There is quantitative evidence that certain groups of MBE/WBEs are less successful than majority-owned firms, and face greater barriers in the marketplace, even after considering neutral factors. Chapter 7 summarizes that evidence and Appendix H presents supporting quantitative analyses.

There is also qualitative evidence of barriers to the success of minority- and women-owned businesses, as summarized in Appendix J. Some of this qualitative information suggests that discrimination on the basis of race, ethnicity and gender affects minority- and women-owned firms in the Hawaii transportation contracting industry.

There is no straightforward way to project the number of MBE/WBEs available for HDOT work but for the effects of these other factors.

Approaches for making step 2 adjustments. Quantification of potential downward or upward step 2 adjustments is summarized below.

⁶ 49 CFR Section 26.45.

1. Current capacity of DBEs to perform work, as measured by the volume of work DBEs have performed in recent years. Analysis of this factor might indicate a downward step 2 adjustment if HDOT analyzed its estimates of past DBE participation from FY 2012 through FY 2016. Based on Keen Independent’s analysis, the median DBE participation on FHWA-funded contracts was 4.73 percent for fiscal years 2012–2016.

USDOT “Tips for Goal-Setting” suggests taking one-half of the difference between the base figure and evidence of current capacity as one approach to calculate the step 2 adjustment for that factor.

The difference between the 17.26 percent base figure (calculated in Chapter 4) and 4.73 percent DBE participation is 12.53 percentage points (17.26% - 4.73% = 12.53%). One-half of this difference is a downward adjustment of 6.27 percentage points (12.53% ÷ 2 = 6.27%). The goal would then be calculated as follows: 17.26% - 6.27% = 11.00%. (These calculations are presented in Figure 8-3.)

2. Information related to employment, self-employment, education, training and unions. The study team was not able to quantify all of the information regarding barriers to entry for MBE/WBEs. Quantification of the business ownership factor indicates an upward step 2 adjustment of 14.21 percentage points to reflect the “but-for” analyses of business ownership rates presented in Figure 8-2. If HDOT made this adjustment, the overall DBE goal for FHWA-funded contracts would be 31.47 percent (17.26% + 14.21% = 31.47%). Figure 8-3 shows these calculations.

Figure 8-3.

Potential step 2 adjustments for HDOT’s overall DBE goal for FHWA-funded contracts, FFY 2020–FFY 2022

Step 2 adjustment component	Value	Explanation
Lower range of overall DBE goal		
Base figure	17.26 %	From base figure analysis
Evidence of current capacity	- 4.73	Past DBE participation (Keen Independent)
Difference	12.53 %	
	÷ 2	Reduce by one-half
Adjustment	6.27 %	Downward adjustment for current capacity
Base figure	17.26 %	From base figure analysis
Adjustment for current capacity	- 6.27	Downward step 2 adjustment
Overall DBE goal	11.00 %	Lower range of DBE goal
Upper range of overall DBE goal		
Base figure	17.26 %	From base figure analysis
Adjustment for "but for" factors	+ 14.21	"But for" step 2 adjustment for business ownership
Overall DBE goal	31.47 %	Upper range of DBE goal

Note: Numbers may not add due to rounding.

Source: Keen Independent analysis.

3. Any disparities in the ability of DBEs to get financing, bonding and insurance. Analysis of financing, bonding and insurance indicates that an upward adjustment is appropriate. However, impact of these factors on availability could not be quantified.

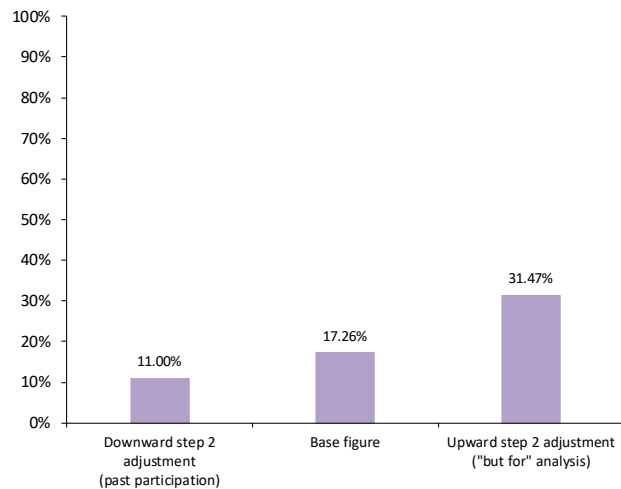
4. Other factors. Impact of the many barriers to success of MBE/WBEs in Hawaii could not be specifically quantified. However, the evidence supports an upward adjustment.

Summary. HDOT will need to consider whether to make a downward, upward or no step 2 adjustment when determining its overall DBE goal. If HDOT makes a downward step 2 adjustment reflecting current capacity to perform work, its overall DBE goal for FHWA-funded contracts would be 11.00 percent. If HDOT decides to not make a downward adjustment and instead makes an upward adjustment that reflects analyses of business ownership rates, its overall DBE goal would be 31.47 percent. Figure 8-3 summarizes this information.

HDOT will need to consider whether to make a downward, upward or no step 2 adjustment when determining its overall DBE goal. Figure 8-4 summarizes the potential adjustments described in this chapter.

Figure 8-4.
Potential step 2 adjustments to overall DBE goal for FHWA-funded contracts

Source:
Keen Independent analysis.



C. Portion of DBE Goal for FHWA-Funded Contracts to be Met through Neutral Means

The Federal DBE Program requires state and local transportation agencies to meet the maximum feasible portion of their overall DBE goals using race- and gender-neutral measures.⁷ Race- and gender-neutral measures are initiatives that encourage the participation of all businesses, or all small businesses, and are not specifically limited to MBE/WBEs or DBEs.

Agencies must determine whether they can meet their overall DBE goals solely through neutral means or whether race- and gender-conscious measures — such as DBE contract goals — are also needed. As part of doing so, agencies must project the portion of their overall DBE goals that they expect to meet (a) through race- and gender-neutral means, and (b) through race- and gender-conscious programs (if any).

⁷ 49 CFR Section 26.51.

- If an agency determines that it can meet its overall DBE goal solely through race- and gender-neutral means, then it would propose only using neutral measures as part of its program. The agency would project that 100 percent of its overall DBE goal would be met through neutral means and that 0 percent would be met through race- and gender-conscious means.
- If an agency determines that a combination of race- and gender-neutral, and race- and gender-conscious measures are needed to meet its overall DBE goal, then the agency would propose using a combination of neutral and conscious measures as part of its program. The agency would project that some percent of its overall DBE goal would be met through neutral means and that the remainder would be met through race- and gender-conscious means.

USDOT offers guidance concerning how transportation agencies should project the portions of their overall DBE goals that will be met through race- and gender-neutral, and race- and gender-conscious measures, including the following:

- USDOT Questions and Answers about 49 CFR Part 26 addresses factors for federal aid recipients to consider when projecting the portion of their overall DBE goals that they will meet through race- and gender-neutral means.⁸
- USDOT “Tips for Goal-Setting” also suggests factors for federal aid recipients to consider when making such projections.⁹
- An FHWA template for how it considers approving DBE goal and methodology submissions includes a section on projecting the percentage of overall DBE goals to be met through neutral and conscious means. An excerpt from that template is provided in Figure 8-5.

Figure 8-5.
Excerpt from Explanation of Approval of [State] DBE Goal Setting Process for FY [Year]

You must also explain the basis for the State’s race-neutral/race-conscious division and why it is the State’s best estimate of the maximum amount of participation that can be achieved through race-neutral means. There are a variety of types of information that can be relied upon when determining a recipient’s race-neutral/race-conscious division. Appropriate information should give a sound analysis of the recipient’s market, the race-neutral measures it employs and information on contracting in the recipient’s contracting area. Information that could be relied on includes: the extent of participation of DBEs in the recipient’s contracts that do not have contract goals; past prime contractors’ achievements; excess DBE achievements over past goals; how many DBE primes have participated in the state’s programs in the past; or information about state, local or private contracting in similar areas that do not use contracting goals and how many minority and women’s businesses participate in programs without goals.

Source:
FHWA, Explanation for Approval of [State] DBE Program Goal Setting Process for FY [Year].
http://www.fhwa.dot.gov/civilrights/dbe_memo_a4.htm

⁸ See <https://www.transportation.gov/sites/dot.gov/files/docs/mission/civil-rights/disadvantaged-business-enterprise/55851/official-questions-and-answers-disadvantaged-business-enterprise-program-regulation-49-cfr-26-4-25.pdf>

⁹ See <https://www.transportation.gov/osdbu/disadvantaged-business-enterprise/tips-goal-setting-disadvantaged-business-enterprise>

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

1. Is there evidence of discrimination within the local transportation contracting marketplace for any racial, ethnic or gender groups?
2. What has been the agency's past experience in meeting its overall DBE goal?
3. What has DBE participation been when HDOT has not applied DBE contract goals (or other race-conscious remedies)?¹⁰
4. What is the extent and effectiveness of race- and gender-neutral measures that the agency could have in place for the next fiscal year?

The balance of Chapter 8 is organized around each of those general areas of questions.

1. Is there evidence of discrimination within the local transportation contracting marketplace for any racial, ethnic or gender groups? The 2019 Availability and Disparity Study considered conditions in the local marketplace to address this question. Quantitative and qualitative information is summarized below.

Marketplace conditions. As discussed in Chapter 7, Keen Independent examined conditions in the Hawaii marketplace, including:

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

There was quantitative evidence of disparities in outcomes for minority- and women-owned firms in general and for certain MBE/WBE groups concerning the above issues. Qualitative information indicated some evidence that discrimination may have been a factor in these outcomes.

Results of the disparity analysis for FHWA-funded contracts. Chapter 6 examines FHWA-funded contracts with and without DBE contract goals.

- There was little difference between overall participation of minority- and women-owned firms with goals (34.7%) and without goals (33.9%) for FHWA-funded contracts. It does not appear that there was any overall difference in the participation of minority- and women-owned firms when HDOT set a DBE contract goal and when HDOT did not.

¹⁰ USDOT guidance suggests evaluating (a) certain DBE participation as prime contractors if the DBE contract goals did not affect utilization, (b) DBE participation as prime contractors and subcontractors for agency contracts without DBE goals, and (c) overall utilization for other state, local or private contracting where contract goals are not used.

- Most of the minority- and women-owned firms receiving work on FHWA-funded contracts were not certified as DBEs. For example, of the 774 FHWA-funded contracts that had DBE contract goals applied, 371 (34.7%) went to MBE/WBEs and 196 (4.6%) went to DBE-certified firms.
- For both goals and non-goals contracts, utilization of firms owned by Asian Pacific Americans, Native Hawaiians and Pacific Islanders exceeded what might be expected from the availability analysis. There is no evidence of disparities for this group from analysis of HDOT FHWA-funded contracts with and without DBE contract goals.

For contracts without goals, there were substantial disparities for African American-, Hispanic American-, American Indian or Alaska Native-, Subcontinent Asian American- and white women-owned firms.

- MBE/WBEs received 32.5 percent of FHWA-funded contract dollars going to primes.

Summary. HDOT should review the information about utilization and availability of minority- and women-owned firms in its contracts in Chapters 5 and 6, and analysis of marketplace conditions presented in Chapter 7 and Appendices E through J, as well as other information it may have, when considering the extent to which it can meet its overall DBE goal through neutral measures.

2. What has been the agency’s past experience in meeting its overall DBE goal? HDOT’s reported certified DBE participation based on DBE commitments/awards on FHWA-funded contracts was considerably below HDOT’s overall DBE goal for FFY 2013 through FFY 2018, as shown in Figure 8-6 below.

Figure 8-6.
HDOT overall DBE goal and reported DBE participation on
FHWA-funded contracts, FFY 2013 through FFY 2018

Federal fiscal year	DBE goal	DBE commitments/awards	Difference from DBE goal
2013	53.43 %	5.90 %	-47.53 %
2014	53.43	1.30	-52.13
2015	53.43	6.33	-47.10
2016	53.43	8.88	-44.55
2017	29.05	3.85	-25.20
2018	29.05	7.43	-21.62

Source: HDOT Uniform Reports of DBE Awards/Commitments and Payments.

The Keen Independent analysis of DBE utilization on FHWA-funded contracts from July 2011 through June 2016, provided in Figure 8-1, indicated annual DBE participation from 2.30 percent to 5.90 percent over this time period, also substantially below HDOT’s overall DBE goal.

Keen Independent’s analysis, however, indicates very high utilization of minority- and women-owned firms that are not DBE-certified. It appears that many of those firms could be certified as DBEs but have not done so.

3. What has DBE participation been when HDOT has not applied DBE contract goals (or other race-conscious remedies)? Keen Independent examined three sources of information to assess race-neutral DBE participation:

- HDOT-reported race-neutral DBE participation on FHWA-funded contracts for the most recent years;
- Keen Independent estimates of DBE participation on FHWA-funded contracts for which no DBE contract goals applied; and
- Information concerning DBE participation as prime contractors on FHWA-funded contracts.

Keen Independent also examined overall participation of minority- and women-owned firms as part of each of these three analyses. The discussion below examines these results.

Race-neutral DBE participation in recent HDOT Uniform Reports. Per USDOT instructions, HDOT counts “neutral” participation as any prime contracts, as well as subcontracts, going to DBEs beyond what was needed to meet DBE contract goals set for a project or that were otherwise awarded in a race-neutral manner.

HDOT’s Uniform Reports of DBE Awards/Commitments and Payments submitted to FHWA for FFY 2013 through FFY 2018 indicates a median race-neutral participation of 0.16 percent. Figure 8-7 presents these results.

Figure 8-7.
 HDOT-reported race-neutral and race-conscious DBE participation on FHWA-funded contracts for FFY 2013–FFY 2018

Federal fiscal year	DBE commitments/awards		
	Total	Race-neutral	Race-conscious
2013	5.90 %	0.06 %	5.84 %
2014	1.30	0.51	0.79
2015	6.33	0.26	6.07
2016	8.88	0.58	8.30
2017	3.85	0.03	3.82
2018	7.43	0.02	7.41

Source: HDOT Uniform Reports of DBE Awards/Commitments and Payments.

DBE participation on contracts without DBE contract goals. Keen Independent also analyzed DBE participation on HDOT's FHWA-funded contracts without DBE contract goals. HDOT achieved a median DBE participation of 6.74 percent for FY 2012 through FY 2016 on FHWA-funded contracts without goals.

Keen Independent also examined these results for MBE/WBEs, including DBEs and firms not certified as DBEs. When HDOT did not apply DBE contract goals, MBE/WBEs received 33.9 percent of contract dollars, and those firms certified as DBEs received 4.2 percent of contract dollars. These results are similar to those when DBE contract goals were applied.

DBE participation as prime contractors. Keen Independent also analyzed DBE participation based on prime contract dollars. From July 2011 through June 2016, the median DBE participation on prime contracts was 0.58 percent for FHWA-funded contracts.

Including non-certified firms, MBE/WBEs received 32.5 percent of FHWA-funded prime contract dollars from July 2011 through June 2016.

4. What is the extent and effectiveness of race- and gender-neutral measures that the agency could have in place for the next fiscal year? When determining the extent to which it could meet its overall DBE goal through the use of neutral measures, HDOT must review the race- and gender-neutral measures that it and other organizations have in place, and those it has planned or could consider for future implementation.

SBE program. One neutral program that HDOT might consider is a small business enterprise (SBE) contract goals program as well as a sheltered market program for SBE prime contractors. HDOT would certify firms as SBEs in the same way it certifies companies as DBEs, except they would not need to be owned and controlled by minorities or women. HDOT would set SBE contract goals in the same way as DBE goals. Monitoring of SBE participation would be the same as for DBE participation.

Federal regulations in 49 CFR Part 26.39(b)(1) allow the use of set-asides for SBE prime contractors for USDOT-funded contracts, which would provide HDOT another tool it could use to boost participation of small businesses.

- About 94 percent of the businesses available for HDOT's USDOT-funded contracts are within the federal small business size limit based on the revenue they reported in the availability survey for this study. Of those small businesses, 59 percent are minority- or women-owned.
- All of the current DBEs in Hawaii would automatically qualify as SBEs.
- In the in-depth interviews in this study, a number of firms commented on the preponderance of business owners of color and women business owners in the Hawaii transportation contracting market. Some minority and female business owners reported that DBE contract goals are not needed. Many current firms eligible to be certified as DBEs have not done so, and there may be some stigma concerning certification as a "disadvantaged business" that might not arise for small business certification.

- Minority and female business owners in Hawaii frequently reported disadvantages because they were a small business competing against large businesses. In Hawaii, some of those large businesses are owned by minorities or women. Large minority-owned firms win a large portion of HDOT’s FHWA-funded contracts.
- An SBE program for USDOT-funded contracts might be especially effective in encouraging minority- and women-owned business participation if it were widely promoted and coupled with further unbundling of HDOT contracts, continued technical assistance for DBEs, restricting bidding on small contracts to SBEs, and parallel efforts to include small businesses in HDOT’s non-federally-funded contracts.
- In addition, Keen Independent determined that HDOT could achieve 11 percent greater DBE participation if minority- and women-owned firms that appear to be eligible for DBE certification became certified.

D. Summary

Chapter 8 provides information to HDOT as it considers (1) its overall DBE goal for FFY 2020 through FFY 2022 for FHWA-funded contracts, and (2) its projection of the portion of its overall DBE goal to be achieved through neutral means.

1. Overall DBE goal for FHWA-funded contracts. As explained in this chapter, HDOT might consider a revised overall DBE goal for FHWA-funded contracts for FFY 2020 through FFY 2022 of 17.26 percent. It could also consider a downward step 2 adjustment to 11.00 percent.

2. Could HDOT project that it can meet all of its overall DBE goal through neutral means? If not, how much of the overall DBE goal can HDOT project to be met through neutral means?

If HDOT’s overall DBE goal for FHWA-funded contracts is in the range of 17.26 percent, HDOT might consider a new SBE Program as a means of achieving that goal. This program would replace HDOT’s use of DBE contract goals with SBE contract goals. It would also encourage SBE participation as prime contractors on small HDOT contracts. Figure 8-8 shows neutral and race-conscious projections for different levels of overall DBE goals if HDOT proposed 100 percent of its overall DBE goal to be achieved through an SBE Program and other neutral means.

Figure 8-8.

Current HDOT overall DBE goal and projections of race-neutral participation for FHWA-funded contracts for FFY 2020 through FFY 2022

Component of overall DBE goal	FFY 2017-FFY 2019	FFY 2020 - FFY 2022		
		Downward adjustment	Base figure	Upward adjustment
Overall goal	29.05 %	11.00 %	17.26 %	31.47 %
Neutral projection	- 0.26	- 11.00	- 17.26	- 31.47
Race-conscious projection	28.79 %	0.00 %	0.00 %	0.00 %

Source: Keen Independent analysis.

CHAPTER 9.

Overall Annual DBE Goal and Projections for FTA-Funded Contracts

As discussed in previous chapters, HDOT is required to set an overall annual goal for DBE participation in its FTA-funded transportation contracts. Federal regulations govern how these goals are determined. Agencies such as HDOT must determine “the level of DBE participation you would expect absent the effects of discrimination.”¹ Goals are set for three-year periods.

At the time of this study, HDOT had an overall annual goal of 8.69 percent for FTA-funded contracts for FFY 2018–FFY 2020. It must submit a new goal by August 2020 for federal fiscal years 2021 through 2023. The new goal will start October 1, 2020.

HDOT must prepare and submit a Goal and Methodology document to FTA that presents its overall annual DBE goal for the next three fiscal years, supported by information about the steps used to develop the overall goal. Chapter 9 provides information for HDOT to consider when establishing this goal and projecting how much of the goal it expects to meet through race-neutral measures.

Chapter 9 is organized in four parts based on the process that 49 CFR Part 26.45 outlines for setting overall goals and projecting the portion to be met through neutral means:

- A. Establishing a base figure;
- B. Consideration of a step 2 adjustment;
- C. Projecting the portion of the overall DBE goal for FTA-funded contracts to be met through neutral means; and
- D. Summary.

A. Establishing a Base Figure

Establishing a base figure is the first step in calculating overall annual goals for DBE participation in HDOT’s FTA-funded transportation contracts.

As presented in Chapter 4, one might expect current and potential DBEs to receive 14.63 percent of HDOT FTA-funded transportation contract dollars based on analysis of FTA-funded contracts from July 2011 through June 2016 and current availability of firms to perform that work.²

¹ 49 CFR Section 26.45(b).

² As discussed in Chapter 4, potential DBEs include current DBEs and those MBE/WBEs that are DBE-certified or appear that they could be based on annual revenue limits described in 49 CFR Part 26.

HDOT might consider 14.63 percent as the base figure for its overall annual DBE goal if it anticipates that the types of FTA-funded contracts that will be awarded in federal fiscal years 2021 through 2023 are, on balance, reasonably similar to the types of FTA-funded contracts awarded during the July 2011 through June 2016 study period.

Chapter 4 explains the availability analysis that developed the base figure.

As point of reference, Keen Independent also calculated the base figure only counting currently certified DBEs. The base figure including only current DBEs is 11.10 percent.

B. Consideration of a Step 2 Adjustment

Per the Federal DBE Program, HDOT must consider potential step 2 adjustments to the base figure as part of determining its overall annual DBE goal for FTA-funded contracts. If HDOT does so, it must explain its consideration of possible step 2 adjustments in its Goal and Methodology document.

The Federal DBE Program outlines factors that an agency must consider when assessing whether to make any step 2 adjustments to its base figure:

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

Keen Independent completed an analysis of each of the above step 2 factors and was able to quantify the effect of certain factors on the base figure. Other information examined was not as easily quantifiable but is still relevant to HDOT as it determines whether to make any step 2 adjustments.

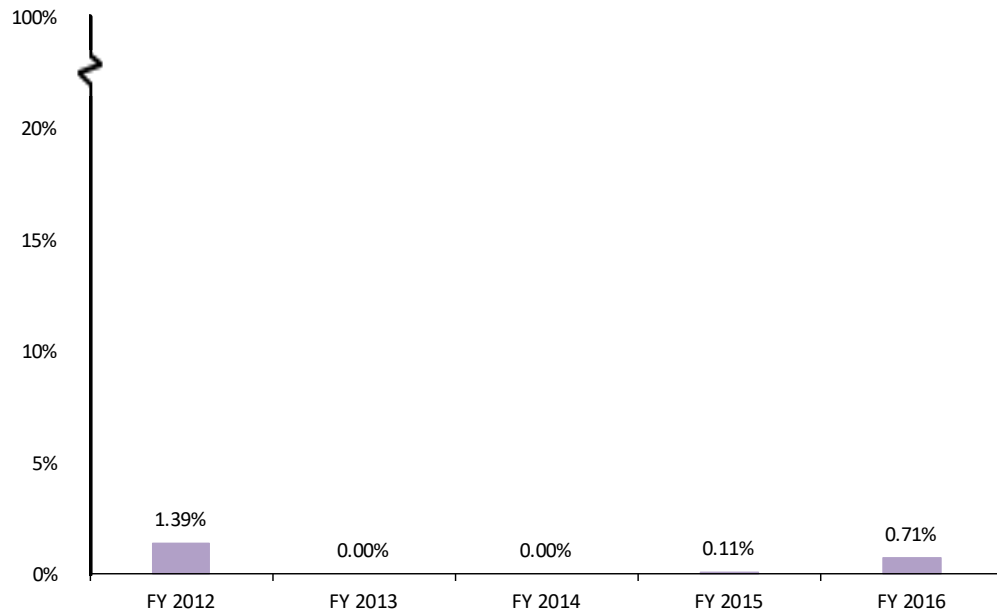
1. Current capacity of DBEs to perform work, as measured by the volume of work DBEs have performed in recent years. USDOT’s “Tips for Goal-Setting” suggests that agencies should examine data on past DBE participation on their USDOT-funded contracts in recent years (i.e., the percentage of contract dollars going to DBEs).

DBE participation based on HDOT Uniform Reports to FTA. Based on commitments/awards data from HDOT Uniform Reports of DBE Awards or Commitments and Payments reported to FTA, the median annual DBE participation for FFY 2013–FFY 2018 is 0.00 percent. This value suggests a possible downward step 2 adjustment based on this factor.

³ 49 CFR Section 26.45.

DBE participation based on Keen Independent utilization analysis for FTA-funded contracts. Keen Independent’s analysis identified a median DBE participation of 0.11 percent on FTA-funded contracts from FY 2012 through FY 2016 (as shown in Figure 9-1).⁴

Figure 9-1.
DBE participation on FTA-funded contracts based on Keen Independent’s analysis, fiscal years 2012 through 2016



Source: Keen Independent analysis based on FTA-funded contracts for July 2011 through June 2016.

The median for the past five fiscal years, 0.11 percent, indicates that HDOT might make a large downward step 2 adjustment based on past DBE participation, as explained later in this chapter.

2. Information related to employment, self-employment, education, training and unions.

Chapter 7 summarizes information about conditions in the Hawaii transportation contracting industry for minorities, women and MBE/WBEs. Detailed quantitative analyses of marketplace conditions in Hawaii are presented in Appendices E through H. Keen Independent’s analyses indicate there are barriers that certain minority groups and women face related to entry and advancement in the Hawaii construction and engineering industries. Such barriers may affect the availability of MBE/WBEs to obtain and perform HDOT transportation contracts. There are also barriers to business ownership for those working in these industries.

It may not be possible to quantify all the cumulative effects that barriers may have had in depressing the availability of minority- and women-owned firms in the Hawaii transportation contracting industry, however, the effects of barriers in business ownership can be quantified. Chapter 8 discusses the effect of disparities in business ownership rates in detail. Key aspects of this analysis are summarized below.

⁴ 0.11 percent is the halfway point between the five values for annual DBE participation.

The study team used regression analyses to investigate whether race, ethnicity and gender affected rates of business ownership among workers in the Hawaii construction and engineering industries.

- The regression analyses allowed the study team to examine those effects while statistically controlling for various personal characteristics including education and age (Appendix F provides detailed results of the business ownership regression analyses).⁵ Those analyses revealed that Asian Pacific/Native Hawaiian and other minority groups were less likely than nonminorities to own construction businesses and that white women were less likely than white men to own construction firms, even after accounting for various race- and gender-neutral personal characteristics. Each of these disparities was statistically significant.
- In addition, there was a substantial, statistically significant disparity in firm ownership for Asian Pacific Americans and Native Hawaiians working in the Hawaii architecture and engineering industry.

As discussed in Chapter 8, Keen Independent analyzed the impact that barriers in business ownership would have on the base figure for FTA-funded contracts if Asian Pacific Americans, Native Hawaiians and white women owned businesses at the same rate as similarly situated nonminorities and white men. This type of inquiry is sometimes referred to as a “but for” analysis because it estimates the availability of MBE/WBEs *but for* the effects of race- and gender-based discrimination.

Figure 9-2 calculates the impact on overall MBE/WBE availability for FTA-funded contracts, resulting in a possible upward adjustment of the base figure to 28.11 percent. The analysis included the same contracts that the study team analyzed to determine the base figure (i.e., FTA-funded construction and engineering prime contracts and subcontracts that HDOT awarded from July 2011 through June 2016). Calculations are explained below.

⁵ The study team examined U.S. Census data on business ownership rates using methods similar to analyses examined in court cases involving state departments of transportation in California, Illinois and Minnesota.

Figure 9-2.

Potential step 2 adjustment considering disparities in the rates of business ownership

Current and potential DBEs	a. Current availability	b. Disparity index for business ownership	c. Availability after initial adjustment*	d. Availability after scaling to 100%	e. Components of overall DBE availability**
Construction					
Asian Pacific American, Native Hawaiian or Pacific Islander	6.01 %	30	20.03 %	17.08 %	
Other minorities	5.75	65	8.85	7.54	
White women	<u>0.08</u>	31	<u>0.26</u>	<u>0.22</u>	
Minorities and women	11.84 %	n/a	29.14 %	24.84 %	20.81 %
All other businesses	<u>88.16</u>	n/a	<u>88.16</u>	<u>75.16</u>	
Total firms	100.00 %	n/a	117.30 %	100.00 %	
Engineering and other subindustries					
Asian Pacific American, Native Hawaiian or Pacific Islander	17.76 %	38	46.73 %	36.23 %	
Other minorities	9.78	n/a	9.78	7.58	
White women	<u>1.47</u>	n/a	<u>1.47</u>	<u>1.14</u>	
Minorities and women	29.01 %	n/a	57.98 %	44.96 %	7.30 %
All other businesses	<u>70.99</u>	n/a	<u>70.99</u>	<u>55.04</u>	
Total firms	100.00 %	n/a	128.97 %	100.00 %	
Total for current and potential DBEs	14.63 %	n/a	n/a		28.11 %
Difference from base figure					13.48 %

Note: Numbers may not add to 100.00% due to rounding.

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

** Components of goal calculated as value after adjustment and scaling to 100% multiplied by percentage of total FTA-funded contract dollars in that category (construction = 83.8%, engineering = 16.2%).

Source: Keen Independent based on FTA-funded contracts for July 2011 through June 2016 and statistical analysis of U.S. Census Bureau American Community Survey data for Hawaii for 2012–2016.

The study team completed these “but for” analyses separately for construction and engineering contracts and then weighted the results based on the proportion of FTA-funded contract dollars that HDOT awarded for construction and engineering for July 2011 through June 2016 (i.e., an 83.8% weight for construction and 16.2% weight for engineering). The rows and columns of Figure 9-2 present the following information from Keen Independent’s “but for” analyses:

- a. **Current availability.** Column (a) presents the current availability of MBE/WBEs by group for construction and for engineering and other subindustries. Each row presents the percentage availability for MBEs and WBEs. The current combined availability of MBE/WBEs for HDOT FTA-funded transportation contracts for July 2011 through June 2016 is 14.63 percent, as shown in the bottom row of column (a).

- b. **Disparity indices for business ownership.** As presented in Appendix F, Asian Pacific Americans, Native Hawaiians and white women were significantly less likely to own construction firms than similarly-situated nonminorities and white men. Keen Independent calculated simulated business ownership rates if those groups owned businesses at the same rate as nonminorities and white males who share similar personal characteristics. The study team then calculated a business ownership disparity index for each group by dividing the observed business ownership rate by the benchmark business ownership rate and then multiplying the result by 100.

Column (b) of Figure 9-2 presents disparity indices related to business ownership for the different racial/ethnic and gender groups. For example, as shown in column (b), Asian Pacific Americans, Native Hawaiians and Pacific Islanders own construction businesses at 30 percent of the rate that would be expected based on the simulated business ownership rates of white males who share similar personal characteristics. Appendix F explains how the study team calculated the disparity indices.

- c. **Availability after initial adjustment.** Column (c) presents availability estimates for MBEs and WBEs by industry after initially adjusting for statistically significant disparities in business ownership rates. The study team calculated those estimates by dividing the current availability in column (a) by the disparity index for business ownership in column (b) and then multiplying by 100.
- d. **Availability after scaling to 100%.** Column (d) shows adjusted availability estimates that were re-scaled so that the sum of the availability estimates equals 100 percent for each industry. The study team re-scaled the adjusted availability estimates by taking each group's adjusted availability estimate in column (c) and dividing it by the sum of availability estimates shown under "Total firms" in column (c) — and multiplying by 100. For example, the re-scaled availability estimate for Asian Pacific Americans, Native Hawaiians or Pacific Islanders shown for construction was calculated in the following way: $(20.03\% \div 117.30\%) \times 100 = 17.08$ percent.
- e. **Components of overall DBE goal with upward adjustment.** Column (e) of Figure 9-2 shows the component of the total base figure attributed to the adjusted MBE and WBE availability for construction versus engineering and other subindustries. The study team calculated each component by taking the total availability estimate shown in column (d) for construction and for engineering/other — and multiplying it by the proportion of total FTA-funded contract dollars in each industry (i.e., 83.8% for construction and 16.2% for engineering). For example, the study team used the 24.84 percent shown for MBE/WBE availability for construction firms in column (d) and multiplied it by 83.8 percent for a result of 20.81 percent. A similar weighting of MBE/WBE availability for engineering/other produced a value of 7.30 percent.

The values in column (e) were then summed to equal the overall base figure adjusted for barriers in business ownership, which is 28.11 percent as shown in the bottom of column (e).

Finally, Keen Independent calculated the difference between the “but for” MBE/WBE availability (28.11%) and the current availability (14.63%) to calculate the potential upward adjustment. This difference, and potential upward adjustment, is 13.48 percentage points (28.11% - 14.63% = 13.48%).

3. Any disparities in the ability of DBEs to get financing, bonding and insurance. Analysis of access to financing and bonding revealed quantitative and qualitative evidence of disadvantages for minorities, women and MBE/WBEs.

- Any barriers to obtaining financing and bonding might affect opportunities for minorities and women to successfully form and operate construction and engineering businesses in the Hawaii marketplace.
- If MBE/WBEs face barriers in obtaining financing and bonding, it would also place those businesses at a disadvantage in obtaining and performing HDOT construction and engineering prime contracts and subcontracts.

Note that financing and bonding are closely linked, as discussed in Chapter 7 and Appendix J.

There is also evidence that some firms cannot bid on certain public sector projects because they cannot afford the levels of insurance required by the agency.

The information about financing, bonding and insurance supports an upward step 2 adjustment in HDOT’s overall annual goal for DBE participation in FTA-funded contracts.

4. Other factors. The Federal DBE Program suggests that federal aid recipients also examine “other factors” when determining whether to make any step 2 adjustments to their base figure.⁶

Among the “other factors” examined in this study was the success of MBE/WBEs relative to majority-owned businesses in the Hawaii marketplace. There is quantitative evidence that certain groups of MBE/WBEs are less successful than majority-owned firms, and face greater barriers in the marketplace, even after considering neutral factors. Chapter 7 summarizes that evidence and Appendix H presents supporting quantitative analyses.

There is also qualitative evidence of barriers to the success of minority- and women-owned businesses, as summarized in Appendix J. Some of this qualitative information suggests that discrimination on the basis of race, ethnicity and gender affects minority- and women-owned firms in the Hawaii transportation contracting industry.

There is no straightforward way to project the number of MBE/WBEs available for HDOT work but for the effects of these other factors.

Approaches for making step 2 adjustments. Quantification of potential downward or upward step 2 adjustments is summarized below.

⁶ 49 CFR Section 26.45.

1. Current capacity of DBEs to perform work, as measured by the volume of work DBEs have performed in recent years. Analysis of this factor might indicate a downward step 2 adjustment if HDOT analyzed its estimates of past DBE participation from FY 2012 through FY 2016. Based on Keen Independent’s analysis, the median DBE participation on FTA-funded contracts was 0.11 percent for fiscal years 2012–2016.

USDOT “Tips for Goal-Setting” suggests taking one-half of the difference between the base figure and evidence of current capacity as one approach to calculate the step 2 adjustment for that factor.

The difference between the 14.63 percent base figure (calculated in Chapter 4) and 0.11 percent DBE participation is 14.52 percentage points (14.63% - 0.11% = 14.52%). One-half of this difference is a downward adjustment of 7.26 percentage points (14.52% ÷ 2 = 7.26%). The goal would then be calculated as follows: 14.63% - 7.26% = 7.37%. (These calculations are presented in Figure 9-3.)

2. Information related to employment, self-employment, education, training and unions. The study team was not able to quantify all of the information regarding barriers to entry for MBE/WBEs. Quantification of the business ownership factor indicates an upward step 2 adjustment of 13.48 percentage points to reflect the “but-for” analyses of business ownership rates presented in Figure 9-2. If HDOT made this adjustment, the overall DBE goal for FTA-funded contracts would be 28.11 percent (14.63% + 13.48% = 28.11%). Figure 9-3 shows these calculations.

Figure 9-3.
Potential step 2 adjustments for HDOT’s overall DBE goal for FTA-funded contracts, FFY 2021–FFY 2023

Step 2 adjustment component	Value	Explanation
Lower range of overall DBE goal		
Base figure	14.63 %	From base figure analysis
Evidence of current capacity	- 0.11	Past DBE participation (Keen Independent)
Difference	14.52 %	
	÷ 2	Reduce by one-half
Adjustment	7.26 %	Downward adjustment for current capacity
Base figure	14.63 %	From base figure analysis
Adjustment for current capacity	- 7.26	Downward step 2 adjustment
Overall DBE goal	7.37 %	Lower range of DBE goal
Upper range of overall DBE goal		
Base figure	14.63 %	From base figure analysis
Adjustment for "but for" factors	+ 13.48	"But for" step 2 adjustment for business ownership
Overall DBE goal	28.11 %	Upper range of DBE goal

Note: Numbers may not add due to rounding.

Source: Keen Independent analysis.

3. Any disparities in the ability of DBEs to get financing, bonding and insurance. Analysis of financing, bonding and insurance indicates that an upward adjustment is appropriate. However, impact of these factors on availability could not be quantified.

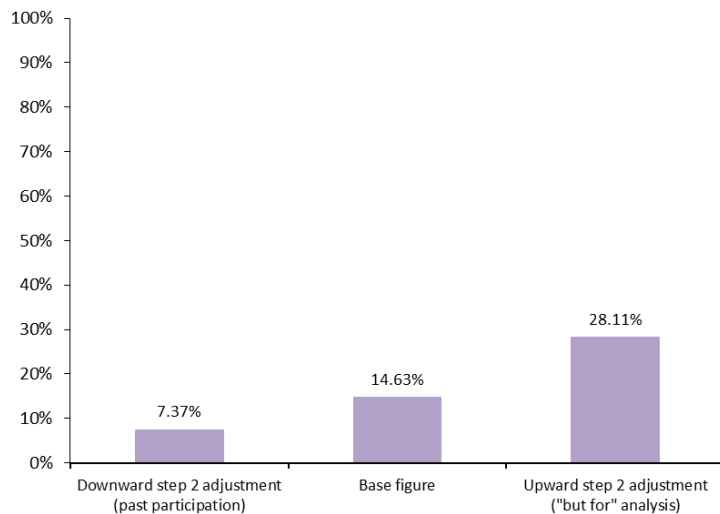
4. Other factors. Impact of the many barriers to success of MBE/WBEs in Hawaii could not be specifically quantified. However, the evidence supports an upward adjustment.

Summary. HDOT will need to consider whether to make a downward, upward or no step 2 adjustment when determining its overall DBE goal for FTA-funded contracts. If HDOT makes a downward step 2 adjustment reflecting current capacity to perform work, its overall DBE goal for FTA-funded contracts would be 7.37 percent. If HDOT decides to not make a downward adjustment and instead makes an upward adjustment that reflects analyses of business ownership rates, its overall DBE goal would be 28.11 percent. This information is summarized in Figure 9-3.

HDOT will need to consider whether to make a downward, upward or no step 2 adjustment when determining its overall DBE goal. Figure 9-4 summarizes the potential adjustments described in this chapter.

Figure 9-4.
Potential step 2 adjustments to overall DBE goal for FTA-funded contracts

Source:
Keen Independent analysis.



C. Portion of DBE Goal for FTA-Funded Contracts to be Met through Neutral Means

The Federal DBE Program requires state and local transportation agencies to meet the maximum feasible portion of their overall DBE goals using race- and gender-neutral measures.⁷ Race- and gender-neutral measures are initiatives that encourage the participation of all businesses, or all small businesses, and are not specifically limited to MBE/WBEs or DBEs.

Agencies must determine whether they can meet their overall DBE goals solely through neutral means or whether race- and gender-conscious measures — such as DBE contract goals — are also needed. As part of doing so, agencies must project the portion of their overall DBE goals that they expect to meet (a) through race- and gender-neutral means, and (b) through race- and gender-conscious programs (if any).

⁷ 49 CFR Section 26.51.

- If an agency determines that it can meet its overall DBE goal solely through race- and gender-neutral means, then it would propose only using neutral measures as part of its program. The agency would project that 100 percent of its overall DBE goal would be met through neutral means and that 0 percent would be met through race- and gender-conscious means.
- If an agency determines that a combination of race- and gender-neutral, and race- and gender-conscious measures are needed to meet its overall DBE goal, then the agency would propose using a combination of neutral and conscious measures as part of its program. The agency would project that some percent of its overall DBE goal would be met through neutral means and that the remainder would be met through race- and gender-conscious means.

USDOT offers guidance concerning how transportation agencies should project the portions of their overall DBE goals that will be met through race- and gender-neutral, and race- and gender-conscious measures, including the following:

- USDOT Questions and Answers about 49 CFR Part 26 addresses factors for federal aid recipients to consider when projecting the portion of their overall DBE goals that they will meet through race- and gender-neutral means.⁸
- USDOT “Tips for Goal-Setting” also suggests factors for federal aid recipients to consider when making such projections.⁹

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

1. Is there evidence of discrimination within the local transportation contracting marketplace for any racial, ethnic or gender groups?
2. What has been the agency’s past experience in meeting its overall DBE goal?
3. What has DBE participation been when HDOT has not applied DBE contract goals (or other race-conscious remedies)?¹⁰
4. What is the extent and effectiveness of race- and gender-neutral measures that the agency could have in place for the next fiscal year?

The balance of Chapter 9 is organized around each of those general areas of questions.

⁸ See <http://www.dotcr.ost.dot.gov/Documents/Dbe/49CFRPART26.doc>

⁹ See <http://www.osdbu.dot.gov/DBEProgram/tips.cfm>

¹⁰ USDOT guidance suggests evaluating (a) certain DBE participation as prime contractors if the DBE contract goals did not affect utilization, (b) DBE participation as prime contractors and subcontractors for agency contracts without DBE goals, and (c) overall utilization for other state, local or private contracting where contract goals are not used.

1. Is there evidence of discrimination within the local transportation contracting marketplace for any racial, ethnic or gender groups? The 2019 Availability and Disparity Study considered conditions in the local marketplace to address this question. Quantitative and qualitative information is summarized below.

Marketplace conditions. As discussed in Chapter 7, Keen Independent examined conditions in the Hawaii marketplace, including:

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

There was quantitative evidence of disparities in outcomes for minority- and women-owned firms in general and for certain MBE/WBE groups concerning the above issues. Qualitative information indicated some evidence that discrimination may have been a factor in these outcomes.

Results of the disparity analysis for FTA-funded contracts. Chapters 5 and 6 examine FTA-funded contracts with and without DBE contract goals.

- The participation of minority- and women-owned firms in FTA-funded contracts without goals was 11.8 percent. There were no FTA-funded contracts with goals during the study period.
- Most of the minority- and women-owned firms receiving work on FTA-funded contracts were not certified as DBEs. Of the 24 MBE/WBE firms that received a contract or subcontract, only seven were DBE-certified.
- The utilization of minority- and women-owned firms was lower of what might be expected from the availability analysis. Therefore, there were substantial disparities for both MBEs and WBEs on FTA-funded contracts.
- MBE/WBEs received 9.9 percent of FTA-funded contract dollars going to primes.

Summary. HDOT should review the information about utilization and availability of minority- and women-owned firms in its contracts in Chapters 5 and 6 and analysis of marketplace conditions presented in Chapter 7 and Appendices E through J, as well as other information it may have, when considering the extent to which it can meet its overall DBE goal through neutral measures.

2. What has been the agency's past experience in meeting its overall DBE goal? HDOT's reported certified DBE participation based on DBE commitments/awards on FTA-funded contracts was considerably below HDOT's overall DBE goal for FFY 2013 through FFY 2018, as shown in Figure 9-5 below.

Figure 9-5.
 HDOT overall DBE goal and reported DBE participation on
 FTA-funded contracts, FFY 2013 through FFY 2018

Federal fiscal year	DBE goal	DBE commitments/ awards	Difference from DBE goal
2013	8.69 %	0.00 %	-8.69 %
2014	8.69	0.29	-8.40
2015	8.69	0.00	-8.69
2016	8.69	0.00	-8.69
2017	8.69	0.00	-8.69
2018	8.69	0.00	-8.69

Source: HDOT Uniform Reports of DBE Awards/Commitments and Payments.

The Keen Independent analysis of DBE utilization on FTA-funded contracts from July 2011 through June 2016 indicated annual DBE participation ranging from 0.00 percent to 1.39 percent over this time period, also substantially below HDOT’s overall 8.69 percent DBE goal.

3. What has DBE participation been when HDOT has not applied DBE contract goals (or other race-conscious remedies)? Keen Independent examined three sources of information to assess race-neutral DBE participation:

- HDOT-reported race-neutral DBE participation on FTA-funded contracts for July 2013 through June 2018;
- Keen Independent estimates of DBE participation on FTA-funded contracts for which no DBE contract goals applied; and
- Information concerning DBE participation as prime contractors on FTA-funded contracts.

The discussion below examines these three sets of participation figures.

Race-neutral DBE participation in recent HDOT Uniform Reports. Per USDOT instructions, HDOT counts “neutral” participation as any prime contracts, as well as subcontracts, going to DBEs beyond what was needed to meet DBE contract goals set for a project or that were otherwise awarded in a race-neutral manner.

HDOT’s Uniform Reports of DBE Awards/Commitments and Payments submitted to FTA for FFY 2013 through FFY 2018 indicates a median race-neutral participation of 0.0 percent. Figure 9-6 presents these results.

Figure 9-6.
 HDOT-reported race-neutral and race-conscious DBE participation on FTA-funded contracts for FFY 2013–FFY 2018

Federal fiscal year	DBE commitments/awards		
	Total	Race-neutral	Race-conscious
2013	0.00 %	0.00 %	0.00 %
2014	0.29	0.29	0.00
2015	0.00	0.00	0.00
2016	0.00	0.00	0.00
2017	0.00	0.00	0.00
2018	0.00	0.00	0.00

Source: HDOT Uniform Reports of DBE Awards/Commitments and Payments.

DBE participation on contracts without DBE contract goals. None of HDOT’s FTA-funded contracts had contract goals during the study period. Therefore, HDOT achieved a median DBE participation of 0.11 percent for FFY 2012 through FFY 2016 on FTA-funded contracts without goals.

DBE participation as prime contractors. Keen Independent also analyzed DBE participation based on prime contract dollars. From July 2011 through June 2016, the median annual DBE participation on prime contracts was 0.00 percent on FTA-funded contracts.

4. What is the extent and effectiveness of race- and gender-neutral measures that the agency could have in place for the next fiscal year? When determining the extent to which it could meet its overall DBE goal through the use of neutral measures, HDOT must review the race- and gender-neutral measures that it and other organizations have in place, and those it has planned or could consider for future implementation.

As discussed in Chapter 8, HDOT might consider a small business enterprise (SBE) contract goals program to entirely or partially meet its overall DBE goal for FTA-funded contracts. It would set SBE goals for FTA-funded contracts in the same way as it currently uses DBE contract goals. Monitoring of SBE participation would be the same as DBE participation.

Federal regulations in 49 CFR Part 26.39(b)(1) allow the use of set-asides for SBE prime contractors for USDOT-funded contracts, which would provide HDOT another tool it could use to boost participation of small businesses. Reasons for using an SBE Program mirror those discussed in Chapter 8 regarding FHWA-funded contracts:

- About 94 percent of the businesses available for HDOT’s USDOT-funded contracts are within the federal small business size limit based on the revenue they reported in the availability survey for this study. Of those small businesses, 59 percent are minority- or women-owned.
- All of the current DBEs in Hawaii would automatically qualify as SBEs.

- There may be some stigma concerning certification as a “disadvantaged business” that might not arise for small business certification.
- Minority and female business owners in Hawaii frequently reported disadvantages because they were a small business competing against large businesses. In Hawaii, some of those large businesses are owned by minorities or women. Large minority-owned firms win a large portion of HDOT’s FTA-funded contracts.
- An SBE program for USDOT-funded contracts might be especially effective in encouraging minority- and women-owned business participation if it were widely promoted and coupled with further unbundling of HDOT contracts, continued technical assistance for DBEs, restricting bidding on small contracts to SBEs, and parallel efforts to include small businesses in HDOT’s non-federally-funded contracts.
- In addition, Keen Independent determined that HDOT could achieve 6.9 percentage point greater DBE participation on its FTA-funded contracts if minority- and women-owned firms that appear to be eligible for DBE certification became certified.

D. Summary

Chapter 9 provides information to HDOT as it considers (1) its overall DBE goal for FFY 2021 through FFY 2023 for FTA-funded contracts, and (2) its projection of the portion of its overall DBE goal to be achieved through neutral means.

1. Overall DBE goal for FTA-funded contracts. As explained earlier in this chapter, HDOT might consider a downward adjustment to 7.37 percent DBE participation.

2. Could HDOT project that it can meet all of its overall DBE goal through neutral means? If not, how much of the overall DBE goal can HDOT project to be met through neutral means?

If HDOT’s overall DBE goal for FTA-funded contracts is in the range of 7 to 15 percent, HDOT might consider a new SBE Program as a means of achieving that goal. This program would replace HDOT’s use of DBE contract goals with SBE contract goals. It would also encourage SBE participation as prime contractors on small HDOT contracts. Figure 9-7 shows neutral and race-conscious projections for different levels of overall DBE goals if HDOT proposed 100 percent of its overall DBE goal to be achieved through an SBE Program and other neutral means.

Figure 9-7.

Current HDOT overall DBE goal and projections of race-neutral participation for FTA-funded contracts for FFY 2021 through FFY 2023

Component of overall DBE goal	FFY 2018-FFY 2020	FFY 2021 - FFY 2023		
		Downward adjustment	Base figure	Upward adjustment
Overall goal	8.69 %	7.37 %	14.63 %	28.11 %
Neutral projection	- 0.00	- 7.37	- 14.63	- 28.11
Race-conscious projection	8.69 %	0.00 %	0.00 %	0.00 %

Source: Keen Independent analysis.

CHAPTER 10.

Overall Annual DBE Goal and Projections for FAA-Funded Contracts at Large and Medium Hub Primary Airports

The Federal Aviation Administration (FAA) provides funds to HDOT for contracts at its large and medium hub primary airports, including Daniel K. Inouye International Airport (Honolulu International Airport) and Kahului Airport.¹ Therefore, HDOT must operate the Federal DBE Program at its airports, including setting three-year goals for DBE participation. Goals are set for three-year periods.

HDOT's overall DBE participation goals for FAA-funded contracts for FFY 2017 through FFY 2019 were 24.40 percent for Honolulu International Airport and 21.70 percent for Kahului Airport. HDOT projected that a portion of those goals would be met through DBE contract goals. In summer 2019, HDOT developed preliminary three-year overall DBE goals of 19.06 percent for Honolulu International Airport and 28.94 percent for Kahului Airport for FFY 2020 through FFY 2022. This Availability and Disparity Study provides information to HDOT that will help it consider revising its overall DBE goals and projections for those two airports for FFY 2020 through FFY 2022.

HDOT will also submit a revised Goal and Methodology document to FAA that presents its revised overall annual DBE goals for the next three fiscal years, supported by information about the steps used to develop the overall goal. Chapter 10 provides information for HDOT to consider when establishing these goals and projecting how much of each goal it expects to meet through race-neutral measures.

Chapter 10 contains four parts based on the process that 49 CFR Part 26.45 outlines for setting overall goals and projecting the portion to be met through neutral means:

- A. Establishing a base figure;
- B. Consideration of a step 2 adjustment;
- C. Portion of DBE goals for FAA-funded contracts at large and medium hub primary airports to be met through neutral means; and
- D. Summary.

¹ The Keen Independent study team identified 109 FAA-funded prime contracts and subcontracts at Honolulu International Airport and Kahului Airport between July 2011 to June 2016 that accounted for \$122 million.

A. Establishing a Base Figure

Establishing a base figure is the first step in calculating an overall annual goal for DBE participation in HDOT's FAA-funded contracts. Chapter 4 presented results from the availability analysis for FAA-funded contracts during the July 2011 through June 2016 study period. As presented in Chapter 4, one might expect current and potential DBEs to receive:

- 6.76 percent of HDOT's FAA-funded contract dollars at Honolulu International Airport; and
- 28.13 percent of FAA-funded contract dollars for Kahului Airport.²

HDOT might consider those percentages as the base figures for its revised overall annual DBE goals if it expects that FAA-funded contracts at those airports for the next three-year period will be reasonably similar to the types of contracts during the July 2011 through June 2016 study period. Chapter 4 explains the methodology for the base figure calculation in considerable detail.

As a point of reference, Keen Independent also calculated the base figures only counting currently certified DBEs. The base figures, including only current DBEs, are 3.12 percent for Honolulu International Airport and 8.28 percent for Kahului Airport.

B. Consideration of a Step 2 Adjustment

Per the Federal DBE Program, HDOT must consider potential step 2 adjustments to the base figures when determining its overall DBE goals for FAA-funded contracts for each airport. Federal regulations outline factors that an agency must consider:

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

Keen Independent completed an analysis of each of the above step 2 factors and was able to quantify the effect of certain factors on the base figures. Other information examined was not as easily quantifiable but is still relevant to HDOT as it determines whether to make any step 2 adjustments.

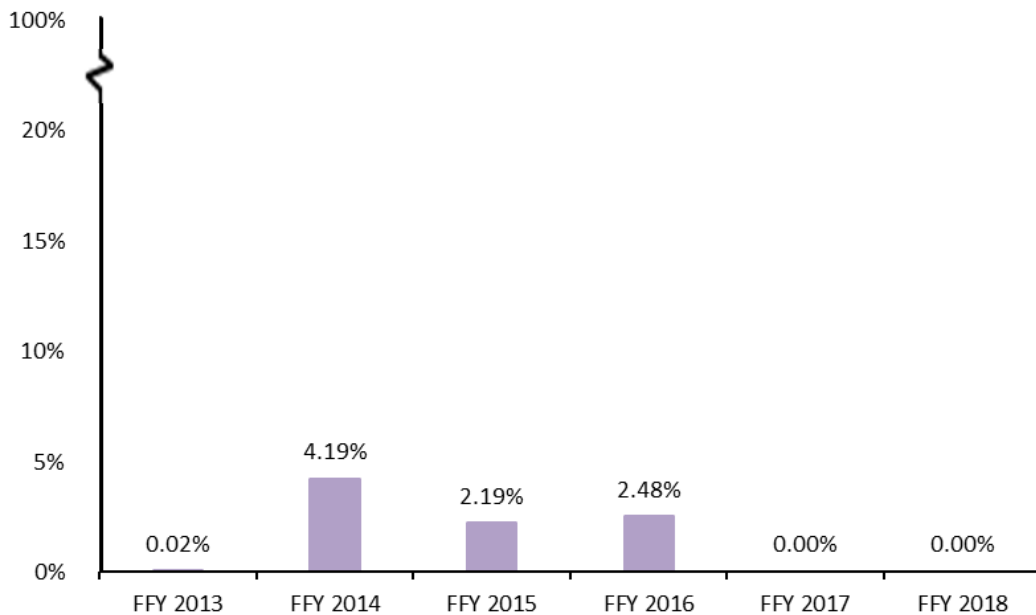
1. Current capacity of DBEs to perform work, as measured by the volume of work DBEs have performed in recent years. USDOT's "Tips for Goal-Setting" suggests that agencies should examine data on past DBE participation on their USDOT-funded contracts in recent years (i.e., the percentage of contract dollars going to DBEs).

² As discussed in Chapter 4, potential DBEs include current DBEs and those MBE/WBEs that are DBE-certified or appear that they could be based on annual revenue limits described in 49 CFR Part 26.

³ 49 CFR Section 26.45.

DBE participation based on HDOT Uniform Reports to FAA for Honolulu International Airport. Figure 10-1 presents information about past DBE participation for Honolulu International Airport contracts based on commitments/awards data from HDOT Uniform Reports of DBE Awards or Commitments and Payments reported to FAA. The median DBE participation for FFY 2013–FFY 2018 is 1.11 percent.

Figure 10-1.
Honolulu International Airport — HDOT-reported past DBE participation on FAA-funded contracts, FFY 2013 through FFY 2018



Source: HDOT Uniform Reports of DBE Awards/Commitments and Payments.

DBE participation based on HDOT Uniform Reports to FAA for Kahului Airport. HDOT reported no prime contract or subcontract awards, or payments to DBEs in its Uniform Reports of DBE Awards or Commitments and Payments to FAA for Kahului Airport for FFY 2013 through FFY 2018. Therefore, the median DBE participation for Kahului Airport based on these data is 0.00 percent.

DBE participation based on Keen Independent utilization analysis for FAA-funded contracts. The Keen Independent study team collected FAA-funded contract information directly from Honolulu International Airport and Kahului Airport.

- The study team identified six Honolulu International Airport contracts going to DBEs totaling \$11 million (9.31% DBE participation).
- The study team identified two Kahului Airport contracts going to DBEs totaling \$8,000, about 0.25 percent DBE participation.

Summary. HDOT might consider these data when determining whether to make a step 2 adjustment based on past DBE participation. HDOT might apply the median DBE participation from FFY 2013 through FFY 2018 of 1.11 percent for Honolulu International Airport and 0.00 percent for Kahului Airport for a downward step 2 adjustment.

2. Information related to employment, self-employment, education, training and unions.

Chapter 7 summarizes information about conditions in the Hawaii transportation contracting industry for minorities, women and MBE/WBEs. Detailed quantitative analyses of marketplace conditions in Hawaii are presented in Appendices E through H. Keen Independent's analyses indicate there are barriers that certain minority groups and women face related to entry and advancement and business ownership in the Hawaii construction and engineering industries. Such barriers may affect the availability of MBE/WBEs to obtain and perform HDOT transportation contracts.

It may not be possible to quantify the cumulative effect that barriers in employment, education and training may have had in depressing the availability of minority- and women-owned firms in the Hawaii transportation contracting industry. However, the effects of barriers in business ownership can be quantified, as first explained in Chapter 8.

The study team used regression analyses to investigate whether race, ethnicity and gender affected rates of business ownership among workers in the Hawaii construction and engineering industries.

- The regression analyses allowed the study team to examine those effects while statistically controlling for various personal characteristics including education and age (Appendix F provides detailed results of the business ownership regression analyses).⁴ Those analyses revealed that Asian Pacific/Native Hawaiian and other minority groups were less likely than nonminorities to own construction businesses and that white women were less likely than white men to own construction firms, even after accounting for various race- and gender-neutral personal characteristics. Each of these disparities was statistically significant.
- In addition, there was a substantial, statistically significant disparity in firm ownership for Asian Pacific Americans and Native Hawaiians working in the Hawaii architecture and engineering industry.

As discussed in Chapters 8 and 9, Keen Independent analyzed the impact that barriers in business ownership would have on the base figure for FAA-funded contracts if Asian Pacific Americans, Native Hawaiians and white women owned businesses at the same rate as similarly situated nonminorities and white men. This type of inquiry is sometimes referred to as a “but for” analysis because it estimates the availability of MBE/WBEs *but for* the effects of race- and gender-based discrimination.

⁴ The study team examined U.S. Census data on business ownership rates using methods similar to analyses examined in court cases involving state departments of transportation in California, Illinois and Minnesota.

First considering Honolulu International Airport, the study team separately completed “but for” analyses for construction and for engineering contracts and then weighted the results based on the proportion of FAA-funded contract dollars that HDOT awarded for construction and engineering at that airport for July 2011 through June 2016. The analysis included the same contracts that the study team analyzed to determine the base figure (i.e., FAA-funded contracts that HDOT awarded from July 2011 through June 2016). Keen Independent followed the same steps to conduct the “but for” analyses as described for FHWA-funded contracts in Chapter 8.

Figure 10-2 calculates the impact on current and potential DBE availability for Honolulu International Airport contracts, resulting in a possible upward adjustment of the base figure to a goal of 14.26 percent. (The calculations indicate a possible upward step 2 adjustment of 7.51 percentage points.)

Figure 10-2.
Honolulu International Airport — potential step 2 adjustment for considering disparities in the rates of business ownership

Current and potential DBEs	a. Current availability	b. Disparity index for business ownership	c. Availability after initial adjustment*	d. Availability after scaling to 100%	e. Components of overall DBE availability**
Construction					
Asian Pacific American, Native Hawaiian or Pacific Islander	2.81 %	30	9.37 %	8.74 %	
Other minorities	1.32	65	2.03	1.89	
White women	0.00	31	0.00	0.00	
Minorities and women	4.13 %	n/a	11.40 %	10.63 %	9.51 %
All other businesses	95.87	n/a	95.87	89.37	
Total firms	100.00 %	n/a	107.27 %	100.00 %	
Engineering and other subindustries					
Asian Pacific American, Native Hawaiian or Pacific Islander	17.88 %	38	47.05 %	36.43 %	
Other minorities	10.52	n/a	10.52	8.14	
White women	0.57	n/a	0.57	0.44	
Minorities and women	28.97 %	n/a	58.14 %	45.01 %	4.76 %
All other businesses	71.03	n/a	71.03	54.99	
Total firms	100.00 %	n/a	129.17 %	100.00 %	
Total for current and potential DBEs	6.76 %	n/a	n/a		14.26 %
Difference from base figure					7.51 %

Note: Numbers may not add to 100.00% due to rounding.

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

** Components of goal calculated as value after adjustment and scaling to 100% multiplied by percentage of total FAA-funded contract dollars in that category (construction = 89.4%, engineering = 10.6%).

Source: Keen Independent based on FAA-funded contracts for July 2011 through June 2016 and statistical analysis of U.S. Census Bureau American Community Survey data for Hawaii for 2012–2016.

Figure 10-3 calculates the impact on overall availability of DBEs and potential DBEs for FAA-funded construction and engineering contracts at Kahului Airport. The result is a possible upward adjustment of the base figure for Kahului Airport from 28.13 percent to 46.17 percent, which is an upward adjustment of 18.04 percentage points. Chapter 8 provides a step-by-step description of the types of calculations made in Figures 10-2 and 10-3.

Figure 10-3.
Kahului Airport — potential step 2 adjustment for considering disparities in the rates of business ownership

Current and potential DBEs	a. Current availability	b. Disparity index for business ownership	c. Availability after initial adjustment*	d. Availability after scaling to 100%	e. Components of overall DBE availability**
Construction					
Asian Pacific American, Native Hawaiian or Pacific Islander	18.98 %	30	63.27 %	43.42 %	
Other minorities	2.63	65	4.05	2.78	
White women	0.00	31	0.00	0.00	
Minorities and women	21.61 %	n/a	67.31 %	46.20 %	10.15 %
All other businesses	78.39	n/a	78.39	53.80	
Total firms	100.00 %	n/a	145.70 %	100.00 %	
Engineering and other subindustries					
Asian Pacific American, Native Hawaiian or Pacific Islander	18.43 %	38	48.51 %	37.29 %	
Other minorities	10.33	n/a	10.33	7.94	
White women	1.20	n/a	1.20	0.92	
Minorities and women	29.96 %	n/a	60.04 %	46.16 %	36.02 %
All other businesses	70.04	n/a	70.04	53.84	
Total firms	100.00 %	n/a	130.08 %	100.00 %	
Total for current and potential DBEs	28.13 %	n/a	n/a		46.17 %
Difference from base figure					18.04 %

Note: Numbers may not add to 100.00% due to rounding.

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

** Components of goal calculated as value after adjustment and scaling to 100% multiplied by percentage of total FAA-funded contract dollars in that category (construction = 22.0%, engineering = 78.0%).

Source: Keen Independent based on FAA-funded contracts for July 2011 through June 2016 and statistical analysis of U.S. Census Bureau American Community Survey data for Hawaii for 2012–2016.

3. Any disparities in the ability of DBEs to get financing, bonding and insurance. Analysis of access to financing and bonding revealed quantitative and qualitative evidence of disadvantages for minorities, women and MBE/WBEs.

- Any barriers to obtaining financing and bonding might affect opportunities for minorities and women to successfully form and operate construction and engineering businesses in the Hawaii marketplace.
- If there are barriers that MBE/WBEs face in obtaining financing and bonding, those firms would also be at a disadvantage in obtaining and performing HDOT construction and engineering prime contracts and subcontracts.

There is also evidence that some firms cannot bid on certain public sector projects because they cannot afford the levels of insurance required by the agency. This barrier appears to affect small businesses, which might disproportionately impact minority- and women-owned firms. The information about financing, bonding and insurance supports an upward step 2 adjustment in HDOT’s overall annual goals for DBE participation in FAA-funded contracts.

Note that financing and bonding are closely linked, as discussed in Chapter 7 and Appendix J.

4. Other factors. The Federal DBE Program suggests that federal aid recipients also examine “other factors” when determining whether to make any step 2 adjustments to their base figure.⁵

Among the “other factors” examined in this study was the success of MBE/WBEs relative to majority-owned businesses in the Hawaii marketplace. There is quantitative evidence that certain groups of MBE/WBEs are less successful than majority-owned firms, and face greater barriers in the marketplace, even after considering neutral factors. Chapter 7 summarizes that evidence and Appendix H presents supporting quantitative analyses.

There is also qualitative evidence of barriers to the success of minority- and women-owned businesses, as summarized in Chapter 7. Some of this qualitative information suggests that discrimination on the basis of race, ethnicity and gender affects minority- and women-owned firms in the Hawaii transportation contracting industry.

Approaches for making step 2 adjustments. Quantification of potential step 2 adjustments is discussed below.

1. Current capacity of DBEs to perform work, as measured by the volume of work DBEs have performed in recent years. DBE capacity analysis might indicate a downward step 2 adjustment if HDOT based this determination on past DBE participation — for the last six fiscal years (FFY 2013 through FFY 2018) the median reported DBE participation on FAA-funded contracts was 1.11 percent for Honolulu International Airport and 0.00 percent for Kahului Airport.

⁵ 49 CFR Section 26.45.

USDOT “Tips for Goal-Setting” suggests taking one-half of the difference between the base figure and evidence of current capacity as one approach to calculate the step 2 adjustment for that factor.

- The difference between the 6.76 percent base figure and 1.11 percent DBE participation for Honolulu International Airport is 5.65 percentage points ($6.76\% - 1.11\% = 5.65\%$). One-half of this difference is a downward adjustment of 2.83 percentage points ($5.65\% \div 2 = 2.82\%$). The goal would then be calculated as follows: $6.76\% - 2.82\% = 3.94\%$. (These calculations are presented in Figure 10-4.)
- For Kahului Airport, the difference between the 28.13 percent base figure and 0.00 percent DBE participation is 28.13 percentage points. One-half of this difference is a downward adjustment of 14.06 percentage points ($28.13\% \div 2 = 14.06\%$). The goal would then be calculated as follows: $28.13\% - 14.06\% = 14.07\%$. (These calculations are presented in Figure 10-5.)

2. Information related to employment, self-employment, education, training and unions.

The study team was not able to quantify all of the information regarding barriers to entry for MBE/WBEs. Quantification of the business ownership factor indicates an upward step 2 adjustment of 7.51 percentage points for Honolulu International Airport (as presented in Figure 10-2) and 18.04 percentage points for Kahului Airport (Figure 10-3) to reflect the “but-for” analyses of business ownership rates. If HDOT made this upward adjustment, the overall DBE goal for FAA-funded contracts would be 14.27 percent for Honolulu International Airport and 46.17 percent for Kahului Airport.

- Honolulu International Airport. $6.76\% + 7.51\% = 14.27\%$; and
- Kahului Airport. $28.13\% + 18.04\% = 46.17\%$.

3. Any disparities in the ability of DBEs to get financing, bonding and insurance. Analysis of financing, bonding and insurance indicates that an upward adjustment is appropriate. However, the impact of these factors on availability could not be quantified.

4. Other factors. Impact of the many barriers to success of MBE/WBEs in Hawaii could not be specifically quantified. However, the evidence supports an upward adjustment.

Summary — Honolulu International Airport. HDOT will need to consider whether to make a downward, upward or no step 2 adjustment when determining its overall DBE goals for Honolulu International Airport.

- If HDOT makes a downward step 2 adjustment reflecting current capacity to perform work, its overall DBE goal for FAA-funded contracts at Honolulu International Airport would be 3.94 percent as calculated in Figure 10-4.
- If HDOT decides to not make a downward adjustment and to instead make an upward adjustment that reflects analyses of business ownership rates, its overall DBE goal would be 14.27 percent.

Alternatively, HDOT might choose to not make any step 2 adjustment to its overall DBE goal for Honolulu International Airport and use the base figure as its overall DBE goal (6.76%).

Figure 10-4 summarizes these results.

Figure 10-4.

Honolulu International Airport — potential step 2 adjustments for HDOT’s overall DBE goal for FAA-funded contracts, FFY 2020–FFY 2022

Step 2 adjustment component	Value	Explanation
Lower range of overall DBE goal		
Base figure	6.76 %	From base figure analysis
Evidence of current capacity	- 1.11	Past DBE participation (Uniform DBE Reports)
Difference	5.65 %	
	÷ 2	Reduce by one-half
Adjustment	2.82 %	Downward adjustment for current capacity
Base figure	6.76 %	From base figure analysis
Adjustment for current capacity	- 2.82	Downward step 2 adjustment
Overall DBE goal	3.94 %	Lower range of DBE goal
Upper range of overall DBE goal		
Base figure	6.76 %	From base figure analysis
Adjustment for "but for" factors	+ 7.51	"But for" step 2 adjustment for business ownership
Overall DBE goal	14.27 %	Upper range of DBE goal

Source: Keen Independent analysis.

Summary — Kahului Airport. HDOT will also need to consider whether to make a downward, upward or no step 2 adjustment when determining its overall DBE goals for Kahului Airport.

- If HDOT makes a downward step 2 adjustment reflecting current capacity to perform work, its overall DBE goal for FAA-funded contracts would be 14.07 percent.
- If HDOT decides instead to make an upward adjustment that reflects analyses of business ownership rates, its overall DBE goal would be 46.17 percent.

Figure 10-5 summarizes this information.

Figure 10-5.

Kahului Airport — potential step 2 adjustments for HDOT’s overall DBE goal for FAA-funded contracts, FFY 2020–FFY 2022

Step 2 adjustment component	Value	Explanation
Lower range of overall DBE goal		
Base figure	28.13 %	From base figure analysis
Evidence of current capacity	- 0.00	Past DBE participation (DBE Uniform Reports)
Difference	28.13 %	
	÷ 2	Reduce by one-half
Adjustment	14.06 %	Downward adjustment for current capacity
Base figure	28.13 %	From base figure analysis
Adjustment for current capacity	- 14.06	Downward step 2 adjustment
Overall DBE goal	14.07 %	Lower range of DBE goal
Upper range of overall DBE goal		
Base figure	28.13 %	From base figure analysis
Adjustment for "but for" factors	+ 18.04	"But for" step 2 adjustment for business ownership
Overall DBE goal	46.17 %	Upper range of DBE goal

Source: Keen Independent analysis.

C. Portion of DBE Goals for FAA-Funded Contracts at Large and Medium Hub Primary Airports to be Met through Neutral Means

As explained in Chapter 8, the Federal DBE Program requires state and local transportation agencies to meet the maximum feasible portion of their overall DBE goals using race- and gender-neutral measures. Along with setting an overall goal for DBE participation, agencies must project the portion of that goal they expect to meet (a) through race- and gender-neutral means, and (b) through race- and gender-conscious programs (if any). USDOT offers guidance concerning how transportation agencies should project the portions of their overall DBE goals that will be met through race- and gender-neutral, and race- and gender-conscious measures, as outlined in detail in Chapter 8.

1. Is there evidence of discrimination within the local transportation contracting marketplace for any racial, ethnic or gender groups? The 2019 Availability and Disparity Study considered conditions in the local marketplace to address this question. Quantitative and qualitative information is summarized below.

As discussed in Chapter 7, Keen Independent examined conditions in the Hawaii marketplace, including:

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

There was quantitative evidence of disparities in outcomes for minority- and women-owned firms in general and for certain MBE/WBE groups concerning the above issues. Qualitative information indicated some evidence that race and gender discrimination may have been a factor in these outcomes (see Appendix J).

Results of the disparity analysis for FAA-funded contracts. Chapter 6 examines FAA-funded contracts with and without DBE contract goals. This analysis pertains to FAA-funded contracts across all HDOT airports.

- The share of FAA-funded contract dollars going to minority- and women-owned firms was relatively high with goals (59.4%) and without goals (65.7%). It does not appear that participation of minority- and women-owned firms on HDOT contracts was higher when HDOT set a DBE contract goal and when HDOT did not.
- Most of the minority- and women-owned firms receiving work on FAA-funded contracts were not certified as DBEs (of the 72 MBE/WBE firms that received a contract or subcontract, only 20 were DBE-certified).
- For both goals and non-goals contracts, utilization of firms owned by Asian Pacific Americans, Native Hawaiians and Pacific Islanders exceeded what might be expected from the availability analysis. There is no evidence of disparities for this group from analysis of HDOT FAA-funded contracts with and without DBE contract goals.

There were substantial disparities for African American-, Hispanic American-, American Indian or Alaska Native-, Subcontinent Asian American- and white women-owned firms.

- MBE/WBEs received 67.9 percent of FAA-funded contract dollars going to primes.

Summary. HDOT should review the information about utilization and availability of minority- and women-owned firms in its contracts in Chapters 5 and 6 and analysis of marketplace conditions presented in Chapter 7 and Appendices E through J, as well as other information it may have, when considering the extent to which it can meet its overall DBE goal through neutral measures.

2. What has been the agency’s past experience in meeting its overall DBE goal? HDOT’s reported DBE participation based on DBE commitments/awards on FAA-funded contracts for Honolulu International Airport was lower than its goal of 24.40 percent for FFY 2013 through FFY 2018.

HDOT reported no DBE participation in FFY 2013 through FFY 2018 for Kahului Airport and therefore did not meet its goal of 21.70 percent in any of those years based on its Uniform Reports.

Keen Independent’s analysis, however, indicates very high utilization of minority- and women-owned firms that are not DBE-certified. It appears that many of those firms could be certified as DBEs but have not done so.

3. What has DBE participation been when HDOT has not applied DBE contract goals (or other race-conscious remedies)? Keen Independent examined three sources of information to assess race-neutral DBE participation:

- HDOT-reported race-neutral DBE participation on FAA-funded contracts for the most recent years for Honolulu International Airport and Kahului Airport;
- Keen Independent estimates of DBE participation on FAA-funded contracts for which no DBE contract goals applied for Honolulu International Airport and Kahului Airport; and
- Information concerning DBE participation as prime contractors on FAA-funded contracts for Honolulu International Airport and Kahului Airport.

Keen Independent also examined overall participation of minority- and women-owned firms as part of each of these three analyses. The discussion below examines these results.

Race-neutral DBE participation in recent HDOT Uniform Reports. Per USDOT instructions, HDOT counts as “neutral” participation any prime contracts, as well as subcontracts, going to DBEs beyond what was needed to meet DBE contract goals set for a project or that were otherwise awarded in a race-neutral manner.

As shown in Figure 10-6, HDOT’s Uniform Reports of DBE Awards/Commitments and Payments submitted to FAA for Honolulu International Airport for the last six federal fiscal years indicate a median race-neutral participation of 0.01 percent.

HDOT reported no prime contract or subcontract awards or payments to DBEs in its FFYs 2013, 2014, 2015, 2016, 2017 and 2018 Uniform Reports of DBE Awards or Commitments and Payments to FAA for Kahului Airport contracts. (Median DBE participation for Kahului Airport based on these data for these six years is 0.00 percent.)

Figure 10-6.

Honolulu International Airport — HDOT-reported race-neutral and race-conscious DBE participation on FAA-funded contracts for FFY 2013–FFY 2018

Federal fiscal year	DBE commitments/awards		
	Total	Race-neutral	Race-conscious
2013	0.02 %	0.02 %	0.00 %
2014	4.19	4.19	0.00
2015	2.19	2.19	0.00
2016	2.48	0.00	2.48
2017	0.00	0.00	0.00
2018	0.00	0.00	0.00

Source: HDOT Uniform Reports of DBE Awards/Commitments and Payments.

DBE participation on contracts without DBE contract goals. Keen Independent also analyzed DBE participation on HDOT’s FAA-funded contracts without DBE contract goals. HDOT achieved 13.34 percent DBE participation on these contracts from July 2011 through June 2016 for Honolulu International Airport and 0.25 percent DBE participation for Kahului Airport.

DBE participation as prime contractors. Keen Independent analyzed DBE participation as prime contractors. DBEs obtained 7.88 percent of prime contract dollars on FAA-funded contracts for Honolulu International Airport, however, DBEs obtained no FAA-funded prime contracts at Kahului Airport.

4. What is the extent and effectiveness of race- and gender-neutral measures that the agency could have in place for the next fiscal year? When determining the extent to which it could meet its overall DBE goals through the use of neutral measures, HDOT must review the race- and gender-neutral measures that it and other organizations have in place, and those it has planned or could consider for future implementation.

As discussed in Chapter 8, HDOT might consider a small business enterprise (SBE) contract goals program to entirely or partially meet its overall DBE goal for FAA-funded contracts. It would set SBE goals for FAA-funded contracts in the same way as it currently uses DBE contract goals. Monitoring of SBE participation would be the same as DBE participation.

Federal regulations in 49 CFR Part 26.39(b)(1) allow the use of set-asides for SBE prime contractors for USDOT-funded contracts, which would provide HDOT another tool it could use to boost participation of small businesses. Reasons for using an SBE Program are similar to those discussed in Chapter 8 regarding FHWA-funded contracts:

- About 94 percent of the businesses available for HDOT’s USDOT-funded contracts are within the federal small business size limit based on the revenue they reported in the availability survey for this study. Of those small businesses, 59 percent are minority- or women-owned.
- All of the current DBEs in Hawaii would automatically qualify as SBEs.
- There may be some stigma concerning certification as a “disadvantaged business” that might not arise for small business certification.
- Minority and female business owners in Hawaii frequently reported disadvantages because they were a small business competing against large businesses. In Hawaii, some of those large businesses are owned by minorities or women. Large minority-owned firms win a large portion of HDOT’s FAA-funded contracts.
- An SBE program for USDOT-funded contracts might be especially effective in encouraging minority- and women-owned business participation if it were widely promoted and coupled with further unbundling of HDOT contracts, continued technical assistance for DBEs, restricting bidding on small contracts to SBEs, and parallel efforts to include small businesses in HDOT’s non-federally-funded contracts.
- In addition, Keen Independent determined that HDOT could achieve 11.3 percentage point greater DBE participation on its FAA-funded contracts across its airports if minority- and women-owned firms that appear to be eligible for DBE certification became certified.

D. Summary

Chapter 10 provides information to HDOT as it considers its overall DBE goals for FFY 2020 through FFY 2022 for FAA-funded contracts at Honolulu and Kahului airports and its projection of the portion of those overall DBE goals to be achieved through neutral means.

1. Overall DBE goals for FAA-funded contracts. As explained in Chapter 10, HDOT might consider an upward and downward adjustments to set its overall DBE goals for FAA-funded contracts at Honolulu International Airport and Kahului Airport.

- If it made an upward adjustment, HDOT could set its overall DBE goal at 14.27 percent for Honolulu International Airport; and
- If it made a downward adjustment, HDOT could set its overall DBE goal at 14.07 percent for Kahului Airport.

2. Could HDOT project that it can meet all of its overall DBE goal through neutral means? If not, how much of the overall DBE goal can HDOT project to be met through neutral means?

HDOT might consider a new SBE Program as a means of achieving its overall DBE goals for these two airports. This program would replace HDOT’s use of DBE contract goals with SBE contract goals. It would also encourage SBE participation as prime contractors on small HDOT contracts.

Honolulu International Airport. As shown below, the first column of Figure 10-7 presents projections of a neutral and race-conscious split when HDOT prepared its overall DBE goal for Honolulu International Airport for FFY 2017 through FFY 2019.

The second column of numbers in Figure 10-7 is an example of projections using an overall DBE goal of 3.94 percent if HDOT proposed 100 percent of its overall DBE goal to be achieved through an SBE Program and other neutral means. The third column presents the same information if HDOT proposed an overall DBE goal of 6.76 percent. Finally, if HDOT proposed an overall DBE goal of 14.27 percent for its FAA-funded contracts at Honolulu International Airport for FFY 2002 through FFY 2022, it might attempt to meet all of that goal through neutral means.

Figure 10-7.

Honolulu International Airport — current HDOT overall DBE goal and projections of race-neutral participation for FAA-funded contracts, FFY 2020 through FFY 2022

Component of overall DBE goal	FFY 2017-FFY 2019	FFY 2020 - FFY 2022		
		Downward adjustment	Base figure	Upward adjustment
Overall goal	24.40 %	3.94 %	6.76 %	14.27 %
Neutral projection	- 4.19	- 3.94	- 6.76	- 14.27
Race-conscious projection	20.21 %	0.00 %	0.00 %	0.00 %

Source: Keen Independent analysis.

Kahului Airport. Figure 10-8 on the following page shows projections of neutral and race-conscious DBE participation at Kahului Airport. The first column of shows these projections when HDOT prepared its overall DBE goal for FFY 2017 through FFY 2019.

HDOT could set its overall DBE goal for Kahului Airport for FFY 2020 through FFY 2022 at 14.07 percent if it made a downward adjustment. It might attempt to meet all of this goal through neutral means (such as an SBE contract goals program). The second column of Figure 10-8 shows this neutral projection.

The third column of Figure 10-8 presents projections using the base figure of 28.13 percent for the overall DBE goal at Kahului Airport.

The fourth column of Figure 10-8 provides the overall DBE goal and neutral projection if HDOT chose to set a higher overall DBE goal for Kahului Airport for FFY 2020 through FFY 2022. In each case, HDOT might attempt to meet these goals through neutral means.

Figure 10-8.

Kahului Airport — current HDOT overall DBE goal and projections of race-neutral participation for FAA-funded contracts, FFY 2020 through FFY 2022

Component of overall DBE goal	FFY 2017-FFY 2019	FFY 2020 - FFY 2022		
		Downward adjustment	Base figure	Upward adjustment
Overall goal	21.70 %	14.07 %	28.13 %	46.17 %
Neutral projection	- <u>11.00</u>	- <u>14.07</u>	- <u>28.13</u>	- <u>46.17</u>
Race-conscious projection	10.70 %	0.00 %	0.00 %	0.00 %

Source: Keen Independent analysis.

CHAPTER 11.

Overall Annual DBE Goals and Projections for FAA-Funded Contracts at Small Hub Primary Airports

The Federal Aviation Administration (FAA) provides funds to HDOT for contracts at its airports, including small hub primary airports: Ellison Onizuka Kona International Airport at Keahole (“Kona International Airport”), Hilo International Airport and Lihue Airport.¹ Therefore, HDOT must operate the Federal DBE Program at its airports, including setting three-year goals for DBE participation. The years covered by those goals differ by airport. Chapter 11 of this Availability and Disparity Study report focuses on small hub primary airports.

HDOT’s current goals for DBE participation in FAA-funded contracts for its small hub primary airports from FFY 2018 through FFY 2020 are as follows:

- 22.00 percent for Kona International Airport;
- 21.00 percent for Hilo International Airport; and
- 29.00 percent for Lihue Airport.

HDOT projected that a portion of those goals would be met through DBE contract goals. This Availability and Disparity Study provides information to HDOT that will help it set new overall DBE goals and projections for those three airports starting in FFY 2021.

Chapter 11 contains four parts:

- A. Establishing a base figure;
- B. Consideration of a step 2 adjustment;
- C. Portion of DBE goals for FAA-funded contracts at small hub primary airports to be met through neutral means; and
- D. Summary.

¹ The Keen Independent study team identified 165 FAA-funded contracts and subcontracts at Kona International Airport, Hilo International Airport and Lihue Airport between July 2011 to June 2016 that accounted for about \$87 million.

A. Establishing a Base Figure

As for FAA-funded contracts for Honolulu International Airport and Kahului Airport discussed in Chapter 10, establishing a base figure is the first step in calculating an overall annual goal for DBE participation in HDOT's FAA-funded contracts at Kona, Hilo and Lihue airports.

Chapter 4 presented results from the availability analysis for FAA-funded contracts during the July 2011 through June 2016 study period. Availability of current and potential DBEs for FAA-funded contracts was:

- 12.66 percent for Kona International Airport;
- 15.64 percent for Hilo International Airport; and
- 8.84 percent for Lihue Airport.

HDOT might consider those percentages as the base figures for its new overall annual DBE goals if it expects FAA-funded contracts at those airports for the three years starting FFY 2021 will be reasonably similar to the types of contracts during the July 2011 through June 2016 study period. Chapter 4 explains the methodology for the base figure calculation in considerable detail.

These goals count firms that are currently certified as DBEs and those potentially certified as DBEs in the base figures. As a point of reference, Keen Independent also calculated the base figures for each airport only counting currently certified DBEs. The base figures including only current DBEs are 5.01 percent for Kona International Airport, 8.41 percent for Hilo International Airport and 3.40 percent for Lihue Airport.

B. Consideration of a Step 2 Adjustment

Per the Federal DBE Program, HDOT must consider potential step 2 adjustments to the base figures when determining its overall DBE goals for FAA-funded contracts for each airport. Federal regulations outline factors that an agency must consider:

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

Keen Independent completed an analysis of each of the above step 2 factors and was able to quantify the effect of certain factors on the base figures. Other information examined was not as easily quantifiable but is still relevant to HDOT as it determines whether to make any step 2 adjustments.

² 49 CFR Section 26.45.

1. Current capacity of DBEs to perform work, as measured by the volume of work DBEs have performed in recent years. USDOT’s “Tips for Goal-Setting” suggests that agencies should examine data on past DBE participation on their USDOT-funded contracts in recent years (i.e., the percentage of contract dollars going to DBEs).

DBE participation based on HDOT Uniform Reports to FAA for Kona International Airport. For Kona International Airport, HDOT identified DBE participation in only one year of its Uniform Reports of DBE Awards or Commitments and Payments for FFY 2012 through FFY 2018 (3.67 percent in FFY 2012). In other years, HDOT reported no awards or payments to DBEs in its Uniform Reports. Therefore, median DBE participation for Kona International Airport based on these data was 0.00 percent.

DBE participation based on HDOT Uniform Reports to FAA for Hilo International Airport. From FFY 2012 through FFY 2018, HDOT reported awards or payments to DBEs in only three fiscal years (0.57% in 2012, 0.82% in 2015 and 20.55% in 2017). HDOT reported no DBE participation during the remaining fiscal years studied (FFY 2013, FFY 2014, FFY 2016 and FFY 2018). Therefore, median DBE participation for Hilo International Airport based on these data was 0.00 percent.

DBE participation based on HDOT Uniform Reports to FAA for Lihue Airport. HDOT reported DBE participation in its Uniform Reports for Lihue Airport in only two fiscal years from FFY 2012 through FFY 2018 (50.43% in 2012 and 0.65% in 2016). As with Kona and Hilo airports, median DBE participation for Lihue Airport based on these data was 0.00 percent.

DBE participation based on Keen Independent utilization analysis for FAA-funded contracts. The Keen Independent study team collected FAA-funded contract information for Kona, Hilo and Lihue airports for the July 2011 through June 2016 study period.

- The study team identified one Kona International Airport contract going to a DBE totaling \$0.7 million (2.71% DBE participation).
- In addition, the study team identified four Hilo International Airport contracts going to DBEs totaling \$0.3 million, about 0.63 percent DBE participation.
- For Lihue Airport, the study team identified three contracts going to DBEs totaling \$0.4 million, or roughly 2.13 percent DBE participation.

Summary. HDOT might consider these data when determining whether to make a step 2 adjustment based on past DBE participation. Keen Independent recommends using the median DBE participation provided in HDOT Uniform Reports from FFY 2012 through FFY 2018 of 0.00 percent for Kona International Airport, 0.00 percent for Hilo International Airport and 0.00 percent for Lihue Airport for a downward step 2 adjustment.

2. Information related to employment, self-employment, education, training and unions.

Chapter 7 summarizes information about conditions in the Hawaii transportation contracting industry for minorities, women and MBE/WBEs. Detailed quantitative analyses of marketplace conditions in Hawaii are presented in Appendices E through H. Keen Independent’s analyses indicate there are barriers that certain minority groups and women face related to entry and advancement and business ownership in the Hawaii construction and engineering industries. Such barriers may affect the availability of MBE/WBEs to obtain and perform HDOT transportation contracts.

It may not be possible to quantify the cumulative effect that barriers in employment, education and training may have had in depressing the availability of minority- and women-owned firms in the Hawaii transportation contracting industry. However, the effects of barriers in business ownership can be quantified, as first explained in Chapter 8.

The study team used regression analyses to investigate whether race, ethnicity and gender affected rates of business ownership among workers in the Hawaii construction and engineering industries.

- The regression analyses allowed the study team to examine those effects while statistically controlling for various personal characteristics including education and age (Appendix F provides detailed results of the business ownership regression analyses).³ Those analyses revealed that Asian Pacific/Native Hawaiian and other minority groups were less likely than nonminorities to own construction businesses and that white women were less likely than white men to own construction firms, even after accounting for various race- and gender-neutral personal characteristics. Each of these disparities was statistically significant.
- In addition, there was a substantial, statistically significant disparity in firm ownership for Asian Pacific Americans and Native Hawaiians working in the Hawaii architecture and engineering industry.

As discussed in Chapters 8, 9 and 10, Keen Independent analyzed the impact that barriers in business ownership would have on the base figure for FAA-funded contracts if Asian Pacific Americans, Native Hawaiians and white women owned businesses at the same rate as similarly situated nonminorities and white men. This type of inquiry is sometimes referred to as a “but for” analysis because it estimates the availability of MBE/WBEs *but for* the effects of race- and gender-based discrimination.

Kona International Airport. First considering Kona International Airport, the study team completed these “but for” analyses for construction and engineering contracts and then weighted the results based on the proportion of FAA-funded contract dollars that HDOT awarded for construction and engineering for July 2011 through June 2016. The analysis included the same contracts that the study team analyzed to determine the base figure (i.e., FAA-funded contracts that HDOT awarded from July 2011 through June 2016). Keen Independent followed the same steps to conduct the “but for” analyses as described for FHWA-funded contracts in Chapter 8.

³ The study team examined U.S. Census data on business ownership rates using methods similar to analyses examined in court cases involving state departments of transportation in California, Illinois and Minnesota.

Figure 11-1 calculates the impact on overall MBE/WBE availability for Kona International Airport contracts, resulting in a possible upward adjustment of the base figure to 27.97 percent. (The calculations in Figure 11-1 indicate a possible upward step 2 adjustment of 15.31 percentage points.)

Figure 11-1.

Kona International Airport — potential step 2 adjustment for considering disparities in the rates of business ownership

Current and potential DBEs	a. Current availability	b. Disparity index for business ownership	c. Availability after initial adjustment*	d. Availability after scaling to 100%	e. Components of overall DBE availability**
Construction					
Asian Pacific American, Native Hawaiian or Pacific Islander	8.37 %	30	27.89 %	23.19 %	
Other minorities	1.38	65	2.12	1.77	
White women	<u>0.26</u>	31	<u>0.26</u>	<u>0.22</u>	
Minorities and women	10.01 %	n/a	30.28 %	25.17 %	21.80 %
All other businesses	<u>89.99</u>	n/a	<u>89.99</u>	<u>74.83</u>	
Total firms	100.00 %	n/a	120.27 %	100.00 %	
Engineering and other subindustries					
Asian Pacific American, Native Hawaiian or Pacific Islander	18.40 %	38	48.43 %	37.25 %	
Other minorities	10.26	n/a	10.26	7.89	
White women	<u>1.15</u>	n/a	<u>1.15</u>	<u>0.88</u>	
Minorities and women	29.81 %	n/a	59.84 %	46.02 %	6.17 %
All other businesses	<u>70.19</u>	n/a	<u>70.19</u>	<u>53.98</u>	
Total firms	100.00 %	n/a	130.03 %	100.00 %	
Total for current and potential DBEs	12.66 %	n/a	n/a		27.97 %
Difference from base figure					15.31 %

Note: Numbers may not add to 100.00% due to rounding.

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

** Components of goal calculated as value after adjustment and scaling to 100% multiplied by percentage of total FAA-funded contract dollars in that category (construction = 86.6%, engineering = 13.4%).

Source: Keen Independent based on FAA-funded contracts for July 2011 through June 2016 and statistical analysis of U.S. Census Bureau American Community Survey data for Hawaii for 2012–2016.

Hilo International Airport. Figure 11-2 calculates the impact on current and potential DBE availability for FAA-funded construction and engineering at Hilo International Airport. The result is a possible upward adjustment of the base figure for Hilo International Airport that would increase the goal from the base figure of 15.64 percent to an adjusted figure of 32.06 percent. There would be an increase in the goal of 16.42 percentage points.

Figure 11-2.
Hilo International Airport — potential step 2 adjustment for considering disparities in the rates of business ownership

Current and potential DBEs	a. Current availability	b. Disparity index for business ownership	c. Availability after initial adjustment*	d. Availability after scaling to 100%	e. Components of overall DBE availability**
Construction					
Asian Pacific American, Native Hawaiian or Pacific Islander	9.15 %	30	30.50 %	24.80 %	
Other minorities	3.07	65	4.72	3.84	
White women	<u>0.11</u>	31	<u>0.11</u>	<u>0.09</u>	
Minorities and women	12.33 %	n/a	35.33 %	28.73 %	23.67 %
All other businesses	<u>87.67</u>	n/a	<u>87.67</u>	<u>71.27</u>	
Total firms	100.00 %	n/a	123.00 %	100.00 %	
Engineering and other subindustries					
Asian Pacific American, Native Hawaiian or Pacific Islander	19.38 %	38	51.01 %	38.75 %	
Other minorities	10.58	n/a	10.58	8.04	
White women	<u>1.18</u>	n/a	<u>1.18</u>	<u>0.90</u>	
Minorities and women	31.14 %	n/a	62.77 %	47.69 %	8.39 %
All other businesses	<u>68.86</u>	n/a	<u>68.86</u>	<u>52.31</u>	
Total firms	100.00 %	n/a	131.62 %	100.00 %	
Total for current and potential DBEs	15.64 %	n/a	n/a		32.06 %
Difference from base figure					16.42 %

Note: Numbers may not add to 100.00% due to rounding.
 * Initial adjustment is calculated as current availability divided by the disparity index.
 ** Components of goal calculated as value after adjustment and scaling to 100% multiplied by percentage of total FAA-funded contract dollars in that category (construction = 82.4%, engineering = 17.6%).

Source: Keen Independent based on FAA-funded contracts for July 2011 through June 2016 and statistical analysis of U.S. Census Bureau American Community Survey data for Hawaii for 2012–2016.

Lihue Airport. Figure 11-3 calculates the impact on overall availability of DBEs and potential DBEs for FAA-funded construction and engineering contracts at Lihue Airport. The result is a possible adjustment of the base figure to 16.60 percent (7.76 percentage point upward adjustment).

Chapter 8 provides a step-by-step description of the types of the types of calculations made in Figures 11-1, 11-2 and 11-3.

Figure 11-3.

Lihue Airport — potential step 2 adjustment for considering disparities in the rates of business ownership

Current and potential DBEs	a. Current availability	b. Disparity index for business ownership	c. Availability after initial adjustment*	d. Availability after scaling to 100%	e. Components of overall DBE availability**
Construction					
Asian Pacific American, Native Hawaiian or Pacific Islander	2.75 %	30	9.17 %	8.58 %	
Other minorities	0.99	65	1.52	1.42	
White women	<u>1.11</u>	31	<u>1.11</u>	<u>1.04</u>	
Minorities and women	4.85 %	n/a	11.81 %	11.04 %	9.25 %
All other businesses	<u>95.15</u>	n/a	<u>95.15</u>	<u>88.96</u>	
Total firms	100.00 %	n/a	106.95 %	100.00 %	
Engineering and other subindustries					
Asian Pacific American, Native Hawaiian or Pacific Islander	17.80 %	38	46.84 %	36.30 %	
Other minorities	10.00	n/a	10.00	7.75	
White women	<u>1.65</u>	n/a	<u>1.65</u>	<u>1.28</u>	
Minorities and women	29.45 %	n/a	58.49 %	45.33 %	7.35 %
All other businesses	<u>70.55</u>	n/a	<u>70.55</u>	<u>54.67</u>	
Total firms	100.00 %	n/a	129.04 %	100.00 %	
Total for current and potential DBEs	8.84 %	n/a	n/a		16.60 %
Difference from base figure					7.76 %

Note: Numbers may not add to 100.00% due to rounding.

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

** Components of goal calculated as value after adjustment and scaling to 100% multiplied by percentage of total FAA-funded contract dollars in that category (construction = 83.8%, engineering = 16.2 %).

Source: Keen Independent based on FAA-funded contracts for July 2011 through June 2016 and statistical analysis of U.S. Census Bureau American Community Survey data for Hawaii for 2012–2016.

3. Any disparities in the ability of DBEs to get financing, bonding and insurance. Analysis of access to financing and bonding revealed quantitative and qualitative evidence of disadvantages for minorities, women and MBE/WBEs.

- Any barriers to obtaining financing and bonding might affect opportunities for minorities and women to successfully form and operate construction and engineering businesses in the Hawaii marketplace.
- If there are barriers that MBE/WBEs face in obtaining financing and bonding, those firms would also be at a disadvantage in obtaining and performing HDOT construction and engineering prime contracts and subcontracts.

There is also evidence that some firms cannot bid on certain public sector projects because they cannot afford the levels of insurance required by the agency. This barrier appears to affect small businesses, which might disproportionately impact minority- and women-owned firms. The information about financing, bonding and insurance supports an upward step 2 adjustment in HDOT’s overall annual goals for DBE participation in FAA-funded contracts.

Note that financing and bonding are closely linked, as discussed in Chapter 7 and Appendix J.

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

Among the “other factors” examined in this study was the success of MBE/WBEs relative to majority-owned businesses in the Hawaii marketplace. There is quantitative evidence that certain groups of MBE/WBEs are less successful than majority-owned firms, and face greater barriers in the marketplace, even after considering neutral factors. Chapter 7 summarizes that evidence and Appendix H presents supporting quantitative analyses. There is also qualitative evidence of barriers to the success of minority- and women-owned businesses, as summarized in Chapter 7. Some of this qualitative information suggests that discrimination on the basis of race, ethnicity and gender affects minority- and women-owned firms in the Hawaii transportation contracting industry.

Approaches for making step 2 adjustments. Quantification of potential step 2 adjustments is discussed below.

1. **Current capacity of DBEs to perform work, as measured by the volume of work DBEs have performed in recent years.** DBE capacity analysis might indicate a downward step 2 adjustment if HDOT based this determination on past DBE participation — for the last seven fiscal years (FFY 2012 through FFY 2018) the median reported DBE participation on FAA-funded contracts was 0.00 percent for Kona, Hilo and Lihue airports.

⁴ 49 CFR Section 26.45.

USDOT “Tips for Goal-Setting” suggests taking one-half of the difference between the base figure and evidence of current capacity as one approach to calculate the step 2 adjustment for that factor.

- For Kona International Airport, the difference between the 12.66 percent base figure and 0.00 percent DBE participation is 12.66 percentage points. One-half of this difference is a downward adjustment of 6.33 percentage points ($12.66\% \div 2 = 6.33\%$). The goal would then be calculated as follows: $12.66\% - 6.33\% = 6.33\%$ (see Figure 11-4).
- For Hilo International Airport, the difference between the 15.64 percent base figure and 0.00 percent DBE participation is 15.64 percentage points. One-half of this difference is a downward adjustment of 7.82 percentage points ($15.64\% \div 2 = 7.82\%$). The goal would then be calculated as follows: $15.64\% - 7.82\% = 7.82\%$. (These calculations are presented in Figure 11-5.)
- For Lihue Airport, the difference between the 8.84 percent base figure and 0.00 percent DBE participation is 8.84 percentage points. One-half of this difference is a downward adjustment of 4.42 percentage points ($8.84\% \div 2 = 4.42\%$). The goal would then be calculated as follows: $8.84\% - 4.42\% = 4.42\%$ (see Figure 11-6).

2. Information related to employment, self-employment, education, training and unions.

The study team was not able to quantify all of the information regarding barriers to entry for MBE/WBEs. Quantification of the business ownership factor indicates an upward step 2 adjustment of 15.31 percentage points for Kona International Airport (as presented in Figure 11-1), 16.42 percentage points for Hilo International Airport (as presented in Figure 11-2) and 7.76 percentage points for Lihue Airport (as presented in Figure 11-3) to reflect the “but-for” analyses of business ownership rates. If HDOT made this upward adjustment, the overall DBE goal for FAA-funded contracts would be 27.97 percent for Kona International Airport, 32.06 percent for Hilo International Airport and 16.60 percent for Lihue Airport.

- Kona International Airport. $12.66\% + 15.31\% = 27.97\%$;
- Hilo International Airport. $15.64\% + 16.42\% = 32.06\%$; and
- Lihue Airport. $8.84\% + 7.76\% = 16.60\%$.

3. Any disparities in the ability of DBEs to get financing, bonding and insurance. Analysis of financing, bonding and insurance indicates that an upward adjustment is appropriate. However, impact of these factors on availability could not be quantified.

4. Other factors. Impact of the many barriers to success of MBE/WBEs in Hawaii could not be specifically quantified. However, the evidence supports an upward adjustment.

Summary — Kona International Airport. HDOT will need to consider whether to make a downward, upward or no step 2 adjustment when determining its overall DBE goals for Kona International Airport.

- If HDOT makes a downward step 2 adjustment reflecting current capacity to perform work, its overall DBE goal for FAA-funded contracts at Kona International Airport would be 6.33 percent as calculated in Figure 11-4.
- If HDOT decides to not make a downward adjustment and to make an upward adjustment that reflects analyses of business ownership rates, its overall DBE goal would be 27.97 percent.
- Alternatively, HDOT might choose to not make any step 2 adjustment to its overall DBE goal for Kona International Airport and use its base figure as its overall DBE goal (12.66%).

Figure 11-4 summarizes these results.

Figure 11-4.

Kona International Airport — potential step 2 adjustments for HDOT’s overall DBE goal for FAA-funded contracts, FFY 2021–FFY 2023

Step 2 adjustment component	Value	Explanation
Lower range of overall DBE goal		
Base figure	12.66 %	From base figure analysis
Evidence of current capacity	- 0.00	Past DBE participation (Uniform DBE Reports)
Difference	12.66 %	
	÷ 2	Reduce by one-half
Adjustment	6.33 %	Downward adjustment for current capacity
Base figure	12.66 %	From base figure analysis
Adjustment for current capacity	- 6.33	Downward step 2 adjustment
Overall DBE goal	6.33 %	Lower range of DBE goal
Upper range of overall DBE goal		
Base figure	12.66 %	From base figure analysis
Adjustment for "but for" factors	+ 15.31	"But for" step 2 adjustment for business ownership
Overall DBE goal	27.97 %	Upper range of DBE goal

Source: Keen Independent analysis.

Summary — Hilo International Airport. HDOT will also need to consider whether to make a downward, upward or no step 2 adjustment when determining its overall DBE goals for Hilo International Airport.

- If HDOT makes a downward step 2 adjustment reflecting current capacity to perform work, its overall DBE goal for FAA-funded contracts would be 7.82 percent.
- If HDOT decides instead to make an upward adjustment that reflects analyses of business ownership rates, its overall DBE goal would be 32.06 percent.
- With no adjustment, HDOT’s overall DBE goal for Hilo International Airport would be 15.64 percent.

Figure 11-5 summarizes this information.

Figure 11-5.

Hilo International Airport — potential step 2 adjustments for HDOT’s overall DBE goal for FAA-funded contracts, FFY 2021–FFY 2023

Step 2 adjustment component	Value	Explanation
Lower range of overall DBE goal		
Base figure	15.64 %	From base figure analysis
Evidence of current capacity	- 0.00	Past DBE participation (Uniform DBE Reports)
Difference	15.64 %	
	÷ 2	Reduce by one-half
Adjustment	7.82 %	Downward adjustment for current capacity
Base figure	15.64 %	From base figure analysis
Adjustment for current capacity	- 7.82	Downward step 2 adjustment
Overall DBE goal	7.82 %	Lower range of DBE goal
Upper range of overall DBE goal		
Base figure	15.64 %	From base figure analysis
Adjustment for "but for" factors	+ 16.42	"But for" step 2 adjustment for business ownership
Overall DBE goal	32.06 %	Upper range of DBE goal

Source: Keen Independent analysis.

Summary — Lihue Airport. HDOT will also need to consider whether to make a downward, upward or no step 2 adjustment when determining its overall DBE goals for Lihue Airport.

- If HDOT makes a downward step 2 adjustment reflecting current capacity to perform work, its overall DBE goal for FAA-funded contracts would be 4.42 percent.
- If HDOT decides instead to make an upward adjustment that reflects analyses of business ownership rates, its overall DBE goal would be 16.60 percent.
- With no adjustment, HDOT’s overall DBE goal for Lihue Airport would be 8.84 percent.

Figure 11-6 summarizes this information.

Figure 11-6.

Lihue Airport — potential step 2 adjustments for HDOT’s overall DBE goal for FAA-funded contracts, FFY 2021–FFY 2023

Step 2 adjustment component	Value	Explanation
Lower range of overall DBE goal		
Base figure	8.84 %	From base figure analysis
Evidence of current capacity	- 0.00	Past DBE participation (DBE Uniform Reports)
Difference	8.84 %	
	÷ 2	Reduce by one-half
Adjustment	4.42 %	Downward adjustment for current capacity
Base figure	8.84 %	From base figure analysis
Adjustment for current capacity	- 4.42	Downward step 2 adjustment
Overall DBE goal	4.42 %	Lower range of DBE goal
Upper range of overall DBE goal		
Base figure	8.84 %	From base figure analysis
Adjustment for "but for" factors	+ 7.76	"But for" step 2 adjustment for business ownership
Overall DBE goal	16.60 %	Upper range of DBE goal

Source: Keen Independent analysis.

C. Portion of DBE Goals for FAA-Funded Contracts at Small Hub Primary Airports to be Met through Neutral Means

As explained in Chapter 8, the Federal DBE Program requires state and local transportation agencies to meet the maximum feasible portion of their overall DBE goals using race- and gender-neutral measures. Along with setting an overall goal for DBE participation, agencies must project the portion of that goal they expect to meet (a) through race- and gender-neutral means, and (b) through race- and gender-conscious programs (if any). USDOT offers guidance concerning how transportation agencies should project the portions of their overall DBE goals that will be met through race- and gender-neutral and race- and gender-conscious measures, as outlined in detail in Chapter 8.

1. Is there evidence of discrimination within the local transportation contracting marketplace for any racial, ethnic or gender groups? The 2019 Availability and Disparity Study considered conditions in the local marketplace to address this question. Quantitative and qualitative information is summarized below.

As discussed in Chapter 7, Keen Independent examined conditions in the Hawaii marketplace, including:

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

There was quantitative evidence of disparities in outcomes for minority- and women-owned firms in general and for certain MBE/WBE groups concerning the above issues. Qualitative information indicated some evidence that race and gender discrimination may have been a factor in these outcomes (see Appendix J).

Results of the disparity analysis for FAA-funded contracts. Chapter 6 examines FAA-funded contracts with and without DBE contract goals. This analysis pertains to FAA-funded contracts across all HDOT airports.

- The share of FAA-funded contract dollars going to minority- and women-owned firms was relatively high with goals (59.4%) and without goals (65.7%). It does not appear that participation of minority- and women-owned firms on HDOT contracts was higher when HDOT set a DBE contract goal and when HDOT did not.
- Most of the minority- and women-owned firms receiving work on FAA-funded contracts were not certified as DBEs (of the 72 MBE/WBE firms that received a contract or subcontract, only 20 were DBE-certified).
- For both goals and non-goals contracts, utilization of firms owned by Asian Pacific Americans, Native Hawaiians and Pacific Islanders exceeded what might be expected from the availability analysis. There is no evidence of disparities for this group from analysis of HDOT FAA-funded contracts with and without DBE contract goals.

There were substantial disparities for African American-, Hispanic American-, American Indian or Alaska Native-, Subcontinent Asian American- and white women-owned firms.

- MBE/WBEs received 67.9 percent of FAA-funded contract dollars going to primes.

Summary. HDOT should review the information about utilization and availability of minority- and women-owned firms in its contracts in Chapters 5 and 6 and analysis of marketplace conditions presented in Chapter 7 and Appendices E through J, as well as other information it may have, when considering the extent to which it can meet its overall DBE goal through neutral measures.

2. What has been the agency's past experience in meeting its overall DBE goal? As discussed previously in Chapter 11, HDOT's reported DBE participation based on DBE commitments/awards on FAA-funded contracts for Kona, Hilo and Lihue airports was considerably lower than the overall DBE goals for these airports for FFY 2012 through FFY 2018.

- For Kona and Hilo airports, HDOT's reported DBE participation in FFY 2012 through FFY 2018 did not meet its overall DBE goals in any of those years based on its Uniform Reports.
- With respect to Lihue Airport, HDOT only met its goal of 29.00 percent DBE participation in one of the past seven fiscal years (DBE participation in FFY 2012 was reported to be 50.43 percent).

3. What has DBE participation been when HDOT has not applied DBE contract goals (or other race-conscious remedies)? Keen Independent examined three sources of information to assess race-neutral DBE participation:

- HDOT-reported race-neutral DBE participation on FAA-funded contracts for the most recent years for Kona International Airport, Hilo International Airport and Lihue Airport;
- Keen Independent estimates of DBE participation on FAA-funded contracts for which no DBE contract goals applied for Kona International Airport, Hilo International Airport and Lihue Airport; and
- Information concerning DBE participation as prime contractors on FAA-funded contracts for Kona International Airport, Hilo International Airport and Lihue Airport.

Keen Independent also examined overall participation of minority- and women-owned firms as part of each of these three analyses. The discussion below examines these results.

Race-neutral DBE participation in recent HDOT Uniform Reports. Per USDOT instructions, HDOT counts as "neutral" participation any prime contracts, as well as subcontracts, going to DBEs beyond what was needed to meet DBE contract goals set for a project or that were otherwise awarded in a race-neutral manner.

As shown in Figure 11-7, HDOT’s Uniform Reports of DBE Awards/Commitments and Payments submitted to FAA for Kona International Airport for the last seven federal fiscal years indicate a median race-neutral participation of 0.00 percent. The only participation was on a race-neutral basis.

Figure 11-7.

Kona International Airport — HDOT-reported race-neutral and race-conscious DBE participation on FAA-funded contracts for FFY 2012–FFY 2018

Federal fiscal year	DBE commitments/awards		
	Total	Race-neutral	Race-conscious
2012	3.67 %	3.67 %	0.00 %
2013	0.00	0.00	0.00
2014	0.00	0.00	0.00
2015	0.00	0.00	0.00
2016	0.00	0.00	0.00
2017	0.00	0.00	0.00
2018	0.00	0.00	0.00

Source: HDOT Uniform Reports of DBE Awards/Commitments and Payments.

Of the three federal fiscal years in which HDOT identified DBE participation at Hilo International Airport, that participation was race-neutral for two years and race-conscious for one year. These results are presented in Figure 11-8.

Figure 11-8.

Hilo International Airport — HDOT-reported race-neutral and race-conscious DBE participation on FAA-funded contracts for FFY 2012–FFY 2018

Federal fiscal year	DBE commitments/awards		
	Total	Race-neutral	Race-conscious
2012	0.57 %	0.57 %	0.00 %
2013	0.00	0.00	0.00
2014	0.00	0.00	0.00
2015	0.82	0.82	0.00
2016	0.00	0.00	0.00
2017	20.55	0.00	20.55
2018	0.00	0.00	0.00

Source: HDOT Uniform Reports of DBE Awards/Commitments and Payments.

Figure 11-9 presents race-neutral DBE participation reported in HDOT’s Uniform Reports of DBE Awards/Commitments and Payments submitted to FAA for Lihue Airport. There was one year in which HDOT reported race-neutral participation and one year where there was race-conscious participation. There was no DBE participation reported for the other years.

Figure 11-9.
Lihue Airport — HDOT-reported race-neutral and race-conscious DBE participation on FAA-funded contracts for FFY 2012–FFY 2018

Federal fiscal year	DBE commitments/awards		
	Total	Race-neutral	Race-conscious
2012	50.43 %	50.43 %	0.00 %
2013	0.00	0.00	0.00
2014	0.00	0.00	0.00
2015	0.00	0.00	0.00
2016	0.65	0.00	0.65
2017	0.00	0.00	0.00
2018	0.00	0.00	0.00

Source: HDOT Uniform Reports of DBE Awards/Commitments and Payments.

DBE participation on contracts without DBE contract goals. Keen Independent also analyzed DBE participation on HDOT’s FAA-funded contracts without DBE contract goals. HDOT achieved 2.71 percent DBE participation on these contracts from July 2011 through June 2016 for Kona International Airport, 0.63 percent DBE participation for Hilo International Airport and 2.13 percent DBE participation for Lihue Airport.

DBE participation as prime contractors. Keen Independent analyzed DBE participation as prime contractors during the July 2011 through June 2016 study period. DBEs obtained no FAA-funded prime contracts for Kona, Hilo or Lihue airports based on Keen Independent’s analysis.

4. What is the extent and effectiveness of race- and gender-neutral measures that the agency could have in place for the next fiscal year? When determining the extent to which it could meet its overall DBE goals through the use of neutral measures, HDOT must review the race- and gender-neutral measures that it and other organizations have in place, and those it has planned or could consider for future implementation.

As discussed in Chapter 8, HDOT might consider a small business enterprise (SBE) contract goals program to entirely or partially meet its overall DBE goal for FAA-funded contracts. It would set SBE goals for FAA-funded contracts in the same way as it currently uses DBE contract goals. Monitoring of SBE participation would be the same as DBE participation.

Federal regulations in 49 CFR Part 26.39(b)(1) allow the use of set-asides for SBE prime contractors for USDOT-funded contracts, which would provide HDOT another tool it could use to boost

participation of small businesses. Reasons for using an SBE Program are similar to those discussed in Chapter 8 regarding FHWA-funded contracts:

- About 94 percent of the businesses available for HDOT’s USDOT-funded contracts are within the federal small business size limit based on the revenue they reported in the availability survey for this study. Of those small businesses, 59 percent are minority- or women-owned.
- All of the current DBEs in Hawaii would automatically qualify as SBEs.
- There may be some stigma concerning certification as a “disadvantaged business” that might not arise for small business certification.
- Minority and female business owners in Hawaii frequently reported disadvantages because they were a small business competing against large businesses. In Hawaii, some of those large businesses are owned by minorities or women. Large minority-owned firms win a large portion of HDOT’s FAA-funded contracts.
- An SBE program for USDOT-funded contracts might be especially effective in encouraging minority- and women-owned business participation if it were widely promoted and coupled with further unbundling of HDOT contracts, continued technical assistance for DBEs, restricting bidding on small contracts to SBEs, and parallel efforts to include small businesses in HDOT’s non-federally-funded contracts.
- In addition, Keen Independent determined that HDOT could achieve 11.3 percentage point greater DBE participation on its FAA-funded contracts across its airports if minority- and women-owned firms that appear to be eligible for DBE certification became certified.

D. Summary

Chapter 11 provides information to HDOT as it considers its overall DBE goals for FFY 2021 through FFY 2023 for FAA-funded contracts at Kona, Hilo and Lihue airports and its projection of the portion of each overall DBE goal to be achieved through neutral means.

1. Overall DBE goals for FAA-funded contracts. As explained in Chapter 11, HDOT might consider an upward adjustment to set its overall DBE goals for FAA-funded contracts at Kona International Airport, Hilo International Airport and Lihue Airport.

If HDOT chose to make no upward or downward step 2 adjustments to its overall DBE goals for these three airports, the overall DBE goals for FFY 2021 through FFY 2023 would be:

- 12.66 percent for Kona International Airport;
- 15.64 percent for Hilo International Airport; and
- 8.84 percent for Lihue Airport.

2. Could HDOT project that it can meet all of its overall DBE goals through neutral means? If not, how much of the overall DBE goal can HDOT project to be met through neutral means?

If its overall DBE goals are in the range of 8.84 percent to 15.64 percent for these three airports, HDOT might consider a new SBE Program as a means of achieving these overall DBE goals.

Kona International Airport. As shown below, the first column of Figure 11-10 presents HDOT’s current overall DBE goal and projections for a neutral and race-conscious split.

The second column of numbers in Figure 11-10 is an example of projections using an overall DBE goal of 6.33 percent if HDOT proposed 100 percent of its overall DBE goal to be achieved through an SBE Program and other neutral means. The third column presents the same information if HDOT proposed an overall DBE goal of 12.66 percent. Finally, if HDOT proposed an overall DBE goal of 27.97 percent for its FAA-funded contracts at Kona International Airport for FFY 2021 through FFY 2023, it might attempt to meet all of that goal through neutral means.

Figure 11-10.

Kona International Airport — current HDOT overall DBE goal and projections of race-neutral participation for FAA-funded contracts, FFY 2021 through FFY 2023

Component of overall DBE goal	FFY 2018-FFY 2020	FFY 2021 - FFY 2023		
		Downward adjustment	Base figure	Upward adjustment
Overall goal	22.00 %	6.33 %	12.66 %	27.97 %
Neutral projection	- 11.00	- 6.33	- 12.66	- 27.97
Race-conscious projection	11.00 %	0.00 %	0.00 %	0.00 %

Source: Keen Independent analysis.

Hilo International Airport. The first column of Figure 11-11 presents projections for a neutral and race-conscious split when HDOT prepared its overall DBE goal for FFY 2018 through FFY 2020. HDOT could set its overall DBE goal for Hilo International Airport for FFY 2021 through FFY 2023 at 15.64 percent if it made no adjustment. It might attempt to meet all of this goal through neutral means (such as an SBE contract goals program). The third column of Figure 11-11 shows these figures. The second and fourth columns provide goals and projections if HDOT chose to make downward or upward adjustments to its overall DBE goal.

Figure 11-11.

Hilo International Airport — current HDOT overall DBE goal and projections of race-neutral participation for FAA-funded contracts, FFY 2021 through FFY 2023

Component of overall DBE goal	FFY 2018-FFY 2020	FFY 2021 - FFY 2023		
		Downward adjustment	Base figure	Upward adjustment
Overall goal	21.00 %	7.82 %	15.64 %	32.06 %
Neutral projection	- 10.00	- 7.82	- 15.64	- 32.06
Race-conscious projection	11.00 %	0.00 %	0.00 %	0.00 %

Source: Keen Independent analysis.

Lihue Airport. The first column of Figure 11-12 presents the goal and projections when HDOT prepared its overall DBE goal for Lihue Airport for FFY 2018 through FFY 2020.

- The second column of numbers in Figure 11-12 is an example of projections using an overall DBE goal of 4.42 percent (a downward adjustment) if HDOT proposed that it would try to achieve all of its overall DBE goal through an SBE Program and other neutral means.
- The third column presents the same information if HDOT proposed an overall DBE goal of 8.84 percent.
- Finally, if HDOT made an upward adjustment, its overall DBE goal would be 16.60 percent for its FAA-funded contracts at Lihue Airport for FFY 2021 through FFY 2023. HDOT could attempt to meet all of that goal through neutral means, as shown in the fourth column of Figure 11-12.

Figure 11-12.

Lihue Airport — current HDOT overall DBE goal and projections of race-neutral participation for FAA-funded contracts, FFY 2021 through FFY 2023

Component of overall DBE goal	FFY 2018-FFY 2020	FFY 2021 - FFY 2023		
		Downward adjustment	Base figure	Upward adjustment
Overall goal	29.00 %	4.42 %	8.84 %	16.60 %
Neutral projection	- 14.00	- 4.42	- 8.84	- 16.60
Race-conscious projection	15.00 %	0.00 %	0.00 %	0.00 %

Source: Keen Independent analysis.

CHAPTER 12.

Overall Annual DBE Goals and Projections for FAA-Funded Contracts at Non-Hub Primary Airports

The Federal Aviation Administration (FAA) provides funds to HDOT for contracts at its airports, including Molokai Airport and Lanai Airport.¹ Therefore, HDOT must operate the Federal DBE Program at its airports, including setting three-year goals for DBE participation. The years covered by those goals differ by airport. Chapter 12 of this Availability and Disparity Study report focuses on non-hub primary airports.

For FFY 2019 through FFY 2021, HDOT's overall goals for DBE participation in FAA-funded contracts are 21.00 percent for Molokai Airport and 21.00 percent for Lanai Airport. HDOT projected that a portion of those goals would be met through DBE contract goals. This Availability and Disparity Study provides information to HDOT that will help it set new overall DBE goals and projections for those two airports.

Chapter 12 contains four parts:

- A. Establishing a base figure;
- B. Consideration of a step 2 adjustment;
- C. Portion of overall DBE goals for FAA-funded contracts at non-hub primary airports to be met through neutral means; and
- D. Summary.

A. Establishing a Base Figure

As for FAA-funded contracts for other HDOT airports previously discussed in Chapters 10 and 11, establishing a base figure is the first step in calculating an overall annual goal for DBE participation in HDOT's FAA-funded contracts at Molokai Airport and Lanai Airport.

Chapter 4 presented results from the availability analysis for FAA-funded contracts during the July 2011 through June 2016 study period. Availability of current and potential DBEs for FAA-funded contracts was:

- 11.12 percent for Molokai Airport; and
- 11.34 percent for Lanai Airport.

¹ The Keen Independent study team identified 51 FAA-funded prime contracts and subcontracts at Molokai Airport and Lanai Airport between July 2011 to June 2016 that accounted for \$33 million.

HDOT might consider those percentages as the base figures for its new overall annual DBE goals if it expects FAA-funded contracts at those airports for the next three years will be reasonably similar to the types of contracts during the July 2011 through June 2016 study period. Chapter 4 explains the methodology for the base figure calculation in considerable detail.

These goals count firms that are currently certified as DBEs and those potentially certified as DBEs in the base figures. As a point of reference, Keen Independent also calculated the base figures only counting currently certified DBEs. The base figures including only current DBEs is 3.71 percent for Molokai Airport and 3.52 percent for Lanai Airport.

B. Consideration of a Step 2 Adjustment

Per the Federal DBE Program, HDOT must consider potential step 2 adjustments to the base figures when determining its overall DBE goals for FAA-funded contracts for each airport. Federal regulations outline factors that an agency must consider:

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

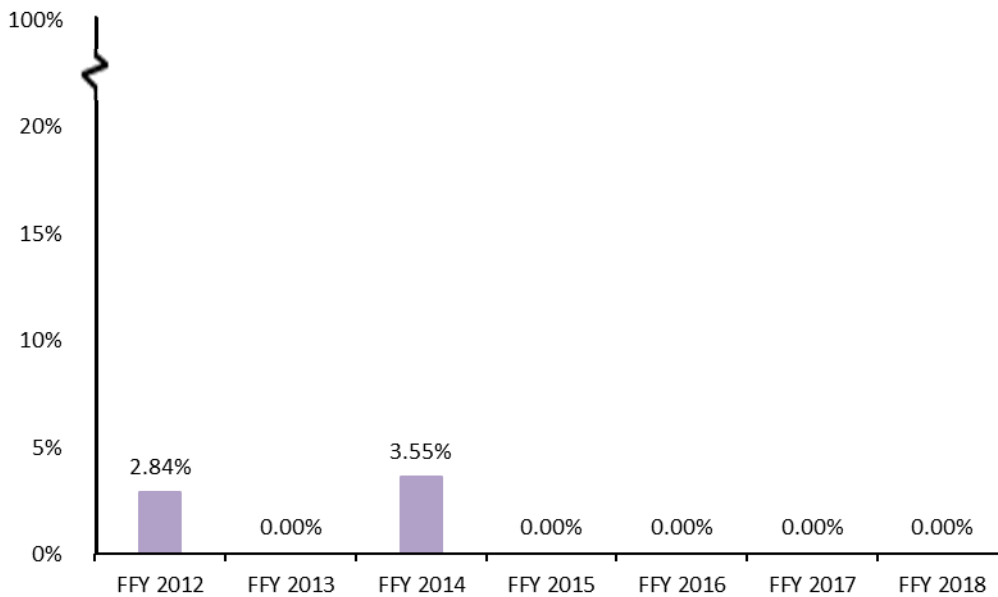
Keen Independent completed an analysis of each of the above step 2 factors and was able to quantify the effect of certain factors on the base figures. Other information examined was not as easily quantifiable but is still relevant to HDOT as it determines whether to make any step 2 adjustments.

1. Current capacity of DBEs to perform work, as measured by the volume of work DBEs have performed in recent years. USDOT’s “Tips for Goal-Setting” suggests that agencies should examine data on past DBE participation on their USDOT-funded contracts in recent years (i.e., the percentage of contract dollars going to DBEs).

DBE participation based on HDOT Uniform Reports to FAA for Molokai Airport. Figure 12-1 presents information about past DBE participation for Molokai International Airport contracts based on commitments/awards data from HDOT Uniform Reports of DBE Awards or Commitments and Payments reported to FAA. The median DBE participation for FFY 2012–FFY 2018 is 0.00 percent.

² 49 CFR Section 26.45.

Figure 12-1.
 Molokai Airport — HDOT-reported past DBE participation
 on FAA-funded contracts, FFY 2012 through FFY 2018



Source: HDOT Uniform Reports of DBE Awards/Commitments and Payments.

DBE participation based on HDOT Uniform Reports to FAA for Lanai Airport. HDOT reported prime contract or subcontract awards or payments to DBEs in its Uniform Reports to FAA for Lanai Airport for only one fiscal year from FFY 2012 through FFY 2018 (0.02% in FFY 2013). Therefore, median DBE participation for Lanai Airport based on these data is 0.00 percent.

DBE participation based on Keen Independent utilization analysis for FAA-funded contracts. The Keen Independent study team collected FAA-funded contract information for Molokai Airport and Lanai Airport for FY 2012 through FY 2016.

- The study team identified two Molokai Airport FAA-funded subcontracts going to DBEs that totaled about \$300,000 (which is 2.39% DBE participation).
- In addition, the study team identified one subcontract for \$3,000 at Lanai Airport that went to a DBE. This amount of work is equivalent to 0.01 percent DBE participation.

Summary. HDOT might consider these data when determining whether to make a step 2 adjustment based on past DBE participation. Keen Independent recommends using the median DBE participation from FFY 2012 through FFY 2018 of 0.00 percent for Molokai Airport and 0.00 percent for Lanai Airport for a downward step 2 adjustment.

2. Information related to employment, self-employment, education, training and unions.

Chapter 7 summarizes information about conditions in the Hawaii transportation contracting industry for minorities, women and MBE/WBEs. Detailed quantitative analyses of marketplace conditions in Hawaii are presented in Appendices E through H. Keen Independent's analyses indicate that there are barriers that certain minority groups and women face related to entry and advancement and business ownership in the Hawaii construction and engineering industries. Such barriers may affect the availability of MBE/WBEs to obtain and perform HDOT transportation contracts.

It may not be possible to quantify the cumulative effect that barriers in employment, education and training may have had in depressing the availability of minority- and women-owned firms in the Hawaii transportation contracting industry. However, the effects of barriers in business ownership can be quantified, as explained in Chapter 8.

The study team used regression analyses to investigate whether race, ethnicity and gender affected rates of business ownership among workers in the Hawaii construction and engineering industries.

- The regression analyses allowed the study team to examine those effects while statistically controlling for various personal characteristics including education and age (Appendix F provides detailed results of the business ownership regression analyses).³ Those analyses revealed that Asian Pacific/Native Hawaiian and other minority groups were less likely than nonminorities to own construction businesses and that white women were less likely than white men to own construction firms, even after accounting for various race- and gender-neutral personal characteristics. Each of these disparities was statistically significant.
- In addition, there was a substantial, statistically significant disparity in firm ownership for Asian Pacific Americans and Native Hawaiians working in the Hawaii architecture and engineering industry.

As discussed in Chapters 8 through 11, Keen Independent analyzed the impact that barriers in business ownership would have on the base figure for FAA-funded contracts if Asian Pacific Americans, Native Hawaiians and white women owned businesses at the same rate as similarly situated nonminorities and white men. This type of inquiry is sometimes referred to as a “but for” analysis because it estimates the availability of MBE/WBEs *but for* the effects of race- and gender-based discrimination.

Molokai Airport. First considering Molokai Airport, the study team completed these “but for” analyses separately for construction and engineering contracts and then weighted the results based on the proportion of FAA-funded contract dollars that HDOT awarded for construction and engineering for July 2011 through June 2016. The analysis included the same contracts that the study team analyzed to determine the base figure (i.e., FAA-funded contracts that HDOT awarded from July 2011 through June 2016). Keen Independent followed the same steps to conduct the “but for” analyses as described for FHWA-funded contracts in Chapter 8.

³ The study team examined U.S. Census data on business ownership rates using methods similar to analyses examined in court cases involving state departments of transportation in California, Illinois and Minnesota.

Figure 12-2 calculates the impact on overall MBE/WBE availability for Molokai Airport contracts, resulting in a possible upward adjustment of the base figure to 19.73 percent. (The calculations in Figure 12-2 indicate a possible upward step 2 adjustment of 8.61 percentage points.)

Figure 12-2.
Molokai Airport — potential step 2 adjustment for considering disparities in the rates of business ownership

Current and potential DBEs	a. Current availability	b. Disparity index for business ownership	c. Availability after initial adjustment*	d. Availability after scaling to 100%	e. Components of overall DBE availability**
Construction					
Asian Pacific American, Native Hawaiian or Pacific Islander	2.38 %	30	7.92 %	7.46 %	
Other minorities	1.08	65	1.66	1.57	
White women	0.10	31	0.10	0.09	
Minorities and women	3.56 %	n/a	9.68 %	9.12 %	6.46 %
All other businesses	96.44	n/a	96.44	90.88	
Total firms	100.00 %	n/a	106.12 %	100.00 %	
Engineering and other subindustries					
Asian Pacific American, Native Hawaiian or Pacific Islander	18.01 %	38	47.40 %	36.64 %	
Other minorities	10.68	n/a	10.68	8.25	
White women	0.84	n/a	0.84	0.65	
Minorities and women	29.53 %	n/a	58.92 %	45.54 %	13.26 %
All other businesses	70.47	n/a	70.47	54.46	
Total firms	100.00 %	n/a	129.39 %	100.00 %	
Total for current and potential DBEs	11.12 %	n/a	n/a		19.73 %
Difference from base figure					8.61 %

Note: Numbers may not add to 100.00% due to rounding.

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

** Components of goal calculated as value after adjustment and scaling to 100% multiplied by percentage of total FAA-funded contract dollars in that category (construction = 70.9%, engineering = 29.1%).

Source: Keen Independent based on FAA-funded contracts for July 2011 through June 2016 and statistical analysis of U.S. Census Bureau American Community Survey data for Hawaii for 2012–2016.

Lanai Airport. Figure 12-3 calculates the impact on current and potential DBE availability for FAA-funded construction and engineering at Lanai Airport. The result is a possible upward adjustment of the base figure for Lanai Airport that would increase the goal from the base figure of 11.34 percent to an adjusted figure of 21.79 percent. There would be an increase in the goal of 10.45 percentage points.

Figure 12-3.
Lanai Airport — potential step 2 adjustment for considering disparities in the rates of business ownership

	a.	b.	c.	d.	e.
Current and potential DBEs	Current availability	Disparity index for business ownership	Availability after initial adjustment*	Availability after scaling to 100%	Components of overall DBE availability**
Construction					
Asian Pacific American, Native Hawaiian or Pacific Islander	3.99 %	30	13.30 %	12.11 %	
Other minorities	0.90	65	1.38	1.26	
White women	<u>0.06</u>	31	<u>0.06</u>	<u>0.05</u>	
Minorities and women	4.95 %	n/a	14.74 %	13.43 %	9.94 %
All other businesses	<u>95.05</u>	n/a	<u>95.05</u>	<u>86.57</u>	
Total firms	100.00 %	n/a	109.79 %	100.00 %	
Engineering and other subindustries					
Asian Pacific American, Native Hawaiian or Pacific Islander	18.12 %	38	47.69 %	36.81 %	
Other minorities	10.78	n/a	10.78	8.32	
White women	<u>0.66</u>	n/a	<u>0.66</u>	<u>0.51</u>	
Minorities and women	29.56 %	n/a	59.13 %	45.63 %	11.85 %
All other businesses	<u>70.44</u>	n/a	<u>70.44</u>	<u>54.37</u>	
Total firms	100.00 %	n/a	129.57 %	100.00 %	
Total for current and potential DBEs	11.34 %	n/a	n/a		21.79 %
Difference from base figure					10.45 %

Note: Numbers may not add to 100.00% due to rounding.

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

** Components of goal calculated as value after adjustment and scaling to 100% multiplied by percentage of total FAA-funded contract dollars in that category (construction = 74.0%, engineering = 26.0%).

Source: Keen Independent based on FAA-funded contracts for July 2011 through June 2016 and statistical analysis of U.S. Census Bureau American Community Survey data for Hawaii for 2012–2016.

The analysis demonstrated above indicates a possible upward step 2 adjustment of 10.45 percentage points that HDOT may consider.

3. Any disparities in the ability of DBEs to get financing, bonding and insurance. Analysis of access to financing and bonding revealed quantitative and qualitative evidence of disadvantages for minorities, women and MBE/WBEs.

- Any barriers to obtaining financing and bonding might affect opportunities for minorities and women to successfully form and operate construction and engineering businesses in the Hawaii marketplace.
- If there are barriers that MBE/WBEs face in obtaining financing and bonding, those firms would also be at a disadvantage in obtaining and performing HDOT construction and engineering prime contracts and subcontracts.

There is also evidence that some firms cannot bid on certain public sector projects because they cannot afford the levels of insurance required by the agency. This barrier appears to affect small businesses, which might disproportionately impact minority- and women-owned firms. The information about financing, bonding and insurance supports an upward step 2 adjustment in HDOT's overall annual goal for DBE participation in FAA-funded contracts.

Note that financing and bonding are closely linked, as discussed in Chapter 7 and Appendix J.

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

Among the “other factors” examined in this study was the success of MBE/WBEs relative to majority-owned businesses in the Hawaii marketplace. There is quantitative evidence that certain groups of MBE/WBEs are less successful than majority-owned firms, and face greater barriers in the marketplace, even after considering neutral factors. Chapter 7 summarizes that evidence and Appendix H presents supporting quantitative analyses. There is also qualitative evidence of barriers to the success of minority- and women-owned businesses, as summarized in Chapter 7. Some of this qualitative information suggests that discrimination on the basis of race, ethnicity and gender affects minority- and women-owned firms in the Hawaii transportation contracting industry.

Approaches for making step 2 adjustments. Quantification of potential step 2 adjustments is discussed below.

Current capacity of DBEs to perform work, as measured by the volume of work DBEs have performed in recent years. DBE capacity analysis might indicate a downward step 2 adjustment if HDOT based this determination on past DBE participation — for the last seven fiscal years (FFY 2012 through FFY 2018) the median reported DBE participation on FAA-funded contracts was 0.00 percent for both Molokai Airport and Lanai Airport.

⁴ 49 CFR Section 26.45.

USDOT “Tips for Goal-Setting” suggests taking one-half of the difference between the base figure and evidence of current capacity as one approach to calculate the step 2 adjustment for that factor.

- For Molokai Airport, the difference between the 11.12 percent base figure and 0.00 percent DBE participation is 11.12 percentage points. One-half of this difference is a downward adjustment of 5.56 percentage points ($11.12\% \div 2 = 5.56\%$). The goal would then be calculated as follows: $11.12\% - 5.56\% = 5.56\%$ (see Figure 12-4).
- For Lanai Airport, the difference between the 11.34 percent base figure and 0.00 percent DBE participation is 11.34 percentage points. One-half of this difference is a downward adjustment of 5.67 percentage points ($11.34\% \div 2 = 5.67\%$). The goal would then be calculated as follows: $11.34\% - 5.67\% = 5.67\%$. (These calculations are presented in Figure 12-5.)

2. Information related to employment, self-employment, education, training and unions.

The study team was not able to quantify all of the information regarding barriers to entry for MBE/WBEs. Quantification of the business ownership factor indicates an upward step 2 adjustment of 8.61 percentage points (for Molokai Airport as presented in Figure 12-2) and 10.45 percentage points (for Lanai Airport as presented in Figure 12-3) to reflect the “but-for” analyses of business ownership rates. If HDOT made this upward adjustment, the overall DBE goal for FAA-funded contracts would be 19.73 percent for Molokai Airport and 21.79 percent for Lanai Airport.

- **Molokai Airport.** $11.12\% + 8.61\% = 19.73\%$; and
- **Lanai Airport.** $11.34\% + 10.45\% = 21.79\%$.

3. Any disparities in the ability of DBEs to get financing, bonding and insurance. Analysis of financing, bonding and insurance indicates that an upward adjustment is appropriate. However, impact of these factors on availability could not be quantified.

4. Other factors. Impact of the many barriers to success of MBE/WBEs in Hawaii could not be specifically quantified. However, the evidence supports an upward adjustment.

Summary — Molokai Airport. HDOT will need to consider whether to make a downward, upward or no step 2 adjustment when determining its overall DBE goals for Molokai Airport.

- If HDOT makes a downward step 2 adjustment reflecting current capacity to perform work, its overall DBE goal for FAA-funded contracts at Molokai Airport would be 5.56 percent as calculated in Figure 12-4.
- If HDOT decides to not make a downward adjustment and to instead make an upward adjustment that reflects analyses of business ownership rates, its overall DBE goal would be 19.73 percent.
- Alternatively, HDOT might choose to not make any step 2 adjustment to its overall DBE goal for Molokai Airport and use its base figure as its overall DBE goal (11.12%).

Figure 12-4 summarizes these results.

Figure 12-4.
Molokai Airport — potential step 2 adjustments for HDOT’s
overall DBE goal for FAA-funded contracts, FFY 2022–FFY 2024

Step 2 adjustment component	Value	Explanation
Lower range of overall DBE goal		
Base figure	11.12 %	From base figure analysis
Evidence of current capacity	- 0.00	Past DBE participation (DBE Uniform Reports)
Difference	11.12 %	
	÷ 2	Reduce by one-half
Adjustment	5.56 %	Downward adjustment for current capacity
Base figure	11.12 %	From base figure analysis
Adjustment for current capacity	- 5.56	Downward step 2 adjustment
Overall DBE goal	5.56 %	Lower range of DBE goal
Upper range of overall DBE goal		
Base figure	11.12 %	From base figure analysis
Adjustment for "but for" factors	+ 8.61	"But for" step 2 adjustment for business ownership
Overall DBE goal	19.73 %	Upper range of DBE goal

Source: Keen Independent analysis.

Summary — Lanai Airport. HDOT will need to consider whether to make a downward, upward or no step 2 adjustment when determining its overall DBE goals for Lanai Airport.

- If HDOT makes a downward step 2 adjustment reflecting current capacity to perform work, its overall DBE goal for FAA-funded contracts at Lanai Airport would be 5.67 percent.
- If HDOT decides to not make a downward adjustment and to instead make an upward adjustment that reflects analyses of business ownership rates, its overall DBE goal would be 21.79 percent.
- Alternatively, HDOT might choose to not make any step 2 adjustment to its overall DBE goal for Lanai Airport and use its base figure as its overall DBE goal (11.34%).

Figure 12-5 summarizes this information.

Figure 12-5.

Lanai Airport — potential step 2 adjustments for HDOT’s overall DBE goal for FAA-funded contracts, FFY 2022–FFY 2024

Step 2 adjustment component	Value	Explanation
Lower range of overall DBE goal		
Base figure	11.34 %	From base figure analysis
Evidence of current capacity	- 0.00	Past DBE participation (DBE Uniform Reports)
Difference	11.34 %	
	÷ 2	Reduce by one-half
Adjustment	5.67 %	Downward adjustment for current capacity
Base figure	11.34 %	From base figure analysis
Adjustment for current capacity	- 5.67	Downward step 2 adjustment
Overall DBE goal	5.67 %	Lower range of DBE goal
Upper range of overall DBE goal		
Base figure	11.34 %	From base figure analysis
Adjustment for "but for" factors	+ 10.45	"But for" step 2 adjustment for business ownership
Overall DBE goal	21.79 %	Upper range of DBE goal

Source: Keen Independent analysis.

C. Portion of Overall DBE Goals for FAA-Funded Contracts at Non-Hub Primary Airports to be Met through Neutral Means

As explained in Chapter 8, the Federal DBE Program requires state and local transportation agencies to meet the maximum feasible portion of their overall DBE goals using race- and gender-neutral measures. Along with setting an overall goal for DBE participation, agencies must project the portion of that goal they expect to meet (a) through race- and gender-neutral means, and (b) through race- and gender-conscious programs (if any). USDOT offers guidance concerning how transportation agencies should project the portions of their overall DBE goals that will be met through race- and gender-neutral, and race- and gender-conscious measures, as outlined in detail in Chapter 8.

1. Is there evidence of discrimination within the local transportation contracting marketplace for any racial, ethnic or gender groups? The 2019 Availability and Disparity Study considered conditions in the local marketplace to address this question. Quantitative and qualitative information is summarized below.

As discussed in Chapter 7, Keen Independent examined conditions in the Hawaii marketplace, including:

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

There was quantitative evidence of disparities in outcomes for minority- and women-owned firms in general and for certain MBE/WBE groups concerning the above issues. Qualitative information indicated some evidence that race and gender discrimination may have been a factor in these outcomes (see Appendix J).

Results of the disparity analysis for FAA-funded contracts. Chapter 6 examines FAA-funded contracts with and without DBE contract goals. This analysis pertains to FAA-funded contracts across all HDOT airports.

- The share of FAA-funded contract dollars going to minority- and women-owned firms was relatively high with goals (59.4%) and without goals (65.7%). It does not appear that participation of minority- and women-owned firms on HDOT contracts was higher when HDOT set a DBE contract goal and when HDOT did not.
- Most of the minority- and women-owned firms receiving work on FAA-funded contracts at HDOT airports were not certified as DBEs (of the 72 MBE/WBE firms that received a contract or subcontract, only 20 were DBE-certified).
- For both goals and non-goals contracts, utilization of firms owned by Asian Pacific Americans, Native Hawaiians and Pacific Islanders exceeded what might be expected from the availability analysis. There is no evidence of disparities for this group from analysis of HDOT FAA-funded contracts with and without DBE contract goals.

There were substantial disparities for African American-, Hispanic American-, American Indian or Alaska Native-, Subcontinent Asian American- and white women-owned firms.

- MBE/WBEs received 67.9 percent of FAA-funded contract dollars going to primes.

Summary. HDOT should review the information about utilization and availability of minority- and women-owned firms in its contracts in Chapters 5 and 6, and analysis of marketplace conditions presented in Chapter 7 and Appendices E through J, as well as other information it may have, when considering the extent to which it can meet its overall DBE goal through neutral measures.

2. What has been the agency's past experience in meeting its overall DBE goal? As discussed previously in Chapter 12, HDOT's reported DBE participation based on DBE commitments/awards on FAA-funded contracts for Molokai Airport was lower than its goal of 21.00 percent for FFY 2012 through FFY 2018.

HDOT reported DBE participation in only one fiscal year from FFY 2012 through FFY 2018 for Lanai Airport (0.02% in FFY 2013), and therefore, did not meet its goal of 21.00 percent in any of those years based on its Uniform Reports.

3. What has DBE participation been when HDOT has not applied DBE contract goals (or other race-conscious remedies)? Keen Independent examined three sources of information to assess race-neutral DBE participation:

- HDOT-reported race-neutral DBE participation on FAA-funded contracts for the most recent years for Molokai Airport and Lanai Airport;
- Keen Independent estimates of DBE participation on FAA-funded contracts for which no DBE contract goals applied for Molokai Airport and Lanai Airport; and
- Information concerning DBE participation as prime contractors on FAA-funded contracts for Molokai Airport and Lanai Airport.

The discussion on the following pages examines these three sets of participation figures.

Race-neutral DBE participation in recent HDOT Uniform Reports. Per USDOT instructions, HDOT counts as “neutral” participation any prime contracts, as well as subcontracts, going to DBEs beyond what was needed to meet DBE contract goals set for a project or that were otherwise awarded in a race-neutral manner.

As shown in Figure 12-6, HDOT’s Uniform Reports of DBE Awards/Commitments and Payments submitted to FAA for Molokai Airport for the last seven federal fiscal years indicate a median race-neutral participation of 0.00 percent.

Figure 12-6.
Molokai Airport — HDOT-reported race-neutral and race-conscious DBE participation on FAA-funded contracts for FFY 2012–FFY 2018

Federal fiscal year	DBE commitments/awards		
	Total	Race-neutral	Race-conscious
2012	2.84 %	2.84 %	0.00 %
2013	0.00	0.00	0.00
2014	3.55	3.55	0.00
2015	0.00	0.00	0.00
2016	0.00	0.00	0.00
2017	0.00	0.00	0.00
2018	0.00	0.00	0.00

Source: HDOT Uniform Reports of DBE Awards/Commitments and Payments.

HDOT reported 0.02 percent race-neutral DBE participation in FFY 2013 for Lanai Airport contracts. However, it made no prime contract or subcontract awards or payments to DBEs on contracts without goals in other fiscal years examined in Figure 12-7. Median DBE participation for Lanai Airport based on these data for those seven years is 0.00 percent. These results are presented in Figure 12-7.

Figure 12-7.
Lanai Airport — HDOT-reported race-neutral and race-conscious DBE participation on FAA-funded contracts for FFY 2012–FFY 2018

Federal fiscal year	DBE commitments/awards		
	Total	Race-neutral	Race-conscious
2012	0.00 %	0.00 %	0.00 %
2013	0.02	0.02	0.00
2014	0.00	0.00	0.00
2015	0.00	0.00	0.00
2016	0.00	0.00	0.00
2017	0.00	0.00	0.00
2018	0.00	0.00	0.00

Source: HDOT Uniform Reports of DBE Awards/Commitments and Payments.

DBE participation on contracts without DBE contract goals. Keen Independent also analyzed DBE participation on HDOT’s FAA-funded contracts without DBE contract goals. HDOT achieved 1.72 percent DBE participation on these contracts from July 2011 through June 2016 for Molokai Airport and 0.00 percent DBE participation for Lanai Airport.

DBE participation as prime contractors. Keen Independent analyzed DBE participation as prime contractors during the July 2011 through June 2016 study period. DBEs obtained no FAA-funded prime contracts for Molokai or Lanai airports based on Keen Independent’s analysis.

4. What is the extent and effectiveness of race- and gender-neutral measures that the agency could have in place for the next fiscal year? When determining the extent to which it could meet its overall DBE goals through the use of neutral measures, HDOT must review the race- and gender-neutral measures that it and other organizations have in place, and those it has planned or could consider for future implementation.

As discussed in Chapter 8, HDOT might consider a small business enterprise (SBE) contract goals program to entirely or partially meet its overall DBE goal for FAA-funded contracts. It would set SBE goals for FAA-funded contracts in the same way as it currently uses DBE contract goals. Monitoring of SBE participation would be the same as DBE participation.

Federal regulations in 49 CFR Part 26.39(b)(1) allow the use of set-asides for SBE prime contractors for USDOT-funded contracts, which would provide HDOT another tool it could use to boost

participation of small businesses. Reasons for using an SBE Program are similar to those discussed in Chapter 8 regarding FHWA-funded contracts:

- About 94 percent of the businesses available for HDOT’s USDOT-funded contracts are within the federal small business size limit based on the revenue they reported in the availability survey for this study. Of those small businesses, 59 percent are minority- or women-owned.
- All of the current DBEs in Hawaii would automatically qualify as SBEs.
- There may be some stigma concerning certification as a “disadvantaged business” that might not arise for small business certification.
- Minority and female business owners in Hawaii frequently reported disadvantages because they were a small business competing against large businesses. In Hawaii, some of those large businesses are owned by minorities or women. Large minority-owned firms win a large portion of HDOT’s FAA-funded contracts.
- An SBE program for USDOT-funded contracts might be especially effective in encouraging minority- and women-owned business participation if it were widely promoted and coupled with further unbundling of HDOT contracts, continued technical assistance for DBEs, restricting bidding on small contracts to SBEs, and parallel efforts to include small businesses in HDOT’s non-federally-funded contracts.
- In addition, Keen Independent determined that HDOT could achieve 11.3 percentage point greater DBE participation on its FAA-funded contracts across its airports if minority- and women-owned firms that appear to be eligible for DBE certification became certified.

D. Summary

Chapter 12 provides information to HDOT as it considers its overall DBE goals for FFY 2022 through FFY 2024 for FAA-funded contracts at Molokai and Lanai airports and its projection of the portion of its overall DBE goals to be achieved through neutral means.

1. Overall DBE goals for FAA-funded contracts. If HDOT chose to make no upward or downward step 2 adjustments to its overall DBE goals for these two airports, the overall DBE goals for FFY 2022 through FFY 2024 would be:

- 11.12 percent for Molokai Airport; and
- 11.34 percent for Lanai Airport.

2. Could HDOT project that it can meet all of its overall DBE goals through neutral means? If not, how much of the overall DBE goal can HDOT project to be met through neutral means?

If its overall DBE goals for Molokai and Lanai airports are in the range considered in this chapter, HDOT might consider a new SBE Program as a means of achieving these overall DBE goals.

Molokai Airport. The first column Figure 12-8 presents HDOT’s current overall DBE goal and projections for a neutral and race-conscious split for Molokai Airport.

The second column of numbers in Figure 12-8 is an example of projections using an overall DBE goal of 5.56 percent if HDOT proposed that all of its future overall DBE goal would be achieved through an SBE Program and other neutral means. The third column presents the same information if HDOT proposed an overall DBE goal of 11.12 percent. Finally, if HDOT proposed an overall DBE goal of 19.73 percent for its FAA-funded contracts at Molokai Airport for FFY 2022 through FFY 2024, it might attempt to meet all of that goal through neutral means.

Figure 12-8.

Molokai Airport — current HDOT overall DBE goal and projections of race-neutral participation for FAA-funded contracts, FFY 2022 through FFY 2024

Component of overall DBE goal	FFY 2019-FFY 2021	FFY 2022 - FFY 2024		
		Downward adjustment	Base figure	Upward adjustment
Overall goal	21.00 %	5.56 %	11.12 %	19.73 %
Neutral projection	- 10.00	- 5.56	- 11.12	- 19.73
Race-conscious projection	11.00 %	0.00 %	0.00 %	0.00 %

Source: Keen Independent analysis.

Lanai Airport. The first column of Figure 12-9 presents HDOT’s projections for neutral and race-conscious participation in HDOT’s current overall DBE goal for Lanai Airport. HDOT could set its future overall DBE goal for Lanai Airport at 11.34 percent if it made no adjustment. It might attempt to meet all of this goal through neutral means (such as an SBE contract goals program). The third column of Figure 11-11 shows these figures. The second and fourth columns provide goals and projections if HDOT chose to make downward or upward adjustments to its overall DBE goal.

Figure 12-9.

Lanai Airport — current HDOT overall DBE goal and projections of race-neutral participation for FAA-funded contracts, FFY 2022 through FFY 2024

Component of overall DBE goal	FFY 2019-FFY 2021	FFY 2022 - FFY 2024		
		Downward adjustment	Base figure	Upward adjustment
Overall goal	21.00 %	5.67 %	11.34 %	21.79 %
Neutral projection	- 10.00	- 5.67	- 11.34	- 21.79
Race-conscious projection	11.00 %	0.00 %	0.00 %	0.00 %

Source: Keen Independent analysis.

CHAPTER 13.

Overall Annual ACDBE Goals and Projections for Concessions at HDOT Airports

Because FAA provides funds to HDOT for contracts at its airports, HDOT must operate the Federal ACDBE Program at its airports, including setting three-year goals for ACDBE participation. The ACDBE regulation requires separate goals for (1) non-car rental concessions, and (2) car rental concessions. HDOT's current ACDBE goals for non-car rental concessions range from 1 percent to 15 percent. For most of its airports, HDOT has a goal of 1 percent for car rental concessions.

This chapter provides analyses for possible future ACDBE goals for large hub primary airports (Honolulu International Airport and Kahului Airport), small hub primary airports (Kona International Airport, Hilo International Airport and Lihue Airport) and non-hub airports (Molokai Airport and Lanai Airport). The years covered by those goals differ by airport.

HDOT's current overall goals for ACDBE participation in non-car rental concessions are as follows:

- For FFY 2018 through FFY 2020:
 - Honolulu International Airport: 7.00 percent;
 - Kahului Airport: 13.00 percent;
- For FFY 2019 through FFY 2021:
 - Kona International Airport: 11.00 percent;
 - Hilo International Airport: 15.00 percent;
 - Lihue Airport: 11.00 percent;
- For FFY 2020 through FFY 2022:
 - Molokai Airport: 1.00 percent; and
 - Lanai Airport: no goal as this airport has no revenue-generating concessions.¹

Chapter 13 contains five parts:

- A. Establishing base figures for non-car rental concessions;
- B. Consideration of step 2 adjustments for non-car rental concessions;
- C. Projecting the portion of ACDBE goals for non-car rental concessions to be met through neutral means;
- D. Summary of ACDBE goals and projections for non-car rental concessions; and
- E. Establishing ACDBE goals and projections for airport car rental concessions.

¹ HDOT does not anticipate having any revenue-generating concessions at Lanai Airport for FFY 2020 through FFY 2022, so ACDBE goals will not be needed for this period.

A. Establishing Base Figures for Non-Car Rental Concessions

Determining a base figure is the first step to calculating an overall annual goal for ACDBE participation at an airport. Regulations pertaining to the Federal ACDBE Program identify allowable approaches to developing a base figure for an overall ACDBE goal. Use of data from a disparity study is one of them.²

Overview. To provide information to help HDOT establish overall ACDBE goals for its airports, Keen Independent used information about:

- The current concessions and subconcessions at each airport;
- Gross receipts generated by each concession and subconcession;
- The length of time each concession agreement is expected to be in place;
- Current ACDBE participation generated in each concession; and
- The relative availability of current and potential ACDBEs, compared to total availability, for each type of concession for each island in the state.³

Data sources and calculations. HDOT provided information on the first four types of information listed above. To determine relative availability of ACDBEs, Keen Independent conducted a statewide survey of firms potentially providing different types of concessions services. As described in Chapter 4 and Appendix D, the survey included questions about:

- Interest in airport concessions;
- The islands where the company could provide those concessions;
- The size of the business; and
- The race, ethnicity and gender of the business owner.

Determining which firms were included in the calculations and which businesses should be counted as ACDBEs. Only those firms indicating interest in providing airport concessions in the survey were included in the concessions availability analysis.

- Each of these firms was counted in the totals for the availability calculations.
- A company was counted as a current or potential ACDBE if it was (a) currently certified as an ACDBE, or (b) was minority- or women-owned and had average revenue below the size limit to be an ACDBE (and had not previously graduated from the program or had been denied certification).

² 49 CFR Section 23.51(c)(3).

³ Hawaii was determined to be the relevant geographic market area for airport concessions for each airport, as discussed in Chapter 3, but only those firms indicating ability to provide concessions on a particular island were counted in the availability analysis for the airport(s) on that island.

Availability calculations. Once the pool of firms available for concessions was created, Keen Independent calculated availability percentages for seven different types of concessions.

The study team made each calculation for a type of concession at that airport by:

- Determining the **number of current and potential ACDBEs** for that type of concession that indicated they could provide airport concessions services on that island (e.g., “Oahu”);
- Determining the **total number of firms** (ACDBEs and non-ACDBEs) for that type of concession that indicated they could provide airport concessions services on that island (e.g., “Oahu”); and
- Dividing the **number of ACDBEs** by the **total number of firms** for that concession (and island).

For example, if there were 50 current or potential ACDBEs out of 100 firms determined to be available for a particular type of concession at an airport, the calculation would be $50 \div 100 = 50\%$. Figure 13-1 on the following page provides availability results for each type of concession for each airport.

Calculating projected ACDBE and total gross receipts. After determining the percentage of the gross receipts that might be generated by an ACDBE for each type of concession or individual concession, Keen Independent:

- Determined the **total gross receipts** associated with that type of concession or individual concession or subconcession. Keen Independent used the most recent data on annual gross receipts for a concession to project future gross receipts without applying a rate of inflation. The Hawaii travel market is very dependent on the national economy, with the possibility of declining concession revenue as well as increasing revenue. HDOT can also more easily use Keen Independent’s data and methods to update these projections as conditions change between the time of this report and when it submits its final ACDBE goals for an airport.
- Multiplied **percentage ACDBE availability** for a type of concession by the future gross receipts by the gross receipts anticipated for that concession (or subconcession) or for that group of concessions.
- Summed the **gross receipts projected to be generated by ACDBEs** for non-car rental concessions at that airport.
- Summed the **project gross receipt projected to be generated by all firms** for non-car rental concessions at that airport.
- Divided the **sum of gross receipts for ACDBEs** by the **sum for all firms**.

The following example assumes there were two concessions agreements at an airport, one with \$500,000 in annual gross receipts with 50 percent projected to be generated by an ACDBE through a subconcession and the second with \$500,000 in annual gross receipts with none of it projected to be generated by an ACDBE.

- Total ACDBE participation is $(50\% \times \$500,000) + (0\% \times \$500,000) = \$250,000$.
- The total gross receipts is $\$500,000 + \$500,000 = \$1,000,000$.
- The base figure is $\$250,000 \div 1,000,000 = 25\%$.

Figure 13-1.

Availability estimates of current and potential ACDBEs for HDOT airport concessions

	Honolulu International Airport	Kahului Airport	Kona International Airport	Hilo International Airport	Lihue Airport	Molokai Airport	Lanai Airport
Eating places	19.31 %	44.97 %	27.06 %	20.91 %	43.58 %	80.95 %	N/A
Gift and news shops	47.63	15.71	0.00	0.00	13.20	N/A	N/A
Flowers, fresh	3.82	N/A	42.30	22.04	2.28	0.00	N/A
Foreign currency exchange	0.00	N/A	N/A	N/A	N/A	N/A	N/A
Coin operated service machines	0.00	N/A	N/A	N/A	N/A	N/A	N/A
Automobile parking	8.14	12.89	0.00	0.00	0.00	N/A	N/A
Other concessions	0.39	0.15	0.41	N/A	N/A	N/A	N/A

Source: Keen Independent availability analysis.

Advantages of the methodology used to calculate base figures for non-car rental concessions. The advantages of this approach to determining availability for a specific type of concession for a specific airport include the following:

- The analysis examined individual concessions and subconcessions now in place at each airport and their associated gross receipts. This assessment included whether or not the term of the existing concession agreement would extend into or through the three-year time period for the new ACDBE goal (and could be projected to remain in place).
- For those concessions agreements that expire prior to the next goal period, Keen Independent could examine the relative availability of ACDBEs for those concessions.
- Only those firms indicating interest in airport concessions in the availability survey were counted in the analysis.
- All data were specific to the type of concession and the individual island.
- As described on the previous page, data for ACDBEs and non-ACDBE firms were collected and analyzed in exactly the same way (an apples-to-apples analysis). These data were the basis for the percentage ACDBE calculations for a specific type of concession at an airport.

- Data for gross receipts for each non-car rental concessions came from the same source, also ensuring apples-to-apples analysis.
- The fact that many HDOT airports have very limited concessions opportunities could be reflected in the analysis. (For example, Keen Independent recognized that some concessions could not be “broken up” to include subconcessions due to a single location for a concession.)

The following discussion presents the base figure analysis for each airport.

Base figure for Honolulu International Airport. Keen Independent calculated a base figure for Honolulu International Airport using the data sources and types of calculations described above. The first column of Figure 13-1 shows availability results for Honolulu International Airport. For example, 19 percent of firms available for eating places concessions on Oahu are current and potential ACDBEs. About 48 percent of firms available for gift and news shop concessions on Oahu are current and potential ACDBEs. There were also some types of concessions for which ACDBE availability appeared to be 0 percent on Oahu.

Keen Independent examined each existing non-car rental concession at Honolulu International Airport, including the term of the lease, to determine which might continue unchanged into the future and which might be open to competition from ACDBEs and non-ACDBEs within the time frame of the future three-year ACDBE goal. Figure 13-2 provides results, with individual calculations for each type of concession explained in the following pages.

Gift shops and newsstands. There are two long-term concessions agreements for gift, novelty and souvenir shops at Honolulu International Airport that have subconcessions operated by ACDBEs. These two concessions had revenue of \$159 million in FFY 2018.⁴ Of that revenue, \$6,752,000 was generated by concessions operated by ACDBEs. As those concessions agreements extend beyond the FFY 2021 through FFY 2023 time frame for the next overall ACDBE goal for Honolulu International Airport, the projection of ACDBE revenue for gift, novelty and souvenir shops at the airport is \$6,752,000 out of the total of \$159 million in annual revenue. (Keen Independent used the most recently reported annual gross receipts as the forecast of future revenue.)

There is one month-to-month master concession for newsstands at the airport that generated \$14 million in revenue in FFY 2018 (002028/Master RP-5180). None of the revenue was produced by an ACDBE. ACDBE availability for airport gift shops and newsstands is 47.63 percent on Oahu based on Keen Independent’s availability survey, so the study team projected that \$6.7 million of the \$14 million in newsstand concessions revenue at Honolulu International Airport might be generated by ACDBEs for FFY 2021 through FFY 2023.

Eating places. There is one long-term concessions contract for eating places at Honolulu International Airport that generates \$76 million in annual revenue (FFY 2018). ACDBEs have subconcessions that generate \$7,639,000 in annual revenue. The eating places concessions agreement extends beyond the time from of the next overall ACDBE goal for Honolulu International Airport. Therefore, Keen Independent used values of \$7,639,000 for ACDBE concessions revenue and

⁴ FFY 2019 revenue had not been reported by HDOT at the time of this report.

\$76 million in total revenue for Honolulu International Airport eating places when determining the base figure for airport concessions at this airport.

Figure 13-2.

Honolulu International Airport — Base figure for non-car rental concessions, FFY 2021–FFY 2023

Type of concession	Concessions agreement number	Current concessionaire gross receipts (FFY 2018)	Current ACDBE gross receipts	Future concessionaire gross receipts	Future ACDBE gross receipts
Gift shops and newsstands					
Long-term concessions	007795/DOTA-07-0001	\$ 99,884,477	\$ 2,007,801	\$ 99,884,477	\$ 2,007,801
	009213/DOTA-09-0002	59,179,272	4,744,065	59,179,272	4,744,065
Month-to-month concessions	002028/Master RP-5180	14,068,272	0	14,068,272	6,700,385
Eating places					
Long-term concessions	002752/DOTA-92-0018	\$ 76,387,102	\$ 7,638,710	\$ 76,387,102	\$ 7,638,710
Automobile parking					
Long-term concessions	014015/DOTA-18-0004	\$ 7,022,052	\$ 0	\$ 7,022,052	\$ 0
	009876/DOTA-10-0004	19,697,125	0	19,697,125	0
Fresh flowers					
Long-term concessions	006919/DOTA-01-0001	\$ 2,136,514	\$ 0	\$ 2,136,514	\$ 0
Month-to-month concessions	001799/RP - 4841	171,064	0	171,064	6,542
	010884/RP - 8006	393,918	0	393,918	15,064
	001781/RP - 5329	581,769	0	581,769	22,248
	001806/RP - 4837	98,094	0	98,094	3,751
	010101/RP - 6967	23,889	0	23,889	914
	001801/RP - 4840	88,288	0	88,288	3,376
Foreign currency exchange					
Long-term concessions	DOTA-03-01/1621	\$ 6,040,647	\$ 0	\$ 6,040,647	\$ 0
Long-term concessions that expire prior to Sept. 30, 2023	001621/DOTA-03-0001	7,247,680	1,898,657	7,247,680	1,898,657
Coin-operated service machines: scales, shoe shine, etc.					
Month-to-month concessions	011239/RP - 8080	\$ 984	\$ 0	\$ 984	\$ 0
	011279/RP - 8086	974,419	0	974,419	0
Other concessions					
Annual concessions that expire prior to Sept. 30, 2023	013320/DOTA-17-0003	\$ 2,443,441	\$ 0	\$ 2,443,441	\$ 0
Month-to-month concessions	013356/DOTA-16-0002	37,027	0	37,027	0
Long-term concessions that expire prior to Sept. 30, 2023	12756/DOTA-15-0019	553,540	0	553,540	0
	008875/DOTA-08-0011	1,454,735	0	1,454,735	0
Total annual future projection		\$ 298,484,307	\$ 16,289,234	\$ 298,484,307	\$ 23,041,513
Base figure (ACDBE percentage of total projection)			5.46 %	7.72 %	

Source: Keen Independent analysis.

Automobile parking. There are two long-term concessions for automobile parking at Honolulu International Airport, neither of which currently includes ACDBE participation. These concessions generated \$26.7 million in revenue in FFY 2018. When determining the base figure for the ACDBE goal for Honolulu International Airport, Keen Independent used these total gross receipts and assumed no ACDBE participation from FFY 2021 through FFY 2023.

Fresh flowers concessions. There is one long-term concession for fresh flowers at Honolulu International Airport (006919/DOA-01-0001) that extends past the FFY 2023 duration of the next overall ACDBE goal. It generated \$2.1 million in annual revenue in FFY 2018 and the concessionaire was not an ACDBE. Keen Independent assumed that this agreement would remain in place during FFY 2021 through FY 2023 with no ACDBE participation.

There are six individual month-to-month concessions for fresh flowers at Honolulu International Airport that collectively generate \$1,357,000 in annual gross receipts. None of the concessionaires in FFY 2018 were ACDBEs. Based on current ACDBE availability of 3.82 percent for florists for Oahu airport concessions determine in the Keen Independent availability survey, 3.82 percent of the future revenue of those fresh flower concessions is projected to be from ACDBE concessionaires (\$52,000 per year).

Foreign currency exchange. There is a long-term concessions agreement for foreign currency exchange (001621/DOA-03-0001) that extends beyond the FFY 2023 duration of the next overall ACDBE goal. It generates \$6 million per year in revenue (FFY 2018) and has no ACDBE participation. Keen Independent assumed continuation of this agreement through the next goal period (with no ACDBE participation).

There is another foreign currency exchange concessions agreement (DOA-03-01/1621) that generates \$7.2 million of revenue per year and includes \$1,899,000 of ACDBE participation. The ACDBE participation is through internet provider subconcessionaires. Although this agreement expires prior to September 30, 2023, Keen Independent projected that it would continue through the next goal period generating the same total receipts and ACDBE receipts as demonstrated for FFY 2018.

Coin-operated service machines. There are two month-to-month concessions for coin-operated service machines at Honolulu International Airport that collectively generate \$1 million per year. Neither of these concessionaires are ACDBEs. Keen Independent assumed that this revenue would continue to be generated by firms other than ACDBEs.

Other concessions. In 2018, there were four concessions related to other types of goods or services at Honolulu International Airport such as luggage carts and electronic lockers. In total, they generated \$4.5 million in revenue in FFY 2018. As Keen Independent identified very low ACDBE availability for other concessions in the availability survey, none of this revenue was projected to be generated by ACDBEs for FFY 2021 through FFY 2023.

Projected ACDBE and total non-car rental concessions for FFY 2021 through FFY 2023. Based on the above analyses, Keen Independent projects \$23 million in annual revenue for ACDBE concessions and \$298 million per year for all concessions for Honolulu International Airport for FFY 2021 through FFY 2023. ACDBE revenue as a share of total revenue is projected to be 7.72 percent.

This base figure result is similar to HDOT's 7 percent ACDBE goal for FFY 2018 through FFY 2020 for Honolulu International Airport.

Base figure for Kahului Airport. Keen Independent next presents the base figure analysis for non-car rental concessions at Kahului Airport. Figure 13-3 on the following page provides detailed projections for this airport.

Gift shops and newsstands. There are two long-term concessions agreements for gift shops and newsstands at Kahului Airport, one of which has a subconcession operated by an ACDBE.

- The larger of the two concessions had revenue of \$14.1 million in FFY 2018. Of that revenue, \$3,466,000 was generated by a concession operated by an ACDBE.
- The newsstand concession, which does not have ACDBE participation, had annual gross receipts of \$1.5 million.

Both of those concessions agreements extend beyond the FFY 2021 through FFY 2023 time frame for the next overall ACDBE goal for Kahului Airport. Therefore, the projection of ACDBE revenue for gift shops and newsstands at the airport is \$3,466,000 out of the total of \$15.6 million in annual revenue. (Keen Independent used the most recently reported annual gross receipts at the time of this report as the forecast of future revenue.)

Eating places. There is one long-term concessions agreement for eating places at Kahului Airport that generates about \$27.5 million in annual revenue (FFY 2018). An ACDBE has a subconcession that generates \$2,746,000 in annual revenue. The eating places concessions agreement extends into the time period for the next overall ACDBE goal for Kahului Airport. Keen Independent used the current values for ACDBE concessions revenue and total revenue for Kahului Airport eating places when determining the projection of ACDBE and total gross receipts for eating places concessions.

Figure 13-3.

Kahului Airport — Base figure for non-car rental concessions, FFY 2021–FFY 2023

Type of concession	Concessions agreement number	Current concessionaire gross receipts (FFY 2018)	Current ACDBE gross receipts	Future concessionaire gross receipts	Future ACDBE gross receipts
Gift shops and newsstands					
Long-term concessions	010375/DOA-11-0005	\$ 14,137,402	\$ 3,465,957	\$ 14,137,402	\$ 3,465,957
	001884/RP - 5067	1,510,325	0	1,510,325	0
Eating places					
Long-term concessions	002018/DOA-92-0014	\$ 27,455,510	\$ 2,745,551	\$ 27,455,510	\$ 2,745,551
Automobile parking					
Long-term concessions	011426/DOA-13-0011	\$ 5,175,008	\$ 0	\$ 5,175,008	\$ 0
Other concessions					
Long-term concessions	013339/DOA-15-0022	\$ 2,484,330	\$ 0	\$ 2,484,330	\$ 0
Month-to-month concessions	001006/RP - 5775	1,272	0	1,272	0
	010382/RP - 7018	6,836	6,836	6,836	6,836
Total annual future projection		\$ 50,770,682	\$ 6,218,344	\$ 50,770,682	\$ 6,218,344
Base figure (ACDBE percentage of total projection)			12.25 %		12.25 %

Source: Keen Independent analysis.

Automobile parking. There is one long-term concession for automobile parking at Kahului Airport and it does not include ACDBE participation. This concession generated \$5.2 million in revenue in FFY 2018. When determining the base figure for the ACDBE goal for Kahului Airport, Keen Independent used these total gross receipts and assumed no ACDBE participation in airport parking concessions from FFY 2021 through FFY 2023.

Other concessions. In 2018, there were three small concessions related to other types of goods or services at Kahului Airport.

- A long-term concession that generated \$2.5 million in annual revenue (non-ACDBE);
- A month-to-month concession that produced \$1,000 in annual revenue (a non-ACDBE); and
- A month-to-month concession that produced about \$7,000 in annual revenue (an ACDBE).

Because the term of the largest of these concessions extends beyond the time frame of the next overall ACDBE goal for Kahului Airport, it is projected to continue for FFY 2021 through FFY 2023. The two smaller concessions are also projected to continue for FFY 2021 through FFY 2023.

Projected ACDBE and total non-car rental concessions revenue for FFY 2021 through FFY 2023. Based on the above analyses, Keen Independent projects about \$6,218,000 in annual revenue for ACDBE concessions and about \$50,771,000 per year for all concessions for Kahului Airport for FFY 2021 through FFY 2023. ACDBE revenue as a share of total revenue is projected to be 12.25 percent.

The base figure indicated in Figure 13-3 is similar to HDOT's 13 percent ACDBE goal for FFY 2018 through FFY 2020 for Kahului Airport.

Base figure for Kona International Airport. Keen Independent's analysis of non-car rental concession at Kona International Airport is presented in Figure 13-4.

Gift shops and newsstands. There are three long-term concessions agreements for gift shops and newsstands at Kona International Airport, none of which have ACDBE participation:

- A gift shop contract with annual revenue of \$6 million; and
- Two newsstand concessions with combined annual revenue of \$2.1 million.

Each of those concessions agreements extend beyond the FFY 2022 through FFY 2024 time frame for the next overall ACDBE goal for Kona International Airport. The study team projected that there would be \$8.1 million revenue for these contracts, with no gross receipts generated by ACDBEs. As with other HDOT airports, Keen Independent used the most recently reported annual gross receipts at the time of this report (FFY 2018) as the forecast of future concessions revenue.

Figure 13-4.

Kona International Airport — Base figure for non-car rental concessions, FFY 2022–FFY 2024

Type of concession	Concessions agreement number	Current concessionaire gross receipts (FFY 2018)	Current ACDBE gross receipts	Future concessionaire gross receipts	Future ACDBE gross receipts
Gift shops and newsstands					
Long-term concessions	009973/DOA-10-0008	\$ 5,930,088	\$ 0	\$ 5,930,088	\$ 0
	001886/RP - 5730	997,161	0	997,161	0
	001887/RP - 5988	1,151,445	0	1,151,445	0
Eating places					
Month-to-month concessions	008641/DOA-07-0012	\$ 7,318,154	\$ 285,887	\$ 7,318,154	\$ 1,979,994
Automobile parking					
Long-term concessions that expire prior to Sept. 30, 2024	013149/DOA-16-0001	\$ 3,357,076	\$ 0	\$ 3,357,076	\$ 0
Other concessions					
Long-term concessions	013339/DOA-15-0022	\$ 66,348	\$ 0	\$ 66,348	\$ 0
Month-to-month concessions	009604/RP - 6890	3,340	0	3,340	0
	009946/RP - 6946	3,790	0	3,790	0
	010332/RP - 7007	0	0	0	0
Total annual future projection		\$ 18,827,401	\$ 285,887	\$ 18,827,401	\$ 1,979,994
Base figure (ACDBE percentage of total projection)			1.52 %		10.52 %

Source: Keen Independent analysis.

Eating places. There is one month-to-month concessions agreement for eating places at Kona International Airport that generates \$7.3 million in annual revenue (FFY 2018). There are two restaurants and one snack shop under this concession agreement. An ACDBE has a subconcession that generates \$0.2 million in annual revenue.

Keen Independent examined whether there was ACDBE availability on Hawaii Island that might substantiate a higher projection of ACDBE participation in the food and beverage concession at Kona International Airport. ACDBE availability for airport eating places concessions is 27.06 percent on Hawaii Island based on Keen Independent’s availability survey. Applying that percentage to current total receipts for eating places at the airport, the study team projected that \$2.0 million of the \$7.3 million in concessions revenue might be generated by ACDBEs for FFY 2022 through FFY 2024. The projected ACDBE gross receipts for eating places concessions in Figure 13-4 shows these results.

Automobile parking. There is one long-term concessions agreement for automobile parking that expires prior to the end of the next goal period at Kona International Airport. It does not generate ACDBE participation. This concession generated \$3.3 million in revenue in FFY 2018. When determining the base figure for the ACDBE goal for Kona International Airport, Keen Independent used these total gross receipts and assumed no ACDBE participation in airport parking concessions from FFY 2022 through FFY 2024 as it was not evident how a subconcession for an ACDBE could be provided under the single parking concession.

Other concessions. In 2018, there were four small concessions related to other types of goods or services at Kona International Airport. None of these concessionaires were ACDBEs.

- A long-term concession generated \$66,000 in annual revenue; and
- Three month-to-month concession agreements earned a combined \$7,000 in annual revenue.

The term of the long-term agreement (013339/DOTA-15-0022) extends beyond the time frame of the next overall ACDBE goal for Kona International Airport, so it that \$66,000 in gross receipts is projected to continue for FFY 2022 through FFY 2024 (without ACDBE participation).

The three smaller concessions are also projected to continue for FFY 2022 through FFY 2024.

Projected ACDBE and total non-car rental concessions revenue for FFY 2022 through FFY 2024. Based on the above analyses, Keen Independent projects \$2.0 million in annual revenue for ACDBE concessions and \$18.8 million per year for all concessions for Kona International Airport for FFY 2022 through FFY 2024. ACDBE revenue as a share of total revenue is projected to be 10.52 percent.

The base figure indicated in Figure 13-4 is similar to the 11 percent ACDBE goal for FFY 2019 through FFY 2021 for Kona International Airport.

Base figure for Hilo International Airport. Keen Independent used the same methodology to calculate a base figure for non-car rental concessions at Hilo International Airport. Figure 13-5 on the following page presents the results.

Gift shops and newsstands. There is one long-term concessions agreement for newsstands for \$0.5 million at Hilo International Airport. This contract (001885/RP - 5721) does not have ACDBE participation.

The newsstand concessions agreement extends beyond the FFY 2022 through FFY 2024 time period of the next overall ACDBE goal for Hilo International Airport. The study team projects that none of the \$0.5 million revenue for this concession will be generated by ACDBEs during FFY 2022 through FFY 2024. (Keen Independent used the most recently reported annual gross receipts as the forecast of future revenue.)

Eating places. There is one long-term concessions agreement for eating places at Hilo International Airport that generates \$1.1 million in annual revenue. An ACDBE has a subconcession that produces \$0.4 million in annual revenue. This agreement extends beyond the next ACDBE goal-setting period of FFY 2022 through FFY 2024. Therefore, Keen Independent projects that an ACDBE will continue to generate \$0.4 million of the \$1.1 million total annual gross receipts for this concessions agreement during the goal period.

Automobile parking. There is one month-to-month concession for automobile parking at Hilo International Airport (002080/RP - 5841) and it does not include ACDBE participation. This concession generated \$1.9 million in revenue in FFY 2018. The Keen Independent availability survey did not identify any availability of ACDBEs for an automobile parking airport concession on Hawaii Island. Keen Independent projected no ACDBE participation in airport parking concessions from FFY 2022 through FFY 2024.

Fresh flower concessions. In 2018, there were agreements for fresh flower concessions (001822/RP - 6050 and 012152/RP - 8253) at Hilo International Airport. These two lei stands generated a combined \$0.29 million in revenue in FFY 2018 and both concessions were held by an ACDBE. The terms of both contracts extend beyond the time frame of the next overall ACDBE goal for Hilo International Airport, so they are projected to continue for FFY 2022 through FFY 2024. To summarize, Keen Independent projects that the \$0.29 million in combined annual gross receipts for these agreements will continue to be generated by ACDBEs.

Projected ACDBE and total non-car rental concessions revenue for FFY 2022 through FFY 2024. Based on the above analyses, Keen Independent projects \$0.7 million in annual revenue for ACDBE concessions and \$3.9 million per year for all concessions for Hilo International Airport for FFY 2022 through FFY 2024. ACDBE revenue as a share of total revenue is projected to be 17.89 percent. Figure 13-5 shows the calculations behind this base figure result for Hilo International Airport.

The base figure indicated in Figure 13-5 is similar to the 15 percent ACDBE goal for FFY 2019 through FFY 2021 for Hilo International Airport.

Figure 13-5.

Hilo International Airport — Base figure for non-car rental concessions contracts, FFY 2022–FFY 2024

Type of concession	Concessions agreement number	Current concessionaire gross receipts (FFY 2018)	Current ACDBE gross receipts	Future concessionaire gross receipts	Future ACDBE gross receipts
Gift shops and newsstands					
Long-term concessions	001885/RP - 5721	\$ 535,179	\$ 0	\$ 535,179	\$ 0
Eating places					
Long-term concessions	008640/DOTA-07-0012	\$ 1,090,053	\$ 402,919	\$ 1,090,053	\$ 402,919
Automobile parking					
Month-to-month concessions	002080/RP - 5841	\$ 1,948,966	\$ 0	\$ 1,948,966	\$ 0
Fresh flowers					
Long-term concessions	012152/RP - 8253	\$ 160,093	\$ 160,093	\$ 160,093	\$ 160,093
	001822/RP - 6050	127,762	127,762	127,762	127,762
Total annual future projection		\$ 3,862,053	\$ 690,774	\$ 3,862,053	\$ 690,774
Base figure (ACDBE percentage of total projection)			17.89 %		17.89 %

Source: Keen Independent analysis.

Base figure for Lihue Airport. Lihue Airport also has non-car rental concessions that Keen Independent analyzed to project ACDBE participation at that airport. Figure 13-6 on the following page presents detailed results of the base figure analysis.

Gift shops and newsstands. There are two long-term concessions agreements for gift shops and newsstands at Lihue Airport:

- One gift shop agreement (013092/DOA-16-0003) generates \$2.4 million annually, \$0.3 million of which from an ACDBE subconcessionaire.
- Contract 001882/RP - 5426, a newsstand concession, generated \$1.6 million in FFY 2018 and had no ACDBE participation.

As both agreements extend beyond the FFY 2022 through FFY 2024 time period for the next overall ACDBE goal for Lihue Airport, ACDBE revenue for gift shops and newsstands at the airport is projected to be \$0.3 million of the \$4.0 million generated through these agreements. (Keen Independent used the most recently reported annual gross receipts as the forecast of future revenue.)

Eating places. There is one long-term concessions agreement for eating places at Lihue Airport that generates \$8.8 million in annual revenue. An ACDBE has a subconcession that generates \$1.3 million in annual gross receipts. The agreement for this concession extends through a portion of the next ACDBE goal period of FFY 2022 through FFY 2024. Keen Independent projected the current annual ACDBE revenue and total revenue to continue throughout the goal period. Figure 13-6 shows these results.

Automobile parking. There is one long-term concession for automobile parking at Lihue Airport. It does not include ACDBE participation. This concession generates \$2.7 million in annual revenue. Because the term of this agreement extends beyond the time frame for the next ACDBE goal period, Keen Independent projects that there will continue to be no ACDBE participation in airport parking concessions at Lihue Airport for FFY 2022 through FFY 2024.

Fresh flower concessions. In 2018, there was one fresh flower shop at Lihue Airport (001993/RP - 6025). This agreement generated \$0.28 million in revenue in FFY 2018 and the concessionaire was not an ACDBE. The term of this contract extends beyond the time frame of the next overall ACDBE goal for Lihue Airport, so it is projected to continue with no ACDBE participation (see Figure 13-6).

Projected ACDBE and total non-car rental concessions revenue for FFY 2022 through FFY 2024. Based on the above projections for individual concessions, Keen Independent projects \$1.6 million in annual revenue for ACDBE concessions and \$15.8 million per year for all concessions for Lihue Airport for FFY 2022 through FFY 2024. ACDBE revenue as a share of total revenue is projected to be 10.00 percent, similar to the 11 percent ACDBE goal for FFY 2019 through FFY 2021 for Lihue Airport. Figure 13-6 shows the calculations behind this base figure projection for Lihue Airport.

Figure 13-6.

Lihue Airport — Base figure for non-car rental concessions, FFY 2022–FFY 2024

Type of concession	Concessions agreement number	Current concessionaire gross receipts (FFY 2018)	Current ACDBE gross receipts	Future concessionaire gross receipts	Future ACDBE gross receipts
Gift shops and newsstands					
Long-term concessions	013092/DOA-16-0003	\$ 2,446,965	\$ 264,272	\$ 2,446,965	\$ 264,272
	001882/RP - 5426	1,599,370	0	1,599,370	0
Eating places					
Long-term concessions that expire prior to Sept. 30, 2024	010408/DOA-11-0006	\$ 8,756,597	\$ 1,313,490	\$ 8,756,597	\$ 1,313,490
Automobile parking					
Long-term concessions	011190/DOA-13-0004	\$ 2,693,668	\$ 0	\$ 2,693,668	\$ 0
Fresh flowers					
Long-term concessions	001993/RP - 6025	\$ 275,024	\$ 0	\$ 275,024	\$ 0
Total annual future projection		\$ 15,771,624	\$ 1,577,762	\$ 15,771,624	\$ 1,577,762
Base figure (ACDBE percentage of total projection)			10.00 %		10.00 %

Source: Keen Independent analysis.

Base figure for Molokai Airport. In 2018, there were two non-car rental concessions at Molokai Airport, as discussed below.

Eating places. There is a month-to-month concessions agreement for one snack bar at Molokai Airport (a non-ACDBE). This contract (012304/RP-8279) generates \$0.3 million in annual revenue, which is projected to continue. Keen Independent projects no ACDBE participation.

Fresh flower concessions. In 2018, there was one month-to-month fresh flower concession (013914/RP-8691) at Molokai Airport. The concessionaire was not an ACDBE. This concession generated \$44,000 in revenue in FFY 2018. The Keen Independent did not identify availability of ACDBEs to provide a fresh flowers airport concession on Molokai, so Keen Independent projects that the fresh flowers concession at Molokai Airport will continue to be a non-ACDBE.

Projected ACDBE and total non-car rental concessions revenue for FFY 2022 through FFY 2024. Based on the above analyses, Keen Independent projects \$0.4 million annual revenue for all concessions for Molokai Airport for FFY 2020 through FFY 2022, none of which is projected to be generated by ACDBEs. Figure 13-7 on the following page shows the calculations behind this base figure projection for Molokai Airport.

HDOT submitted a 1 percent ACDBE goal for FFY 2017 through FFY 2019 for Molokai Airport and a 1 percent ACDBE goal for FFY 2020 through FFY 2022, with the intention of meeting this goal through the use of DBE goods and services. Keen Independent’s analysis of the ACDBE goal for Molokai Airport is consistent with the 1 percent goal.

Figure 13-7.

Molokai Airport — Base figure for non-car rental concessions, FFY 2020–FFY 2022

Type of concession	Concessions agreement number	Current concessionaire gross receipts (FFY 2018)	Current ACDBE gross receipts	Future concessionaire gross receipts	Future ACDBE gross receipts
Eating places					
Month-to-month concessions	012304/RP-8279	\$ 328,526	\$ 0	\$ 328,526	\$ 0
Fresh flowers					
Month-to-month concessions	013914/RP-8691	\$ 44,166	\$ 0	\$ 44,166	\$ 0
Total annual future projection		\$ 372,693	\$ 0	\$ 372,693	\$ 0
Base figure (ACDBE percentage of total projection)			0.00 %		0.00 %

Source: Keen Independent analysis.

B. Consideration of Step 2 Adjustments for Non-Car Rental Concessions

Per the Federal ACDBE Program, HDOT must consider potential step 2 adjustments to the base figures when determining its overall ACDBE goals for concessions for each airport. Federal regulations outline factors that an agency must consider:

1. Current capacity of ACDBEs to perform work, as measured by the volume of work ACDBEs have performed in recent years;
2. Information related to employment, self-employment, education, training and union apprenticeship programs;
3. Any disparities in the ability of ACDBEs to get financing, bonding and insurance; and
4. Other relevant factors.⁵

Keen Independent completed an analysis of each of the above step 2 factors and was able to quantify the effect of certain factors on the base figures. Other information examined was not as easily quantifiable but is still relevant to HDOT as it determines whether to make any step 2 adjustments.

1. Current capacity of ACDBEs to perform work, as measured by the volume of work ACDBEs have performed in recent years. Federal regulations in 49 CFR Section 23.51(d) direct agencies to consider the volume of work ACDBEs have performed in recent years when considering a potential step 2 adjustment to their ACDBE goals. USDOT’s “Tips for Goal-Setting” suggests that agencies should examine data on past participation on their USDOT-funded contracts in recent years (i.e., the percentage of contract dollars going to ACDBEs).

⁵ 49 CFR Section 23.51(d).

ACDBE participation based on HDOT Uniform Reports to FAA. Figure 13-8 presents information about past ACDBE participation for Hawaii airport contracts based on data from HDOT Uniform Reports of ACDBE Participation reported to FAA.

- The median ACDBE participation for FFY 2014–FFY 2018 is 7.91 percent for Honolulu International Airport and 11.72 percent for Kahului Airport.
- Median ACDBE participation figures for Kona International Airport, Hilo International Airport and Lihue Airport are 1.72 percent, 17.89 percent and 9.75 percent, respectively.
- For Molokai Airport, HDOT reported ACDBE participation of 0.00 percent (not shown in Figure 13-8).

Figure 13-8.

ACDBE participation in non-car rental concessions by HDOT airport, FFY 2014 through FFY 2018

	Honolulu International Airport	Kahului Airport	Kona International Airport	Hilo International Airport	Lihue Airport
Federal fiscal year					
2014	7.91 %	11.72 %	43.79 %	39.17 %	13.04 %
2015	9.26	11.58	0.03	13.38	9.75
2016	11.95	10.54	37.13	22.05	9.51
2017	6.01	12.99	0.29	16.89	9.36
2018	5.46	12.25	1.52	17.89	10.00
Median	7.91 %	11.72 %	1.52 %	17.89 %	9.75 %

Source: HDOT Uniform Reports of ACDBE Participation.

Summary. HDOT might consider these data when determining whether to make a step 2 adjustment based on past ACDBE participation. Each step 2 adjustment can be made using the median ACDBE participation from FFY 2014 through FFY 2018, as explained later in this chapter.

2. Information related to employment, self-employment, education, training and unions.

Chapter 7 summarizes information about conditions in the Hawaii airport concessions industry for minorities, women and MBE/WBEs. Detailed quantitative analyses of marketplace conditions in Hawaii are presented in Appendices E through H. Keen Independent’s analyses indicate that there are barriers that certain minority groups and women face that may affect the availability of minority- and women-owned firms for HDOT concessions agreements.

Employment, education and training. There is evidence of some barriers in employment, education and training that may have depressed the availability of minority- and women-owned firms in the Hawaii airport concessions industry. It was not possible to quantify the effects as part of the Availability and Disparity Study, however.

Self-employment. Keen Independent examined whether there were statistically significant disparities in rates of self-employment (business ownership) for the concessions industry, as explained in Chapter 7.

- There were no differences in business ownership rates between women and men working in the Hawaii food, beverage and selected retail industry.
- There were disparities in business ownership rates for Filipino Americans and Native Hawaiians working in the industry after controlling for neutral factors. However, business ownership rates for some other Asian American groups were higher than non-Hispanic whites. When examining results for all Asian Americans, Native Hawaiians and Pacific Islanders working in the industry, business ownership rates were about the same as non-Hispanic whites.

For these reasons, Keen Independent did not calculate an upward adjustment based on any differences in self-employment rates in the concessions industry.

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

Keen Independent examined the ability of ACDBEs to obtain financing. This analysis revealed quantitative and qualitative evidence of disadvantages for minorities, women and MBE/WBEs.

For example, of the food, beverage and selected retail companies surveyed in Hawaii that expressed interest in airport concessions, 14 percent of minority- and women-owned companies indicated difficulties obtaining lines of credit or loans compared with 3 percent of majority-owned firms.

- Any barriers to obtaining financing might affect opportunities for minorities and women to successfully form and operate airport concessions businesses in the Hawaii marketplace.
- If there are barriers that MBE/WBEs face in obtaining financing, those firms would also be at a disadvantage in obtaining and performing HDOT airport concessions prime contracts and subcontracts.

It was not possible to calculate the impact of any barriers regarding access to capital on the availability of minority- and women-owned airport concessionaires.

4. Other factors. The Federal ACDBE Program suggests that federal aid recipients also examine other relevant factors when determining whether to make any step 2 adjustments to their base figure.⁶

Among the other factors examined in this study was the success of MBE/WBEs relative to majority-owned businesses in the Hawaii food, beverage and selected retail industry. There is quantitative evidence that certain groups of MBE/WBEs are less successful than majority-owned firms, and face greater barriers in the marketplace, even after considering neutral factors. Chapter 7 summarizes that evidence and Appendix H presents supporting quantitative analyses.

⁶ 49 CFR Section 23.51(d).

For example:

- Among companies in Hawaii interested in airport concessions, minority- and women-owned businesses had lower revenue than majority-owned firms (see Appendix H).
- Women-owned food, beverage and selected retail companies in Hawaii had lower revenue than male-owned companies, even after controlling for certain gender-neutral factors (see Appendix H).

There is also qualitative evidence of barriers to the success of minority- and women-owned businesses, as summarized in Chapter 7 and explored in detail in Appendix J. Some of this qualitative information suggests that minority- and women-owned firms do not have equal access to opportunities for Hawaii airport concessions.

Approaches for making step 2 adjustments. Quantification of potential step 2 adjustments is discussed below.

1. Current capacity of ACDBEs to perform work, as measured by the volume of work ACDBEs have performed in recent years. The capacity analysis indicates potential step 2 adjustments if based on past ACDBE participation for the last five fiscal years (FFY 2014 through FFY 2018) the median reported ACDBE participation on non-car rental concessions was:

- 7.91 percent for Honolulu International Airport;
- 11.72 percent for Kahului Airport;
- 1.52 percent for Kona International Airport;
- 17.89 percent for Hilo International Airport;
- 9.75 percent for Lihue Airport; and
- 0.00 percent for Molokai Airport.

As discussed starting on the following page, Keen Independent calculated potential step 2 adjustments based on median past participation.

2. Information related to employment, self-employment, education, training and unions.

Analysis of self-employment indicated no need for an upward step 2 adjustment related to disparities in business ownership rates. The study team did not quantify a step 2 adjustment based on information related to employment, education, training and unions.

3. Any disparities in the ability of ACDBEs to get financing, bonding and insurance. Analysis of financing indicates that an upward adjustment is appropriate. However, impact of this factor on availability could not be quantified.

4. Other factors. Impact of the many barriers to success of MBE/WBEs in Hawaii could not be specifically quantified. However, the evidence supports an upward adjustment.

Summary. HDOT will need to consider whether to make a downward, upward or no step 2 adjustment when determining its overall ACDBE goals for the airports studied.

Calculation of potential step 2 adjustments. Figures 13-9 through 13-13 present calculations of potential step 2 adjustments for each airport. For each airport, Keen Independent determined the difference between the base figure and the median annual ACDBE participation that HDOT reported for FFY 2014 through FFY 2018. The study team subtracted or added one-half of this difference to the base figure to perform the step 2 adjustment.

For example, the difference between the 6.76% base figure and 1.11% DBE participation for Honolulu International Airport is 5.65 percentage points (6.76% - 1.11% = 5.65%). One-half of this difference is a downward adjustment of 2.82 percentage points (5.65% ÷ 2 = 2.82%). The goal would then be calculated as follows: 6.76% - 2.82% = 3.94%. Figure 13-9 through 13-13 present these calculations for each airport.

Honolulu International Airport. If HDOT makes a step 2 adjustment reflecting current capacity to perform work, its overall ACDBE goals for Honolulu International Airport would be 7.82 percent. Figure 13-9 shows the components of this step 2 adjustment.

Figure 13-9.

Honolulu International Airport — Potential step 2 adjustment for ACDBE goals for non-car rental concessions, FFY 2021–FFY 2023

Step 2 adjustment component	Value	Explanation
Evidence of current capacity	7.91 %	Past ACDBE participation (Uniform DBE Reports)
Base figure	- 7.72	From base figure analysis
Difference	0.19 %	
	÷ 2	Reduce by one-half
Adjustment	0.10 %	Adjustment for current capacity
Base figure	7.72 %	From base figure analysis
Adjustment for current capacity	+ 0.10	Step 2 adjustment
Overall DBE goal	7.82 %	Possible adjusted ACDBE goal

Source: Keen Independent analysis.

Kahului Airport. For Kahului Airport, HDOT could consider a downward adjustment of 0.27 percentage points, which would lead to an ACDBE goal of 11.99 percent (see Figure 13-10).

Figure 13-10.

Kahului Airport — Potential step 2 adjustment for ACDBE goal for non-car rental concessions, FFY 2021–FFY 2023

Step 2 adjustment component	Value	Explanation
Base figure	12.25 %	From base figure analysis
Evidence of current capacity	- 11.72	Past ACDBE participation (Uniform DBE Reports)
Difference	0.53 %	
	÷ 2	Reduce by one-half
Adjustment	0.27 %	Adjustment for current capacity
Base figure	12.25 %	From base figure analysis
Adjustment for current capacity	- 0.27	Step 2 adjustment
Overall ACDBE goal	11.99 %	Possible adjusted ACDBE goal

Source: Keen Independent analysis.

Kona International Airport. There is a 9 percentage point difference between the base figure and the median past participation of ACDBEs at Kona International Airport, which could lead to a downward adjustment of 4.50 percentage points. The ACDBE goal for non-car rental concessions would be 6.02 percent if HDOT made this adjustment. Figure 13-11 presents these calculations.

Figure 13-11.

Kona International Airport — potential step 2 adjustment for ACDBE goal non-car rental concessions, FFY 2022–FFY 2024

Step 2 adjustment component	Value	Explanation
Base figure	10.52 %	From base figure analysis
Evidence of current capacity	- 1.52	Past ACDBE participation (Uniform DBE Reports)
Difference	9.00 %	
	÷ 2	Reduce by one-half
Adjustment	4.50 %	Adjustment for current capacity
Base figure	10.52 %	From base figure analysis
Adjustment for current capacity	- 4.50	Step 2 adjustment
Overall ACDBE goal	6.02 %	Possible adjusted ACDBE goal

Source: Keen Independent analysis.

Hilo International Airport. Median ACDBE participation for Hilo International Airport (17.89%) is equal to the base figure, so no adjustment is needed (see Figure 13-12).

Figure 13-12.

Hilo International Airport — potential step 2 adjustment for ACDBE goal for non-car rental concessions, FFY 2022–FFY 2024

Step 2 adjustment component	Value	Explanation
Base figure	17.89 %	From base figure analysis
Evidence of current capacity	- 17.89	Past ACDBE participation (Uniform DBE Reports)
Difference	0.00 %	
	÷ 2	Reduce by one-half
Adjustment	0.00 %	Adjustment for current capacity
Base figure	17.89 %	From base figure analysis
Adjustment for current capacity	- 0.00	Step 2 adjustment
Overall DBE goal	17.89 %	Possible adjusted ACDBE goal

Source: Keen Independent analysis.

Lihue Airport. If HDOT chose to make a step 2 adjustment for past ACDBE participation at Lihue Airport, it would be small (0.13 percentage points). The ACDBE goal for non-car rental concessions at this airport would be 9.88 percent, as shown in Figure 13-13.

Figure 13-13.

Lihue Airport — potential step 2 adjustments for ACDBE goal for non-car rental concessions, FFY 2022–FFY 2024

Step 2 adjustment component	Value	Explanation
Base figure	10.00 %	From base figure analysis
Evidence of current capacity	- 9.75	Past ACDBE participation (Uniform DBE Reports)
Difference	0.25 %	
	÷ 2	Reduce by one-half
Adjustment	0.13 %	Adjustment for current capacity
Base figure	10.00 %	From base figure analysis
Adjustment for current capacity	- 0.13	Step 2 adjustment
Overall DBE goal	9.88 %	Possible adjusted ACDBE goal

Source: Keen Independent analysis.

Molokai Airport. For Molokai Airport both the base figure and median past ACDBE participation are 0 percent, so no base figure adjustment is needed based on demonstrated capacity of ACDBEs.

C. Projecting the Portion of ACDBE Goals for Non-Car Rental Concessions to be Met through Neutral Means

Along with setting an overall goal for ACDBE participation, the Federal ACDBE Program requires agencies receiving FAA funding to project the portion of that goal they expect to meet (a) through race- and gender-neutral means, and (b) through race- and gender-conscious programs (if any). USDOT offers guidance concerning how transportation agencies should project the portions of their overall ACDBE goals that will be met through race- and gender-neutral and race- and gender-conscious measures.

The section of the regulations in 49 CFR Part 23 pertaining to projecting neutral- and race-conscious portions of ACDBE goals references Section 26.51 of the regulations for the Federal DBE Program.⁷ USDOT has provided extensive information about how to make such projections for overall DBE goals, which is applied here as well.

Chapter 8 of this report summarizes the types of information transportation agencies can consider related to the Federal DBE Program. Key areas of questions include:

1. Is there evidence of discrimination within the airport concessions marketplace for any racial, ethnic or gender groups?
2. What has been the agency's past experience in meeting its overall ACDBE goal?
3. What has ACDBE participation been when HDOT has not applied ACDBE contract goals (or other race-conscious remedies)?
4. What is the extent and effectiveness of race- and gender-neutral measures that the agency could have in place for the next fiscal year?

The following pages of Chapter 13 are organized around each of those general areas of questions.

1. Is there evidence of discrimination within the concessions marketplace for any racial, ethnic or gender groups? The 2019 Availability and Disparity Study considered conditions in the Hawaii marketplace to address this question. Quantitative and qualitative information is summarized below.

Marketplace conditions. As discussed in Chapter 7 and summarized in an earlier part of Chapter 13, Keen Independent examined conditions in the Hawaii marketplace regarding:

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

⁷ 49 CFR Section 23.51(d)(5).

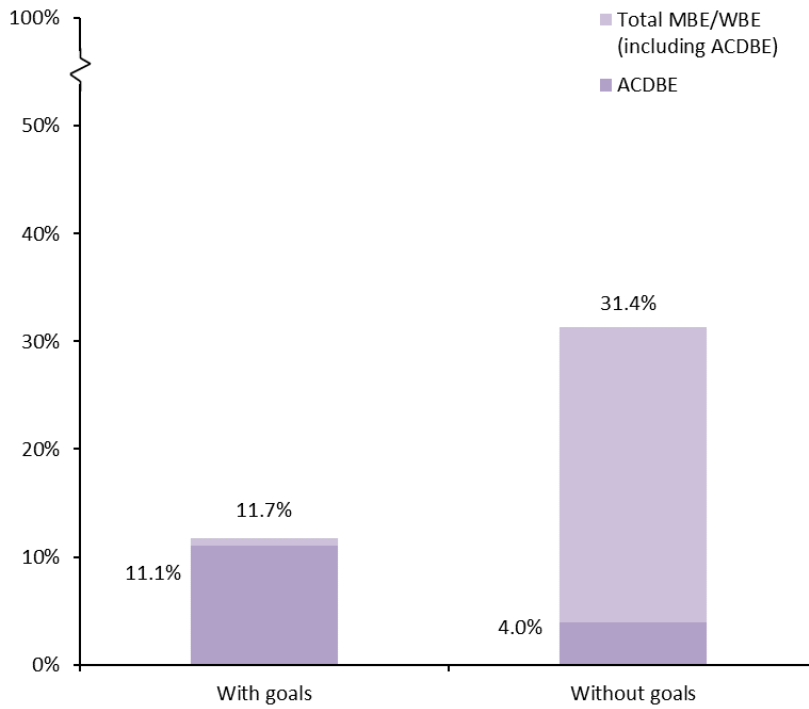
African Americans, Filipino Americans and Native Hawaiians were less likely to be business owners than non-Hispanic whites working in the Hawaii food, beverage and selected retail industry, and those disparities persisted for Filipino Americans and Native Hawaiians after controlling for neutral factors.

There was quantitative evidence of unequal access to capital for minorities in Hawaii and evidence of disparities in outcomes for minority- and women-owned firms in general and for certain MBE/WBE groups concerning the above issues. Qualitative information indicated some evidence that race and gender discrimination may have been a factor in these outcomes (see Appendix J).

Results of the disparity analysis for airport concessions. Chapter 6 of this report examines utilization of minority- and women-owned firms as concessionaires on agreements with and without ACDBE contract goals. Although HDOT had overall goals for ACDBEs for concessions, it did not apply ACDBE goals to each of the concession agreements, and for some airports, did not apply ACDBE contract goals at all (i.e., they operated the program solely through neutral means). Airports on Lanai and Molokai did not have ACDBE goals for concession agreements during the study period. Other airports had ACDBE goals for certain concessions agreements (mainly agreements with master concessionaires) but not others.

- **Concessions agreements with goals.** For HDOT airport concessions agreements with ACDBE goals, minority- and women-owned businesses received 12 percent of concessions revenue, mostly going to certified ACDBEs, as shown in Figure 13-14. For agreements with goals, each MBE/WBE group showed a substantial disparity except for Hispanic American-owned companies (see chapter 6).
- **Concessions agreements without goals.** Figure 13-14 also presents results for concessions agreements for which no specific ACDBE goals applied. For airports concessions contracts without goals, minority- and women-owned businesses received 31 percent of concessions revenue (31%), 4 percentage points of which went to certified ACDBEs. Participation of minority- and women-owned firms was much higher for these concessions than for those which ACDBE goals applied. As discussed in Chapter 6, there were still disparities for some groups of minority-owned firms, however.

Figure 13-14.
 MBE/WBE and DBE share of HDOT airport concessions revenue for agreements
 with and without ACDBE goals, July 2011–June 2016



Note: Dark portion of bar is certified ACDBE utilization.
 Number of master/subconcessionaire agreements analyzed is 162 with ACDBE contract goals and 337 without contract goals.

Source: Keen Independent from data on HDOT and LPA USDOT-funded prime contracts and subcontracts, July 2011–June 2016.

Summary. HDOT should review the information about utilization and availability of minority- and women-owned firms for airport concessions in Chapters 5 and 6 when considering the extent to which it can meet its overall ACDBE goals through neutral measures. HDOT should also examine the analysis of marketplace conditions presented in Chapter 7 and Appendices E through J, as well as other information it may have.

2. What has been the agency’s past experience in meeting its overall ACDBE goal? HDOT’s success in meeting its overall ACDBE goals for FFY 2014 through FFY 2018 varied by airport.

Honolulu International Airport. At Honolulu International Airport, HDOT did not meet its ACDBE goal for non-car rental concessions in any of the fiscal years studied. Figure 13-15 presents these results.

Figure 13-15.

Honolulu International Airport — Overall ACDBE goal and reported ACDBE participation on FAA-funded contracts, FFY 2014 through FFY 2018

Federal fiscal year	ACDBE goal	ACDBE commitments/ awards	Difference from ACDBE goal
2014	12.00 %	7.91 %	-4.09 %
2015	12.00	9.26	-2.74
2016	12.00	11.95	-0.05
2017	24.00	6.01	-17.99
2018	7.00	5.46	-1.54

Source: HDOT Uniform Reports of ACDBE Participation.

Kahului Airport. At Kahului Airport, HDOT did not meet its ACDBE goal for non-car rental concessions in any of the fiscal years studied (see Figure 13-16).

Figure 13-16.

Kahului Airport — Overall ACDBE goal and reported ACDBE participation on FAA-funded contracts, FFY 2014 through FFY 2018

Federal fiscal year	ACDBE goal	ACDBE commitments/ awards	Difference from ACDBE goal
2014	22.00 %	11.72 %	-10.28 %
2015	24.00	11.58	-12.42
2016	24.00	10.54	-13.46
2017	24.00	12.99	-11.01
2018	13.00	12.25	-0.75

Source: HDOT Uniform Reports of ACDBE Participation.

Kona International Airport. At Kona International Airport, HDOT substantially exceeded its ACDBE goal for non-car rental concessions in two of the fiscal years studied (FFY 2014 and FFY 2016). However, in the remaining three fiscal years HDOT’s ACDBE commitment figures were substantially lower than the goal. Figure 13-17 provides these results.

Figure 13-17.

Kona International Airport — Overall ACDBE goal and reported ACDBE participation on FAA-funded contracts, FFY 2014 through FFY 2018

Federal fiscal year	ACDBE goal	ACDBE commitments/ awards	Difference from ACDBE goal
2014	20.00 %	43.79 %	23.79 %
2015	20.00	0.03	-19.97
2016	13.00	37.13	24.13
2017	13.00	0.29	-12.71
2018	13.00	1.52	-11.48

Source: HDOT Uniform Reports of ACDBE Participation.

Hilo International Airport. As presented in Figure 13-18, HDOT exceeded its ACDBE goal for non-car rental concessions at Hilo International Airport in four of the five years examined.

Figure 13-18.

Hilo International Airport — Overall ACDBE goal and reported ACDBE participation on FAA-funded contracts, FFY 2014 through FFY 2018

Federal fiscal year	ACDBE goal	ACDBE commitments/ awards	Difference from ACDBE goal
2014	15.00 %	39.17 %	24.17 %
2015	15.00	13.38	-1.62
2016	15.00	22.05	7.05
2017	15.00	16.89	1.89
2018	15.00	17.89	2.89

Source: HDOT Uniform Reports of ACDBE Participation.

Lihue Airport. At Lihue Airport, HDOT met its ACDBE goal for non-car rental concessions in one of the fiscal years studied (FFY 2014) and came within 2 percentage points of its goal in three other years. Figure 13-19 examines these results.

Figure 13-19.

Lihue Airport — Overall ACDBE goal and reported ACDBE participation on FAA-funded contracts, FFY 2014 through FFY 2018

Federal fiscal year	ACDBE goal	ACDBE commitments/ awards	Difference from ACDBE goal
2014	13.00 %	13.04 %	0.04 %
2015	13.00	9.75	-3.25
2016	11.00	9.51	-1.49
2017	11.00	9.36	-1.64
2018	11.00	10.00	-1.00

Source: HDOT Uniform Reports of ACDBE Participation.

Molokai Airport. At Molokai Airport, HDOT did not meet its ACDBE goal for non-car rental concessions in any of the fiscal years studied where it set a goal greater than 0.00 percent. Figure 13-20 presents these results.

Figure 13-20.

Molokai Airport — Overall ACDBE goal and reported ACDBE participation on FAA-funded contracts, FFY 2014 through FFY 2018

Federal fiscal year	ACDBE goal	ACDBE commitments/ awards	Difference from ACDBE goal
2014	0.00 %	0.00 %	0.00 %
2015	0.00	0.00	0.00
2016	0.00	0.00	0.00
2017	1.00	0.00	-1.00
2018	1.00	0.00	-1.00

Source: HDOT Uniform Reports of ACDBE Participation.

3. What has ACDBE participation been when HDOT has not applied ACDBE contract goals (or other race-conscious remedies)? Participation of ACDBEs was 4 percent for concessions agreements without ACDBE goals and 11 percent for agreements with goals.

- However, 39 percent of the gross receipts for airport concessions agreements without ACDBE goals went to minority- and women-owned firms, many of which might be eligible for certification as ACDBEs. This participation was much higher than the 12 percent of revenue that went to MBE/WBEs for concessions agreements with ACDBE goals.
- These results indicate that HDOT could achieve as much or more ACDBE participation without using ACDBE goals if it could encourage more concessionaires that are minority- or women-owned to become ACDBE-certified.

4. What is the extent and effectiveness of race- and gender-neutral measures that the agency could have in place for the next fiscal year? When determining the extent to which it could meet its overall ACDBE goals through the use of neutral measures, HDOT must review the race- and gender-neutral measures that it and other organizations have in place, and those it has planned or could consider for future implementation.

One neutral effort to increase ACDBE participation is for HDOT to encourage minority- and women-owned firms that currently have concessions to become certified as ACDBEs. Almost 40 percent of the gross receipts for agreements without goals went to minority- and women-owned firms.

Another neutral program that HDOT might consider is an airport concessions small business enterprise (ACSBE) contract goals program.

- In this program, HDOT would set ACSBE goals for specific concessions agreements in the same way as it has for ACDBE goals. Monitoring of ACSBE participation would be the same as ACDBE participation.
- HDOT would certify firms as ACSBEs in the same way it certifies companies as ACDBEs, except they would not need to be owned and controlled by minorities or women. All of the current ACDBEs in Hawaii would automatically qualify as ACSBEs.
- In the in-depth interviews in this study, a number of firms commented on the preponderance of business owners of color and women business owners in the Hawaii marketplace. Many current firms eligible to be certified as ACDBEs have not done so, and there may be some stigma concerning certification as a “disadvantaged business” that might not arise for small business certification.
- Minority and female business owners in Hawaii frequently reported disadvantages because they were a small business competing against large businesses. In Hawaii, some of those large businesses are owned by minorities or women.

An ACSBE concessions goals program for HDOT airports might be effective in encouraging minority- and women-owned business participation if it were widely promoted in advance of new concessions agreements becoming available, coupled with further unbundling of HDOT's concessions agreements and technical assistance for current and potential ACDBEs.

D. Summary of ACDBE Goals and Projections for Non-Car Rental Airport Concessions

Chapter 13 provides information to HDOT as it considers its overall ACDBE goals for non-car rental airport concessions and its projection of the portion of its overall ACDBE goals to be achieved through neutral means.

1. Overall ACDBE goals for non-car rental airport concessions. As explained previously this chapter, HDOT might consider the following ACDBE goals for non-car rental concessions if it made adjustments to its base figures based on median past ACDBE participation:

- 7.82 percent for Honolulu International Airport;
- 11.99 percent for Kahului Airport;
- For Kona International Airport, a downward adjustment to 6.02 percent;
- 17.89 percent for Hilo International Airport (no step 2 adjustment as the median past participation matches the base figure);
- 6.02 percent for Lihue Airport; and
- A goal close to 0 percent for Molokai Airport.

2. Could HDOT project that it can meet all of its overall ACDBE goal through neutral means? If not, how much of the overall DBE goal can HDOT project to be met through neutral means?

HDOT must consider whether it can achieve its overall ACDBE goal through neutral means alone or whether race-conscious programs are needed. Depending in part on the level of the overall ACDBE goals, it might be appropriate for HDOT to attempt to achieve the entire amounts of those goals through a new ACSBE Program along with encouraging more minority- and women-owned firms with current concessions agreements to become ACDBE-certified.

- As discussed previously in Chapter 13, most potential ACSBEs in Hawaii are minority- or women-owned, based on Keen Independent's analysis of small businesses available for HDOT work. And, minority- and women-owned firms are disproportionately small businesses.
- HDOT would set ACSBE contract goals in the same way as it currently sets ACDBE contract goals. The same firms currently eligible to count toward the goals would still be available to count toward the goals as ACSBEs.
- HDOT could provide technical assistance and other assistance to ACSBEs.

- The primary reason HDOT would not meet its ACDBE goals for each airport is if minority- and women-owned firms eligible for ACDBE certification continue to choose not to become certified. With outreach and additional reasons to become certified, a new ACSBE Program could encourage more of these firms to become certified. The market and economic disadvantages this program is attempting to remedy for businesses, lack of access to concessions opportunities and small size, are the ways many minority and female business owners in Hawaii perceive their own disadvantage, which could encourage participation in the program. The minority- and women-owned firms attracted to a new ACSBE certification would also be certified as ACDBEs. This would increase reported ACDBE participation as many of these minority- and women-owned firms already participate in HDOT contracts.
- White men comprise about 12 percent of the workforce in Hawaii. The concept of “social disadvantage” for people who are not white differs in a state that has a workforce that is almost 90 percent people of color and women. Keen Independent found evidence of social disadvantages for women and minorities compared with men and nonminorities, but those disadvantages may occur in different ways than on the Mainland. Social disadvantages associated with race and ethnicity also occur within Hawaii’s majority population of Asian Pacific Americans, Native Hawaiians and Pacific Islanders. An ACSBE Program might better tailor operation of the Federal ACDBE Program to achieve success in removing barriers for socially and economically disadvantaged businesses in this demographically unique state.

HDOT should consider all of the information in the report and other sources when reaching its decision on any use of race- and gender-conscious programs (such as ACDBE contract goals). The balance of Chapter 13 presents projections if HDOT chooses for all of the ACDBE participation to come from neutral efforts.

The following tables present the current goals and potential new goals for non-car rental concessions at each airport. Keen Independent also presents possible projections of the share of the ACDBE goals to be met through neutral means.

Honolulu International Airport. HDOT projected a 1.00 percent point neutral and 6.00 percentage point race-conscious split when it prepared its overall ACDBE goal of 7.00 percent for Honolulu International Airport for FFY 2018 through FFY 2020. The first column Figure 13-21 presents HDOT’s neutral/race-conscious split for that ACDBE goal.

Figure 13-21 also shows neutral and race-conscious projections for different levels of overall ACDBE goals if HDOT proposed 100 percent of its overall ACDBE goal to be achieved through an ACSBE Program and other neutral means, calculations of neutral and race-conscious projections with possible goals are shown in the three right-hand columns of Figure 13-21.

Figure 13-21.

Honolulu International Airport — Overall ACDBE goals and projections of race-neutral and race-conscious ACDBE participation for non-car rental concessions for FFY 2021 through FFY 2023

Component of overall DBE goal	FFY 2018- FFY 2020	FFY 2021 - FFY 2023	
		Base figure	With step 2 adjustment
Overall goal	7.00 %	7.72 %	7.82 %
Neutral projection	- <u>1.00</u>	- <u>7.72</u>	- <u>7.82</u>
Race-conscious projection	6.00 %	0.00 %	0.00 %

Source: Keen Independent analysis.

Kahului Airport. The first column Figure 13-22 presents HDOT’s recent projections of neutral and race-conscious participation of ACDBEs for Kahului Airport concessions. The other two columns provide projections for two different overall ACDBE goals if HDOT chose to attempt to achieve all of its ACDBE participation through neutral means.

Figure 13-22.

Kahului Airport — Overall ACDBE goals and projections of race-neutral and race-conscious ACDBE participation for non-car rental concessions for FFY 2021 through FFY 2023

Component of overall DBE goal	FFY 2018- FFY 2020	FFY 2021 - FFY 2023	
		Base figure	With step 2 adjustment
Overall goal	13.00 %	12.25 %	11.99 %
Neutral projection	- <u>1.00</u>	- <u>12.25</u>	- <u>11.99</u>
Race-conscious projection	12.00 %	0.00 %	0.00 %

Source: Keen Independent analysis.

Kona International Airport. Figure 13-23 shows similar information for Kona International Airport. Each of the projections for the new ACDBE goals indicate that all of the participation is projected to be obtained through neutral means.

Figure 13-23.

Kona International Airport — Overall ACDBE goals and projections of race-neutral and race-conscious ACDBE participation for non-car rental concessions for FFY 2022 through FFY 2024

Component of overall DBE goal	FFY 2019- FFY 2021	FFY 2022 - FFY 2024	
		Base figure	With step 2 adjustment
Overall goal	11.00 %	10.52 %	6.02 %
Neutral projection	- <u>11.00</u>	- <u>10.52</u>	- <u>6.02</u>
Race-conscious projection	0.00 %	0.00 %	0.00 %

Source: Keen Independent analysis.

Hilo International Airport. Figure 13-24 shows the current goal and the possible future goal, with neutral projection, for Hilo International Airport. As explained earlier in this chapter, Hilo International Airport did not require a step 2 adjustment as that adjustment would have been 0 percentage points. All future ACDBE participation is projected to be obtained through neutral means.

Figure 13-24.

Hilo International Airport — Overall ACDBE goals and projections of race-neutral and race-conscious ACDBE participation for non-car rental concessions for FFY 2022 through FFY 2024

Component of overall DBE goal	FFY 2019- FFY 2021	FFY 2022- FFY 2024
Overall goal	15.00 %	17.89 %
Neutral projection	- <u>9.00</u>	- <u>17.89</u>
Race-conscious projection	6.00 %	0.00 %

Source: Keen Independent analysis.

Lihue Airport. Neutral projections under two options for overall ACDBE goals for Lihue Airport are provided in Figure 13-25. All of the future ACDBE participation is projected to be attained through neutral means.

Figure 13-25.

Lihue Airport — Overall ACDBE goal and projections of race-neutral participation for FAA-funded contracts for FFY 2022 through FFY 2024

Component of overall DBE goal	FFY 2019- FFY 2021	FFY 2022 - FFY 2024	
		Base figure	With step 2 adjustment
Overall goal	11.00 %	10.00 %	9.88 %
Neutral projection	- <u>11.00</u>	- <u>10.00</u>	- <u>9.88</u>
Race-conscious projection	0.00 %	0.00 %	0.00 %

Source: Keen Independent analysis.

Molokai Airport. Figure 13-26 shows a possible future overall ACDBE goal of 1 percent for Molokai Airport, which would be achieved through race-neutral means.

Figure 13-26.

Molokai Airport — Overall ACDBE goal and projections of race-neutral participation for FAA-funded contracts for FFY 2020 through FFY 2022

Component of overall DBE goal	FFY 2017- FFY 2019	FFY 2020- FFY 2022
Overall goal	1.00 %	1.00 %
Neutral projection	- <u>1.00</u>	- <u>1.00</u>
Race-conscious projection	0.00 %	0.00 %

Source: Keen Independent analysis.

E. Establishing ACDBE Goals and Projections for Airport Car Rental Concessions

Because HDOT reported that there are no ACDBEs available to perform car rental concessions in Hawaii, it has set goals of 1 percent or less for each airport for each of the years studied. HDOT’s current overall goals for ACDBE participation in airport car rental concessions are:

- 1.00 percent each for large and medium hub airports (Honolulu International Airport and Kahului Airport);
- 1.00 percent each for each of the three small hub airports (Kona International Airport, Hilo International Airport and Lihue Airport); and
- 0.00 percent for Molokai Airport. Lanai Airport did not have any revenue-generating car rental concessions during the previous goal period and HDOT does not anticipate that the airport will have any revenue-generating concessions during the goal period from FFY 2020 through FFY 2022.

Figure 13-27 provides historical information on car rental concession revenue for each of the airports. Lanai Airport is not shown as it does not have a car rental concession at the airport.

Figure 13-27.

Annual car rental concession revenue by airport, FFY 2011 through FFY 2018

Federal fiscal year	Revenue from car rental concessions (\$1,000s)					
	Honolulu International Airport	Kahului Airport	Kona International Airport	Hilo International Airport	Lihue Airport	Molokai Airport
2014	\$ 106,853	\$ 214,174	\$ 105,974	\$ 20,371	\$ 95,470	\$ 2,407
2015	113,144	218,519	111,810	21,369	96,620	2,702
2016	106,109	210,961	114,265	21,631	103,164	2,619
2017	143,309	222,088	131,177	24,784	120,284	2,582
2018	162,608	257,488	139,030	25,237	139,702	2,691

Source: HDOT Uniform Reports of ACDBE Participation.

Base figure analysis. There are no ACDBEs that provide airport car rental services in Hawaii, so HDOT has attempted to reach these goals through purchases of goods and services from DBEs. HDOT typically sets overall goals of 1 percent for car rental concessions.

Comprehensive data on the all the goods and service purchases that airport car rental concessions did not appear to be producible from HDOT records, so there is no additional information in this disparity study to fine-tune HDOT’s goals for goods and services purchases from car rental concessions. Other research in this study documented that there is availability of minority- and women-owned firms for many types of goods and services in Hawaii, so there is support for HDOT’s goals of at least 1 percent for car rental concessions.

Potential step 2 adjustments. HDOT has reported no ACDBE or DBE participation related to airport car rental concessions in recent years and HDOT reports no ACDBE availability for airport car rental concessions in the state. There is no information in the Availability and Disparity Study that would indicate any step 2 adjustment for HDOT's ACDBE goals for car rental concessions at HDOT airports.

Keen Independent did identify availability of small minority- and women-owned businesses that supply a wide range of goods and services in Hawaii. There is information from the study to expect some level of participation of DBEs in supplying those goods and services to car rental concessions at HDOT airports. However, the study team did not receive comprehensive data on goods and services purchases by airport car rental concessions that would allow quantification of these goals.

Projection of neutral attainment. If HDOT strongly encouraged car rental concessions to reach out to DBEs and encourage their current minority- and women-owned suppliers and service providers to become DBE-certified, it could likely achieve goals in the range of 1 percent solely through neutral participation.

APPENDIX A.

Definition of Terms

Appendix A provides explanations and definitions useful to understanding the 2019 Availability and Disparity Study. The following definitions are only relevant in the context of this report.

A&E. “A&E” refers to architecture and engineering (i.e., A&E contracts).

Airport Concessions Disadvantaged Business Enterprise (ACDBE). An ACDBE is a concessionaire that is a for-profit small business concern 51 percent or more owned and controlled by one or more individuals who are both socially and economically disadvantaged according to the guidelines in the Federal DBE Program (49 CFR Part 23).

Anecdotal evidence. Anecdotal evidence includes personal accounts and perceptions of incidents, including any incidents of discrimination, told from each individual interviewee’s or participant’s perspective.

Availability analysis. The availability analysis examines the number of minority-, women-owned and majority-owned businesses ready, willing and able to perform transportation-related construction and engineering work for HDOT or local agencies in Hawaii.

“Availability” is often expressed as the percentage of contract dollars that might be expected to go to minority- or women-owned firms based on analysis of the specific type, location, size and timing of each HDOT prime contract and subcontract and the relative number of minority- and women-owned firms available for that work.

Business. A business is a for-profit enterprise, including all of its establishments (synonymous with “firm” and “company”).

Business establishment. A business establishment (or simply, “establishment”) is a place of business with an address and working phone number. One business can have many business establishments.

Business listing. A business listing is a record in the Dun & Bradstreet (D&B) database (or other database) of business information. A D&B record is a “listing” until the study team determines it to be an actual business establishment with a working phone number.

Code of Federal Regulations or CFR. Code of Federal Regulations (CFR) is a codification of the federal agency regulations. An electronic version can be found at <http://www.gpo.gov/fdsys/browse/collectionCfr.action?collectionCode=CFR>.

Concession. A concession is a business located in an airport that is engaged in the sale of consumer goods or services to the public under an agreement with an airport, another concessionaire, or the owner or lessee of a terminal.

Contract. A contract is a legally binding agreement between the seller of goods or services and a buyer.

Contract element. A contract element is either a prime contract or subcontract that the study team included in its analyses.

Consultant. A consultant is a business performing professional services contracts.

Contractor. A contractor is a business performing construction contracts.

Controlled. Controlled means exercising management and executive authority for a business.

Disadvantaged Business Enterprise (DBE). A small business that is 51 percent or more owned and controlled by one or more individuals who are both socially and economically disadvantaged according to the guidelines in the Federal DBE Program (49 CFR Part 26). Members of certain racial and ethnic groups identified under “minority-owned business enterprise” in this appendix may meet the presumption of social and economic disadvantage. Women are also presumed to be socially and economically disadvantaged. Examination of economic disadvantage also includes investigating the three-year average gross revenues and the business owner’s personal net worth (at the time of this report, a maximum of \$1.32 million excluding equity in the business and primary personal residence).

Some minority- and women-owned businesses do not qualify as DBEs because of gross revenue or net worth limits.

A business owned by a nonminority male may also be certified as a DBE on a case-by-case basis if the enterprise meets its burden to show it is owned and controlled by one or more socially and economically disadvantaged individuals according to the requirements in 49 CFR Part 26.

Disparity. A disparity is an inequality, difference or gap between an actual outcome and a reference point or benchmark. For example, a difference between an outcome for one racial or ethnic group and an outcome for nonminorities may constitute a disparity.

Disparity analysis. A disparity analysis compares actual outcomes with what might be expected based on other data. Analysis of whether there is a “disparity” between the utilization and availability of minority- and women-owned businesses is one tool used to examine whether there is evidence consistent with discrimination against such businesses.

Disparity index. A disparity index is a measure of the relative difference between an outcome, such as percentage of contract dollars received by a group, and a corresponding benchmark, such as the percentage of contract dollars that might be expected given the relative availability of that group for those contracts. In this example, it is calculated by dividing percent utilization (numerator) by percent availability (denominator) and then multiplying the result by 100. A disparity index of 100 indicates “parity” or utilization “on par” with availability. Disparity index figures closer to 0 indicate larger disparities between utilization and availability. For example, the disparity index would be “50” if the utilization of a particular group was 5 percent of contract dollars and its availability was 10 percent.

Dun & Bradstreet (D&B). D&B is the leading global provider of lists of business establishments and other business information (see www.dnb.com). Hoover's is the D&B company that provides these lists. Obtaining a DUNS number and being listed by D&B is free to listed companies; it does not require companies to pay to be listed in its database.

Employer firms. Employer firms are firms with paid employees other than the business owner and family members.

Engineering-related services. For purposes of this study, services such as surveying, transportation planning, environmental consulting, construction management and certain related professional services.

Enterprise. An enterprise is an economic unit that is a for-profit business or business establishment, not-for-profit organization or public sector organization.

Establishment. See “business establishment.”

Federal Aviation Administration (FAA). The FAA is an agency of the United States Department of Transportation that administers federal funding to support all aspects of civil aviation in the United States including airports and air traffic control centers.

Federal Disadvantaged Business Enterprise (DBE) Program. Federal DBE Program refers to the Disadvantaged Business Enterprise Program established by the United States Department of Transportation after enactment of the Transportation Equity Act for the 21st Century (TEA-21) as amended in 1998. The regulations for the Federal DBE Program are set forth in 49 CFR Part 26.

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

Federal Transit Administration (FTA). The FTA is an agency of the United States Department of Transportation that administers federal funding to support local public transportation systems including buses, subways, light rail and passenger ferry boats.

Firm. See “business.”

Federally-funded contract. A federally-funded contract is any contract or project funded in whole or in part (a dollar or more) with United States Department of Transportation financial assistance, including loans. As used in this study, it is synonymous with “USDOT-funded contract.”

Hawaii Awards & Notices Data System (HANDS). Hawaii Awards & Notices Data System (HANDS) is State of Hawaii’s “one-stop shop” for contracting with State of Hawaii and its municipalities. It includes bidding opportunities for construction, professional services, goods and other services, among others.

Hawaii Department of Labor and Industrial Relations (DLIR). Hawaii Department of Labor and Industrial Relations (DLIR) is the state agency responsible for enforcement of anti-discrimination laws that apply to workplaces, housing and public accommodations; enforcement of state laws related to wages, hours and terms and conditions of employment; education of employers concerning wage, hour and civil rights laws; and workforce development through apprenticeship programs and other efforts.

Hawaii Department of Transportation (HDOT). HDOT is the steward of the State of Hawaii’s transportation system. HDOT is responsible for building, maintaining and operating the state highway system. In addition, HDOT works with various partners to maintain and improve local transportation infrastructure. HDOT provides other transportation services related to Hawaii’s roads and bridges, railways, public transportation services, transportation safety, driver and vehicle licensing and motor carrier regulation.

Hawaii eProcurement System (HIePRO). Hawaii eProcurement System (HIePRO) is State of Hawaii’s online procurement system used for issuing solicitations, receiving responses and issuing award notices.

Hawaii Office of Civil Rights (OCR). Hawaii Office of Civil Rights (OCR) assures that HDOT is in full compliance with all related federal and state anti-discrimination laws, regulations, directives and executive orders in all of its programs and activities.

Hawaii Unified Certification Program (UCP). Hawaii Unified Certification Program (UCP) is operated by HDOT Office of Civil Rights (OCR) to provide statewide certification, renewal and decertification for the Disadvantaged Business Enterprise (DBE) Program. HDOT is the sole certifying agency of the program.

Industry. An industry is a broad classification for businesses providing related goods or services.

Local agency. A local agency is any city, county, town, tribal government, regional transportation commission or other local government receiving money through HDOT.

Majority-owned business. A majority-owned business is a for-profit business that is not owned and controlled by minorities or women (see definition of “minorities” below).

MBE. Minority-owned business enterprise. See minority-owned business.

Minorities. Minorities are individuals who belong to one or more of the racial/ethnic groups identified in the federal regulations in 49 CFR Section 26.5:

- Black Americans (or “African Americans” in this study), which include persons having origins in any of the black racial groups of Africa.
- Hispanic Americans, which include persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race.
- American Indians, which include persons who are Alaska Natives.
- Asian-Pacific Americans and Native Hawaiians, which include persons whose origins are from Hawaii or from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Mongolia, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), Republic of the Northern Marianas Islands, Macao, Fiji, Tonga, Kiribati, Tuvalu, Nauru, Federated States of Micronesia, Hong Kong, or other Asian and Pacific Islanders.
- Subcontinent Asian Americans, which include persons whose origins are from India, Pakistan, Bangladesh, Bhutan, Nepal or Sri Lanka.

Minority-owned business (MBE). An MBE is a business that is at least 51 percent owned and controlled by one or more individuals that belong to a minority group. Minority groups in this study are those listed in 49 CFR Section 26.5. For purposes of this study, a business need not be certified as such to be counted as a minority-owned business. Businesses owned by minority women are also counted as MBEs in this study (where that information is available). In this study, “MBE-certified businesses” are those that have been certified by the State of Hawaii as a minority-owned company.

North American Industry Classification System (NAICS) codes. NAICS codes identify the primary line of business of a business enterprise. See <http://www.census.gov/epcd/www/naics.html>.

Non-DBEs. Non-DBEs are firms that are not certified as DBEs, regardless of the race/ethnicity or gender of the owner.

Non-response bias. Non-response bias occurs when the observed responses to a survey question differ from what would have been obtained if all individuals in a population, including non-respondents, had answered the question.

Owned. Owned indicates at least 51 percent ownership of a company. For example, a “minority-owned” business is at least 51 percent owned by one or more minorities.

Potential DBE. A potential DBE is a minority- or woman-owned business that appears that it could be DBE-certified (and not currently DBE certified) based on revenue requirements specified as part of the Federal DBE Program.

Prime consultant. A prime consultant is a professional services firm that performs a prime contract for an end user, such as HDOT.

Prime contract. A prime contract is a contract between a prime contractor or a prime consultant and the project owner, such as HDOT.

Prime contractor. A prime contractor is a construction firm that performs a prime contract for an end user, such as HDOT.

Project. A project refers to an HDOT or local agency transportation construction and/or engineering endeavor. A project could include one or multiple prime contracts and corresponding subcontracts.

Race-and gender-conscious measures. Race- and gender-conscious measures are programs in which businesses owned by some minority groups or women may participate but majority-owned firms typically may not. A DBE contract goal is one example of a race- and gender-conscious measure.

Note that the term is a shortened version of “race-, ethnicity- and gender-conscious measures.” For ease of communication, the study team has truncated the term to “race- and gender-conscious measures.”

Race- and gender-neutral measures. Race- and gender-neutral measures apply to businesses regardless of the race/ethnicity or gender of firm ownership. Race- and gender-neutral measures may include assistance in overcoming bonding and financing obstacles, simplifying bidding procedures, providing technical assistance, establishing programs to assist start-up firms, and other methods open to all businesses or any disadvantaged business regardless of race or gender of ownership. A broader list of examples can be found in 49 CFR Section 26.51(b).

Note that the term is more accurately “race, ethnicity and gender-neutral” measures. However, for ease of communication, the study team has shortened the term to “race- and gender-neutral measures.”

Relevant geographic market area. The relevant geographic market area is the geographic area in which the businesses receiving most HDOT and local agency contracting dollars are located. The relevant geographic market area is also referred to as the “local marketplace.” Case law related to race- and gender-conscious programs requires disparity analyses to focus on the “relevant geographic market area.”¹

Remedial measure. A remedial measure, sometimes shortened to “remedy,” is a program designed to address barriers to full participation of minorities or women, or minority- or women-owned firms.

¹ See, e.g., *Crosby*, 448 U.S. at 509; 49 CFR Section 26.35; *Rothe*, 545 F.3d at 1041-1042; *N. Contracting*, 473 F.3d at 718, 722-23; *Western States Paving*, 407 F.3d at 995.

SBA 8(a). SBA 8(a) is a U.S. Small Business Administration business assistance program for small disadvantaged businesses owned and controlled by at least 51 percent socially and economically disadvantaged individuals.

The Service Corps of Retired Executives (SCORE). The Service Corps of Retired Executives (SCORE) is a non-profit, volunteer-run organization that offers small business supportive services and business mentoring nationwide as a resource partner of the U.S. Small Business Administration (SBA). Hawaii has SCORE chapters on Hawaii Island and Maui.

Service-disabled Veteran-owned Small Business (SDVOSB). A firm certified as a service disabled veteran-owned small business according to the criteria of the federal Service-disabled Veteran-owned Small Business Concern (SDVOSBC) Program.

Small business. A small business is a business with low revenues or size (based on revenue or number of employees) relative to other businesses in the industry. “Small business” does not necessarily mean that the business is certified as such.

Small Business Enterprise (SBE). A firm certified as a small business according to the size criteria of the certifying agency.

Small Business Administration (SBA). The SBA refers to the United States Small Business Administration, which is an independent agency of the United States government that assists small businesses.

State-funded contract. A state-funded contract is any contract or project that is entirely funded with State of Hawaii, local government and other non-USDOT funds. As these contracts do not include federal funds, the Federal DBE Program does not apply.

Statistically significant difference. A statistically significant difference refers to a quantitative difference for which there is a high probability that random chance can be rejected as an explanation for the difference. This has applications when analyzing differences based on sample data such as most U.S. Census datasets (could chance in the sampling process for the data explain the difference?), or when simulating an outcome to determine if it can be replicated through chance. Often a 95 percent confidence level is applied as a standard for when chance can reasonably be rejected as a cause for a difference.

Subconsultant. A subconsultant is a professional services firm that performs services for a prime consultant as part of the prime consultant’s contract for a customer such as HDOT.

Subcontract. A subcontract is a contract between a prime contractor or prime consultant and another business selling goods or services to the prime contractor or prime consultant as part of the prime contractor’s contract for a customer such as HDOT.

Subcontract goals program. A program in which a public agency sets a percent goal for participation of DBEs, MBE/WBEs, ESBs, small businesses or another group on a contract. These programs typically require that a bidder either meet the percentage goal with members of the group or show good faith efforts to do so as part of its bid or proposal.

Subcontractor. A subcontractor is a construction firm that performs services for a prime contractor as part of a larger project.

Subrecipient. A subrecipient is a local agency receiving financial assistance from the United States Department of Transportation, passed through HDOT.

Supplier. A supplier is a firm that sells supplies to a prime contractor as part of a larger project (or in some cases sells supplies directly to HDOT).

United States Department of Transportation (USDOT). USDOT refers to the United States Department of Transportation, which includes the Federal Highway Administration, the Federal Transit Administration, the Federal Aviation Administration and the Federal Rail Administration. Note that the Federal DBE Program does not apply to contracts solely using funds from the Federal Rail Administration (at the time of this report).

Utilization. Utilization refers to the percentage of total contracting dollars of a particular type of work going to a specific group of businesses (for example, DBEs).

WBE. Woman-owned business enterprise. See women-owned business.

Women-owned business (WBE). A WBE is a business that is at least 51 percent owned and controlled by one or more individuals that are nonminority women. A business need not be certified as such to be included as a WBE in this study. For this study, businesses owned and controlled by minority women are counted as minority-owned businesses. In this study, a “WBE-certified businesses” is one certified as a woman-owned firm by the State of Hawaii.

Women-Owned Small Business (WOSB). Under the WOSB Federal Contract Program, “WOSB” designation allows women-owned small businesses to compete on certain federal projects with set-asides in industries where women-owned small businesses are substantially underrepresented. Set-asides are also available on certain federal projects for Economically Disadvantaged Women-Owned Small Businesses (EDWOSBs). This program applies to direct contracts with federal agencies, not on contracts with agencies such as HDOT.

APPENDIX B.

Legal Framework and Analysis

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 Hawaii Department of Transportation.

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 P*”), which applied the strict scrutiny analysis set forth in *Croson* to federal programs that provide federal assistance to a recipient of federal funds. The Supreme Court’s decisions in *Adarand I* and *Croson*, and subsequent cases and authorities provide the basis for the legal analysis in connection with the study.

The legal framework analyzes and reviews significant recent court decisions that have followed, interpreted, and applied *Croson* and *Adarand I* to the present and that are applicable to this disparity study, the Federal DBE Program and Federal ACDBE Program (49 CFR Part 23 — Participation of Disadvantaged Business Enterprise in Airport Concessions) and their implementation by state DOTs and state and local recipients of federal funds, MBE/WBE/DBE programs, and the strict scrutiny analysis. In particular, this analysis reviews in Section D below recent Ninth Circuit Court of Appeals decisions that are instructive to the study, including the recent decisions in *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation (“Caltrans”), et al.*⁶ and *Western States Paving Co. v. Washington State DOT*,⁷ *Orion Insurance Group*, and *Ralph G. Taylor 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).

⁶ *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, 713 F.3d 1187, (9th Cir. 2013).

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

Washington State Office of Minority and Woman's Business Enterprises, United States DOT, et al.,⁸ and the recent non-published decision in *Mountain West Holding Co. v. Montana, Montana DOT, et al.*⁹ and the District Court decision in *M.K. Weeden Construction v. Montana, Montana DOT, et al.*¹⁰

In addition, the analysis reviews in Section E below recent federal cases that have considered the validity of the Federal DBE Program and its implementation by state DOTs and local or state government agencies and the validity of local and state DBE programs, including: *Dunnet Bay Construction Co. v. Illinois DOT*,¹¹ *Northern Contracting, Inc. v. Illinois DOT*,¹² *Sherbrooke Turf, Inc. v. Minnesota DOT and Gross Seed v. Nebraska Department of Roads*,¹³ *Geyer Signal, Inc. v. Minnesota DOT*,¹⁴ *Adarand Constructors, Inc. v. Slater*¹⁵ (“*Adarand VII*”), *Midwest Fence Corp. v. USDOT, FHWA, Illinois DOT, Illinois State Toll Highway Authority, et al.*,¹⁶ *Geod Corporation v. New Jersey Transit Corporation*,¹⁷ and *South Florida Chapter of the A.G.C. v. Broward County, Florida*.¹⁸ The analysis also reviews recent court decisions that involved challenges to MBE/WBE/DBE programs in other jurisdictions in Section F below, which are informative to Hawaii DOT and the study.

The analyses of these and other recent cases summarized below are instructive to the disparity study because they are the most recent and significant decisions by federal courts setting forth the legal framework applied to the Federal DBE and Federal Airport Concession Disadvantaged Business Enterprise (“ACDBE”) Programs and their implementation by state DOTs, MBE/WBE/DBE Programs and disparity studies, and construing the validity of government programs involving MBE/WBE/DBEs and ACDBEs.

The analyses of the Ninth Circuit decisions in *AGC, SDC v. Cal. DOT, Western States Paving*, and *Mountain West Holding, Inc.*, and the District Court decision in *M.K. Weeden*, and these other recent cases from other jurisdictions are instructive to the disparity study because they are the most recent and significant decisions by federal courts setting forth the legal framework applied to the Federal DBE Program and its implementation by state DOTs and recipients of federal financial assistance

⁸ *Orion Insurance Group, Taylor v. WSOMWBE, U.S. DOT, et al.*, 2018 WL 6695345 (9th Cir. 2018), Memorandum opinion (not for publication and not precedent); Petition for Writ of Certiorari filed with the U.S. Supreme Court on April 22, 2019, which was denied on June 24, 2019.

⁹ *Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.*, 2017 WL 2179120 Memorandum Opinion (Not for Publication) (9th Cir. May 16, 2017). The case on remand was voluntarily dismissed by stipulation of the parties (March 2018).

¹⁰ *M. K. Weeden Construction v State of Montana, Montana DOT*, 2013 WL 4774517 (D. Mont. 2013).

¹¹ *Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al.*, 799 F.3d 676, 2015 WL 4934560 (7th Cir. August 19, 2015), cert. denied, 2016 WL 193809 (2016); *Dunnet Bay Construction Co. v. Illinois DOT, et al.* 2014 WL 552213 (C. D. Ill. 2014), affirmed by *Dunnet Bay*, 2015 WL 4934560 (7th Cir. August 19, 2015).

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

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

¹⁴ *Geyer Signal, Inc. v. Minnesota DOT*, 2014 W.L. 1309092 (D. Minn. 2014).

¹⁵ *Adarand Constructors, Inc. v. Slater, Colorado DOT*, 228 F.3d 1147 (10th Cir. 2000) (“*Adarand VII*”).

¹⁶ *Midwest Fence Corp. v. U.S. DOT, Illinois DOT, et al.*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016), cert. denied, 2017 WL 497345 (2017).

¹⁷ *Geod Corp. v. New Jersey Transit Corp.*, 766 F. Supp.2d. 642 (D. N.J. 2010).

¹⁸ *South Florida Chapter of the A.G.C. v. Broward County, Florida*, 544 F. Supp.2d 1336 (S.D. Fla. 2008).

governed by 49 CFR Part 26. They also are applicable in terms of the preparation of a DBE Program and ACDBE Program by Hawaii DOT submitted in compliance with the Federal DBE and ACDBE regulations.

Although these cases did not involve specific challenges to the Federal ACDBE Program, they are applicable and instructive to the study in connection with the implementation of the Federal ACDBE Program by state DOTs governed by 49 CFR Part 23 (“Participation of Disadvantaged Business Enterprise in Airport Concessions”). The Federal DBE Program and the Federal ACDBE Program are similar in many respects and the ACDBE Program in its regulations located at 49 CFR Part 23 expressly incorporates many of the federal regulations located in 49 CFR Part 26.

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

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

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; See, 49 CFR § 23.13.

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

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

The District Court had held that the "Caltrans DBE Program is based on substantial statistical and anecdotal evidence of discrimination in the California contracting industry," satisfied the strict scrutiny standard, and is "clearly constitutional" and "narrowly tailored" under *Western States Paving* and the Supreme Court cases.²⁶

The District Court decision in Montana in *M.K. Weeden*²⁷ followed the *AGC, SDC v. Caltrans* Ninth Circuit decision, and held as valid and constitutional the Montana Department of Transportation's implementation of the Federal DBE Program.

In *Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.*,²⁸ the Ninth Circuit and the district court applied the decision in *Western States*,²⁹ and the decision in *AGC, San Diego v. California DOT*,³⁰ as establishing the law to be followed in this case. The district court noted that in *Western States*, the Ninth Circuit held that a state's implementation of the Federal DBE Program can be subject to an as-applied constitutional challenge, despite the facial validity of the Federal DBE Program.³¹ The Ninth Circuit and the district court stated the Ninth Circuit has held that whether a state's implementation of the DBE Program "is narrowly tailored to further Congress's remedial objective depends upon the presence or absence of discrimination in the State's transportation

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

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 *M.K. Weeden*, 2013 WL 4774517.

²⁸ 2017 WL 2179120 (9th Cir. 2017), Memorandum opinion, (Not for Publication and not precedent), dismissing in part, reversing in part and remanding the U.S. District Court decision at 2014 WL 6686734 (D. Mont. 2014).

²⁹ 407 F.3d 983 (9th Cir. 2005).

³⁰ 713 F.3d 1187 (9th Cir. 2013).

³¹ 2014 WL 6686734 at *2 (D. Mont. 2014).

contracting industry.”³² The Ninth Circuit in *Mountain West* also pointed out it had held that “even when discrimination is present within a State, a remedial program is only narrowly tailored if its application is limited to those minority groups that have actually suffered discrimination.”³³

Montana, the Court found, bears the burden to justify any racial classifications. *Id.* In an as-applied challenge to a state’s DBE contracting program, “(1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be ‘limited to those minority groups that have actually suffered discrimination.’”³⁴ Discrimination may be inferred from “a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality’s prime contractors.”³⁵

The Ninth Circuit reversed the District Court’s grant of summary judgment to Montana based on issues of fact as to the evidence and remanded the case for trial. The *Mountain West* case was settled and voluntarily dismissed by the parties on remand in 2018.

It is noteworthy that the Ninth Circuit in *Mountain West* stated in its Memorandum Opinion that the case is not appropriate for official publication and is not precedent. The Memorandum order expressly provides: “This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.” Thus, the decision may not be cited as binding precedential authority in the Ninth Circuit.

As noted above, the District Court decision in the Ninth Circuit in Montana, *M.K. Weeden*,³⁶ held as valid and constitutional the Montana Department of Transportation’s implementation of the Federal DBE Program, which decision was not appealed.

In a recent case in the Ninth Circuit, *Orion Insurance Group; Ralph G. Taylor, Plaintiffs v. Washington State Office of Minority & Women’s Business Enterprises, United States DOT, et. al.*³⁷ Plaintiffs, Orion Insurance Group (“Orion”) and its owner Ralph Taylor, alleged violations of federal and state law due to the denial of their application for Orion to be considered a DBE under federal law.

Plaintiff Taylor received results from a genetic ancestry test that estimated he was 90 percent European, 6 percent Indigenous American and 4 percent Sub-Saharan African. Taylor submitted an application to OMWBE seeking to have Orion certified as an MBE under Washington State law. Taylor identified himself as black. His application was initially rejected, but after Taylor appealed, OMWBE voluntarily reversed their decision and certified Orion as an MBE. Plaintiffs submitted to

³² *Mountain West*, 2014 WL 6686734 at *2, quoting *Western States*, at 997-998, and *Mountain West*, 2017 WL 2179120 at *2 (9th Cir. 2017) Memorandum, at 5-6, quoting *AGC, San Diego v. California DOT*, 713 F.3d 1187, 1196. The case on remand voluntarily dismissed by stipulation of parties (March 14, 2018).

³³ *Mountain West*, 2017 WL 2179120 at *2, Memorandum, at 6, and 2014 WL 6686734 at *2, quoting *Western States*, 407 F.3d at 997-999.

³⁴ *Mountain West*, 2017 WL 2179120 at *2 (9th Cir.), Memorandum, at 6-7, quoting *Assoc. Gen. Contractors of Am. v. Cal. Dep’t of Transp.*, 713 F.3d 1187, 1196 (9th Cir. 2013) (quoting *W. States Paving*, 407 F.3d at 997-99).

³⁵ *Mountain West*, 2017 WL 2179120 at *2 (9th Cir.), Memorandum, at 6-7, quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989).

³⁶ *M.K. Weeden*, 2013 WL 4774517.

³⁷ 2018 WL 6695345 (9th Cir. December 19, 2018)(Memorandum)(Not for Publication).

OMWBE Orion’s application for DBE certification under federal law. Taylor identified himself as black and Native American in the Affidavit of Certification.

Orion’s DBE application was denied because there was insufficient evidence that: he was a member of a racial group recognized under the regulations; was regarded by the relevant community as either black or Native American; or that he held himself out as being a member of either group. OMWBE found the presumption of disadvantage was rebutted and the evidence was insufficient to show Taylor was socially and economically disadvantaged.

The District court held OMWBE did not act arbitrarily or capriciously when it found the presumption was rebutted that Taylor was socially and economically disadvantaged because there was insufficient evidence that he was either black or Native American. By requiring individualized determinations of social and economic disadvantage, the court found the Federal DBE Program requires states to extend benefits only to those who are actually disadvantaged.

The District court dismissed the claim that, on its face, the Federal DBE Program violates the Equal Protection Clause, and the claim that the Defendants, in applying the Federal DBE Program to him, violated the Equal Protection Clause. The court found no evidence that the application of the federal regulations was done with an intent to discriminate against mixed-race individuals or with racial animus, or creates a disparate impact on mixed-race individuals. The court held Plaintiffs failed to show that either the State or Federal Defendants had no rational basis for the difference in treatment.

The District court dismissed claims that the definitions of “Black American” and “Native American” in the DBE regulations are impermissibly vague. Plaintiffs’ claims were dismissed against the State Defendants for violation of Title VI because Plaintiffs failed to show the State engaged in intentional racial discrimination. The DBE regulations’ requirement that the State make decisions based on race was held constitutional.

On appeal, the Ninth Circuit in affirming the District court held it correctly dismissed Taylor’s claims against Acting Director of the USDOT’s Office of Civil Rights, in her individual capacity, Taylor’s discrimination claims under 42 U.S.C. §1983 because the federal defendants did not act “under color or state law,” Taylor’s claims for damages because the United States has not waived its sovereign immunity, and Taylor’s claims for equitable relief under 42 U.S.C. §2000d because the Federal DBE Program does not qualify as a “program or activity” within the meaning of the statute.

The Ninth Circuit held OMWBE did not act in an arbitrary and capricious manner when it determined it had a “well-founded reason” to question Taylor’s membership claims, determined that Taylor did not qualify as a “socially and economically disadvantaged individual,” and when it affirmed the state’s decision was supported by substantial evidence and consistent with federal regulations. The court held the USDOT “articulated a rational connection” between the evidence and the decision to deny Taylor’s application for certification.

It also is noteworthy that the Ninth Circuit in *Orion* stated in its Memorandum decision that the case is not appropriate for official publication and is not precedent. Thus, the case may not be cited as controlling precedential authority in the Ninth Circuit.

Also, recently the Seventh Circuit Court of Appeals in *Midwest Fence Corp. v. USDOT, FHWA, Illinois DOT, Illinois State Toll Highway Authority, et al.*,³⁸ and in *Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al.*,³⁹ upheld the implementation of the Federal DBE Program by the Illinois DOT.⁴⁰ The court held Dunnet Bay lacked standing to challenge the IDOT DBE Program, and that even if it had standing, any other federal claims were foreclosed by the *Northern Contracting v. Illinois DOT, et al.* decision because there was no evidence IDOT exceeded its authority under federal law.⁴¹ The Seventh Circuit in *Midwest Fence* also held the Federal DBE Program is facially constitutional. The court agreed with the Eighth, Ninth, and Tenth Circuits that the Federal DBE Program is narrowly tailored on its face, and thus survives strict scrutiny.⁴²

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.⁴³ J.A. Croson Co. (“Croson”) challenged the City of Richmond’s minority contracting preference plan, which required prime contractors to subcontract at least 30 percent of the dollar amount of contracts to one or more Minority Business Enterprises (“MBE”). In enacting the plan, the City cited past discrimination and an intent to increase minority business participation in construction projects as motivating factors.

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

The Court determined that the plan neither served a “compelling governmental interest” nor offered a “narrowly tailored” remedy to past discrimination. The Court found no “compelling governmental interest” because the City had not provided “a strong basis in evidence for its conclusion that [race-based] remedial action was necessary.”⁴⁴ 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.⁴⁵ The Court also found there were only generalized allegations of societal and industry discrimination coupled with

³⁸ 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016).

³⁹ 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016).

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

⁴¹ *Id.*

⁴² 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016)

⁴³ 488 U.S. 469 (1989).

⁴⁴ 488 U.S. at 500, 510.

⁴⁵ 488 U.S. at 480, 505.

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.⁴⁶

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.⁴⁷ 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.”⁴⁸

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.”⁴⁹ “Nor does the city know what percentage of total city construction dollars minority firms now receive as subcontractors on prime contracts let by the city.”⁵⁰

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.”⁵¹ 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.”⁵²

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.”⁵³ “Under such circumstances, the city could act to dismantle the closed business system by taking appropriate measures against those who discriminate on the

⁴⁶ 488 U.S. at 507-510.

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

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

⁴⁹ 488 U.S. at 502.

⁵⁰ *Id.*

⁵¹ 488 U.S. at 509.

⁵² *Id.*

⁵³ 488 U.S. at 509.

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.”⁵⁴

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.”⁵⁵

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 *Crosby* and ruled that all federal government programs that use racial or ethnic criteria as factors in procurement decisions must pass a test of strict scrutiny in order to survive constitutional muster.

The cases interpreting *Adarand I* are the most recent and significant decisions by federal courts setting forth the legal framework for disparity studies as well as the predicate to satisfy the constitutional strict scrutiny standard of review, which applies to the implementation of the Federal DBE Program by recipients of federal funds.

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

The following provides an analysis for the legal framework focusing on recent key cases regarding the Federal DBE Program and state and local MBE/WBE programs, and their implications for a disparity study. The recent decisions involving the Federal DBE Program are instructive to the disparity study because they concern the strict scrutiny analysis, the legal framework in this area, challenges to the validity of MBE/WBE/DBE programs, an analysis of disparity studies, and implementation of the Federal DBE and ACDBE Programs by state DOTs and recipients of federal financial assistance based on 49 CFR Part 26 and 49 CFR Part 23.

1. The Federal DBE Program (and ACDBE Program)

After the *Adarand* decision, the U.S. Department of Justice in 1996 conducted a study of evidence on the issue of discrimination in government construction procurement contracts, which Congress relied upon as documenting a compelling governmental interest to have a federal program to remedy the effects of current and past discrimination in the transportation contracting industry for federally-funded contracts.⁵⁶ 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

⁵⁴ *Id.*

⁵⁵ 488 U.S. at 492.

⁵⁶ *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*.

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”).⁵⁷ In December 2015, Congress passed the Fixing America’s Surface Transportation Act (“FAST Act”).⁵⁸

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.⁵⁹

The Federal DBE Program and ACDBE Program established responsibility for implementing the DBE Program to state and local government recipients of federal funds. A recipient of federal financial assistance must set an annual DBE and/or ACDBE goals specific to conditions in the relevant marketplace. Even though an overall annual 10 percent aspirational goal applies at the federal level, it does not affect the goals established by individual state or local governmental recipients. The Federal DBE and ACDBE Programs outline certain steps a state or local government recipient can follow in establishing a goal, and USDOT (FHWA and FAA) considers and must approve the goal and the recipient’s DBE and ACDBE program. The implementation of the Federal DBE and ACDBE Programs are substantially in the hands of the state DOT and state or local government recipient and is set forth in detail in the federal regulations, including 49 CFR § 26.45 and 49 CFR §§23.41-51.

Provided in 49 CFR § 26.45 and 49 CFR §§ 23.41-51 are instructions as to how recipients of federal funds should set the overall goals for their DBE and ACDBE Programs. In summary, the recipient establishes a base figure for relative availability of DBEs and ACDBEs.⁶⁰ This is accomplished by determining the relative number of ready, willing, and able DBEs in the recipient’s market.⁶¹ Second, the recipient must determine an appropriate adjustment, if any, to the base figure to arrive at the overall goal.⁶² There are many types of evidence considered when determining if an adjustment is appropriate, according to 49 CFR § 26.45(d) and 49 CFR § 23.51(d). These include, among other types, the current capacity of DBEs and ACDBEs to perform work on the recipient’s contracts as measured by the volume of work DBEs and ACDBEs have performed in recent years. If available, recipients consider evidence from related fields that affect the opportunities for DBEs and ACDBEs to form, grow, and compete, such as statistical disparities between the ability of DBEs and ACDBEs to obtain financing, bonding, and insurance, as well as data on employment, education, and

⁵⁷ Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.

⁵⁸ Pub. L. 114-94, H.R. 22, § 1101(b), December 4, 2015, 129 Stat. 1312.

⁵⁹ 49 CFR § 26.51. *See*, 49 CFR §23.25.

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

⁶¹ *Id.*

⁶² *Id.* at § 26.45(d); *Id.* at §23.51(d).

training.⁶³ This process, based on the federal regulations, aims to establish a goal that reflects a determination of the level of DBE and ACDBE participation one would expect absent the effects of discrimination.⁶⁴

Further, the Federal DBE Program and ACDBE Program require state and local government recipients of federal funds to assess how much of the DBE and ACDBE goal can be met through race- and gender-neutral efforts and what percentage, if any, should be met through race- and gender-based efforts.⁶⁵ A state or local government recipient is responsible for seriously considering and determining race- and gender-neutral measures that can be implemented.⁶⁶

Federal aid recipients are to certify DBEs and ACDBEs according to their race/gender, size, net worth and other factors related to defining an economically and socially disadvantaged business.⁶⁷

“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;

⁶³ *Id.*

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

⁶⁵ 49 CFR § 26.51; 49 CFR § 23.51(a).

⁶⁶ 49 CFR § 26.51(b); 49 CFR § 23.25.

⁶⁷ 49 CFR §§ 26.61-26.73; 49 CFR §§ 23.31-23.39.

- (D) the testimony and documentation described in subparagraph (C) demonstrate that discrimination across the United States poses a barrier to full and fair participation in surface transportation-related businesses of women business owners and minority business owners and has impacted firm development and many aspects of surface transportation-related business in the public and private markets; and
- (E) the testimony and documentation described in subparagraph (C) provide a strong basis that there is a compelling need for the continuation of the disadvantaged business enterprise program to address race and gender discrimination in surface transportation-related business.

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

(A) SMALL BUSINESS CONCERN —

- (i) IN GENERAL — The term ‘small business concern’ means a small business concern (as the term is used in section 3 of the Small Business Act (15 U.S.C. 632)).
- (ii) EXCLUSIONS — The term ‘small business concern’ does not include any concern or group of concerns controlled by the same socially and economically disadvantaged individual or individuals that have average annual gross receipts during the preceding three fiscal years in excess of \$23,980,000, as adjusted annually by the Secretary for inflation.⁶⁸

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.⁶⁹

⁶⁸ Pub. L. 114-94, H.R. 22, § 1101(b), December 4, 2015, 129 Stat. 1312.

⁶⁹ *Id.*

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

DBE: Program Implementation Modifications for 49 CFR Part 26 (Effective Nov. 3, 2014).⁷⁰

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.⁷¹

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.⁷²

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

- (1) The Rule revised the Uniform Certification Application and reporting forms, establishes a uniform personal net worth form as part of the Uniform Certification Application, and provides for data collection required by the USDOT statutory reauthorization, MAP-21;
- (2) The Rule revised the certification-related program provisions and standards; and
- (3) The Rule amended and modified several program provisions, including: overall goal setting by recipients of federal funds, good faith efforts, guidance and submissions, transit vehicle manufacturers, counting for trucking companies, and program administration.⁷³

The new and revised forms include the USDOT personal net worth form, a revised uniform application form and checklist, and a revised uniform report of awards or commitments, and payments. The new provisions include reporting requirements under MAP-21, adding a new provision authorizing summary suspensions of DBEs under certain circumstances, and new record retention requirements.⁷⁴

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

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

⁷² 77 F.R. 54952.

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

⁷⁴ *Id.*

Several of the areas revised include:

- The size standard on statutory gross receipts has been increased for inflation;
- The ownership and control provisions have been amended, including a new rule examining whether there are any agreements or practices that give a non-disadvantage individual or firm a priority or superior right to a DBE's profits, and setting forth an assumption of control when a non-disadvantaged individual who is a former owner of the firm remains involved in the operation of the firm;
- Certification procedures and grounds for decertification are revised including the areas of prequalification, grounds for removal, summary suspension, and certification appeals;
- 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.⁷⁵

In terms of forms and data collection, the new Rule attempted to simplify the Uniform Certification Application; established a new USDOT personal net worth form to be used by applicants; established a uniform report of DBE awards or commitments and payments; captured data on minority women-owned DBEs and actual payments to DBEs reporting; and provided for a new submission required by MAP-21 on the percentage of DBEs in the state owned by nonminority women, and men.⁷⁶

The new Rule made certain changes in connection with program administration, including: adding to the definitions of "immediate family members" and "spouse" domestic partnerships and civil unions; the retention of all records documenting a DBE's compliance with the eligibility requirements, including the complete application package and subsequent reports; and adding to the provisions relating to the contract clause included in each DOT-assisted contract that obligates the contractor to

⁷⁵ 79 F.R. 59566-59622.

⁷⁶ *Id.*

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.⁷⁷

The Rule also provided changes to the definitions in the federal regulations, including for the following terms: assets, business, business concern, business enterprise, contingent liability, liabilities, primary industry classification, principal place of business, and social and economically disadvantaged individual.⁷⁸

USDOT Order 4220.1 (February 5, 2014).

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

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

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

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

⁷⁷ *Id.*

⁷⁸ *Id.*

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 provided “Findings” that “discrimination and related barriers” “merit the continuation of the” Federal DBE Program.⁷⁹ In MAP-21, Congress specifically found as follows:

“(A) while significant progress has occurred due to the establishment of the disadvantaged business enterprise program, discrimination and related barriers continue to pose significant obstacles for minority- and women-owned businesses seeking to do business in federally-assisted surface transportation markets across the United States;

(B) the continuing barriers described in subparagraph (A) merit the continuation of the disadvantaged business enterprise program;

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

(D) the testimony and documentation described in subparagraph (C) demonstrate that discrimination across the United States poses a barrier to full and fair participation in surface transportation-related businesses of women business owners and minority business owners and has impacted firm development and many aspects of surface transportation-related business in the public and private markets; and

(E) the testimony and documentation described in subparagraph (C) provide a strong basis that there is a compelling need for the continuation of the disadvantaged business enterprise program to address race and gender discrimination in surface transportation-related business.”⁸⁰

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.⁸¹

⁷⁹ Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.

⁸⁰ Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.

⁸¹ *Id.*

USDOT Final Rule, 76 Fed. Reg. 5083 (January 28, 2011).

The United States Department of Transportation promulgated a Final Rule on January 28, 2011, effective February 28, 2011, 76 Fed. Reg. 5083 (January 28, 2011) (“2011 Final Rule”) amending the Federal DBE Program at 49 CFR Part 26. According to the United States DOT, the 2011 Final 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.⁸²

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.⁸³

In addition, the 2011 Final Rule added a Section 26.39 to Subpart B to provide for fostering small business participation.⁸⁴ 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.⁸⁵ 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.⁸⁶ 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.⁸⁷

⁸² 76 F.R. 5083-5101.

⁸³ See 49 CFR § 26.37, 76 F.R. at 5097.

⁸⁴ 76 F.R. at 5097, January 28, 2011.

⁸⁵ *Id.*

⁸⁶ *Id.* at 5097, amending 49 CFR § 26.39(b)(1)-(5).

⁸⁷ *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.⁸⁸ 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.⁸⁹ 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.⁹⁰

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.”⁹¹

The United States DOT in the 2011 Final Rule stated that there is a continuing compelling need for the DBE program.⁹² 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.”⁹³ 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.”⁹⁴ This information, the DOT stated, “confirms the continuing compelling need for race- and gender-conscious programs such as the DOT DBE program.”⁹⁵

⁸⁸ 76 F.R. at 5098, amending 49 CFR § 26.47(c).

⁸⁹ *Id.*, amending 49 CFR § 26.47(c)(1)-(5).

⁹⁰ *Id.*, amending 49 CFR § 26.47(c)(5).

⁹¹ 76 F.R. at 5092.

⁹² 76 F.R. at 5095.

⁹³ 76 F.R. at 5095.

⁹⁴ *Id.*

⁹⁵ *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.⁹⁶ The implementation of the Federal DBE Program and ACDBE Program by state DOTs and recipients of federal funds are subject to and must follow the strict scrutiny analysis if they utilize race- and ethnicity-based measures.⁹⁷ 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.⁹⁸

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.⁹⁹ 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.¹⁰⁰ 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.¹⁰¹

⁹⁶ *Croson*, 448 U.S. at 492-493; *Adarand Constructors, Inc. v. Peña (Adarand I)*, 515 U.S. 200, 227 (1995); See *Fisher v. University of Texas*, 133 S.Ct. 2411 (2013); *AGC, SDC v. Caltrans*, 713 F.3d 1187, 1195-1200 (9th Cir. 2013); *Northern Contracting*, 473 F.3d at 721; *Western States Paving*, 407 F.3d at 991; *Sherbrooke Turf*, 345 F.3d at 969; *Adarand VII*, 228 F.3d at 1176; see, e.g. *H. B. Rowe*, 615.3d 233, 241-242 (4th Cir. 2010); *Associated Gen. Contractors of Ohio, Inc. v. Drabik (“Drabik II”)*, 214 F.3d 730 (6th Cir. 2000); *Eng’g Contractors Ass’n of South Florida, Inc. v. Metro. Dade County*, 122 F.3d 895 (11th Cir. 1997); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 990 (3d Cir. 1993).

⁹⁷ *Adarand I*, 515 U.S. 200, 227 (1995); *Mountain West Holding*, 2017 WL 2179120; *Midwest Fence*, 840 F.3d 930; *Dunnet Bay*, 799 F.3d 676; *AGC, SDC v. Caltrans*, 713 F.3d 1187, 1195-1200 (9th Cir. 2013); *Northern Contracting*, 473 F.3d at 721; *Western States Paving*, 407 F.3d at 991 (9th Cir. 2005); *Sherbrooke Turf*, 345 F.3d at 969; *Adarand VII*, 228 F.3d at 1176; *M.K. Weeden Construction*, 2013 WL 4774517; *South Florida*, 544 F.Supp. 2d 1336; *Geod Corp.*, 746 F.Supp. 2d 642.

⁹⁸ *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); *Geyer Signal, Inc.*, 2014 WL 1309092.

⁹⁹ *Id.*

¹⁰⁰ *Id.*; see e.g., *Concrete Works, Inc. v. City and County of Denver (“Concrete Works P”)*, 36 F.3d 1513, 1520 (10th Cir. 1994).

¹⁰¹ See, e.g., *Concrete Works I*, 36 F.3d at 1520.

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.¹⁰² 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).¹⁰³

It is instructive to the study to review the type of evidence utilized by Congress and considered by the courts to support the Federal DBE Program, and its implementation by local and state governments and agencies, which is similar to evidence considered by cases ruling on the validity of MBE/WBE/DBE programs. The federal courts found Congress “spent decades compiling evidence of race discrimination in government highway contracting, of barriers to the formation of minority-owned construction businesses, and of barriers to entry.”¹⁰⁴ 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).¹⁰⁵ The evidentiary basis on which Congress relied to support its finding of discrimination includes:

¹⁰² *N. Contracting*, 473 F.3d at 721; *Western States Paving*, 407 F.3d at 991; *Sherbrooke Turf*, 345 F.3d at 969; *Adarand VII*, 228 F.3d at 1176; *See Midwest Fence*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016), and *affirming*, 84 F. Supp. 3d 705, 2015 WL 1396376.

¹⁰³ *Id.* In the case of *Rothe Dev. Corp. v. U.S. Dept. of Defense*, 545 F.3d 1023 (Fed. Cir. 2008), the Federal Circuit Court of Appeals pointed out it had questioned in its earlier decision whether the evidence of discrimination before Congress was in fact so “outdated” so as to provide an insufficient basis in evidence for the Department of Defense program (*i.e.*, whether a compelling interest was satisfied). 413 F.3d 1327 (Fed. Cir. 2005). The Federal Circuit Court of Appeals after its 2005 decision remanded the case to the district court to rule on this issue. *Rothe* considered the validity of race- and gender-conscious Department of Defense (“DOD”) regulations (2006 Reauthorization of the 1207 Program). The decisions in *N. Contracting*, *Sherbrooke Turf*, *Adarand VII*, and *Western States Paving* held the evidence of discrimination nationwide in transportation contracting was sufficient to find the Federal DBE Program on its face was constitutional. On remand, the district court in *Rothe* on August 10, 2007 issued its order denying plaintiff *Rothe’s* Motion for Summary Judgment and granting Defendant United States Department of Defense’s Cross-Motion for Summary Judgment, holding the 2006 Reauthorization of the 1207 DOD Program constitutional. *Rothe Devel. Corp. v. U.S. Dept. of Defense*, 499 F.Supp.2d 775 (W.D. Tex. 2007). The district court found the data contained in the Appendix (The Compelling Interest, 61 Fed. Reg. 26050 (1996)), the Urban Institute Report, and the Benchmark Study — relied upon in part by the courts in *Sherbrooke Turf*, *Adarand VII*, and *Western States Paving* in upholding the constitutionality of the Federal DBE Program — was “stale” as applied to and for purposes of the 2006 Reauthorization of the 1207 DOD Program. This district court finding was not appealed or considered by the Federal Circuit Court of Appeals. 545 F.3d 1023, 1037. The Federal Circuit Court of Appeals reversed the district court decision in part and held invalid the DOD Section 1207 program as enacted in 2006. 545 F.3d 1023, 1050. See the discussion of the 2008 Federal Circuit Court of Appeals decision below in Section G. *see, also*, the discussion below in Section G of the 2012 district court decision in *DynaLantic Corp. v. U.S. Department of Defense, et al.*, 885 F.Supp.2d 237, (D.D.C.). Recently, in *Rothe Development, Inc. v. U.S. Dept of Defense and U.S. S.B.A.*, 836 F.3d 57, 2016 WL 4719049 (D.C. Cir. Sept. 9, 2016), the United States Court of Appeals, District of Columbia Circuit, upheld the constitutionality of the Section 8(a) Program on its face, finding the Section 8(a) statute was race-neutral. The Court of Appeals affirmed on other grounds the district court decision that had upheld the constitutionality of the Section 8(a) Program. The district court had found the federal government’s evidence of discrimination provided a sufficient basis for the Section 8(a) Program. 107 F.Supp. 3d 183, 2015 WL 3536271 (D. D.C. June 5, 2015). See the discussion of the 2016 and 2015 decisions in *Rothe* in Section G below.

¹⁰⁴ *Sherbrooke Turf*, 345 F.3d at 970, (*citing Adarand VII*, 228 F.3d at 1167 – 76); *Western States Paving*, 407 F.3d at 992-93; *Geyer Signal, Inc.*, 2014 WL 1309092.

¹⁰⁵ *See, e.g., Adarand VII*, 228 F.3d at 1167– 76; *see also Western States Paving*, 407 F.3d at 992 (Congress “explicitly relied upon” the Department of Justice study that “documented the discriminatory hurdles that minorities must overcome to secure federally funded contracts”); *Geyer Signal, Inc.*, 2014 WL 1309092.

- **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.¹⁰⁶
- **Barriers to competition for existing minority enterprises.** Congress found evidence showing systematic exclusion and discrimination by prime contractors, private sector customers, business networks, suppliers, and bonding companies precluding minority enterprises from opportunities to bid. When minority firms are permitted to bid on subcontracts, prime contractors often resist working with them. Congress found evidence of the same prime contractor using a minority business enterprise on a government contract not using that minority business enterprise on a private contract, despite being satisfied with that subcontractor’s work. Congress found that informal, racially exclusionary business networks dominate the subcontracting construction industry.¹⁰⁷
- **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.¹⁰⁸
- **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.¹⁰⁹
- **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.¹¹⁰ Congress also found in both the FAST Act and MAP-21 that it received and reviewed testimony and documentation of

¹⁰⁶ *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.

¹⁰⁷ *Adarand VII*. at 1170-72; see *DynaLantic*, 885 F.Supp.2d 237.

¹⁰⁸ *Id.* at 1172-74; see *DynaLantic*, 885 F.Supp.2d 237; *Geyer Signal, Inc.*, 2014 WL 1309092.

¹⁰⁹ *Adarand VII*, 228 F.3d at 1174-75; see *H. B. Rowe*, 615 F.3d 233, 247-258 (4th Cir. 2010); *Sherbrooke Turf*, 345 F.3d at 973-4.

¹¹⁰ 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.

race and gender discrimination which “provide a strong basis that there is a compelling need for the continuation of the” Federal DBE Program.¹¹¹

Burden of proof. Under the strict scrutiny analysis, and to the extent a state or local governmental entity has implemented a race-ethnic- and gender-conscious program, the governmental entity has the initial burden of showing a strong basis in evidence (including statistical and anecdotal evidence) to support its remedial action.¹¹² If the government makes its initial showing, the burden shifts to the challenger to rebut that showing.¹¹³ The challenger bears the ultimate burden of showing that the governmental entity’s evidence “did not support an inference of prior discrimination.”¹¹⁴

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.¹¹⁵ It is well established that “remediating the effects of past or present racial discrimination” is a compelling interest.¹¹⁶ In addition, the government must also demonstrate “a strong basis in evidence for its conclusion that remedial action [is] necessary.”¹¹⁷

Since the decision by the Supreme Court in *Croson*, “numerous courts have recognized that disparity studies provide probative evidence of discrimination.”¹¹⁸ “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

¹¹¹ *Id.* at § 1101(b)(1).

¹¹² See *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Rotbe Development Corp. v. Department of Defense*, 545 F.3d 1023, 1036 (Fed. Cir. 2008); *N. Contracting, Inc. Illinois*, 473 F.3d at 715, 721 (7th Cir. 2007) (Federal DBE Program); *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983, 990-991 (9th Cir. 2005) (Federal DBE Program); *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d 964, 969 (8th Cir. 2003) (Federal DBE Program); *Adarand Constructors Inc. v. Slater* (“*Adarand VII*”), 228 F.3d 1147, 1166 (10th Cir. 2000) (Federal DBE Program); *Eng’g Contractors Ass’n*, 122 F.3d at 916; *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 713 (9th Cir. 1997); *Contractors Ass’n of E. Pennsylvania v. City of Philadelphia*, 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1005-1007 (3d Cir. 1993); *Geyer Signal, Inc.*, 2014 WL 1309092; *DynaLantic*, 885 F.Supp.2d 237, 2012 WL 3356813; *Hersbell Gill Consulting Engineers, Inc. v. Miami Dade County*, 333 F. Supp.2d 1305, 1316 (S.D. Fla. 2004).

¹¹³ *Adarand VII*, 228 F.3d at 1166; *Eng’g Contractors Ass’n*, 122 F.3d at 916; *Contractors Ass’n of E. Pennsylvania v. City of Philadelphia*, 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1005-1007 (3d Cir. 1993); *Geyer Signal, Inc.*, 2014 WL 1309092.

¹¹⁴ See, e.g., *Adarand VII*, 228 F.3d at 1166; *Eng’g Contractors Ass’n*, 122 F.3d at 916; *Contractors Ass’n of E. Pennsylvania v. City of Philadelphia*, 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1005-1007 (3d Cir. 1993); see also *Sherbrooke Turf*, 345 F.3d at 971; *N. Contracting*, 473 F.3d at 721; *Geyer Signal, Inc.*, 2014 WL 1309092.

¹¹⁵ *Id.*; *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Western States Paving*, 407 F.3d at 990; see also *Majeske v. City of Chicago*, 218 F.3d 816, 820 (7th Cir. 2000); *Geyer Signal, Inc.*, 2014 WL 1309092.

¹¹⁶ *Shaw v. V. Hunt*, 517 U.S. 899, 909 (1996); *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 492 (1989); see *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *Contractors Ass’n of E. Pennsylvania v. City of Philadelphia*, 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1005-1007 (3d Cir. 1993).

¹¹⁷ *Croson*, 488 U.S. at 500; see e.g., *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Sherbrooke Turf*, 345 F.3d at 971-972; *Contractors Ass’n of E. Pennsylvania v. City of Philadelphia*, 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1005-1007 (3d Cir. 1993); *Geyer Signal, Inc.*, 2014 WL 1309092.

¹¹⁸ *Midwest Fence*, 2015 W.L. 1396376 at *7 (N.D. Ill. 2015), *affirmed*, 840 F.3d 932 (7th Cir. 2016); see, e.g., *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1195-1200; *H. B. Rowe v. NCDOT*, 615 F.3d 233 (4th Cir. 2010); *Concrete Works of Colo. Inc. v. City and County of Denver*, 36 F.3d 1513, 1522 (10th Cir. 1994); *Geyer Signal, Inc.*, 2014 WL 1309092 (D. Minn. 2014); see also, *Contractors Ass’n of E. Pennsylvania v. City of Philadelphia*, 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1005-1007 (3d Cir. 1993).

locality or the locality's prime contractors.”¹¹⁹ Anecdotal evidence may be used in combination with statistical evidence to establish a compelling governmental interest.¹²⁰

In addition to providing “hard proof” to support its compelling interest, the government must also show that the challenged program is narrowly tailored.¹²¹ Once the governmental entity has shown acceptable proof of a compelling interest and remedying past discrimination and illustrated that its plan is narrowly tailored to achieve this goal, the party challenging the affirmative action plan bears the ultimate burden of proving that the plan is unconstitutional.¹²² Therefore, notwithstanding the burden of initial production rests with the government, the ultimate burden remains with the party challenging the application of a DBE, ACDBE or MBE/WBE Program to demonstrate the unconstitutionality of an affirmative-action type program.¹²³

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.¹²⁴ This rebuttal can be accomplished by providing a neutral explanation for the disparity between MBE/WBE/DBE utilization and availability, showing that the government's data is flawed, demonstrating that the observed disparities are statistically insignificant, or presenting contrasting statistical data.¹²⁵ Conjecture and unsupported criticisms of the government's methodology are

¹¹⁹ See, e.g., *Midwest Fence*, 840 F.3d 932 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d 1187 (9th Cir. 2013); *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Midwest Fence*, 2015 W.L. 1396376 at *7, quoting *Concrete Works*, 36 F.3d 1513, 1522 (quoting *Croson*, 488 U.S. at 509), affirmed 840 F.3d 932 (7th Cir. 2016); see also, *Sherbrooke Turf*, 345 F.3d at 973 (8th Cir. 2003); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993).

¹²⁰ *Croson*, 488 U.S. at 509; see, e.g., *AGC, SDC v. Caltrans*, 713 R.3d at 1196; *Midwest Fence*, 2015 WL 1396376 at *7, affirmed, 840 F.3d 932 (7th Cir. 2016); *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993).

¹²¹ *Adarand Constructors, Inc. v. Peña*, (“*Adarand IIP*”), 515 U.S. 200 at 235 (1995); See, e.g., *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *Majeske v. City of Chicago*, 218 F.3d at 820; *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993).

¹²² *Majeske*, 218 F.3d at 820; see, e.g. *Wjygant v. Jackson Bd. Of Educ.*, 476 U.S. 267, 277-78; *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *Midwest Fence*, 2015 WL 1396376 *7, affirmed, 840 F.3d 932; *Geyer Signal, Inc.*, 2014 WL 1309092; *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993)

¹²³ *Id.*; *Adarand VII*, 228 F.3d at 1166.

¹²⁴ See e.g., *H.B. Rowe v. North Carolina DOT* (4th Cir. 2010), 615 F.3d 233, at 241-242; *Concrete Works*, 321 F.3d 950, 959 (quoting *Adarand Constructors, Inc. vs. Slater*, 228 F.3d 1147, 1175 (10th Cir. 2000)); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993); *Midwest Fence*, 2015 W.L. 1396376 at *7, affirmed, 840 F.3d 932 (7th Cir. 2016); see also, *Sherbrooke Turf*, 345 F.3d at 971-974; *Geyer Signal, Inc.*, 2014 WL 1309092.

¹²⁵ See e.g., *H.B. Rowe v. North Carolina DOT* (4th Cir. 2010), 615 F.3d 233, at 241-242; *Concrete Works*, 321 F.3d 950, 959 (quoting *Adarand Constructors, Inc. vs. Slater*, 228 F.3d 1147, 1175 (10th Cir. 2000)); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993); *Midwest Fence*, 2015 WL 1396376 at *7, affirmed, 840 F.3d 932 (7th Cir. 2016); see also, *Sherbrooke Turf*, 345 F.3d at 971-974; *Geyer Signal, Inc.*, 2014 WL 1309092; see generally, *Engineering Contractors*, 122 F.3d at 916; *Coral Construction, Co. v. King County*, 941 F.2d 910, 921 (9th Cir. 1991).

insufficient.¹²⁶ 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.¹²⁷

The courts have stated that “it is insufficient to show that ‘data was susceptible to multiple interpretations,’ instead, plaintiffs must ‘present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to and participation in highway contracts.’”¹²⁸ The courts hold that in assessing the evidence offered in support of a finding of discrimination, it considers “both direct and circumstantial evidence, including post-enactment evidence introduced by defendants as well as the evidence in the legislative history itself.”¹²⁹

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.”¹³⁰ 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.¹³¹ 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.¹³² 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.¹³³

¹²⁶ See e.g., *H.B. Rowe v. North Carolina DOT* (4th Cir. 2010), 615 F.3d 233, at 241-242; *Concrete Works*, 321 F.3d 950, 959 (quoting *Adarand Constructors, Inc. vs. Slater*, 228 F.3d 1147, 1175 (10th Cir. 2000)); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993); *Midwest Fence*, 2015 WL 1396376 at *7, affirmed, 840 F.3d 932 (7th Cir. 2016); see also, *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *Sherbrooke Turf*, 345 F.3d at 971-974; *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016); *Geyer Signal, Inc.*, 2014 WL 1309092.

¹²⁷ *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *H.B. Rowe*, 615 F.3d 233, at 242; see *Concrete Works*, 321 F.3d at 991; see also, *Sherbrooke Turf*, 345 F.3d at 971-974; *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 W.L. 1104363 (S.D. Tex. 2016); *Geyer Signal, Inc.*, 2014 WL 1309092.

¹²⁸ *Geyer Signal, Inc.*, 2014 WL 1309092, quoting *Sherbrooke Turf*, 345 F.3d at 970.

¹²⁹ *Id.*, quoting *Adarand Constructors, Inc.*, 228 F.3d at 1166; see, e.g., *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 597 (3d Cir. 1996).

¹³⁰ *H.B. Rowe*, 615 F.3d at 241, quoting *Rothe Dev. Corp. v. Dep’t of Def.*, 545 F.3d 1023, 1049 (Fed. Cir. 2008) (quoting *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206, 218 n. 11 (5th Cir. 1999)); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); see, *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586, 596-598; 603; (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 996, 1002-1007 (3d Cir. 1993);

¹³¹ *H.B. Rowe Co.*, 615 F.3d at 241; see, e.g., *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *Concrete Works*, 321 F.3d at 958; see, *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586, 596-598; 603; (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 996, 1002-1007 (3d Cir. 1993).

¹³² *Croson*, 488 U.S. 509, see, e.g., *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *H.B. Rowe*, 615 F.3d at 241; *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586, 596-598; 603; (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 996, 1002-1007 (3d Cir. 1993).

¹³³ *H.B. Rowe*, 615 F.3d at 241, quoting *Maryland Troopers Association, Inc. v. Evans*, 993 F.2d 1072, 1077 (4th Cir. 1993); see, e.g., *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *AGC, San Diego v. Caltrans*, 713 F.3d at 1196; see also, *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586, 596-598; 603; (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 996, 1002-1007 (3d Cir. 1993); *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

Statistical evidence. Statistical evidence of discrimination is a primary method used to determine whether or not a strong basis in evidence exists to develop, adopt and support a remedial program (i.e., to prove a compelling governmental interest), or in the case of a state DOT or recipient of USDOT funds complying with the Federal DBE Program or ACDBE Program, to prove narrow tailoring by the state DOT or recipient implementing the Federal DBE Program or ACDBE Program at the state DOT or recipient level.¹³⁴ “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.”¹³⁵

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.¹³⁶ 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.¹³⁷ However, a small statistical disparity, standing alone, may be insufficient to establish discrimination.¹³⁸

Other considerations regarding statistical evidence include:

- **Availability analysis.** A disparity index requires an availability analysis. MBE/WBE and DBE (and ACDBE) availability measures the relative number of MBE/WBEs and DBEs (and ACDBEs) among all firms ready, willing and able to perform a certain type of work within a particular geographic market area.¹³⁹ There is authority that measures of availability may be approached with different levels of specificity and the practicality of various approaches must be considered,¹⁴⁰ “An analysis is not devoid of probative

¹³⁴ See, e.g., *Croson*, 488 U.S. at 509; *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1195-1196; *N. Contracting*, 473 F.3d at 718-19, 723-24; *Western States Paving*, 407 F.3d at 991; *Sherbrooke Turf*, 345 F.3d at 973-974; *Adarand VII*, 228 F.3d at 1166; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-605; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 999, 1002, 1005-1008 (3d Cir. 1993); see also, *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016); *Geyer Signal*, 2014 WL 1309092.

¹³⁵ *Croson*, 488 U.S. at 501, quoting *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08 (1977); see *Midwest Fence*, 840 F.3d 932, 948-954; *AGC, SDC v. Caltrans*, 713 F.3d at 1196-1197; *N. Contracting*, 473 F.3d at 718-19, 723-24; *Western States Paving*, 407 F.3d at 991; *Sherbrooke Turf*, 345 F.3d at 973-974; *Adarand VII*, 228 F.3d at 1166; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999).

¹³⁶ *Croson*, 448 U.S. at 509; see *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Rothe*, 545 F.3d at 1041-1042; *Concrete Works of Colo., Inc. v. City and County of Denver (“Concrete Works IP”)*, 321 F.3d 950, 959 (10th Cir. 2003); *Drabik II*, 214 F.3d 730, 734-736; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-605; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 999, 1002, 1005-1008 (3d Cir. 1993); see also, *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

¹³⁷ See, e.g., *Croson*, 488 U.S. at 509; *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Rothe*, 545 F.3d at 1041; *Concrete Works II*, 321 F.3d at 970; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-605; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 999, 1002, 1005-1008 (3d Cir. 1993); see also *Western States Paving*, 407 F.3d at 1001; *Kossmann Contracting*, 2016 WL 1104363 (S.D. Tex. 2016).

¹³⁸ *Western States Paving*, 407 F.3d at 1001.

¹³⁹ See, e.g., *Croson*, 448 U.S. at 509; 49 CFR § 26.35; *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *Rothe*, 545 F.3d at 1041-1042; *N. Contracting*, 473 F.3d at 718, 722-23; *Western States Paving*, 407 F.3d at 995; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 602-603 (3d Cir. 1996); see also, *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

¹⁴⁰ *Contractors Ass’n of Eastern Pennsylvania, Inc. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586, 603 (3d Cir. 1996); see, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1197, quoting *Croson*, 488 U.S. at 706 (“degree of specificity required in the findings of discrimination ... may vary.”); *H.B. Rowe v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *W.H. Scott Constr. Co. v. City of*

value simply because it may theoretically be possible to adopt a more refined approach.”¹⁴¹

- **Utilization analysis.** Courts have accepted measuring utilization based on the proportion of an agency’s contract dollars going to MBE/WBEs and DBEs.¹⁴²
- **Disparity index.** An important component of statistical evidence is the “disparity index.”¹⁴³ 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.”¹⁴⁴
- **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.¹⁴⁵

In terms of statistical evidence, Courts have held that a state “need not conclusively prove the existence of past or present racial discrimination to establish a strong basis in evidence”, but rather it may rely on “a significant statistical disparity” between the availability of qualified, willing, and able minority subcontractors and the utilization of such subcontractors by the governmental entity or its prime contractors.¹⁴⁶

Jackson, Mississippi, 199 F.3d 206, 217-218 (5th Cir. 1999); *see also*, *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

¹⁴¹ *Id.*

¹⁴² *See, e.g.*, *Midwest Fence*, 840 F.3d 932, 949-953 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *H.B. Rowe v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Eng’g Contractors Ass’n*, 122 F.3d at 912; *N. Contracting*, 473 F.3d at 717-720; *Sherbrooke Turf*, 345 F.3d at 973.

¹⁴³ *See, e.g.*, *Midwest Fence*, 840 F.3d 932, 949-953 (7th Cir. 2016); *H.B. Rowe v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Eng’g Contractors Ass’n*, 122 F.3d at 914; *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206, 218 (5th Cir. 1999); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 602-603 (3d Cir. 1996); *Contractors Ass’n of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 6 F.3d 990 at 1005 (3rd Cir. 1993).

¹⁴⁴ *See, e.g.*, *Ricci v. DeStefano*, 557 U.S. 557, 129 S.Ct. 2658, 2678 (2009); *Midwest Fence*, 840 F.3d 932, 950 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1191; *H.B. Rowe Co.*, 615 F.3d 233, 243-245; *Rothe*, 545 F.3d at 1041; *Eng’g Contractors Ass’n*, 122 F.3d at 914, 923; *Concrete Works I*, 36 F.3d at 1524.

¹⁴⁵ *See, e.g.*, *H.B. Rowe Co. v. NCDOT*, 615 F.3d 233, 243-245; *Eng’g Contractors Ass’n*, 122 F.3d at 914, 917, 923. The Eleventh Circuit found that a disparity greater than two or three standard deviations has been held to be statistically 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.

¹⁴⁶ *H. B. Rowe*, 615 F.3d 233 at 241, *citing Croson*, 488 U.S. at 509 (plurality opinion), and *citing Concrete Works*, 321 F.3d at 958; *see, e.g.*; *Croson*, 488 U.S. at 509; *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Rothe*, 545 F.3d at 1041; *Concrete Works II*, 321 F.3d at 970; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-605; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 999, 1002, 1005-1008 (3d Cir. 1993); *see also Western States Paving*, 407 F.3d at 1001; *Kossmann Contracting*, 2016 WL 1104363 (S.D. Tex. 2016).

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.¹⁴⁷ But, the courts point out, including the Ninth Circuit, that personal accounts of actual discrimination may complement empirical evidence and play an important role in bolstering statistical evidence.¹⁴⁸ It has been held that anecdotal evidence of a local or state government's institutional practices that exacerbate discriminatory market conditions are often particularly probative, and that the combination of anecdotal and statistical evidence is "potent."¹⁴⁹

Examples of anecdotal evidence may include:

- Testimony of MBE/WBE or DBE (and ACDBE) owners regarding whether they face difficulties or barriers;
- Descriptions of instances in which MBE/WBE or DBE (and ACDBE) owners believe they were treated unfairly or were discriminated against based on their race, ethnicity, or gender or believe they were treated fairly without regard to race, ethnicity, or gender;
- Statements regarding whether firms solicit, or fail to solicit, bids or price quotes from MBE/WBEs or DBEs (and ACDBEs) on non-goal projects; and
- Statements regarding whether there are instances of discrimination in bidding on specific contracts and in the financing and insurance markets.¹⁵⁰

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.¹⁵¹

¹⁴⁷ See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1192, 1196-1198; *Eng'g Contractors Ass'n*, 122 F.3d at 924-25; *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 1002-1003 (3d Cir. 1993); *Coral Constr. Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991); *O'Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 427 (D.C. Cir. 1992).

¹⁴⁸ See, e.g., *Midwest Fence*, 840 F.3d 932, 953 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1192, 1196-1198; *H. B. Rowe*, 615 F.3d 233, 248-249; *Eng'g Contractors Ass'n*, 122 F.3d at 925-26; *Concrete Works*, 36 F.3d at 1520; *Contractors Ass'n*, 6 F.3d at 1003; *Coral Constr. Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991); see also, *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

¹⁴⁹ *Concrete Works I*, 36 F.3d at 1520; *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 1002-1003 (3d Cir. 1993); *Coral Construction Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991).

¹⁵⁰ See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1197-1198; *H. B. Rowe*, 615 F.3d 233, 241-242, 248-249; *Northern Contracting*, 2005 WL 2230195, at 13-15 (N.D. Ill. 2005), *affirmed*, 473 F.3d 715 (7th Cir. 2007); *Concrete Works*, 321 F.3d at 989; *Adarand VII*, 228 F.3d at 1166-76; see also, *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 1002-1003 (3d Cir. 1993). For additional examples of anecdotal evidence, see *Eng'g Contractors Ass'n*, 122 F.3d at 924; *Concrete Works*, 36 F.3d at 1520; *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 915 (11th Cir. 1990); *DynaLantic*, 885 F.Supp.2d 237; *Florida A.G.C. Council, Inc. v. State of Florida*, 303 F. Supp.2d 1307, 1325 (N.D. Fla. 2004).

¹⁵¹ See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1197; *H. B. Rowe*, 615 F.3d 233, 241-242, 248-249; *Concrete Works II*, 321 F.3d at 989; *Eng'g Contractors Ass'n*, 122 F.3d at 924-26; *Cone Corp.*, 908 F.2d at 915; *Northern Contracting, Inc. v. Illinois*, 2005 WL 2230195 at *21, N. 32 (N.D. Ill. Sept. 8, 2005), *aff'd* 473 F.3d 715 (7th Cir. 2007).

b. The Narrow Tailoring Requirement.

The second prong of the strict scrutiny analysis requires that a race- or ethnicity-based program or legislation implemented to remedy past identified discrimination in the relevant market be “narrowly tailored” to reach that objective.

The narrow tailoring requirement has several components and the courts, including the Ninth Circuit Court of Appeals, analyze several criteria or factors in determining whether a program or legislation satisfies this requirement including:

- The necessity for the relief and the efficacy of alternative race-, ethnicity- and gender-neutral remedies;
- The flexibility and duration of the relief, including the availability of waiver provisions;
- The relationship of numerical goals to the relevant labor market; and
- The impact of a race-, ethnicity-, or gender-conscious remedy on the rights of third parties.¹⁵²

Implementation of the Federal DBE Program (and ACDBE Program): Narrow tailoring.

The second prong of the strict scrutiny analysis requires the implementation of the Federal DBE Program (and ACDBE Program) by state DOTs and recipients of federal funds be “narrowly tailored” to remedy identified discrimination in the particular state DOT’s or recipient’s transportation contracting and procurement market.¹⁵³

In *Western States Paving*, the Ninth Circuit held the state DOT or recipient of federal funds must have independent evidence of discrimination within the recipient’s own transportation contracting and procurement marketplace in order to determine whether or not there is the need for race-, ethnicity-, or gender-conscious remedial action.¹⁵⁴ Thus, the Ninth Circuit held in *Western States Paving* that mere compliance with the Federal DBE Program does not satisfy strict scrutiny.¹⁵⁵

¹⁵² See, e.g., *Midwest Fence*, 840 F.3d 932, 942, 953-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1198-1199; *H. B. Rowe*, 615 F.3d 233, 252-255; *Rotbe*, 545 F.3d at 1036; *Western States Paving*, 407 F.3d at 993-995; *Sherbrooke Turf*, 345 F.3d at 971; *Adarand VII*, 228 F.3d at 1181; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206 (5th Cir. 1999); *Eng’g Contractors Ass’n*, 122 F.3d at 927 (internal quotations and citations omitted); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 605-610 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 1008-1009 (3d Cir. 1993); see also, *Geyer Signal, Inc.*, 2014 WL 1309092.

¹⁵³ *AGC, SDC v. Caltrans*, 713 F.3d at 1197-1199 (9th Cir. 2013); *Western States Paving*, 407 F.3d at 995-998; *Sherbrooke Turf*, 345 F.3d at 970-71; see, e.g., *Midwest Fence*, 840 F.3d 932, 949-953.

¹⁵⁴ *Western States Paving*, 407 F.3d at 997-98, 1002-03; see *AGC, SDC v. Caltrans*, 713 F.3d at 1197-1199.

¹⁵⁵ *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.

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.¹⁵⁶

In *Northern Contracting* decision (2007) the Seventh Circuit Court of Appeals cited its earlier precedent in *Milwaukee County Pavers v. Fielder* to hold "that a state is insulated from [a narrow tailoring] constitutional attack, absent a showing that the state exceeded its federal authority. IDOT [Illinois DOT] here is acting as an instrument of federal policy and Northern Contracting (NCI) cannot collaterally attack the federal regulations through a challenge to IDOT's program."¹⁵⁷ 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.¹⁵⁸ 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.¹⁵⁹ The court held NCI failed to demonstrate that IDOT did not satisfy compliance with the federal regulations (49 CFR Part 26).¹⁶⁰ Accordingly, the Seventh Circuit Court of Appeals affirmed the district court's decision upholding the validity of IDOT's DBE program.¹⁶¹

The recent 2015 and 2016 Seventh Circuit Court of Appeals decisions in *Dunnet Bay Construction Company v. Borggren, Illinois DOT, et. al.* and *Midwest Fence Corp. v. USDOT, Federal Highway Administration, Illinois DOT* followed the ruling in *Northern Contracting* that a state DOT implementing the Federal DBE Program is insulated from a constitutional challenge absent a showing that the state exceeded its federal authority.¹⁶² 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.¹⁶³ The court found *Dunnet Bay* had not established sufficient evidence that IDOT's implementation of the

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

¹⁵⁷ 473 F.3d at 722.

¹⁵⁸ *Id.* at 722.

¹⁵⁹ *Id.* at 723-24.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*; *See, e.g., Midwest Fence*, 840 F.3d 932 (7th Cir. 2016); *Midwest Fence*, 84 F. Supp. 3d 705, 2015 WL 1396376 (N.D. Ill. 2015), *affirmed*, 840 F.3d 932 (7th Cir. 2016); *Geod Corp. v. New Jersey Transit Corp., et al.*, 746 F.Supp 2d 642 (D.N.J. 2010); *South Florida Chapter of the A.G.C. v. Broward County, Florida*, 544 F.Supp.2d 1336 (S.D. Fla. 2008).

¹⁶² *Midwest Fence*, 840 F.3d 932 (7th Cir. 2016); *Dunnet Bay Construction Company v. Borggren, Illinois DOT, et al.*, 799 F. 3d 676, 2015 WL 4934560 at **18-22 (7th Cir. 2015).

¹⁶³ *Dunnet Bay*, 799 F.3d 676, 2015 WL 4934560 at **18-22.

Federal DBE Program constituted unlawful discrimination.¹⁶⁴ In addition, the court in *Midwest Fence* upheld the constitutionality of the Federal DBE Program, and upheld the Illinois DOT DBE Program and Illinois State Tollway Highway Authority DBE Program that did not involve federal funds under the Federal DBE Program.¹⁶⁵

To satisfy the narrowly tailored prong of the strict scrutiny analysis in the context of the Federal DBE Program, and the Federal ACDBE Program, the federal courts that have evaluated local and state DBE Programs by state DOTs and recipients of federal funds, and their implementation of the Federal DBE Program, hold the following factors are pertinent:

- Evidence of discrimination or its effects in the state transportation contracting industry;
- Flexibility and duration of a race- or ethnicity-conscious remedy;
- Relationship of any numerical DBE goals to the relevant market;
- Effectiveness of alternative race- and ethnicity-neutral remedies;
- Impact of a race- or ethnicity-conscious remedy on third parties; and
- Application of any race- or ethnicity-conscious program to only those minority groups who have actually suffered discrimination.¹⁶⁶

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.

¹⁶⁴ *Id.*

¹⁶⁵ 840 F.3d 932 (7th Cir. 2016).

¹⁶⁶ See, e.g., *Midwest Fence*, 840 F.3d 932, 942, 953-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1198-1199; *H.B. Rowe Co. v. NCDOT*, 615 F.3d 233, 243-245, 252-254; *Western States Paving*, 407 F.3d at 998; *Sherbrooke Turf*, 345 F.3d at 971; *Adarand VII*, 228 F.3d at 1181; see, also, *Geyer Signal, Inc.*, 2014 WL 1309092; see generally, *Kornhass Construction, Inc. v. State of Oklahoma, Department of Central Services*, 140 F.Supp.2d at 1247-1248.

The courts require that a local or state government seriously consider race-, ethnicity- and gender-neutral efforts to remedy identified discrimination.¹⁶⁷ 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.¹⁶⁸

In holding the Federal DBE regulations were narrowly tailored, the Eighth Circuit stated those regulations “place strong emphasis on ‘the use of race-neutral means to increase minority business participation in government contracting.’”¹⁶⁹

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.”¹⁷⁰ Courts, including the Ninth Circuit, have found that “[w]hile narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, it does require serious, good faith consideration of whether such alternatives could serve the governmental interest at stake.”¹⁷¹

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.’”¹⁷²

The Supreme Court in *Parents Involved in Community Schools v. Seattle School District*¹⁷³ 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.”¹⁷⁴ The Court found that the District failed to show it seriously considered race-neutral measures.

¹⁶⁷ See, e.g., *Midwest Fence*, 840 F.3d 932, 937-938, 953-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1199; *H. B. Rome*, 615 F.3d 233, 252-255; *Western States Paving*, 407 F.3d at 993; *Sherbrooke Turf*, 345 F.3d at 972; *Adarand VII*, 228 F.3d at 1179; *Eng’g Contractors Ass’n*, 122 F.3d at 927; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d at 608-609 (3d Cir. 1996); *Contractors Ass’n*, 6 F.3d at 1008-1009 (3d Cir. 1993); *Coral Constr.*, 941 F.2d at 923.

¹⁶⁸ See, *Croson*, 488 U.S. at 507; *Drabik I*, 214 F.3d at 738 (citations and internal quotations omitted); *Eng’g Contractors Ass’n*, 122 F.3d at 927; *Virdi*, 2005 WL 13892 (11th Cir. 2005); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d at 608-609 (3d Cir. 1996); *Contractors Ass’n*, 6 F.3d at 1008-1009 (3d Cir. 1993).

¹⁶⁹ *Sherbrooke Turf, Inc.*, 345 F. 3d at 972, quoting *Adarand Constrs., Inc.*, 515 U.S. at 237-38.

¹⁷⁰ *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).

¹⁷¹ See *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509-10 (1989); *Western States Paving*, 407 F.3d at 993; *Sherbrooke Turf*, 345 F.3d at 972; see also *Adarand I*, 515 U.S. at 237-38.

¹⁷² *Associated Gen. Contractors of Ohio, Inc. v. Drabik* (“*Drabik II*”), 214 F.3d 730, 738 (6th Cir. 2000).

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

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

The Court in *Croson* followed by decisions from federal courts of appeal found that local and state governments have at their disposal a “whole array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races.”¹⁷⁵

The federal regulations and the courts require that state DOTs and recipients of federal financial assistance governed by 49 CFR Part 26 and 49 CFR Part 23 implement or seriously consider race-, ethnicity-, and gender-neutral remedies prior to the implementation of race-, ethnicity- and gender-conscious remedies.¹⁷⁶ The courts also have found the regulations require a state to meet the maximum feasible portion of its overall goal by using race neutral means.¹⁷⁷

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;

¹⁷⁵ *Croson*, 488 U.S. at 509-510.

¹⁷⁶ 49 CFR § 26.51(a) requires recipients of federal funds to “meet the maximum feasible portion of your overall goal by using race-neutral means of facilitating DBE participation.” See, 49 CFR § 23.25; see, e.g., *Adarand VII*, 228 F.3d at 1179; *Western States Paving*, 407 F.3d at 993; *Sherbrooke Turf*, 345 F.3d at 972. Additionally, in September of 2005, the United States Commission on Civil Rights (the “Commission”) issued its report entitled “Federal Procurement After *Adarand*” setting forth its findings pertaining to federal agencies’ compliance with the constitutional standard enunciated in *Adarand*. United States Commission on Civil Rights: Federal Procurement After *Adarand* (Sept. 2005), available at <http://www.usccr.gov>. The Commission found that 10 years after the Court’s *Adarand* decision, federal agencies have largely failed to narrowly tailor their reliance on race-conscious programs and have failed to seriously consider race-neutral measures that would effectively redress discrimination.

¹⁷⁷ See, e.g., *Northern Contracting*, 473 F.3d at 723 – 724; *Western States Paving*, 407 F.3d at 993 (citing 49 CFR § 26.51(a)); see, 49 CFR § 26.51; 49 CFR § 23.25.

- 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.¹⁷⁸

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.”¹⁷⁹

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.¹⁸⁰ For example, to be considered narrowly tailored, courts have held that a MBE/WBE- or DBE-type program should include: (1) built-in flexibility;¹⁸¹ (2) good faith efforts provisions;¹⁸² (3) waiver provisions;¹⁸³ (4) a rational basis for goals;¹⁸⁴ (5) graduation provisions;¹⁸⁵ (6) remedies only for groups for which there

¹⁷⁸ See, e.g., *Croson*, 488 U.S. at 509-510; *H. B. Rowe*, 615 F.3d 233, 252-255; *N. Contracting*, 473 F.3d at 724; *Adarand VII*, 228 F.3d 1179; 49 CFR § 26.51(b); see also, *Eng’g Contractors Ass’n*, 122 F.3d at 927-29; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d at 608-609 (3d. Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1008-1009 (3d. Cir. 1993).

¹⁷⁹ *Parents Involved in Community Schools v. Seattle School District*, 551 U.S. 701, 732-47, 127 S.Ct 2738, 2760-61 (2007); *AGC, SDC v. Caltrans*, 713 F.3d at 1199, citing *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003); *H. B. Rowe*, 615 F.3d 233, 252-255 (4th Cir. 2010); *Western States Paving*, 407 F.3d at 993; *Sherbrooke Turf*, 345 F.3d at 972; *Eng’g Contractors Ass’n*, 122 F.3d at 927.

¹⁸⁰ See *Midwest Fence*, 840 F.3d 932, 937-939, 947-954 (7th Cir. 2016); *H. B. Rowe*, 615 F.3d 233, 252-255; *Sherbrooke Turf*, 345 F.3d at 971-972; *Eng’g Contractors Ass’n*, 122 F.3d at 927; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d at 608-609 (3d. Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1008-1009 (3d. Cir. 1993).

¹⁸¹ See, e.g., *Midwest Fence*, 840 F.3d 932, 937-939, 947-954 (7th Cir. 2016); *H. B. Rowe*, 615 F.3d 233, 252-255 (4th Cir. 2010); *Sherbrooke Turf*, 345 F.3d at 971-972; *CAEP I*, 6 F.3d at 1009; *Associated Gen. Contractors of Ca., Inc. v. Coalition for Economic Equality* (“AGC of Ca.”), 950 F.2d 1401, 1417 (9th Cir. 1991); *Coral Constr. Co. v. King County*, 941 F.2d 910, 923 (9th Cir. 1991); *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 917 (11th Cir. 1990).

¹⁸² See, e.g., *Midwest Fence*, 840 F.3d 932, 937-939, 947-954 (7th Cir. 2016); *H. B. Rowe*, 615 F.3d 233, 252-255 (4th Cir. 2010); *Sherbrooke Turf*, 345 F.3d at 971-972; *CAEP I*, 6 F.3d at 1019; *Cone Corp.*, 908 F.2d at 917.

¹⁸³ *Midwest Fence*, 840 F.3d 932, 937-939, 947-954 (7th Cir. 2016); *H. B. Rowe*, 615 F.3d 233, 253; *AGC of Ca.*, 950 F.2d at 1417; *Cone Corp.*, 908 F.2d at 917; see, e.g., *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d at 606-608 (3d. Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1008-1009 (3d. Cir. 1993).

¹⁸⁴ *Id.*; *Sherbrooke Turf*, 345 F.3d at 971-973; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d at 606-608 (3d. Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1008-1009 (3d. Cir. 1993).

¹⁸⁵ *Id.*

were findings of discrimination;¹⁸⁶ (7) sunset provisions;¹⁸⁷ and (8) limitation in its geographical scope to the boundaries of the enacting jurisdiction.¹⁸⁸

Several federal court decisions have upheld the Federal DBE Program and its implementation by state DOTs and recipients of federal funds, including satisfying the narrow tailoring factors.¹⁸⁹

3. Intermediate scrutiny analysis

Certain Federal Courts of Appeal, including the Ninth Circuit Court of Appeals, apply intermediate scrutiny to gender-conscious programs.¹⁹⁰

The courts have interpreted this intermediate scrutiny standard to require that gender-based classifications be:

1. Supported by both “sufficient probative” evidence or “exceedingly persuasive justification” in support of the stated rationale for the program; and
2. Substantially related to the achievement of that underlying objective.¹⁹¹

¹⁸⁶ See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1198-1199; *H. B. Rowe*, 615 F.3d 233, 253-255; *Western States Paving*, 407 F.3d at 998; *AGC of Ca.*, 950 F.2d at 1417; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d at 593-594, 605-609 (3d Cir. 1996); *Contractors Ass’n (CAEP I)*, 6 F.3d at 1009, 1012 (3d Cir. 1993); *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (W.D. Tex. 2016); *Sherbrooke Turf*, 2001 WL 150284 (unpublished opinion), aff’d 345 F.3d 964.

¹⁸⁷ See, e.g., *H. B. Rowe*, 615 F.3d 233, 254; *Sherbrooke Turf*, 345 F.3d at 971-972; *Peightal*, 26 F.3d at 1559; see also, *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (W.D. Tex. 2016).

¹⁸⁸ *Coral Constr.*, 941 F.2d at 925.

¹⁸⁹ See, e.g., *Midwest Fence Corp. v. U.S. DOT, Illinois DOT, et al.*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016), cert. denied, 2017 WL 497345 (2017); *Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al.*, 799 F.3d 676, 2015 WL 4934560 (7th Cir. 2015), cert. denied, 2016 WL 193809 (2016); *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, 713 F.3d 1187, (9th Cir. 2013); *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983 (9th Cir. 2005), cert. denied, 546 U.S. 1170 (2006); *Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.*, 2017 WL 2179120 Memorandum Opinion (Not for Publication) (9th Cir. May 16, 2017); *Northern Contracting, Inc. v. Illinois DOT*, 473 F.3d 715 (7th Cir. 2007); *Sherbrooke Turf, Inc. v. Minnesota DOT and Grass Seed v. Nebraska Department of Roads*, 345 F.3d 964 8th Cir. 2003), cert. denied, 541 U.S. 1041 (2004); *Adarand Constructors, Inc. v. Slater, Colorado DOT*, 228 F.3d 1147 (10th Cir. 2000) (“*Adarand VIP*”); *Dunnet Bay Construction Co. v. Illinois DOT, et al.* 2014 WL 552213 (C. D. Ill. 2014), affirmed by *Dunnet Bay*, 2015 WL 4934560 (7th Cir. 2015); *Geyer Signal, Inc. v. Minnesota DOT*, 2014 W.L. 1309092 (D. Minn. 2014); *M. K. Weeden Construction v State of Montana, Montana DOT*, 2013 WL 4774517 (D. Mont. 2013); *Geod Corp. v. New Jersey Transit Corp.*, 766 F. Supp.2d. 642 (D. N.J. 2010); *South Florida Chapter of the A.G.C. v. Broward County, Florida*, 544 F. Supp.2d 1336 (S.D. Fla. 2008).

¹⁹⁰ See e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1195 (9th Cir. 2013); *H. B. Rowe*, 615 F.3d 233, 242 (4th Cir. 2010); *Western States Paving*, 407 F.3d at 990 n. 6; *Coral Constr. Co.*, 941 F.2d at 931-932 (9th Cir. 1991); *Equal Found. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997); *Eng’g Contractors Ass’n*, 122 F.3d at 905, 908, 910; *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548 (11th Cir. 1994); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1009-1011 (3d Cir. 1993); see also *U.S. v. Virginia*, 518 U.S. 515, 532 and n. 6 (1996) (“exceedingly persuasive justification.”); *Geyer Signal, Inc.*, 2014 WL 1309092.

¹⁹¹ See e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *H. B. Rowe, Inc. v. NCDOT*, 615 F.3d 233, 242 (4th Cir. 2010); *Western States Paving*, 407 F.3d at 990 n. 6; *Coral Constr. Co.*, 941 F.2d at 931-932 (9th Cir. 1991); *Equal Found. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997); *Eng’g Contractors Ass’n*, 122 F.3d at 905, 908, 910; *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548 (11th Cir. 1994); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1009-1011 (3d Cir. 1993); see, also, *U.S. v. Virginia*, 518 U.S. 515, 532 and n. 6 (1996) (“exceedingly persuasive justification.”)

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.¹⁹²

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.¹⁹³ 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.¹⁹⁴

Certain courts have held that “[w]hen a gender-conscious affirmative action program rests on sufficient evidentiary foundation, the government is not required to implement the program only as a last resort Additionally, under intermediate scrutiny, a gender-conscious program need not closely tie its numerical goals to the proportion of qualified women in the market.”¹⁹⁵

4. Rational basis scrutiny analysis

Where a challenge to the constitutionality of a statute or a regulation does not involve a fundamental right or a suspect class, the appropriate level of scrutiny to apply is the rational basis standard.¹⁹⁶ When applying rational basis review under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, a court is required to inquire “whether the challenged classification has a legitimate purpose and whether it was reasonable [for the legislature] to believe that use of the challenged classification would promote that purpose.”¹⁹⁷

¹⁹² *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*.

¹⁹³ See e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *H. B. Rowe, Inc. v. NCDOT*, 615 F.3d 233, 242 (4th Cir. 2010); *Western States Paving*, 407 F.3d at 990 n. 6; *Coral Constr. Co.*, 941 F.2d at 931-932 (9th Cir. 1991); *Equal Found. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997); *Eng’g Contractors Ass’n*, 122 F.3d at 905, 908, 910; *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548 (11th Cir. 1994); see, also, *U.S. v. Virginia*, 518 U.S. 515, 532 and n. 6 (1996) (“exceedingly persuasive justification.”)

¹⁹⁴ *Coral Constr. Co.*, 941 F.2d at 931-932; see *Eng’g Contractors Ass’n*, 122 F.3d at 910.

¹⁹⁵ 122 F.3d at 929 (internal citations omitted.)

¹⁹⁶ *Del Rio v. Crote*, 87 Haw. 297, 305, 955 P.2d 90, 98 (Haw. 1998); *Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44, *reconsidered denied*, 74 Haw. 645, 852 P.3d 74 (1993); *Nachtwey v. Doi*, 59 Haw. 430, 437, 583 P.2d 955, 960 (1978); see, e.g., *Heller v. Doe*, 509 U.S. 312, 320 (1993); *Hettinga v. United States*, 677 F.3d 471, 478 (D.C. Cir 2012); *Cunningham v. Beavers* 858 F.2d 269, 273 (5th Cir. 1988); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1011 (3d. Cir. 1993); see also *Lundeen v. Canadian Pac. R. Co.*, 532 F.3d 682, 689 (8th Cir. 2008) (stating that federal courts review legislation regulating economic and business affairs under a ‘highly deferential rational basis’ standard of review.”); *H. B. Rowe, Inc. v. NCDOT*, 615 F.3d 233 at 254.

¹⁹⁷ *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1011 (3d. Cir. 1993); see, e.g., *Heller v. Doe*, 509 U.S. 312, 320 (1993); *Hettinga v. United States*, 677 F.3d 471, 478 (D.C. Cir 2012); *Cunningham v. Beavers* 858 F.2d 269, 273 (5th Cir. 1988).

In analyzing alleged equal protection violations, classifications that are neither “suspect” nor “quasi-suspect” are subject to the rational basis test.¹⁹⁸ Similarly, when the class of persons who are ineligible for benefits is neither “suspect” nor “quasi-suspect,” courts apply the rational basis test.¹⁹⁹

To prevail, a party challenging the constitutionality of a statutory classification on equal protection ground has the burden of showing with convincing clarity that the classification is not rationally related to the statutory purpose, or that the challenged classification does not rest upon some ground of difference having a fair and substantial relation to the object of the legislation.²⁰⁰

Equal protection does not mandate that all laws apply with universality to all persons; the State cannot function without classifying its citizens for various purposes and treating some differently from others. The legislature may not, however, in exercising this right to classify, do so arbitrarily. The classification must be reasonably related to the purpose of the legislation.²⁰¹

Thus, under the rational basis test, “the court essentially asks whether a statute rationally furthers a legitimate state interest.”²⁰² In making this inquiry, a court will not look for empirical data in support of the statute. It will only seek to determine whether any reasonable justification can be conceived to uphold the legislative enactment.²⁰³

Once it is determined that the legislature passed the statute at issue to further a legitimate government purpose, then the pertinent inquiry is only whether the Legislature rationally could have believed that the statute would promote its objective.²⁰⁴ Additionally, the lawmakers are under no obligation to convince the courts of the correctness of their legislative judgments.²⁰⁵ Rather, those challenging the legislative judgment must convince the court that the legislative facts on which the statute is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.²⁰⁶

¹⁹⁸ *Baehr v. Levin*, 74 Haw. 530, 852 P.2d 44, *reconsidered denied*, 74 Haw. 645, 852 P.3d 74 (1993); *see also*, *Nachtwey v. Doi*, 59 Haw. 430, 437, 583 P.2d 955, 960 (1978).

¹⁹⁹ *Id.*

²⁰⁰ *Del Rio v. Crote*, 87 Haw. 297, 305, 955 P.2d 90, 98 (Haw. 1998).

²⁰¹ *Washington v. Fireman’s Fund Inc. Companies*, 68 Haw. 192, 199, 708 P.2d 129, 134 (1985) (*citations, internal quotation marks, and brackets omitted*), *cert. denied*, 476 U.S. 1169 (1986).

²⁰² *Housing Fin. & Dev. Corp. v. Castle*, 79 Hawaii 64, 86, 898 P.2d 576,598 (1995); *see also*, *State v. Miller*, 84 Hawaii 269, 276, 933 P.2d 606, 613 (holding that “the challenged classification must bear some rational relationship to legitimate state purposes”).

²⁰³ *Del Rio v. Crote*, 87 Haw. 297, 955 P.2d 90, 98 (Haw. 1998).

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Del Rio v. Castle*, 87 Haw. 297, 955 P.2d 90, 98 (Haw. 1998); *Housing Fin. & Dev. Corp. v. Castle*, 79 Hawaii at 86, 898 P.2d at 598.

Hence, in determining whether a statute passes constitutional muster under the rational basis test, the courts apply a two-step test. First, the court must ascertain whether the statute was passed for a legitimate government purpose.²⁰⁷ Second, if the purpose is legitimate, the court must determine whether the legislature rationally could have believed that the statute would promote its objective.²⁰⁸

Under the federal standard of review a court will presume the “legislation is valid and will sustain it if the classification drawn by the statute is rationally related to a legitimate [government] interest.”²⁰⁹ Moreover, “courts are compelled under rational-basis review to accept a legislature’s generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality.”²¹⁰

Under a rational basis review standard, a legislative classification will be upheld “if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.”²¹¹ Because all legislation classifies its objects, differential treatment is justified by “any reasonably conceivable state of facts.”²¹²

A recent federal court decision, which is instructive to the study, involved a challenge to and the application of a small business goal in a pre-bid process for a federal procurement. *Firstline Transportation Security, Inc. v. United States*, is instructive and analogous to some of the issues in a small business program. The case is informative as to the use, estimation and determination of goals (small business goals) in a procurement under the Federal Acquisition Regulations (“FAR”).²¹³

Firstline involved a solicitation that established a small business subcontracting goal requirement. In *Firstline*, the Transportation Security Administration (“TSA”) issued a solicitation for security screening services at the Kansas City Airport. The solicitation stated that the: “Government anticipates an overall Small Business goal of 40 percent,” and that “[w]ithin that goal, the government anticipates further small business goals of: Small, Disadvantaged business[:] 14.5 percent; Woman Owned[:] 5 percent; HUBZone[:] 3 percent; Service Disabled, Veteran Owned[:] 3 percent.”²¹⁴

²⁰⁷ *Del Rio v. Croke*, 87 Haw. 297, 955 P.2d 90 (Haw. 1998).

²⁰⁸ *Id.*

²⁰⁹ *Chance Mgmt., Inc. v. S. Dakota*, 97 F.3d 1107, 1114 (8th Cir. 1996); *see also Lawrence v. Texas*, 539 U.S. 558, 580, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003) (“Under our rational basis standard of review, legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest Laws such as economic or tax legislation that are scrutinized under rational basis review normally pass constitutional muster.” (internal citations and quotations omitted)) (O’Connor, J., concurring); *Gallagher v. City of Clayton*, 699 F.3d 1013, 1019 (8th Cir. 2012) (“Under rational basis review, the classification must only be rationally related to a legitimate government interest.”).

²¹⁰ *Heller v. Doe*, 509 U.S. 312, 321 (1993).

²¹¹ *Heller v. Doe*, 509 U.S. 312, 320 (1993); *see, e.g., Hettinga v. United States*, 677 F.3d 471, 478 (D.C. Cir 2012).

²¹² *Id.*

²¹³ 2012 WL 5939228 (Fed. Cl. 2012).

²¹⁴ *Id.*

The court applied the rational basis test in construing the challenge to the establishment by the TSA of a 40 percent small business participation goal as unlawful and irrational.²¹⁵ The court stated it “cannot say that the agency’s approach is clearly unlawful, or that the approach lacks a rational basis.”²¹⁶

The court found that “an agency may rationally establish aspirational small business subcontracting goals for prospective offerors” Consequently, the Court held one rational method by which the Government may attempt to maximize small business participation is to establish a rough subcontracting goal for a given contract, and then allow potential contractors to compete in designing innovative ways to structure and maximize small business subcontracting within their proposals.²¹⁷ The court, in an exercise of judicial restraint, found the “40 percent goal is a rational expression of the Government’s policy of affording small business concerns ... the maximum practicable opportunity to participate as subcontractors”²¹⁸

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

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

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

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

At the time of this report, Defendants have filed a Motion to Dismiss the Second Amended Complaint, which is pending. Also, the parties are engaged in discovery.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

Palm Beach County Board of County Commissioners v. Mason Tillman Associates, Ltd.; Florida East Coast Chapter of the AGC of America, Inc., Case No. 502018CA010511; In the 15th Judicial Circuit in and for Palm Beach County, Florida. In this case, the County sued Mason Tillman Associates (MTA) to turn over background documents from disparity studies it conducted for the Solid Waste Authority and for the county as a whole. Those documents include the names of women and minority business owners who, after MTA promised them anonymity, described discrimination they say they faced trying to get county contracts. Those documents were sought initially as part of a records request by the Associated General Contractors of America (AGC).

The County filed suit after its alleged unsuccessful efforts to get MTA to provide documents needed to satisfy a public records request from AGC. The Florida ECC of AGC (AGC) also requested information related to the disparity study that MTA prepared for the County.

The AGC requests documents from the County and MTA related to its study and its findings and conclusions. AGC requests documents including the availability database, underlying data, anecdotal interview identities, transcripts and findings, and documents supporting the findings of discrimination.

At the time of this report, MTA has filed a Motion to Dismiss, which is pending.

United States v. Taylor, 232 F. Supp. 3d 741 (W.D. Penn. 2017). It is instructive to the study to note the recent decision by the federal District Court for the Western District of Pennsylvania in *United States v. Taylor*, 232 F. Supp. 3d 741 (W. D. Penn. 2017) (See Section E below). The court upheld the Indictment by the United States against Defendant Taylor who had been indicted on multiple counts arising out of a scheme to defraud the United States Department of Transportation's Disadvantaged Business Enterprise Program ("Federal DBE Program"). *United States v. Taylor*, 232 F.Supp. 3d 741, 743 (W.D. Penn. 2017). The court in denying the motion to dismiss the Indictment upheld the federal DBE regulations in issue against a challenge to the Federal DBE Program.

The court rejected a challenge to the authority of the USDOT to promulgate the federal DBE regulations claiming the USDOT exceeded its authority. 232 F.Supp. at 757. The court found that the legislative history and executive rulemaking with respect to the relevant statutory provisions and regulations were sufficient to demonstrate that the federal DBE regulations were made under the broad grant of rights authorized by Congressional statutes. *Id.* at 757, *citing*, 49 U.S.C. Section 322, 23 U.S.C. Section 304, and 23 U.S.C. Section 315.

In addition, the court in *Taylor*, pointed out that the Federal DBE Program has been upheld in various contexts, "even surviving strict scrutiny," with multiple courts holding that the DBE Program is narrowly tailored to further compelling governmental interests. *Id.* at 757, *citing*, *Midwest Fence Corp.*, 840 F.3d at 942 (*citing Western States Paving Co. v. Washington State Dep't of Transportation*, 407 F.3d 983, 993 (9th Cir. 2005); *Sherbrooke Turf, Inc. v. Minnesota Dep't of Transportation*, 345 F.3d 964, 973 (8th Cir. 2003); *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1155 (10th Cir. 2000)).

After the court denied Defendant Taylor's motion to dismiss the Indictment, the Defendant subsequently pleaded guilty. Recently on March 13, 2018, the court issued the final Judgment sentencing the Defendant, and ordered restitution and a fine. The case also was terminated on March 13, 2018. See Section E below.

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

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

D. Recent Decisions Involving the Federal DBE Program and State or Local Government MBE/WBE/DBE Programs in the Ninth Circuit Court of Appeals

1. Orion Insurance Group, a Washington Corporation; Ralph G. Taylor, an individual, Plaintiffs, v. Washington State Office Of Minority & Women’s Business Enterprises, United States DOT, et. al., 2018 WL 6695345 (9th Cir. December 19, 2018), Memorandum opinion (not for publication), Petition for Rehearing denied, February 2019. Petition for Writ of Certiorari filed with the U.S. Supreme Court denied (June 24, 2019)

Plaintiffs, Orion Insurance Group (“Orion”) and its owner Ralph Taylor, filed this case alleging violations of federal and state law due to the denial of their application for Orion to be considered a DBE under federal law. The USDOT and Washington State Office of Minority & Women’s Business Enterprises (“OMWBE”), moved for a summary dismissal of all the claims.

Plaintiff Taylor received results from a genetic ancestry test that estimated he was 90 percent European, 6 percent Indigenous American and 4 percent Sub-Saharan African. Taylor submitted an application to OMWBE seeking to have Orion certified as an MBE under Washington State law. Taylor identified himself as black. His application was initially rejected, but after Taylor appealed, OMWBE voluntarily reversed their decision and certified Orion as an MBE.

Plaintiffs submitted to OMWBE Orion’s application for DBE certification under federal law. Taylor identified himself as Black American and Native American in the Affidavit of Certification. Orion’s DBE application was denied because there was insufficient evidence that he was a member of a racial group recognized under the regulations, was regarded by the relevant community as either black or Native American, or that he held himself out as being a member of either group.

OMWBE found the presumption of disadvantage was rebutted and the evidence was insufficient to show Taylor was socially and economically disadvantaged.

District Court decision. The district court held OMWBE did not act arbitrarily or capriciously when it found the presumption that Taylor was socially and economically disadvantaged was rebutted because of insufficient evidence he was either black or Native American. By requiring individualized determinations of social and economic disadvantage, the court held the Federal DBE Program requires states to extend benefits only to those who are actually disadvantaged.

Therefore, the district court dismissed the claim that, on its face, the Federal DBE Program violates the Equal Protection Clause. The district court also dismissed the claim that the Defendants, in applying the Federal DBE Program to him, violated the Equal Protection Clause.

The district court found there was no evidence that the application of the federal regulations was done with an intent to discriminate against mixed-race individuals or with racial animus, or creates a disparate impact on mixed-race individuals. The district court held the Plaintiffs failed to show that either the State or Federal Defendants had no rational basis for the difference in treatment.

Void for vagueness claim. Plaintiffs asserted that the regulatory definitions of “Black American” and “Native American” are void for vagueness. The district court dismissed the claims that the definitions of “Black American” and “Native American” in the DBE regulations are impermissibly vague.

Claims for violations of 42 U.S.C. § 2000d (Title VI) against the State. Plaintiffs’ claims were dismissed against the State Defendants for violation of Title VI. The district court found plaintiffs failed to show the state engaged in intentional racial discrimination. The DBE regulations’ requirement that the state make decisions based on race, the district court held were constitutional.

The Ninth Circuit on appeal affirmed the District Court. The Ninth Circuit held the district court correctly dismissed Taylor’s claims against Acting Director of the USDOT’s Office of Civil Rights, in her individual capacity. The Ninth Circuit also held the district court correctly dismissed Taylor’s discrimination claims under 42 U.S.C. § 1983 because the federal defendants did not act “under color or state law” as required by the statute.

In addition, the Ninth Circuit concluded the district court correctly dismissed Taylor’s claims for damages because the United States has not waived its sovereign immunity on those claims. The Ninth Circuit found the district court correctly dismissed Taylor’s claims for equitable relief refund under 42 U.S.C. § 2000d because the Federal DBE Program does not qualify as a “program or activity” within the meaning of the statute.

Claims under the Administrative Procedure Act. The Ninth Circuit stated the OMWBE did not act in an arbitrary and capricious manner when it determined it had a “well-founded reason” to question Taylor’s membership claims, and that Taylor did not qualify as a “socially and economically disadvantaged individual.” Also, the court found OMWBE did not act in an arbitrary and capricious manner when it did not provide an in-person hearing under 49 C.F.R. §§ 26.67(b)(2) and 26.87(d) because Taylor was not entitled to a hearing under the regulations.

The Ninth Circuit held the USDOT did not act in an arbitrary and capricious manner when it affirmed the state’s decision because the decision was supported by substantial evidence and consistent with federal regulations. The USDOT “articulated a rational connection” between the evidence and the decision to deny Taylor’s application for certification.

Claims under the Equal Protection Clause and 42 U.S.C. §§ 1983 and 2000d. The Ninth Circuit held the district court correctly granted summary judgment to the federal and state Defendants on Taylor’s equal protection claims because Defendants did not discriminate against Taylor, and did not treat Taylor differently from others similarly situated. In addition, the court found the district court

properly granted summary judgment to the state defendants on Taylor’s discrimination claims under 42 U.S.C. §§ 1983 and 2000d because neither statute applies to Taylor’s claims.

Having granted summary judgment on Taylor’s claims under federal law, the Ninth Circuit concluded the district court properly declined to exercise jurisdiction over Taylor’s state law claims.

Petition for Writ of Certiorari. Plaintiffs/Appellants filed a Petition for Writ of Certiorari with the U.S. Supreme Court on April 22, 2019, which was denied on June 24, 2019.

2. *Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.*, 2017 WL 2179120 (9th Cir. May 16, 2017), Memorandum opinion, (not for publication) United States Court of Appeals for the Ninth Circuit, May 16, 2017, Docket Nos. 14-26097 and 15-35003, dismissing in part, reversing in part and remanding the U.S. District Court decision at 2014 WL 6686734 (D. Mont. Nov. 26, 2014)

Note: The Ninth Circuit Court of Appeals Memorandum provides: “This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.”

Introduction. Mountain West Holding Company installs signs, guardrails, and concrete barriers on highways in Montana. It competes to win subcontracts from prime contractors who have contracted with the State. It is not owned and controlled by women or minorities. Some of its competitors are disadvantaged business enterprises (DBEs) owned by women or minorities. In this case it claims that Montana’s DBE goal-setting program unconstitutionally required prime contractors to give preference to these minority or female-owned competitors, which Mountain West Holdings Company argues is a violation of the Equal Protection Clause, 42 U.S.C. § 1983 and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.*

Factual and procedural background. *In Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.*, 2014 WL 6686734 (D. Mont. Nov. 26, 2014); Case No. 1:13-CV-00049-DLC, United States District Court for the District of Montana, Billings Division, plaintiff Mountain West Holding Co., Inc. (“Mountain West”), alleged it is a contractor that provides construction-specific traffic planning and staffing for construction projects as well as the installation of signs, guardrails, and concrete barriers. Mountain West sued the Montana Department of Transportation (“MDT”) and the State of Montana, challenging their implementation of the Federal DBE Program. Mountain West brought this action alleging violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, Title VI of the Civil Rights Act, 42 USC § 2000(d)(7), and 42 USC § 1983.

Following the Ninth Circuit’s 2005 decision in *Western States Paving v. Washington DOT, et al.*, MDT commissioned a disparity study which was completed in 2009. MDT utilized the results of the disparity study to establish its overall DBE goal. MDT determined that to meet its overall goal, it would need to implement race-conscious contract specific goals. Based upon the disparity study, Mountain West alleges the State of Montana utilized race, national origin, and gender-conscious goals in highway construction contracts. Mountain West claims the State did not have a strong basis in evidence to show there was past discrimination in the highway construction industry in Montana and that the implementation of race, gender, and national origin preferences were necessary or

appropriate. Mountain West also alleges that Montana has instituted policies and practices which exceed the United States Department of Transportation DBE requirements.

Mountain West asserts that the 2009 study concluded all “relevant” minority groups were underutilized in “professional services” and Asian Pacific Americans and Hispanic Americans were underutilized in “business categories combined,” but it also concluded that all “relevant” minority groups were significantly overutilized in construction. Mountain West thus alleges that although the disparity study demonstrates that DBE groups are “significantly overrepresented” in the highway construction field, MDT has established preferences for DBE construction subcontractor firms over non-DBE construction subcontractor firms in the award of contracts.

Mountain West also asserts that the Montana DBE Program does not have a valid statistical basis for the establishment or inclusion of race, national origin, and gender conscious goals, that MDT inappropriately relies upon the 2009 study as the basis for its DBE Program, and that the study is flawed. Mountain West claims the Montana DBE Program is not narrowly tailored because it disregards large differences in DBE firm utilization in MDT contracts as among three different categories of subcontractors: business categories combined, construction, and professional services; the MDT DBE certification process does not require the applicant to specify any specific racial or ethnic prejudice or cultural bias that had a negative impact upon his or her business success; and the certification process does not require the applicant to certify that he or she was discriminated against in the State of Montana in highway construction.

Mountain West and the State of Montana and the MDT filed cross Motions for Summary Judgment. Mountain West asserts that there was no evidence that all relevant minority groups had suffered discrimination in Montana’s transportation contracting industry because, while the study had determined there were substantial disparities in the utilization of all minority groups in professional services contracts, there was no disparity in the utilization of minority groups in construction contracts.

AGC, San Diego v. California DOT and Western States Paving Co. v. Washington DOT. The Ninth Circuit and the district court in *Mountain West* applied the decision in *Western States*, 407 F.3d 983 (9th Cir. 2005), and the decision in *AGC, San Diego v. California DOT*, 713 F.3d 1187 (9th Cir. 2013) as establishing the law to be followed in this case. The district court noted that in *Western States*, the Ninth Circuit held that a state’s implementation of the Federal DBE Program can be subject to an as-applied constitutional challenge, despite the facial validity of the Federal DBE Program. 2014 WL 6686734 at *2 (D. Mont. November 26, 2014). The Ninth Circuit and the district court stated the Ninth Circuit has held that whether a state’s implementation of the DBE Program “is narrowly tailored to further Congress’s remedial objective depends upon the presence or absence of discrimination in the State’s transportation contracting industry.” *Mountain West*, 2014 WL 6686734 at *2, quoting *Western States*, at 997-998, and *Mountain West*, 2017 WL 2179120 at *2 (9th Cir. May 16, 2017) Memorandum, May 16, 2017, at 5-6, quoting *AGC, San Diego v. California DOT*, 713 F.3d 1187, 1196. The Ninth Circuit in *Mountain West* also pointed out it had held that “even when discrimination is present within a State, a remedial program is only narrowly tailored if its application is limited to those minority groups that have actually suffered discrimination.” *Mountain West*, 2017 WL 2179120 at *2, Memorandum, May 16, 2017, at 6, and 2014 WL 6686734 at *2, quoting *Western States*, 407 F.3d at 997-999.

MDT study. MDT obtained a firm to conduct a disparity study that was completed in 2009. The district court in *Mountain West* stated that the results of the study indicated significant underutilization of DBEs in all minority groups in “professional services” contracts, significant underutilization of Asian Pacific Americans and Hispanic Americans in “business categories combined,” slight underutilization of nonminority women in “business categories combined,” and overutilization of all groups in subcontractor “construction” contracts. *Mountain West*, 2014 WL 6686734 at *2.

In addition to the statistical evidence, the 2009 disparity study gathered anecdotal evidence through surveys and other means. The district court stated the anecdotal evidence suggested various forms of discrimination existed within Montana’s transportation contracting industry, including evidence of an exclusive “good ole boy network” that made it difficult for DBEs to break into the market. *Id.* at *3. The district court said that despite these findings, the consulting firm recommended that MDT continue to monitor DBE utilization while employing only race-neutral means to meet its overall goal. *Id.* The consulting firm recommended that MDT consider the use of race-conscious measures if DBE utilization decreased or did not improve.

Montana followed the recommendations provided in the study, and continued using only race-neutral means in its effort to accomplish its overall goal for DBE utilization. *Id.* Based on the statistical analysis provided in the study, Montana established an overall DBE utilization goal of 5.83 percent. *Id.*

Montana’s DBE utilization after ceasing the use of contract goals. The district court found that in 2006, Montana achieved a DBE utilization rate of 13.1 percent, however, after Montana ceased using contract goals to achieve its overall goal, the rate of DBE utilization declined sharply. 2014 WL 6686734 at *3. The utilization rate dropped, according to the district court, to 5 percent in 2007, 3 percent in 2008, 2.5 percent in 2009, 0.8 percent in 2010, and in 2011, it was 2.8 percent. *Id.* In response to this decline, for fiscal years 2011-2014, the district court said MDT employed contract goals on certain USDOT contracts in order to achieve 3.27 percentage points of Montana’s overall goal of 5.83 percent DBE utilization.

MDT then conducted and prepared a new Goal Methodology for DBE utilization for federal fiscal years 2014-2016. *Id.* US DOT approved the new and current goal methodology for MDT, which does not provide for the use of contract goals to meet the overall goal. *Id.* Thus, the new overall goal is to be made entirely through the use of race-neutral means. *Id.*

Mountain West’s claims for relief. Mountain West sought declaratory and injunctive relief, including prospective relief, against the individual defendants, and sought monetary damages against the State of Montana and the MDT for alleged violation of Title VI. 2014 WL 6686734 at *3. Mountain West’s claim for monetary damages is based on its claim that on three occasions it was a low-quoting subcontractor to a prime contractor submitting a bid to the MDT on a project that utilized contract goals, and that despite being a low-quoting bidder, Mountain West was not awarded the contract. *Id.* Mountain West brings an as-applied challenge to Montana’s DBE program. *Id.*

The two-prong test to demonstrate that a DBE program is narrowly tailored. The Court, *citing* AGC, *San Diego v. California DOT*, 713 F.3d 1187, 1196, stated that under the two-prong test established in *Western States*, in order to demonstrate that its DBE program is narrowly tailored, (1) the state must establish the presence of discrimination within its transportation contracting

industry, and (2) the remedial program must be limited to those minority groups that have actually suffered discrimination. *Mountain West*, 2017 WL 2179120 at *2, Memorandum, May 16, 2017, at 6-7.

District Court Holding in 2014 and the Appeal. The district court granted summary judgment to the State, and Mountain West appealed. *See Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.* 2014 WL 6686734 (D. Mont. Nov. 26, 2014), *dismissed in part, reversed in part, and remanded*, U.S. Court of Appeals, Ninth Circuit, Docket Nos. 14-36097 and 15-35003, Memorandum 2017 WL 2179120 at **1-4 (9th Cir. May 16, 2017). Montana also appealed the district court's threshold determination that Mountain West had a private right of action under Title VI, and it appealed the district court's denial of the State's motion to strike an expert report submitted in support of Mountain West's motion.

Ninth Circuit Holding. The Ninth Circuit Court of Appeals in its Memorandum opinion dismissed Mountain West's appeal as moot to the extent Mountain West pursues equitable remedies, affirmed the district court's determination that Mountain West has a private right to enforce Title VI, affirmed the district court's decision to consider the disputed expert report by Mountain West's expert witness, and reversed the order granting summary judgment to the State. 2017 WL 2179120 at **1-4 (9th Cir. May 16, 2017), U.S. Court of Appeals, Ninth Circuit, Docket Nos. 14-36097 and 15-35003, Memorandum, at 3, 5, 11.

Mootness. The Ninth Circuit found that Montana does not currently employ gender- or race-conscious goals, and the data it relied upon as justification for its previous goals are now several years old. The Court thus held that Mountain West's claims for injunctive and declaratory relief are therefore moot. *Mountain West*, 2017 WL 2179120 at *2 (9th Cir.), Memorandum, May 16, 2017, at 4.

The Court also held, however, that Mountain West's Title VI claim for damages is not moot. 2017 WL 2179120 at **1-2. The Court stated that a plaintiff may seek damages to remedy violations of Title VI, *see* 42 U.S.C. § 2000d-7(a)(1)-(2); and Mountain West has sought damages. Claims for damages, according to the Court, do not become moot even if changes to a challenged program make claims for prospective relief moot. *Id.*

The appeal, the Ninth Circuit held, is therefore dismissed with respect to Mountain West's claims for injunctive and declaratory relief; and only the claim for damages under Title VI remains in the case. *Mountain West*, 2017 WL 2179120 at **1 (9th Cir.), Memorandum, May 16, 2017, at 4.

Private Right of Action and Discrimination under Title VI. The Court concluded for the reasons found in the district court's order that Mountain West may state a private claim for damages against Montana under Title VI. *Id.* at *2. The district court had granted summary judgment to Montana on Mountain West's claims for discrimination under Title VI.

Montana does not dispute that its program took race into account. The Ninth Circuit held that classifications based on race are permissible "only if they are narrowly tailored measures that further compelling governmental interests." *Mountain West*, 2017 WL 2179120 (9th Cir.) at *2, Memorandum, May 16, 2017, at 6-7. *W. States Paving*, 407 F.3d at 990 (*quoting Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)). As in *Western States Paving*, the Court applied the same test to claims of unconstitutional discrimination and discrimination in violation of Title VI. *Mountain West*, 2017 WL 2179120 at *2, n.2, Memorandum, May 16, 2017, at 6, n. 2; *see*, 407 F.3d at 987.

Montana, the Court found bears the burden to justify any racial classifications. *Id.* In an as-applied challenge to a state’s DBE contracting program, “(1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be ‘limited to those minority groups that have actually suffered discrimination.’” *Mountain West*, 2017 WL 2179120 at *2 (9th Cir.), Memorandum, May 16, 2017, at 6-7, quoting, *Assoc. Gen. Contractors of Am. v. Cal. Dep’t of Transp.*, 713 F.3d 1187, 1196 (9th Cir. 2013) (quoting *W. States Paving*, 407 F.3d at 997-99). Discrimination may be inferred from “a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality’s prime contractors.” *Mountain West*, 2017 WL 2179120 at *2 (9th Cir.), Memorandum, May 16, 2017, at 6-7, quoting, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989).

Here, the district court held that Montana had satisfied its burden. In reaching this conclusion, the district court relied on three types of evidence offered by Montana. First, it cited a study, which reported disparities in professional services contract awards in Montana. Second, the district court noted that participation by DBEs declined after Montana abandoned race-conscious goals in the years following the decision in *Western States Paving*, 407 F.3d 983. Third, the district court cited anecdotes of a “good ol’ boys” network within the State’s contracting industry. *Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 7.

The Ninth Circuit reversed the district court and held that summary judgment was improper in light of genuine disputes of material fact as to the study’s analysis, and because the second two categories of evidence were insufficient to prove a history of discrimination. *Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 7.

Disputes of fact as to study. *Mountain West*’s expert testified that the study relied on several questionable assumptions and an opaque methodology to conclude that professional services contracts were awarded on a discriminatory basis. *Id.* at *3. The Ninth Circuit pointed out a few examples that it found illustrated the areas in which there are disputes of fact as to whether the study sufficiently supported Montana’s actions:

1. Ninth Circuit stated that its cases require states to ascertain whether lower-than-expected DBE participation is attributable to factors other than race or gender. *W. States Paving*, 407 F.3d at 1000-01. *Mountain West* argues that the study did not explain whether or how it accounted for a given firm’s size, age, geography, or other similar factors. The report’s authors were unable to explain their analysis in depositions for this case. Indeed, the Court noted, even Montana appears to have questioned the validity of the study’s statistical results *Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 8.
2. The study relied on a telephone survey of a sample of Montana contractors. *Mountain West* argued that (a) it is unclear how the study selected that sample, (b) only a small percentage of surveyed contractors responded to questions, and (c) it is unclear whether responsive contractors were representative of nonresponsive contractors. 2017 WL 2179120 at *3 (9th Cir. May 16, 2017), Memorandum at 8-9.

3. The study relied on very small sample sizes but did no tests for statistical significance, and the study consultant admitted that “some of the population samples were very small and the result may not be significant statistically.” 2017 WL 2179120 at *3 (9th Cir. May 16, 2017), Memorandum at 8-9.
4. Mountain West argued that the study gave equal weight to professional services contracts and construction contracts, but professional services contracts composed less than 10 percent of total contract volume in the State’s transportation contracting industry. 2017 WL 2179120 at *3 (9th Cir. May 16, 2017), Memorandum at 9.
5. Mountain West argued that Montana incorrectly compared the proportion of available subcontractors to the proportion of prime contract dollars awarded. The district court did not address this criticism or explain why the study’s comparison was appropriate. 2017 WL 2179120 at *3 (9th Cir. May 16, 2017), Memorandum at 9.

The post-2005 decline in participation by DBEs. The Ninth Circuit was unable to affirm the district court’s order in reliance on the decrease in DBE participation after 2005. In *Western States Paving*, it was held that a decline in DBE participation after race- and gender- based preferences are halted is not necessarily evidence of discrimination against DBEs. *Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 9, quoting *Western States*, 407 F.3d at 999 (“If [minority groups have not suffered from discrimination], then the DBE program provides minorities who have not encountered discriminatory barriers with an unconstitutional competitive advantage at the expense of both nonminorities and any minority groups that have actually been targeted for discrimination.”); *id.* at 1001 (“The disparity between the proportion of DBE performance on contracts that include affirmative action components and on those without such provisions does not provide any evidence of discrimination against DBEs.”). *Id.*

The Ninth Circuit also cited to the USDOT statement made to the Court in *Western States. Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 10, quoting U.S. Dep’t of Transp., *Western States Paving Co. Case Q&A* (Dec. 16, 2014) (“In calculating availability of DBEs, [a state’s] study should not rely on numbers that may have been inflated by race-conscious programs that may not have been narrowly tailored.”).

Anecdotal evidence of discrimination. The Ninth Circuit said that without a statistical basis, the State cannot rely on anecdotal evidence alone. *Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 10, quoting *Coral Const. Co. v. King Cty.*, 941 F.2d 910, 919 (9th Cir. 1991) (“While anecdotal evidence may suffice to prove individual claims of discrimination, rarely, if ever, can such evidence show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan.”); and quoting *Croson*, 488 U.S. at 509 (“[E]vidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government’s determination that broader remedial relief is justified.”). *Id.*

In sum, the Ninth Circuit found that because it must view the record in the light most favorable to Mountain West’s case, it concluded that the record provides an inadequate basis for summary judgment in Montana’s favor. 2017 WL 2179120 at *3.

Conclusion. The Ninth Circuit thus reversed and remanded for the district court to conduct whatever further proceedings it considers most appropriate, including trial or the resumption of pretrial litigation. Thus, the case was dismissed in part, reversed in part, and remanded to the district court. *Mountain West*, 2017 WL 2179120 at *4 (9th Cir.), Memorandum, May 16, 2017, at 11. The case on remand was voluntarily dismissed by stipulation of the parties (March 2018).

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

The Associated General Contractors of America, Inc., San Diego Chapter, Inc., (“AGC”) sought declaratory and injunctive relief against the California Department of Transportation (“Caltrans”) and its officers on the grounds that Caltrans’ Disadvantaged Business initial Enterprise (“DBE”) program unconstitutionally provided race -and sex-based preferences to African American, Native American-, Asian-Pacific American-, and women-owned firms on certain transportation contracts. The federal district court upheld the constitutionality of Caltrans’ DBE program implementing the Federal DBE Program and granted summary judgment to Caltrans. The district court held that Caltrans’ DBE program implementing the Federal DBE Program satisfied strict scrutiny because Caltrans had a strong basis in evidence of discrimination in the California transportation contracting industry, and the program was narrowly tailored to those groups that actually suffered discrimination. The district court held that Caltrans’ substantial statistical and anecdotal evidence from a disparity study conducted by BBC Research and Consulting, provided a strong basis in evidence of discrimination against the four named groups, and that the program was narrowly tailored to benefit only those groups. 713 F.3d at 1190.

The AGC appealed the decision to the Ninth Circuit Court of Appeals. The Ninth Circuit initially held that because the AGC did not identify any of the members who have suffered or will suffer harm as a result of Caltrans’ program, the AGC did not establish that it had associational standing to bring the lawsuit. *Id.* Most significantly, the Ninth Circuit held that even if the AGC could establish standing, its appeal failed because the Court found Caltrans’ DBE program implementing the Federal DBE Program is constitutional and satisfied the applicable level of strict scrutiny required by the Equal Protection Clause of the United States Constitution. *Id.* at 1194-1200.

Court Applies *Western States Paving Co. v. Washington State DOT* decision. In 2005 the Ninth Circuit Court of Appeal decided *Western States Paving Co. v. Washington State Department of Transportation*, 407 F.3d. 983 (9th Cir. 2005), which involved a facial challenge to the constitutional validity of the federal law authorizing the United States Department of Transportation to distribute funds to States for transportation-related projects. *Id.* at 1191. The challenge in the *Western States Paving* case also included an as-applied challenge to the Washington DOT program implementing the federal mandate. *Id.* Applying strict scrutiny, the Ninth Circuit upheld the constitutionality of the federal statute and the federal regulations (the Federal DBE Program), but struck down Washington DOT’s program because it was not narrowly tailored. *Id.*, citing *Western States Paving Co.*, 407 F.3d at 990-995, 999-1002.

In *Western States Paving*, the Ninth Circuit announced a two-pronged test for “narrow tailoring”:

“(1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be limited to those minority groups that have actually suffered discrimination.” *Id.* 1191, citing *Western States Paving Co.*, 407 F.3d at 997-998.

Evidence gathering and the 2007 Disparity Study. On May 1, 2006, Caltrans ceased to use race- and gender-conscious measures in implementing their DBE program on federally assisted contracts while it gathered evidence in an effort to comply with the *Western States Paving* decision. *Id.* at 1191. Caltrans commissioned a disparity study by BBC Research and Consulting to determine whether there was evidence of discrimination in California’s transportation contracting industry. *Id.* The Court noted that disparity analysis involves making a comparison between the availability of minority- and women-owned businesses and their actual utilization, producing a number called a “disparity index.” *Id.* An index of 100 represents statistical parity between availability and utilization, and a number below 100 indicates underutilization. *Id.* An index below 80 is considered a substantial disparity that supports an inference of discrimination. *Id.*

The Court found the research firm and the disparity study gathered extensive data to calculate disadvantaged business availability in the California transportation contracting industry. *Id.* at 1191. The Court stated: “Based on review of public records, interviews, assessments as to whether a firm could be considered available, for Caltrans contracts, as well as numerous other adjustments, the firm concluded that minority- and women-owned businesses should be expected to receive 13.5 percent of contact dollars from Caltrans administered federally assisted contracts.” *Id.* at 1191-1192.

The Court said the research firm “examined over 10,000 transportation-related contracts administered by Caltrans between 2002 and 2006 to determine actual DBE utilization. The firm assessed disparities across a variety of contracts, separately assessing contracts based on funding source (state or federal), type of contract (prime or subcontract), and type of project (engineering or construction).” *Id.* at 1192.

The Court pointed out a key difference between federally funded and state funded contracts is that race-conscious goals were in place for the federally funded contracts during the 2002–2006 period, but not for the state funded contracts. *Id.* at 1192. Thus, the Court stated: “state funded contracts functioned as a control group to help determine whether previous affirmative action programs skewed the data.” *Id.*

Moreover, the Court found the research firm measured disparities in all twelve of Caltrans’ administrative districts, and computed aggregate disparities based on statewide data. *Id.* at 1192. The firm evaluated statistical disparities by race and gender. The Court stated that within and across many categories of contracts, the research firm found substantial statistical disparities for African American, Asian-Pacific, and Native American firms. *Id.* However, the research firm found that there were not substantial disparities for these minorities in *every* subcategory of contract. *Id.* The Court noted that the disparity study also found substantial disparities in utilization of women-owned firms for some categories of contracts. *Id.* After publication of the disparity study, the Court pointed out the research firm calculated disparity indices for all women-owned firms, including female minorities, showing substantial disparities in the utilization of all women-owned firms similar to those measured for white women. *Id.*

The Court found that the disparity study and Caltrans also developed extensive anecdotal evidence, by (1) conducting twelve public hearings to receive comments on the firm's findings; (2) receiving letters from business owners and trade associations; and (3) interviewing representatives from twelve trade associations and 79 owners/managers of transportation firms. *Id.* at 1192. The Court stated that some of the anecdotal evidence indicated discrimination based on race or gender. *Id.*

Caltrans' DBE Program. Caltrans concluded that the evidence from the disparity study supported an inference of discrimination in the California transportation contracting industry. *Id.* at 1192-1193. Caltrans concluded that it had sufficient evidence to make race- and gender-conscious goals for African American-, Asian-Pacific American-, Native American-, and women-owned firms. *Id.* The Court stated that Caltrans adopted the recommendations of the disparity report and set an overall goal of 13.5 percent for disadvantaged business participation. Caltrans expected to meet one-half of the 13.5 percent goal using race-neutral measures. *Id.*

Caltrans submitted its proposed DBE program to the USDOT for approval, including a request for a waiver to implement the program only for the four identified groups. *Id.* at 1193. The Caltrans' DBE program included 66 race-neutral measures that Caltrans already operated or planned to implement, and subsequent proposals increased the number of race-neutral measures to 150. *Id.* The USDOT granted the waiver, but initially did not approve Caltrans' DBE program until in 2009, the DOT approved Caltrans' DBE program for fiscal year 2009.

District Court proceedings. AGC then filed a complaint alleging that Caltrans' implementation of the Federal DBE Program violated the Fourteenth Amendment of the U.S. Constitution, Title VI of the Civil Rights Act, and other laws. Ultimately, the AGC only argued an as-applied challenge to Caltrans' DBE program. The district court on motions of summary judgment held that Caltrans' program was "clearly constitutional," as it "was supported by a strong basis in evidence of discrimination in the California contracting industry and was narrowly tailored to those groups which had actually suffered discrimination. *Id.* at 1193.

Subsequent Caltrans study and program. While the appeal by the AGC was pending, Caltrans commissioned a new disparity study from BBC to update its DBE program as required by the federal regulations. *Id.* at 1193. In August 2012, BBC published its second disparity report, and Caltrans concluded that the updated study provided evidence of continuing discrimination in the California transportation contracting industry against the same four groups and Hispanic Americans. *Id.* Caltrans submitted a modified DBE program that is nearly identical to the program approved in 2009, except that it now includes Hispanic Americans and sets an overall goal of 12.5 percent, of which 9.5 percent will be achieved through race- and gender-conscious measures. *Id.* The USDOT approved Caltrans' updated program in November 2012. *Id.*

Jurisdiction issue. Initially, the Ninth Circuit Court of Appeals considered whether it had jurisdiction over the AGC's appeal based on the doctrines of mootness and standing. The Court held that the appeal is not moot because Caltrans' new DBE program is substantially similar to the prior program and is alleged to disadvantage AGC's members "in the same fundamental way" as the previous program. *Id.* at 1194.

The Court, however, held that the AGC did not establish associational standing. *Id.* at 1194-1195: The Court found that the AGC did not identify any affected members by name nor has it submitted declarations by any of its members attesting to harm they have suffered or will suffer under Caltrans' program. *Id.* at 1194-1195. Because AGC failed to establish standing, the Court held it must dismiss the appeal due to lack of jurisdiction. *Id.* at 1195.

Caltrans' DBE Program held constitutional on the merits. The Court then held that even if AGC could establish standing, its appeal would fail. *Id.* at 1194-1195. The Court held that Caltrans' DBE program is constitutional because it survives the applicable level of scrutiny required by the Equal Protection Clause and jurisprudence. *Id.* at 1195-1200.

The Court stated that race-conscious remedial programs must satisfy strict scrutiny and that although strict scrutiny is stringent, it is not "fatal in fact." *Id.* at 1194-1195 (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995) (*Adarand III*)). The Court quoted *Adarand III*: "The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." *Id.* (quoting *Adarand III*, 515 U.S. at 237.)

The Court pointed out that gender-conscious programs must satisfy intermediate scrutiny which requires that gender-conscious programs be supported by an 'exceedingly persuasive justification' and be substantially related to the achievement of that underlying objective. *Id.* at 1195 (citing *Western States Paving*, 407 F.3d at 990 n. 6.).

The Court held that Caltrans' DBE program contains both race- and gender-conscious measures, and that the "entire program passes strict scrutiny." *Id.* at 1195.

Application of strict scrutiny standard articulated in *Western States Paving*. The Court held that the framework for AGC's as-applied challenge to Caltrans' DBE program is governed by *Western States Paving*. The Ninth Circuit in *Western States Paving* devised a two-pronged test for narrow tailoring: (1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be "limited to those minority groups that have actually suffered discrimination." *Id.* at 1195-1196 (quoting *Western States Paving*, 407 F.3d at 997-99).

Evidence of discrimination in California contracting industry. The Court held that in Equal Protection cases, courts consider statistical and anecdotal evidence to identify the existence of discrimination. *Id.* at 1196. The U.S. Supreme Court has suggested that a "significant statistical disparity" could be sufficient to justify race-conscious remedial programs. *Id.* at *7 (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989)). The Court stated that although generally not sufficient, anecdotal evidence complements statistical evidence because of its ability to bring "the cold numbers convincingly to life." *Id.* (quoting *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977)).

The Court pointed out that Washington DOT's DBE program in the *Western States Paving* case was held invalid because Washington DOT had performed no statistical studies and it offered no anecdotal evidence. *Id.* at 1196. The Court also stated that the Washington DOT used an oversimplified methodology resulting in little weight being given by the Court to the purported

disparity because Washington's data "did not account for the relative capacity of disadvantaged businesses to perform work, nor did it control for the fact that existing affirmative action programs skewed the prior utilization of minority businesses in the state." *Id.* (quoting *Western States Paving*, 407 F.3d at 999-1001). The Court said that it struck down Washington's program after determining that the record was devoid of any evidence suggesting that minorities currently suffer — or have ever suffered — discrimination in the Washington transportation contracting industry." *Id.*

Significantly, the Court held in this case as follows: "In contrast, Caltrans' affirmative action program is supported by substantial statistical and anecdotal evidence of discrimination in the California transportation contracting industry." *Id.* at 1196. The Court noted that the disparity study documented disparities in many categories of transportation firms and the utilization of certain minority- and women-owned firms. *Id.* The Court found the disparity study "accounted for the factors mentioned in *Western States Paving* as well as others, adjusting availability data based on capacity to perform work and controlling for previously administered affirmative action programs." *Id.* (citing *Western States*, 407 F.3d at 1000).

The Court also held: "Moreover, the statistical evidence from the disparity study is bolstered by anecdotal evidence supporting an inference of discrimination. The substantial statistical disparities alone would give rise to an inference of discrimination, *see Croson*, 488 U.S. at 509, and certainly Caltrans' statistical evidence combined with anecdotal evidence passes constitutional muster." *Id.* at 1196.

The Court specifically rejected the argument by AGC that strict scrutiny requires Caltrans to provide evidence of "specific acts" of "deliberate" discrimination by Caltrans employees or prime contractors. *Id.* at 1196-1197. The Court found that the Supreme Court in *Croson* explicitly states that "[t]he degree of specificity required in the findings of discrimination . . . may vary." *Id.* at 1197 (quoting *Croson*, 488 U.S. at 489). The Court concluded that a rule requiring a state to show specific acts of deliberate discrimination by identified individuals would run contrary to the statement in *Croson* that statistical disparities alone could be sufficient to support race-conscious remedial programs. *Id.* (citing *Croson*, 488 U.S. at 509). The Court rejected AGC's argument that Caltrans' program does not survive strict scrutiny because the disparity study does not identify individual acts of deliberate discrimination. *Id.*

The Court rejected a second argument by AGC that this study showed inconsistent results for utilization of minority businesses depending on the type and nature of the contract, and thus cannot support an inference of discrimination in the entire transportation contracting industry. *Id.* at 1197. AGC argued that each of these subcategories of contracts must be viewed in isolation when considering whether an inference of discrimination arises, which the Court rejected. *Id.* The Court found that AGC's argument overlooks the rationale underpinning the constitutional justification for remedial race-conscious programs: they are designed to root out "patterns of discrimination." *Id.* quoting *Croson*, 488 U.S. at 504.

The Court stated that the issue is not whether Caltrans can show underutilization of disadvantaged businesses in *every* measured category of contract. But rather, the issue is whether Caltrans can meet the evidentiary standard required by *Western States Paving* if, looking at the evidence in its entirety, the data show substantial disparities in utilization of minority firms suggesting that public dollars are

being poured into “a system of racial exclusion practiced by elements of the local construction industry.” *Id.* at 1197 quoting *Croson* 488 U.S. at 492.

The Court concluded that the disparity study and anecdotal evidence document a pattern of disparities for the four groups, and that the study found substantial underutilization of these groups in numerous categories of California transportation contracts, which the anecdotal evidence confirms. *Id.* at 1197. The Court held this is sufficient to enable Caltrans to infer that these groups are systematically discriminated against in publicly-funded contracts. *Id.*

Third, the Court considered and rejected AGC’s argument that the anecdotal evidence has little or no probative value in identifying discrimination because it is not verified. *Id.* at *9. The Court noted that the Fourth and Tenth Circuits have rejected the need to verify anecdotal evidence, and the Court stated the AGC made no persuasive argument that the Ninth Circuit should hold otherwise. *Id.*

The Court pointed out that AGC attempted to discount the anecdotal evidence because some accounts ascribe minority underutilization to factors other than overt discrimination, such as difficulties with obtaining bonding and breaking into the “good ol boy” network of contractors. *Id.* at 1197-1198. The Court held, however, that the federal courts and regulations have identified precisely these factors as barriers that disadvantage minority firms because of the lingering effects of discrimination. *Id.* at 1198, citing *Western States Paving*, 407 and *AGCC II*, 950 F.2d at 1414.

The Court found that AGC ignores the many incidents of racial and gender discrimination presented in the anecdotal evidence. *Id.* at 1198. The Court said that Caltrans does not claim, and the anecdotal evidence does not need to prove, that *every* minority-owned business is discriminated against. *Id.* The Court concluded: “It is enough that the anecdotal evidence supports Caltrans’ statistical data showing a pervasive pattern of discrimination.” *Id.* The individual accounts of discrimination offered by Caltrans, according to the Court, met this burden. *Id.*

Fourth, the Court rejected AGC’s contention that Caltrans’ evidence does not support an inference of discrimination against all women because gender-based disparities in the study are limited to white women. *Id.* at 1198. AGC, the Court said, misunderstands the statistical techniques used in the disparity study, and that the study correctly isolates the effect of gender by limiting its data pool to white women, ensuring that statistical results for gender-based discrimination are not skewed by discrimination against minority women on account of their race. *Id.*

In addition, after AGC’s early incorrect objections to the methodology, the research firm conducted a follow-up analysis of all women-owned firms that produced a disparity index of 59. *Id.* at 1198. The Court held that this index is evidence of a substantial disparity that raises an inference of discrimination and is sufficient to support Caltrans’ decision to include all women in its DBE program. *Id.* at 1195.

Program tailored to groups who actually suffered discrimination. The Court pointed out that the second prong of the test articulated in *Western States Paving* requires that a DBE program be limited to those groups that actually suffered discrimination in the state’s contracting industry. *Id.* at 1198. The Court found Caltrans’ DBE program is limited to those minority groups that have actually suffered discrimination. *Id.* The Court held that the 2007 disparity study showed systematic and substantial underutilization of African American-, Native American-, Asian-Pacific American- and

women-owned firms across a range of contract categories. *Id.* at 1198-1199. *Id.* These disparities, according to the Court, support an inference of discrimination against those groups. *Id.*

Caltrans concluded that the statistical evidence did not support an inference of a pattern of discrimination against Hispanic or Subcontinent Asian Americans. *Id.* at 1199. California applied for and received a waiver from the USDOT in order to limit its 2009 program to African American, Native American, Asian-Pacific American, and women-owned firms. *Id.* The Court held that Caltrans' program "adheres precisely to the narrow tailoring requirements of *Western States*." *Id.*

The Court rejected the AGC contention that the DBE program is not narrowly tailored because it creates race-based preferences for all transportation-related contracts, rather than distinguishing between construction and engineering contracts. *Id.* at 1199. The Court stated that AGC cited no case that requires a state preference program to provide separate goals for disadvantaged business participation on construction and engineering contracts. *Id.* The Court noted that to the contrary, the federal guidelines for implementing the federal program instruct states *not* to separate different types of contracts. *Id.* The Court found there are "sound policy reasons to not require such parsing, including the fact that there is substantial overlap in firms competing for construction and engineering contracts, as prime *and* subcontractors." *Id.*

Consideration of race-neutral alternatives. The Court rejected the AGC assertion that Caltrans' program is not narrowly tailored because it failed to evaluate race-neutral measures before implementing the system of racial preferences, and stated the law imposes no such requirement. *Id.* at 1199. The Court held that *Western States Paving* does not require states to independently meet this aspect of narrow tailoring, and instead focuses on whether the federal statute sufficiently considered race-neutral alternatives. *Id.*

Second, the Court found that even if this requirement does apply to Caltrans' program, narrow tailoring only requires "serious, good faith consideration of workable race-neutral alternatives." *Id.* at 1199, citing *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003). The Court found that the Caltrans program has considered an increasing number of race-neutral alternatives, and it rejected AGC's claim that Caltrans' program does not sufficiently consider race-neutral alternatives. *Id.* at 1199.

Certification affidavits for Disadvantaged Business Enterprises. The Court rejected the AGC argument that Caltrans' program is not narrowly tailored because affidavits that applicants must submit to obtain certification as DBEs do not require applicants to assert they have suffered discrimination *in California*. *Id.* at 1199-1200. The Court held the certification process employed by Caltrans follows the process detailed in the federal regulations, and that this is an impermissible collateral attack on the facial validity of the Congressional Act authorizing the Federal DBE Program and the federal regulations promulgated by the USDOT (The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub.L.No. 109-59, § 1101(b), 119 Sect. 1144 (2005)). *Id.* at 1200.

Application of program to mixed state- and federally-funded contracts. The Court also rejected AGC's challenge that Caltrans applies its program to transportation contracts funded by both federal and state money. *Id.* at 1200. The Court held that this is another impermissible collateral attack on the federal program, which explicitly requires goals to be set for mix-funded contracts. *Id.*

Conclusion. The Court concluded that the AGC did not have standing, and that further, Caltrans' DBE program survives strict scrutiny by: 1) having a strong basis in evidence of discrimination within the California transportation contracting industry, and 2) being narrowly tailored to benefit only those groups that have actually suffered discrimination. *Id.* at 1200. The Court then dismissed the appeal. *Id.*

4. 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.*

5. Orion Insurance Group, a Washington Corporation; Ralph G. Taylor, an individual, Plaintiffs, v. Washington State Office Of Minority & Women’s Business Enterprises, United States DOT, et. al., 2017 WL 3387344 (W.D. Wash. 2017)

Plaintiffs, Orion Insurance Group (“Orion”), a Washington corporation, and its owner, Ralph Taylor, filed this case alleging violations of federal and state law due to the denial of their application for Orion to be considered a disadvantaged business enterprise (“DBE”) under federal law. 2017 WL 3387344. Plaintiffs moved the Court for an order that summarily declared that the Defendants violated the Administrative Procedure Act (APA), declared that the denial of the DBE certification for Orion was unlawful, and reversed the decision that Orion is not a DBE. *Id.* at *1. The United States Department of Transportation (“USDOT”) and the Acting Director of USDOT, (collectively the “Federal Defendants”) move for a summary dismissal of all the claims asserted against them. *Id.* The Washington State Office of Minority & Women’s Business Enterprises (“OMWBE”), (collectively the “State Defendants”) moved for summary dismissal of all claims asserted against them. *Id.*

The court held Plaintiffs’ motion for partial summary judgment was denied, in part, and stricken, in part, the Federal Defendants’ motion for summary judgment was granted, and the State Defendants’ motion for summary judgment was granted, in part, and stricken, in part. *Id.*

Factual and procedural history. In 2010, Plaintiff Ralph Taylor received results from a genetic ancestry test that estimated that he was 90 percent European, 6 percent Indigenous American, and 4 percent Sub-Saharan African. Mr. Taylor acknowledged that he grew up thinking of himself as Caucasian, but asserted that in his late 40s, when he realized he had black ancestry, he “embraced his black culture.” *Id.* at *2.

In 2013, Mr. Taylor submitted an application to OMWBE, seeking to have Orion, his insurance business, certified as an MBE under Washington State law. *Id.* at *2. In the application, Mr. Taylor identified himself as black, but not Native American. *Id.* His application was initially rejected, but after Mr. Taylor appealed the decision, OMWBE voluntarily reversed their decision and certified Orion as an MBE under the Washington Administrative Code and other Washington law. *Id.* at *2.

In 2014, Plaintiffs submitted, to OMWBE, Orion's application for DBE certification under federal law. *Id.* at *2. His application indicated that Mr. Taylor identified himself as black American and Native American in the Affidavit of Certification submitted with the federal application. *Id.* Considered with his initial submittal were the results from the 2010 genetic ancestry test that estimated that he was 90 percent European, 6 percent Indigenous American, and 4 percent Sub-Saharan African. *Id.* Mr. Taylor submitted the results of his father's genetic results, which estimated that he was 44 percent European, 44 percent Sub-Saharan African, and 12 percent East Asian. *Id.* Mr. Taylor included a 1916 death certificate for a woman from Virginia, Eliza Ray, identified as a "Negro," who was around 86 years old, with no other supporting documentation to indicate she was an ancestor of Mr. Taylor. *Id.* at *2.

In 2014, Orion's DBE application was denied because there was insufficient evidence that he was a member of a racial group recognized under the regulations, was regarded by the relevant community as either black or Native American, or that he held himself out as being a member of either group over a long period of time prior to his application. *Id.* at *3. OMWBE also found that even if there was sufficient evidence to find that Mr. Taylor was a member of either of these racial groups, "the presumption of disadvantage has been rebutted," and the evidence Mr. Taylor submitted was insufficient to show that he was socially and economically disadvantaged. *Id.*

Mr. Taylor appealed the denial of the DBE certification to the USDOT. Plaintiffs voluntarily dismissed this case after the USDOT issued its decision. *Id.* at **3-4. *Orion Insurance Group v. Washington State Office of Minority & Women's Business Enterprises, et al.*, U.S. District Court for the Western District of Washington case number 15-5267 BHS. In 2015, the USDOT affirmed the denial of Orion's DBE certification, concluding that there was substantial evidence in the administrative record to support OMWBE's decision. *Id.* at *4.

This case was filed in 2016. *Id.* at *4. Plaintiffs assert claims for (A) violation of the Administrative Procedures Act, 5 U.S.C. § 706, (B) "Discrimination under 42 U.S.C. § 1983" (reference is made to Equal Protection), (C) "Discrimination under 42 U.S.C. § 2000d," (D) violation of Equal Protection under the United States Constitution, (E) violation of the Washington Law Against Discrimination and Article 1, Sec. 12 of the Washington State Constitution, and (F) assert that the definitions in 49 C.F.R. § 26.5 are void for vagueness. *Id.* Plaintiffs seek damages, injunctive relief: ("[r]eversing the decisions of the USDOT, Ms. Jones and OMWBE, and OMWBE's representatives ... and issuing an injunction and/or declaratory relief requiring Orion to be certified as a DBE," and a declaration the "definitions of 'Black American' and 'Native American' in 49 C.F.R. § 26.5 to be void as impermissibly vague,") and attorneys' fees, and costs. *Id.*

OMWBE did not act arbitrarily or capriciously in denying certification. The court examined the evidence submitted by Mr. Taylor and by the State Defendants. *Id.* at **7-12. The court held that OMWBE did not act arbitrarily or capriciously when it found that the presumption that Mr. Taylor was socially and economically disadvantaged was rebutted because there was insufficient evidence

that he was a member of either the black or Native American groups. *Id.* at *8. Nor did it act arbitrarily and capriciously when it found that Mr. Taylor failed to demonstrate, by a preponderance of the evidence, that Mr. Taylor was socially and economically disadvantaged. *Id.* at *9. Under 49 C.F.R. § 26.63(b)(1), after OMWBE determined that Mr. Taylor was not a “member of a designated disadvantaged group,” the court stated Mr. Taylor “must demonstrate social and economic disadvantage on an individual basis.” *Id.* Accordingly, pursuant to 49 C.F.R. § 26.61(d), Plaintiffs had the burden to prove, by a preponderance of the evidence, that Mr. Taylor was socially and economically disadvantaged. *Id.*

In making these decisions, the court found OMWBE considered the relevant evidence and “articulated a rational connection between the facts found and the choices made.” *Id.* at *10. By requiring individualized determinations of social and economic disadvantage, the Federal DBE “program requires states to extend benefits only to those who are actually disadvantaged.” *Id.*, citing, *Midwest Fence Corp. v. United States Dep’t of Transp.*, 840 F.3d 932, 946 (7th Cir. 2016). OMWBE did not act arbitrary or capriciously when it found that Mr. Taylor failed to show he was “actually disadvantaged” or when it denied Plaintiff’s application. *Id.*

The USDOT affirmed the decision of the state OMWBE to deny DBE status to Orion. *Id.* at **10-11.

Claims for violation of equal protection. To the extent that Plaintiffs assert a claim that, on its face, the Federal DBE Program violates the Equal Protection Clause of the U.S. Constitution, the court held the claim should be dismissed. *Id.* at **12-13. The Ninth Circuit has held that the Federal DBE Program, including its implementing regulations, does not, on its face, violate the Equal Protection Clause of the U.S. Constitution. *Western States Paving Co. v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005). *Id.* The Western States Court held that Congress had evidence of discrimination against women and minorities in the national transportation contracting industry and the Federal DBE Program was a narrowly tailored means of remedying that sex and raced based discrimination. *Id.* Accordingly, the court found race-based determinations under the program have been determined to be constitutional. *Id.* The court noted that several other circuits, including the Seventh, Eighth, and Tenth have held the same. *Id.* at *12, citing, *Midwest Fence Corp. v. United States Dep’t of Transp.*, 840 F.3d 932, 936 (7th Cir. 2016); *Sherbrooke Turf, Inc. v. Minnesota Dep’t of Transportation*, 345 F.3d 964, 973 (8th Cir. 2003); *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1155 (10th Cir. 2000).

To the extent that Plaintiffs assert that the Defendants, in applying the Federal DBE Program to him, violated the Equal Protection Clause of the U.S. Constitution, the court held the claim should be dismissed. *Id.* at *12. Plaintiffs argue that, as applied to them, the regulations “weigh adversely and disproportionately upon” mixed-race individuals, like Mr. Taylor. *Id.* This claim should be dismissed, according to the court, as the Equal Protection Clause prohibits only intentional discrimination. *Id.* Even considering materials filed outside the administrative record, the court found Plaintiffs point to no evidence that the application of the regulations here was done with an intent to discriminate against mixed-race individuals, or that it was done with racial animus. *Id.* Further, the court said Plaintiffs offer no evidence that application of the regulations creates a disparate impact on mixed-race individuals. *Id.* Plaintiffs’ remaining arguments relate to the facial validity of the DBE program, and the court held they also should be dismissed. *Id.*

The court concluded that to the extent that Plaintiffs base their equal protection claim on an assertion that they were treated differently than others similarly situated, their “class of one” equal protection claim should be dismissed. *Id.* at *13. For a class of one equal protection claim, the court stated Plaintiffs must show they have been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. *Id.*

Plaintiffs, the court found, have failed to show that Mr. Taylor was intentionally treated differently than others similarly situated. *Id.* at *13. Plaintiffs pointed to no evidence of intentional differential treatment by the Defendants. *Id.* Plaintiffs failed to show that others that were similarly situated were treated differently. *Id.*

Further, the court held Plaintiffs failed to show that either the State or Federal Defendants had no rational basis for the difference in treatment. *Id.* at *13. Both the State and Federal Defendants according to the court, offered rational explanations for the denial of the application. *Id.* Plaintiffs’ Equal Protection claims, asserted against all Defendants, the court held, should be denied. *Id.*

Void for vagueness claim. Plaintiffs assert that the regulatory definitions of “Black American” and both the definition of “Native American” that was applied to Plaintiffs and a new definition of “Native American” are void for vagueness, presumably contrary to the Fifth and Fourteenth Amendments’ due process clauses. *Id.* at *13.

The court pointed out that although it can be applied in the civil context, the Seventh Circuit Court of Appeals has noted that in relation to the DBE regulations, the void for vagueness “doctrine is a poor fit.” *Id.* at *14, *citing, Midwest Fence Corp. v. United States Dep’t of Transp.*, 840 F.3d 932, 947–48 (7th Cir. 2016). Unlike criminal or civil statutes that prohibit certain conduct, the Seventh Circuit noted that the DBE regulations do not threaten parties with punishment, but, at worst, cause lost opportunities for contracts. *Id.* In any event, the court held Plaintiffs’ claims that the definitions of “Black American” and of “Native American” in the DBE regulations are impermissibly vague should be dismissed. *Id.*

The court found the regulations require that to show membership, an applicant must submit a statement, and then if the reviewer has a “well founded” question regarding group membership, the reviewer must ask for additional evidence. 49 C.F.R. § 26.63 (a)(1). *Id.* at *14. Considering the purpose of the law, the court stated the regulations clearly explain to a person of ordinary intelligence what is required to qualify for this governmental benefit. *Id.*

The definition of “socially and economically disadvantaged individual” as a “citizen ... who has been subjected to racial or ethnic prejudice or cultural bias within American society because of his or her identity as a member of groups and without regard to their individual qualities,” the court determined, gives further meaning to the definitions of “Black American” and “Native American” here. *Id.* at *14. “Otherwise imprecise terms may avoid vagueness problems when used in combination with terms that provide sufficient clarity.” *Id.* at *14, *quoting, Gammoh v. City of La Habra*, 395 F.3d 1114, 1120 (9th Cir. 2005).

The court held plaintiffs also fail to show that these terms, when considered within the statutory framework, are so vague that they lend themselves to “arbitrary” decisions. *Id.* at *14. Moreover, even if the court did have jurisdiction to consider whether the revised definition of “Native American” was void for vagueness, the court found a simple review of the statutory language leads to the conclusion that it is not. *Id.* The revised definition of “Native Americans” now “includes persons who are enrolled members of a federally or State recognized Indian tribe, Alaska Natives, or Native Hawaiian.” *Id.*, citing, 49 C.F.R. § 26.5. This definition, the court said, provides an objective criterion based on the decisions of the tribes, and does not leave the reviewer with any discretion. *Id.* The court thus held that Plaintiffs’ void for vagueness challenges were dismissed. *Id.*

Claims for violations of 42 U.S.C. §2000d against the State Defendants. Plaintiffs’ claims against the State Defendants for violation of Title VI (42 U.S.C. § 2000d), the court also held, should be dismissed. *Id.* at *16. Plaintiffs failed to show that the State Defendants engaged in intentional impermissible racial discrimination. *Id.* The court stated that “Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment.” *Id.* The court pointed out the DBE regulations’ requirement that the State make decisions based on race has already been held to pass constitutional muster in the Ninth Circuit. *Id.* at *16, citing, *Western States Paving Co. v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005). Plaintiffs made no showing that the State Defendants violated their Equal Protection or other constitutional rights. *Id.* Moreover, Plaintiffs, the court found, failed to show that the State Defendants intentionally acted with discriminatory animus. *Id.*

The court held to the extent the Plaintiffs assert claims that are based on disparate impact, those claims are unavailable because “Title VI itself prohibits only intentional discrimination.” *Id.* at *17, quoting, *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 178 (2005). The court therefore held this claim should be dismissed. *Id.* at *17.

Holding. Therefore, the court ordered that Plaintiffs’ Motion for Partial Summary Judgment was: Denied as to the federal claims; and Stricken as to the state law claims asserted against the State Defendants for violations of the Washington Constitution and WLAD.

In addition, the Federal Defendants’ Motion for Summary Judgment on the Administrative Procedure Act, Equal Protection, and Void for Vagueness Claims was Granted; and the claims asserted against the Federal Defendants were Dismissed.

The State Defendants’ Cross Motion for Summary Judgment was Granted as to Plaintiffs claims against the State Defendants for violations of the APA, Equal Protection, Void for Vagueness, 42 U.S.C. § 1983, and 42 U.S.C. § 2000d, and those claims were Dismissed. *Id.* Also, the court held the State Defendants’ Cross Motion for Summary Judgment was Stricken as to the state law claims asserted against the State Defendants for violations of the Washington Constitution and WLAD. *Id.*

6. M.K. Weeden Construction v. State of Montana, Montana Department of Transportation, et al., 2013 WL 4774517 (D. Mont.) (2013)

This case involved a challenge by a prime contractor, M.K. Weeden Construction, Inc. (“Weeden”) against the State of Montana, Montana Department of Transportation and others, to the DBE Program adopted by MDT implementing the Federal DBE Program at 49 CFR Part 26. Weeden sought an application for Temporary Restraining Order and Preliminary Injunction against the State of Montana and the MDT.

Factual background and claims. Weeden was the low dollar bidder with a bid of \$14,770,163.01 on the Arrow Creek Slide Project. The project received federal funding, and as such, was required to comply with the USDOT’s DBE Program. 2013 WL 4774517 at *1. MDT had established an overall goal of 5.83 percent DBE participation in Montana’s highway construction projects. On the Arrow Creek Slide Project, MDT established a DBE goal of 2 percent. *Id.*

Plaintiff Weeden, although it submitted the low dollar bid, did not meet the 2 percent DBE requirement. 2013 WL 4774517 at *1. Weeden claimed that its bid relied upon only 1.87 percent DBE subcontractors (although the court points out that Weeden’s bid actually identified only 81 percent DBE subcontractors). Weeden was the only bidder out of the six bidders who did not meet the 2 percent DBE goal. The other five bidders exceeded the 2 percent goal, with bids ranging from 2.19 percent DBE participation to 6.98 percent DBE participation. *Id.* at *2.

Weeden attempted to utilize a good faith exception to the DBE requirement under the Federal DBE Program and Montana’s DBE Program. MDT’s DBE Participation Review Committee considered Weeden’s good faith documentation and found that Weeden’s bid was non-compliant as to the DBE requirement, and that Weeden failed to demonstrate good faith efforts to solicit DBE subcontractor participation in the contract. 2013 WL 4774517 at *2. Weeden appealed that decision to the MDT DBE Review Board and appeared before the Board at a hearing. The DBE Review Board affirmed the Committee decision finding that Weeden’s bid was not in compliance with the contract DBE goal and that Weeden had failed to make a good faith effort to comply with the goal. *Id.* at *2. The DBE Review Board found that Weeden had received a DBE bid for traffic control, but Weeden decided to perform that work itself in order to lower its bid amount. *Id.* at *2. Additionally, the DBE Review Board found that Weeden’s mass email to 158 DBE subcontractors without any follow up was a *pro forma* effort not credited by the Review Board as an active and aggressive effort to obtain DBE participation. *Id.*

Plaintiff Weeden sought an injunction in federal district court against MDT to prevent it from letting the contract to another bidder. Weeden claimed that MDT’s DBE Program violated the Equal Protection Clause of the U.S. Constitution and the Montana Constitution, asserting that there was no supporting evidence of discrimination in the Montana highway construction industry, and therefore, there was no government interest that would justify favoring DBE entities. 2013 WL 4774517 at *2. Weeden also claimed that its right to Due Process under the U.S. Constitution and Montana Constitution had been violated. Specifically, Weeden claimed that MDT did not provide reasonable notice of the good faith effort requirements. *Id.*

No proof of irreparable harm and balance of equities favor MDT. First, the Court found that Weeden did not prove for a certainty that it would suffer irreparable harm based on the Court's conclusion that in the past four years, Weeden had obtained six state highway construction contracts valued at approximately \$26 million, and that MDT had \$50 million more in highway construction projects to be let during the remainder of 2013 alone. 2013 WL 4774517 at *3. Thus, the Court concluded that as demonstrated by its past performance, Weeden has the capacity to obtain other highway construction contracts and thus there is little risk of irreparable injury in the event MDT awards the Project to another bidder. *Id.*

Second, the Court found the balance of the equities did not tip in Weeden's favor. 2013 WL 4774517 at *3. Weeden had asserted that MDT and USDOT rules regarding good faith efforts to obtain DBE subcontractor participation are confusing, non-specific and contradictory. *Id.* The Court held that it is obvious the other five bidders were able to meet and exceed the 2 percent DBE requirement without any difficulty whatsoever. *Id.* The Court found that Weeden's bid is not responsive to the requirements, therefore is not and cannot be the lowest responsible bid. *Id.* The balance of the equities, according to the Court, do not tilt in favor of Weeden, who did not meet the requirements of the contract, especially when numerous other bidders ably demonstrated an ability to meet those requirements. *Id.*

No standing. The Court also questioned whether Weeden raised any serious issues on the merits of its equal protection claim because Weeden is a prime contractor and not a subcontractor. Since Weeden is a prime contractor, the Court held it is clear that Weeden lacks Article III standing to assert its equal protection claim. *Id.* at *3. The Court held that a prime contractor, such as Weeden, is not permitted to challenge MDT's DBE Project as if it were a non-DBE subcontractor because Weeden cannot show that *it* was subjected to a racial or gender-based barrier in its competition for the prime contract. *Id.* at *3. Because Weeden was not deprived of the ability to compete on equal footing with the other bidders, the Court found Weeden suffered no equal protection injury and lacks standing to assert an equal protection claim as if it were a non-DBE subcontractor. *Id.*

Court applies AGC v. California DOT case; evidence supports narrowly tailored DBE program.

Significantly, the Court found that even if Weeden had standing to present an equal protection claim, MDT presented significant evidence of underutilization of DBE's generally, evidence that supports a narrowly tailored race and gender preference program. 2013 WL 4774517 at *4. Moreover, the Court noted that although Weeden points out that some business categories in Montana's highway construction industry do not have a history of discrimination (namely, the category of construction businesses in contrast to the category of professional businesses), the Ninth Circuit "has recently rejected a similar argument requiring the evidence of discrimination in every single segment of the highway construction industry before a preference program can be implemented." *Id.*, citing *Associated General Contractors v. California Dept. of Transportation*, 713 F.3d 1187 (9th Cir. 2013) (holding that Caltrans' DBE program survived strict scrutiny, was narrowly tailored, did not violate equal protection, and was supported by substantial statistical and anecdotal evidence of discrimination).

The Court stated that particularly relevant in this case, "the Ninth Circuit held that California's DBE program need not isolate construction from engineering contracts or prime from subcontracts to determine whether the evidence in each and every category gives rise to an inference of discrimination." *Id.* at 4, citing *Associated General Contractors v. California DOT*, 713 F.3d at 1197. Instead,

according to the Court, California — and, by extension, Montana — “is entitled to look at the evidence ‘in its entirety’ to determine whether there are ‘substantial disparities in utilization of minority firms’ practiced by some elements of the construction industry.” 2013 WL 4774517 at *4, quoting *AGC v. California DOT*, 713 F.3d at 1197. The Court, also quoting the decision in *AGC v. California DOT*, said: “It is enough that the anecdotal evidence supports Caltrans’ statistical data showing a pervasive pattern of discrimination.” *Id.* at *4, quoting *AGC v. California DOT*, 713 F.3d at 1197.

The Court pointed out that there is no allegation that MDT has exceeded any federal requirement or done other than complied with USDOT regulations. 2013 WL 4774517 at *4. Therefore, the Court concluded that given the similarities between Weeden’s claim and AGC’s equal protection claim against California DOT in the *AGC v. California DOT* case, it does not appear likely that Weeden will succeed on the merits of its equal protection claim. *Id.* at *4.

Due Process claim. The Court also rejected Weeden’s bald assertion that it has a protected property right in the contract that has not been awarded to it where the government agency retains discretion to determine the responsiveness of the bid. The Court found that Montana law requires that an award of a public contract for construction must be made to the lowest *responsible* bidder and that the applicable Montana statute confers upon the government agency broad discretion in the award of a public works contract. Thus, a lower bidder such as Weeden requires no vested property right in a contract until the contract has been awarded, which here obviously had not yet occurred. 2013 WL 4774517 at *5. In any event, the Court noted that Weeden was granted notice, hearing and appeal for MDT’s decision denying the good faith exception to the DBE contract requirement, and therefore it does not appear likely that Weeden would succeed on its due process claim. *Id.* at *5.

Holding and Voluntary Dismissal. The Court denied plaintiff Weeden’s application for Temporary Restraining Order and Preliminary Injunction. Subsequently, Weeden filed a Notice of Voluntary Dismissal Without Prejudice on September 10, 2013.

7. *Braunstein v. Arizona DOT*, 683 F.3d 1177 (9th Cir. 2012)

Braunstein is an engineering contractor that provided subsurface utility location services for ADO T. 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. ADO T 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. *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983 (9th Cir. 2005), cert. denied, 546 U.S. 1170 (2006)

This case out of the Ninth Circuit struck down a state’s implementation of the Federal DBE Program for failure to pass constitutional muster. In *Western States Paving*, the Ninth Circuit held that the State of Washington’s implementation of the Federal DBE Program was unconstitutional because it did not satisfy the narrow tailoring element of the constitutional test. The Ninth Circuit held that the State must present its own evidence of past discrimination within its own boundaries in order to survive constitutional muster and could not merely rely upon data supplied by Congress. The United States Supreme Court denied certiorari. The analysis in the decision also is instructive in particular as to the application of the narrowly tailored prong of the strict scrutiny test.

Plaintiff Western States Paving Co. (“plaintiff”) was a white male-owned asphalt and paving company. 407 F.3d 983, 987 (9th Cir. 2005). In July of 2000, plaintiff submitted a bid for a project for the City of Vancouver; the project was financed with federal funds provided to the Washington State DOT (“WSDOT”) under the Transportation Equity Act for the 21st Century (“TEA-21”). *Id.*

Congress enacted TEA-21 in 1991 and after multiple renewals, it was set to expire on May 31, 2004. *Id.* at 988. TEA-21 established minimum minority-owned business participation requirements (10%) for certain federally-funded projects. *Id.* The regulations require each state accepting federal transportation funds to implement a DBE program that comports with the TEA-21. *Id.* TEA-21 indicates the 10 percent DBE utilization requirement is “aspirational,” and the statutory goal “does not authorize or require recipients to set overall or contract goals at the 10 percent level, or any other particular level, or to take any special administrative steps if their goals are above or below 10 percent.” *Id.*

TEA-21 sets forth a two-step process for a state to determine its own DBE utilization goal: (1) the state must calculate the relative availability of DBEs in its local transportation contracting industry (one way to do this is to divide the number of ready, willing and able DBEs in a state by the total number of ready, willing and able firms); and (2) the state is required to “adjust this base figure upward or downward to reflect the proven capacity of DBEs to perform work (as measured by the volume of work allocated to DBEs in recent years) and evidence of discrimination against DBEs obtained from statistical disparity studies.” *Id.* at 989 (citing regulation). A state is also permitted to consider discrimination in the bonding and financing industries and the present effects of past discrimination. *Id.* (citing regulation). TEA-21 requires a generalized, “undifferentiated” minority goal

and a state is prohibited from apportioning their DBE utilization goal among different minority groups (e.g., between Hispanics, blacks, and women). *Id.* at 990 (citing regulation).

“A state must meet the maximum feasible portion of this goal through race- [and gender-] neutral means, including informational and instructional programs targeted toward all small businesses.” *Id.* (citing regulation). Race- and gender-conscious contract goals must be used to achieve any portion of the contract goals not achievable through race- and gender-neutral measures. *Id.* (citing regulation). However, TEA-21 does not require that DBE participation goals be used on every contract or at the same level on every contract in which they are used; rather, the overall effect must be to “obtain that portion of the requisite DBE participation that cannot be achieved through race- [and gender-] neutral means.” *Id.* (citing regulation).

A prime contractor must use “good faith efforts” to satisfy a contract’s DBE utilization goal. *Id.* (citing regulation). However, a state is prohibited from enacting rigid quotas that do not contemplate such good faith efforts. *Id.* (citing regulation).

Under the TEA-21 minority utilization requirements, the City set a goal of 14 percent minority participation on the first project plaintiff bid on; the prime contractor thus rejected plaintiff’s bid in favor of a higher bidding minority-owned subcontracting firm. *Id.* at 987. In September of 2000, plaintiff again submitted a bid on a project financed with TEA-21 funds and was again rejected in favor of a higher bidding minority-owned subcontracting firm. *Id.* The prime contractor expressly stated that he rejected plaintiff’s bid due to the minority utilization requirement. *Id.*

Plaintiff filed suit against the WSDOT, Clark County, and the City, challenging the minority preference requirements of TEA-21 as unconstitutional both facially and as applied. *Id.* The district court rejected both of plaintiff’s challenges. The district court held the program was facially constitutional because it found that Congress had identified significant evidence of discrimination in the transportation contracting industry and the TEA-21 was narrowly tailored to remedy such discrimination. *Id.* at 988. The district court rejected the as-applied challenge concluding that Washington’s implementation of the program comported with the federal requirements and the state was not required to demonstrate that its minority preference program independently satisfied strict scrutiny. *Id.* Plaintiff appealed to the Ninth Circuit Court of Appeals. *Id.*

The Ninth Circuit considered whether the TEA-21, which authorizes the use of race- and gender-based preferences in federally-funded transportation contracts, violated equal protection, either on its face or as applied by the State of Washington.

The court applied a strict scrutiny analysis to both the facial and as-applied challenges to TEA-21. *Id.* at 990-91. The court did not apply a separate intermediate scrutiny analysis to the gender-based classifications because it determined that it “would not yield a different result.” *Id.* at 990, n. 6.

Facial challenge (Federal Government). The court first noted that the federal government has a compelling interest in “ensuring that its funding is not distributed in a manner that perpetuates the effects of either public or private discrimination within the transportation contracting industry.” *Id.* at 991, citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989) and *Adarand Constructors, Inc. v. Slater* (“Adarand VII”), 228 F.3d 1147, 1176 (10th Cir. 2000). The court found that “[b]oth statistical and anecdotal evidence are relevant in identifying the existence of discrimination.” *Id.* at 991. The

court found that although Congress did not have evidence of discrimination against minorities in every state, such evidence was unnecessary for the enactment of nationwide legislation. *Id.* However, citing both the Eighth and Tenth Circuits, the court found that Congress had ample evidence of discrimination in the transportation contracting industry to justify TEA-21. *Id.* The court also found that because TEA-21 set forth flexible race-conscious measures to be used only when race-neutral efforts were unsuccessful, the program was narrowly tailored and thus satisfied strict scrutiny. *Id.* at 992-93. The court accordingly rejected plaintiff's facial challenge. *Id.*

As-applied challenge (State of Washington). Plaintiff alleged TEA-21 was unconstitutional as-applied because there was no evidence of discrimination in Washington's transportation contracting industry. *Id.* at 995. The State alleged that it was not required to independently demonstrate that its application of TEA-21 satisfied strict scrutiny. *Id.* The United States intervened to defend TEA-21's facial constitutionality, and "unambiguously conceded that TEA-21's race conscious measures can be constitutionally applied only in those states where the effects of discrimination are present." *Id.* at 996; see also Br. for the United States at 28 (April 19, 2004) ("DOT's regulations ... are designed to assist States in ensuring that race-conscious remedies are limited to only those jurisdictions where discrimination or its effects are a problem and only as a last resort when race-neutral relief is insufficient." (emphasis in original)).

The court found that the Eighth Circuit was the only other court to consider an as-applied challenge to TEA-21 in *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d 964 (8th Cir. 2003), *cert. denied* 124 S. Ct. 2158 (2004). *Id.* at 996. The Eighth Circuit did not require Minnesota and Nebraska to identify a compelling purpose for their programs independent of Congress's nationwide remedial objective. *Id.* However, the Eighth Circuit did consider whether the states' implementation of TEA-21 was narrowly tailored to achieve Congress's remedial objective. *Id.* The Eighth Circuit thus looked to the states' independent evidence of discrimination because "to be narrowly tailored, a *national* program must be limited to those parts of the country where its race-based measures are demonstrably needed." *Id.* (internal citations omitted). The Eighth Circuit relied on the states' statistical analyses of the availability and capacity of DBEs in their local markets conducted by outside consulting firms to conclude that the states satisfied the narrow tailoring requirement. *Id.* at 997.

The court concurred with the Eighth Circuit and found that Washington did not need to demonstrate a compelling interest for its DBE program, independent from the compelling nationwide interest identified by Congress. *Id.* However, the court determined that the district court erred in holding that mere compliance with the federal program satisfied strict scrutiny. *Id.* Rather, the court held that whether Washington's DBE program was narrowly tailored was dependent on the presence or absence of discrimination in Washington's transportation contracting industry. *Id.* at 997-98. "If no such discrimination is present in Washington, then the State's DBE program does not serve a remedial purpose; it instead provides an unconstitutional windfall to minority contractors solely on the basis of their race or sex." *Id.* at 998. The court held that a Sixth Circuit decision to the contrary, *Tennessee Asphalt Co. v. Farris*, 942 F.2d 969, 970 (6th Cir. 1991), misinterpreted earlier case law. *Id.* at 997, n. 9.

The court found that moreover, even where discrimination is present in a state, a program is narrowly tailored only if it applies only to those minority groups who have actually suffered discrimination. *Id.* at 998, *citing Croson*, 488 U.S. at 478. The court also found that in *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 713 (9th Cir. 1997), it had “previously expressed similar concerns about the haphazard inclusion of minority groups in affirmative action programs ostensibly designed to remedy the effects of discrimination.” *Id.* In *Monterey Mechanical*, the court held that “the overly inclusive designation of benefited minority groups was a ‘red flag signaling that the statute is not, as the Equal Protection Clause requires, narrowly tailored.’” *Id.*, *citing Monterey Mechanical*, 125 F.3d at 714. The court found that other courts are in accord. *Id.* at 998-99, *citing Builders Ass’n of Greater Chi. v. County of Cook*, 256 F.3d 642, 647 (7th Cir. 2001); *Associated Gen. Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 737 (6th Cir. 2000); *O’Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 427 (D.C. Cir. 1992). Accordingly, the court found that each of the principal minority groups benefited by WSDOT’s DBE program must have suffered discrimination within the State. *Id.* at 999.

The court found that WSDOT’s program closely tracked the sample USDOT DBE program. *Id.* WSDOT calculated its DBE participation goal by first calculating the availability of ready, willing and able DBEs in the State (dividing the number of transportation contracting firms in the Washington State Office of Minority, Women and Disadvantaged Business Enterprises Directory by the total number of transportation contracting firms listed in the Census Bureau’s Washington database, which equaled 11.17%). *Id.* WSDOT then upwardly adjusted the 11.17 percent base figure to 14 percent “to account for the proven capacity of DBEs to perform work, as reflected by the volume of work performed by DBEs [during a certain time period].” *Id.* Although DBEs performed 18 percent of work on State projects during the prescribed time period, Washington set the final adjusted figure at 14 percent because TEA-21 reduced the number of eligible DBEs in Washington by imposing more stringent certification requirements. *Id.* at 999, n. 11. WSDOT did not make an adjustment to account for discriminatory barriers in obtaining bonding and financing. *Id.* WSDOT similarly did not make any adjustment to reflect present or past discrimination “because it lacked any statistical studies evidencing such discrimination.” *Id.*

WSDOT then determined that it needed to achieve 5 percent of its 14 percent goal through race-conscious means based on a 9 percent DBE participation rate on state-funded contracts that did not include affirmative action components (i.e., 9% participation could be achieved through race-neutral means). *Id.* at 1000. The USDOT approved WSDOT goal-setting program and the totality of its 2000 DBE program. *Id.*

Washington conceded that it did not have statistical studies to establish the existence of past or present discrimination. *Id.* It argued, however, that it had evidence of discrimination because minority-owned firms had the capacity to perform 14 percent of the State’s transportation contracts in 2000 but received only 9 percent of the subcontracting funds on contracts that did not include an affirmative action’s component. *Id.* The court found that the State’s methodology was flawed because the 14 percent figure was based on the earlier 18 percent figure, discussed *supra*, which included contracts with affirmative action components. *Id.* The court concluded that the 14 percent figure did not accurately reflect the performance capacity of DBEs in a race-neutral market. *Id.* The court also found the State conceded as much to the district court. *Id.*

The court held that a disparity between DBE performance on contracts with an affirmative action component and those without “does not provide any evidence of discrimination against DBEs.” *Id.* The court found that the only evidence upon which Washington could rely was the disparity between the proportion of DBE firms in the State (11.17%) and the percentage of contracts awarded to DBEs on race-neutral grounds (9%). *Id.* However, the court determined that such evidence was entitled to “little weight” because it did not take into account a multitude of other factors such as firm size. *Id.*

Moreover, the court found that the minimal statistical evidence was insufficient evidence, standing alone, of discrimination in the transportation contracting industry. *Id.* at 1001. The court found that WSDOT did not present any anecdotal evidence. *Id.* The court rejected the State’s argument that the DBE applications themselves constituted evidence of past discrimination because the applications were not properly in the record, and because the applicants were not required to certify that they had been victims of discrimination in the contracting industry. *Id.* Accordingly, the court held that because the State failed to proffer evidence of discrimination within its own transportation contracting market, its DBE program was not narrowly tailored to Congress’s compelling remedial interest. *Id.* at 1002-03.

The court affirmed the district court’s grant on summary judgment to the United States regarding the facial constitutionality of TEA-21, reversed the grant of summary judgment to Washington on the as-applied challenge, and remanded to determine the State’s liability for damages.

The dissent argued that where the State complied with TEA-21 in implementing its DBE program, it was not susceptible to an as-applied challenge.

9. *Western States Paving Co. v. Washington DOT, USDOT & FHWA*, 2006 WL 1734163, (W.D. Wash. June 23, 2006) (unpublished opinion)

This case was before the district court pursuant to the Ninth Circuit’s remand order in *Western States Paving Co. v. Washington DOT, USDOT, and FHWA*, 407 F.3d 983 (9th Cir. 2005), *cert. denied*, 546 U.S. 1170 (2006). In this decision, the district court adjudicated cross Motions for Summary Judgment on plaintiff’s claim for injunction and for damages under 42 U.S.C. §§1981, 1983, and §2000d.

Because the WSDOT voluntarily discontinued its DBE program after the Ninth Circuit decision, *supra*, the district court dismissed plaintiff’s claim for injunctive relief as moot. The court found “it is absolutely clear in this case that WSDOT will not resume or continue the activity the Ninth Circuit found unlawful in *Western States*,” and cited specifically to the informational letters WSDOT sent to contractors informing them of the termination of the program.

Second, the court dismissed Western States Paving’s claims under 42 U.S.C. §§ 1981, 1983, and 2000d against Clark County and the City of Vancouver holding neither the City nor the County acted with the requisite discriminatory intent. The court held the County and the City were merely implementing the WSDOT’s unlawful DBE program and their actions in this respect were involuntary and required no independent activity. The court also noted that the County and the City were not parties to the precise discriminatory actions at issue in the case, which occurred due to the conduct of the “State defendants.” Specifically, the WSDOT — and not the County or the City — developed the DBE program without sufficient anecdotal and statistical evidence, and improperly

relied on the affidavits of contractors seeking DBE certification “who averred that they had been subject to ‘general societal discrimination.’”

Third, the court dismissed plaintiff’s 42 U.S.C. §§ 1981 and 1983 claims against WSDOT, finding them barred by the Eleventh Amendment sovereign immunity doctrine. However, the court allowed plaintiff’s 42 U.S.C. §2000d claim to proceed against WSDOT because it was not similarly barred. The court held that Congress had conditioned the receipt of federal highway funds on compliance with Title VI (42 U.S.C. § 2000d et seq.) and the waiver of sovereign immunity from claims arising under Title VI. Section 2001 specifically provides that “a State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of ... Title VI.” The court held that this language put the WSDOT on notice that it faced private causes of action in the event of noncompliance.

The court held that WSDOT’s DBE program was not narrowly tailored to serve a compelling government interest. The court stressed that discriminatory intent is an essential element of a plaintiff’s claim under Title VI. The WSDOT argued that even if sovereign immunity did not bar plaintiff’s §2000d claim, WSDOT could be held liable for damages because there was no evidence that WSDOT staff knew of or consciously considered plaintiff’s race when calculating the annual utilization goal. The court held that since the policy was not “facially neutral” — and was in fact “specifically race conscious” — any resulting discrimination was therefore intentional, whether the reason for the classification was benign or its purpose remedial. As such, WSDOT’s program was subject to strict scrutiny.

In order for the court to uphold the DBE program as constitutional, WSDOT had to show that the program served a compelling interest and was narrowly tailored to achieve that goal. The court found that the Ninth Circuit had already concluded that the program was not narrowly tailored, and the record was devoid of any evidence suggesting that minorities currently suffer or have suffered discrimination in the Washington transportation contracting industry. The court therefore denied WSDOT’s Motion for Summary Judgment on the §2000d claim. The remedy available to Western States remains for further adjudication and the case is currently pending.

10. *Associated Gen. Contractors of California, Inc. v. Coalition for Econ. Equity (“AGCC”), 950 F.2d 1401 (9th Cir. 1991)*

In *Associated Gen. Contractors of California, Inc. v. Coalition for Econ. Equity (“AGCC”)*, the Ninth Circuit Court of Appeals denied plaintiffs request for preliminary injunction to enjoin enforcement of the city’s bid preference program. 950 F.2d 1401 (9th Cir. 1991). Although an older case, *AGCC* is instructive as to the analysis conducted by the Ninth Circuit. The court discussed the utilization of statistical evidence and anecdotal evidence in the context of the strict scrutiny analysis. *Id.* at 1413-18.

The City of San Francisco adopted an ordinance in 1989 providing bid preferences to prime contractors who were members of groups found disadvantaged by previous bidding practices, and specifically provided a 5 percent bid preference for LBEs, WBEs and MBEs. 950 F.2d at 1405. Local MBEs and WBEs were eligible for a 10 percent total bid preference, representing the cumulative total of the 5 percent preference given Local Business Enterprises (“LBEs”) and the 5 percent preference given MBEs and WBEs. *Id.* The ordinance defined “MBE” as an economically disadvantaged business that was owned and controlled by one or more minority persons, which were

defined to include Asian, blacks and Latinos. “WBE” was defined as an economically disadvantaged business that was owned and controlled by one or more women. Economically disadvantaged was defined as a business with average gross annual receipts that did not exceed \$14 million. *Id.*

The Motion for Preliminary Injunction challenged the constitutionality of the MBE provisions of the 1989 Ordinance insofar as it pertained to Public Works construction contracts. *Id.* at 1405. The district court denied the Motion for Preliminary Injunction on the AGCC’s constitutional claim on the ground that AGCC failed to demonstrate a likelihood of success on the merits. *Id.* at 1412.

The Ninth Circuit Court of Appeals applied the strict scrutiny analysis following the decision of the U.S. Supreme Court in *City of Richmond v. Croson*. The court stated that according to the U.S. Supreme Court in *Croson*, a municipality has a compelling interest in redressing, not only discrimination committed by the municipality itself, but also discrimination committed by private parties within the municipalities’ legislative jurisdiction, so long as the municipality in some way perpetuated the discrimination to be remedied by the program. *Id.* at 1412-13, *citing Croson* at 488 U.S. at 491-92, 537-38. To satisfy this requirement, “the governmental actor need not be an active perpetrator of such discrimination; passive participation will satisfy this sub-part of strict scrutiny review.” *Id.* at 1413, *quoting Coral Construction Company v. King County*, 941 F.2d 910 at 916 (9th Cir. 1991). In addition, the [m]ere infusion of tax dollars into a discriminatory industry may be sufficient governmental involvement to satisfy this prong.” *Id.* at 1413 *quoting Coral Construction*, 941 F.2d at 916.

The court pointed out that the City had made detailed findings of prior discrimination in construction and building within its borders, had testimony taken at more than ten public hearings and received numerous written submissions from the public as part of its anecdotal evidence. *Id.* at 1414. The City Departments continued to discriminate against MBEs and WBEs and continued to operate under the “old boy network” in awarding contracts, thereby disadvantaging MBEs and WBEs. *Id.* And, the City found that large statistical disparities existed between the percentage of contracts awarded to MBEs and the percentage of available MBEs. 950 F.2d at 1414. The court stated the City also found “discrimination in the private sector against MBEs and WBEs that is manifested in and exacerbated by the City’s procurement practices.” *Id.* at 1414.

The Ninth Circuit found the study commissioned by the City indicated the existence of large disparities between the award of city contracts to available nonminority businesses and to MBEs. *Id.* at 1414. Using the City and County of San Francisco as the “relevant market,” the study compared the number of available MBE prime construction contractors in San Francisco with the amount of contract dollars awarded by the City to San Francisco-based MBEs for a particular year. *Id.* at 1414. The study found that available MBEs received far fewer city contracts in proportion to their numbers than their available nonminority counterparts. *Id.* Specifically, the study found that with respect to prime construction contracting, disparities between the number of available local Asian-, black- and Hispanic-owned firms and the number of contracts awarded to such firms were statistically significant and supported an inference of discrimination. *Id.* For example, in prime contracting for construction, although MBE availability was determined to be at 49.5 percent, MBE dollar participation was only 11.1 percent. *Id.* The Ninth Circuit stated that in its decision in *Coral Construction*, it emphasized that such statistical disparities are “an invaluable tool and demonstrating the discrimination necessary to establish a compelling interest. *Id.* at 1414, *citing to Coral Construction*, 941 F.2d at 918 and *Croson*, 488 U.S. at 509.

The court noted that the record documents a vast number of individual accounts of discrimination, which bring “the cold numbers convincingly to life. *Id.* at 1414, *quoting Coral Construction*, 941 F.2d at 919. These accounts include numerous reports of MBEs being denied contracts despite being the low bidder, MBEs being told they were not qualified although they were later found qualified when evaluated by outside parties, MBEs being refused work even after they were awarded contracts as low bidder, and MBEs being harassed by city personnel to discourage them from bidding on city contracts. *Id.* at 1415. The City pointed to numerous individual accounts of discrimination, that an “old boy network” still exists, and that racial discrimination is still prevalent within the San Francisco construction industry. *Id.* The court found that such a “combination of convincing anecdotal and statistical evidence is potent.” *Id.* at 1415 *quoting Coral Construction*, 941 F.2d at 919.

The court also stated that the 1989 Ordinance applies only to resident MBEs. The City, therefore, according to the court, appropriately confined its study to the city limits in order to focus on those whom the preference scheme targeted. *Id.* at 1415. The court noted that the statistics relied upon by the City to demonstrate discrimination in its contracting processes considered only MBEs located within the City of San Francisco. *Id.*

The court pointed out the City’s findings were based upon dozens of specific instances of discrimination that are laid out with particularity in the record, as well as the significant statistical disparities in the award of contracts. The court noted that the City must simply demonstrate the existence of past discrimination with specificity, but there is no requirement that the legislative findings specifically detail each and every incidence that the legislative body has relied upon in support of this decision that affirmative action is necessary. *Id.* at 1416.

In its analysis of the “narrowly tailored” requirement, the court focused on three characteristics identified by the decision in *Croson* as indicative of narrow tailoring. First, an MBE program should be instituted either after, or in conjunction with, race-neutral means of increasing minority business participation in public contracting. *Id.* at 1416. Second, the plan should avoid the use of “rigid numerical quotas.” *Id.* According to the Supreme Court, systems that permit waiver in appropriate cases and therefore require some individualized consideration of the applicants pose a lesser danger of offending the Constitution. *Id.* Mechanisms that introduce flexibility into the system also prevent the imposition of a disproportionate burden on a few individuals. *Id.* Third, “an MBE program must be limited in its effective scope to the boundaries of the enacting jurisdiction. *Id.* at 1416 *quoting Coral Construction*, 941 F.2d at 922.

The court found that the record showed the City considered, but rejected as not viable, specific race-neutral alternatives including a fund to assist newly established MBEs in meeting bonding requirements. The court stated that “while strict scrutiny requires serious, good faith consideration of race-neutral alternatives, strict scrutiny does not require exhaustion of every possible such alternative ... however irrational, costly, unreasonable, and unlikely to succeed such alternative may be.” *Id.* at 1417 *quoting Coral Construction*, 941 F.2d at 923. The court found the City ten years before had attempted to eradicate discrimination in city contracting through passage of a race-neutral ordinance that prohibited city contractors from discriminating against their employees on the basis of race and required contractors to take steps to integrate their work force; and that the City made and continues to make efforts to enforce the anti-discrimination ordinance. *Id.* at 1417. The court stated inclusion

of such race-neutral measures is one factor suggesting that an MBE plan is narrowly tailored. *Id.* at 1417.

The court also found that the Ordinance possessed the requisite flexibility. Rather than a rigid quota system, the City adopted a more modest system according to the court, that of bid preferences. *Id.* at 1417. The court pointed out that there were no goals, quotas, or set-asides and moreover, the plan remedies only specifically identified discrimination: the City provides preferences only to those minority groups found to have previously received a lower percentage of specific types of contracts than their availability to perform such work would suggest. *Id.* at 1417.

The court rejected the argument of AGCC that to pass constitutional muster any remedy must provide redress only to specific individuals who have been identified as victims of discrimination. *Id.* at 1417, n. 12. The Ninth Circuit agreed with the district court that an iron-clad requirement limiting any remedy to individuals personally proven to have suffered prior discrimination would render any race-conscious remedy “superfluous,” and would thwart the Supreme Court’s directive in *Croson* that race-conscious remedies may be permitted in some circumstances. *Id.* at 1417, n. 12. The court also found that the burdens of the bid preferences on those not entitled to them appear “relatively light and well distributed.” *Id.* at 1417. The court stated that the Ordinance was “limited in its geographical scope to the boundaries of the enacting jurisdiction. *Id.* at 1418, quoting *Coral Construction*, 941 F.2d at 925. The court found that San Francisco had carefully limited the ordinance to benefit only those MBEs located within the City’s borders. *Id.* 1418.

11. *Coral Construction Co. v. King County*, 941 F.2d 910 (9th Cir. 1991)

In *Coral Construction Co. v. King County*, 941 F.2d 910 (9th Cir. 1991), the Ninth Circuit examined the constitutionality of King County, Washington’s minority and women business set-aside program in light of the standard set forth in *City of Richmond v. J.A. Croson Co.* The court held that although the County presented ample anecdotal evidence of disparate treatment of MBE contractors and subcontractors, the total absence of pre-program enactment statistical evidence was problematic to the compelling government interest component of the strict scrutiny analysis. The court remanded to the district court for a determination of whether the post-program enactment studies constituted a sufficient compelling government interest. Per the narrow tailoring prong of the strict scrutiny test, the court found that although the program included race-neutral alternative measures and was flexible (i.e., included a waiver provision), the over breadth of the program to include MBEs outside of King County was fatal to the narrow tailoring analysis.

The court also remanded on the issue of whether the plaintiffs were entitled to damages under 42 U.S.C. §§ 1981 and 1983, and in particular to determine whether evidence of causation existed. With respect to the WBE program, the court held the plaintiff had standing to challenge the program, and applying the intermediate scrutiny analysis, held the WBE program survived the facial challenge.

In finding the absence of any statistical data in support of the County’s MBE Program, the court made it clear that statistical analyses have served and will continue to serve an important role in cases in which the existence of discrimination is a disputed issue. 941 F.2d at 918. The court noted that it has repeatedly approved the use of statistical proof to establish a prima facie case of discrimination. *Id.* The court pointed out that the U.S. Supreme Court in *Croson* held that where “gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or

practice of discrimination.” *Id.* at 918, quoting *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08, and *Croson*, 488 U.S. at 501.

The court points out that statistical evidence may not fully account for the complex factors and motivations guiding employment decisions, many of which may be entirely race-neutral. *Id.* at 919. The court noted that the record contained a plethora of anecdotal evidence, but that anecdotal evidence, standing alone, suffers the same flaws as statistical evidence. *Id.* at 919. While anecdotal evidence may suffice to prove individual claims of discrimination, rarely, according to the court, if ever, can such evidence show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan. *Id.*

Nonetheless, the court held that the combination of convincing anecdotal and statistical evidence is potent. *Id.* at 919. The court pointed out that individuals who testified about their personal experiences brought the cold numbers of statistics “convincingly to life.” *Id.* at 919, quoting *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 339 (1977). The court also pointed out that the Eleventh Circuit Court of Appeals, in passing upon a minority set aside program similar to the one in King County, concluded that the testimony regarding complaints of discrimination combined with the gross statistical disparities uncovered by the County studies provided more than enough evidence on the question of prior discrimination and need for racial classification to justify the denial of a Motion for Summary Judgment. *Id.* at 919, citing *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 916 (11th Cir. 1990).

The court found that the MBE Program of the County could not stand without a proper statistical foundation. *Id.* at 919. The court addressed whether post-enactment studies done by the County of a statistical foundation could be considered by the court in connection with determining the validity of the County MBE Program. The court held that a municipality must have *some* concrete evidence of discrimination in a particular industry before it may adopt a remedial program. *Id.* at 920. However, the court said this requirement of *some* evidence does not mean that a program will be automatically struck down if the evidence before the municipality at the time of enactment does not completely fulfill both prongs of the strict scrutiny test. *Id.* Rather, the court held, the factual predicate for the program should be evaluated based upon all evidence presented to the district court, whether such evidence was adduced before or after enactment of the MBE Program. *Id.* Therefore, the court adopted a rule that a municipality should have before it some evidence of discrimination before adopting a race-conscious program, while allowing post-adoption evidence to be considered in passing on the constitutionality of the program. *Id.*

The court, therefore, remanded the case to the district court for determination of whether the consultant studies that were performed after the enactment of the MBE Program could provide an adequate factual justification to establish a “propelling government interest” for King County’s adopting the MBE Program. *Id.* at 922.

The court also found that *Croson* does not require a showing of active discrimination by the enacting agency, and that passive participation, such as the infusion of tax dollars into a discriminatory industry, suffices. *Id.* at 922, citing *Croson*, 488 U.S. at 492. The court pointed out that the Supreme Court in *Croson* concluded that if the City had evidence before it, that nonminority contractors were systematically excluding minority businesses from subcontracting opportunities, it could take action to end the discriminatory exclusion. *Id.* at 922. The court points out that if the record ultimately

supported a finding of systemic discrimination, the County adequately limited its program to those businesses that receive tax dollars, and the program imposed obligations upon only those businesses which voluntarily sought King County tax dollars by contracting with the County. *Id.*

The court addressed several factors in terms of the narrowly tailored analysis, and found that first, an MBE program should be instituted either after, or in conjunction with, race-neutral means of increasing minority business participation and public contracting. *Id.* at 922, *citing Croson*, 488 U.S. at 507. The second characteristic of the narrowly-tailored program, according to the court, is the use of minority utilization goals on a case-by-case basis, rather than upon a system of rigid numerical quotas. *Id.* Finally, the court stated that an MBE program must be limited in its effective scope to the boundaries of the enacting jurisdiction. *Id.*

Among the various narrowly tailored requirements, the court held consideration of race-neutral alternatives is among the most important. *Id.* at 922. Nevertheless, the court stated that while strict scrutiny requires serious, good faith consideration of race-neutral alternatives, strict scrutiny does not require exhaustion of every possible such alternative. *Id.* at 923. The court noted that it does not intend a government entity exhaust *every* alternative, however irrational, costly, unreasonable, and unlikely to succeed such alternative might be. *Id.* Thus, the court required only that a state exhausts race-neutral measures that the state is authorized to enact, and that have a reasonable possibility of being effective. *Id.* The court noted in this case the County considered alternatives, but determined that they were not available as a matter of law. *Id.* The County cannot be required to engage in conduct that may be illegal, nor can it be compelled to expend precious tax dollars on projects where potential for success is marginal at best. *Id.*

The court noted that King County had adopted some race-neutral measures in conjunction with the MBE Program, for example, hosting one or two training sessions for small businesses, covering such topics as doing business with the government, small business management, and accounting techniques. *Id.* at 923. In addition, the County provided information on assessing Small Business Assistance Programs. *Id.* The court found that King County fulfilled its burden of considering race-neutral alternative programs. *Id.*

A second indicator of a program's narrowly tailoring is program flexibility. *Id.* at 924. The court found that an important means of achieving such flexibility is through use of case-by-case utilization goals, rather than rigid numerical quotas or goals. *Id.* at 924. The court pointed out that King County used a "percentage preference" method, which is not a quota, and while the preference is locked at 5 percent, such a fixed preference is not unduly rigid in light of the waiver provisions. The court found that a valid MBE Program should include a waiver system that accounts for both the availability of qualified MBEs and whether the qualified MBEs have suffered from the effects of past discrimination by the County or prime contractors. *Id.* at 924. The court found that King County's program provided waivers in both instances, including where neither minority nor a woman's business is available to provide needed goods or services and where available minority and/or women's businesses have given price quotes that are unreasonably high. *Id.*

The court also pointed out other attributes of the narrowly tailored and flexible MBE program, including a bidder that does not meet planned goals, may nonetheless be awarded the contract by demonstrating a good faith effort to comply. *Id.* The actual percentages of required MBE participation are determined on a case-by-case basis. Levels of participation may be reduced if the

prescribed levels are not feasible, if qualified MBEs are unavailable, or if MBE price quotes are not competitive. *Id.*

The court concluded that an MBE program must also be limited in its geographical scope to the boundaries of the enacting jurisdiction. *Id.* at 925. Here the court held that King County’s MBE program fails this third portion of “narrowly tailored” requirement. The court found the definition of “minority business” included in the Program indicated that a minority-owned business may qualify for preferential treatment if the business has been discriminated against in the particular geographical areas in which it operates. The court held this definition as overly broad. *Id.* at 925. The court held that the County should ask the question whether a business has been discriminated against in King County. *Id.* This determination, according to the court, is not an insurmountable burden for the County, as the rule does not require finding specific instances of discriminatory exclusion for each MBE. *Id.* Rather, if the County successfully proves malignant discrimination within the King County business community, an MBE would be presumptively eligible for relief if it had previously sought to do business in the County. *Id.*

In other words, if systemic discrimination in the County is shown, then it is fair to presume that an MBE was victimized by the discrimination. *Id.* at 925. For the presumption to attach to the MBE, however, it must be established that the MBE is, or attempted to become, an active participant in the County’s business community. *Id.* Because King County’s program permitted MBE participation even by MBEs that have no prior contact with King County, the program was overbroad to that extent. *Id.* Therefore, the court reversed the grant of summary judgment to King County on the MBE program on the basis that it was geographically overbroad.

The court considered the gender-specific aspect of the MBE program. The court determined the degree of judicial scrutiny afforded gender-conscious programs was intermediate scrutiny, rather than strict scrutiny. *Id.* at 930. Under intermediate scrutiny, gender-based classification must serve an important governmental objective, and there must be a direct, substantial relationship between the objective and the means chosen to accomplish the objective. *Id.* at 931.

In this case, the court concluded, that King County’s WBE preference survived a facial challenge. *Id.* at 932. The court found that King County had a legitimate and important interest in remedying the many disadvantages that confront women business owners and that the means chosen in the program were substantially related to the objective. *Id.* The court found the record adequately indicated discrimination against women in the King County construction industry, noting the anecdotal evidence including an affidavit of the president of a consulting engineering firm. *Id.* at 933. Therefore, the court upheld the WBE portion of the MBE program and affirmed the district court’s grant of summary judgment to King County for the WBE program.

E. Recent Decisions Involving the Federal DBE Program and its Implementation in Other Jurisdictions

There are several recent and pending cases involving challenges to the United States Federal DBE Program and its implementation by the states and their governmental entities for federally-funded projects. These cases could have a significant impact on the nature and provisions of contracting and procurement on federally-funded projects, including and relating to the utilization of DBEs. In

addition, these cases provide an instructive analysis of the recent application of the strict scrutiny test to MBE/WBE- and DBE-type programs.

Recent Decisions in Federal Circuit Courts of Appeal

1. *Midwest Fence Corporation v. U.S. Department of Transportation, Illinois Department of Transportation, Illinois State Toll Highway Authority*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016), cert. denied, 2017 WL 497345 (2017).

Plaintiff Midwest Fence Corporation is a guardrails and fencing specialty contractor that usually bids on projects as a subcontractor. 2016 WL 6543514 at *1. Midwest Fence is not a DBE. *Id.* Midwest Fence alleges that the defendants' DBE programs violated its Fourteenth Amendment right to equal protection under the law, and challenges the United States DOT Federal DBE Program and the implementation of the Federal DBE Program by the Illinois DOT (IDOT). *Id.* Midwest Fence also challenges the Illinois State Toll Highway Authority (Tollway) and its implementation of its DBE Program. *Id.*

The district court granted all the defendants' motions for summary judgment. *Id.* at *1. *See Midwest Fence Corp. v. U.S. Department of Transportation, et al.*, 84 F. Supp. 3d 705 (N.D. Ill. 2015) (*see* discussion of district court decision below). The Seventh Circuit Court of Appeals affirmed the grant of summary judgment by the district court. *Id.* The court held that it joins the other federal circuit courts of appeal in holding that the Federal DBE Program is facially constitutional, the program serves a compelling government interest in remedying a history of discrimination in highway construction contracting, the program provides states with ample discretion to tailor their DBE programs to the realities of their own markets and requires the use of race- and gender-neutral measures before turning to race- and gender-conscious measures. *Id.*

The court of appeals also held the IDOT and Tollway programs survive strict scrutiny because these state defendants establish a substantial basis in evidence to support the need to remedy the effects of past discrimination in their markets, and the programs are narrowly tailored to serve that remedial purpose. *Id.* at *1.

Procedural history. Midwest Fence asserted the following primary theories in its challenge to the Federal DBE Program, IDOT's implementation of it, and the Tollway's own program:

1. The federal regulations prescribe a method for setting individual contract goals that places an undue burden on non-DBE subcontractors, especially certain kinds of subcontractors, including guardrail and fencing contractors like Midwest Fence.
2. The presumption of social and economic disadvantage is not tailored adequately to reflect differences in the circumstances actually faced by women and the various racial and ethnic groups who receive that presumption.
3. The federal regulations are unconstitutionally vague, particularly with respect to good faith efforts to justify a front-end waiver.

Id. at *3-4. Midwest Fence also asserted that IDOT’s implementation of the Federal DBE Program is unconstitutional for essentially the same reasons. And, Midwest Fence challenges the Tollway’s program on its face and as applied. *Id.* at *4.

The district court found that Midwest Fence had standing to bring most of its claims and on the merits, and the court upheld the facial constitutionality of the Federal DBE Program. 84 F. Supp. 3d at 722-23 729; *id.* at *4.

The district court also concluded Midwest Fence did not rebut the evidence of discrimination that IDOT offered to justify its program, and Midwest Fence had presented no “affirmative evidence” that IDOT’s implementation unduly burdened non-DBEs, failed to make use of race-neutral alternatives, or lacked flexibility. 84 F. Supp. 3d at 733, 737; *id.* at *4.

The district court noted that Midwest Fence’s challenge to the Tollway’s program paralleled the challenge to IDOT’s program, and concluded that the Tollway, like IDOT, had established a strong basis in evidence for its program. 84 F. Supp. 3d at 737, 739; *id.* at *4. In addition, the court concluded that, like IDOT’s program, the Tollway’s program imposed a minimal burden on non-DBEs, employed a number of race-neutral measures, and offered substantial flexibility. 84 F. Supp. 3d at 739-740; *id.* at *4.

Standing to challenge the DBE Programs generally. The defendants argued that Midwest Fence lacked standing. The court of appeals held that the district court correctly found that Midwest Fence has standing. *Id.* at *5. The court of appeals stated that by alleging and then offering evidence of lost bids, decreased revenue, difficulties keeping its business afloat as a result of the DBE program, and its inability to compete for contracts on an equal footing with DBEs, Midwest Fence showed both causation and redressability. *Id.* at *5.

The court of appeals distinguished its ruling in the *Dunnet Bay Construction Co. v. Borggren*, 799 F. 3d 676 (7th Cir. 2015), holding that there was no standing for the plaintiff Dunnet Bay based on an unusual and complex set of facts under which it would have been impossible for the plaintiff Dunnet Bay to have won the contract it sought and for which it sought damages. IDOT did not award the contract to anyone under the first bid and had re-let the contract, thus Dunnet Bay suffered no injury because of the DBE program in the first bid. *Id.* at *5. The court of appeals held this case is distinguishable from *Dunnet Bay* because Midwest Fence seeks prospective relief that would enable it to compete with DBEs on an equal basis more generally than in *Dunnet Bay*. *Id.* at *5.

Standing to challenge the IDOT Target Market Program. The district court had carved out one narrow exception to its finding that Midwest Fence had standing generally, finding that Midwest Fence lacked standing to challenge the IDOT “target market program.” *Id.* at *6. The court of appeals found that no evidence in the record established Midwest Fence bid on or lost any contracts subject to the IDOT target market program. *Id.* at *6. The court stated that IDOT had not set aside any guardrail and fencing contracts under the target market program. *Id.* Therefore, Midwest Fence did not show that it had suffered from an inability to compete on an equal footing in the bidding process with respect to contracts within the target market program. *Id.*

Facial versus as-applied challenge to the USDOT Program. In this appeal, Midwest Fence did not challenge whether USDOT had established a “compelling interest” to remedy the effects of past or present discrimination. Thus, it did not challenge the national compelling interest in remedying past discrimination in its claims against the Federal DBE Program. *Id.* at *6. Therefore, the court of appeals focused on whether the federal program is narrowly tailored. *Id.*

First, the court addressed a preliminary issue, namely, whether Midwest Fence could maintain an as-applied challenge against USDOT and the Federal DBE Program or whether, as the district court held, the claim against USDOT is limited to a facial challenge. *Id.* Midwest Fence sought a declaration that the federal regulations are unconstitutional as applied in Illinois. *Id.* The district court rejected the attempt to bring that claim against USDOT, treating it as applying only to IDOT. *Id.* at *6 *citing Midwest Fence*, 84 F. Supp. 3d at 718. The court of appeals agreed with the district court. *Id.*

The court of appeals pointed out that a principal feature of the federal regulations is their flexibility and adaptability to local conditions, and that flexibility is important to the constitutionality of the Federal DBE Program, including because a race- and gender-conscious program must be narrowly tailored to serve the compelling governmental interest. *Id.* at *6. The flexibility in regulations, according to the court, makes the state, not USDOT, primarily responsible for implementing their own programs in ways that comply with the Equal Protection Clause. *Id.* at *6. The court said that a state, not USDOT, is the correct party to defend a challenge to its implementation of its program. *Id.* Thus, the court held the district court did not err by treating the claims against USDOT as only a facial challenge to the federal regulations. *Id.*

Federal DBE Program: Narrow Tailoring. The Seventh Circuit noted that the Eighth, Ninth, and Tenth Circuits all found the Federal DBE Program constitutional on its face, and the Seventh Circuit agreed with these other circuits. *Id.* at *7. The court found that narrow tailoring requires “a close match between the evil against which the remedy is directed and the terms of the remedy.” *Id.* The court stated it looks to four factors in determining narrow tailoring: (a) “the necessity for the relief and the efficacy of alternative [race-neutral] remedies,” (b) “the flexibility and duration of the relief, including the availability of waiver provisions,” (c) “the relationship of the numerical goals to the relevant labor [or here, contracting] market,” and (d) “the impact of the relief on the rights of third parties.” *Id.* at *7 *quoting United States v. Paradise*, 480 U.S. 149, 171 (1987). The Seventh Circuit also pointed out that the Tenth Circuit added to this analysis the question of over- or under-inclusiveness. *Id.* at *7.

In applying these factors to determine narrow tailoring, the court said that first, the Federal DBE Program requires states to meet as much as possible of their overall DBE participation goals through race- and gender-neutral means. *Id.* at *7, *citing* 49 C.F.R. § 26.51(a). Next, on its face, the federal program is both flexible and limited in duration. *Id.* Quotas are flatly prohibited, and states may apply for waivers, including waivers of “any provisions regarding administrative requirements, overall goals, contract goals or good faith efforts,” § 26.15(b). *Id.* at *7. The regulations also require states to remain flexible as they administer the program over the course of the year, including continually reassessing their DBE participation goals and whether contract goals are necessary. *Id.*

The court pointed out that a state need not set a contract goal on every USDOT-assisted contract, nor must they set those goals at the same percentage as the overall participation goal. *Id.* at *7. Together, the court found, all of these provisions allow for significant and ongoing flexibility. *Id.* at *8. States are not locked into their initial DBE participation goals. *Id.* Their use of contract goals is meant to remain fluid, reflecting a state’s progress towards overall DBE goal. *Id.*

As for duration, the court said that Congress has repeatedly reauthorized the program after taking new looks at the need for it. *Id.* at *8. And, as noted, states must monitor progress toward meeting DBE goals on a regular basis and alter the goals if necessary. *Id.* They must stop using race- and gender-conscious measures if those measures are no longer needed. *Id.*

The court found that the numerical goals are also tied to the relevant markets. *Id.* at *8. In addition, the regulations prescribe a process for setting a DBE participation goal that focuses on information about the specific market, and that it is intended to reflect the level of DBE participation you would expect absent the effects of discrimination. *Id.* at *8, *citing* § 26.45(b). The court stated that the regulations thus instruct states to set their DBE participation goals to reflect actual DBE availability in their jurisdictions, as modified by other relevant factors like DBE capacity. *Id.* at *8.

Midwest Fence “mismatch” argument: burden on third parties. Midwest Fence, the court said, focuses its criticism on the burden of third parties and argues the program is over-inclusive. *Id.* at *8. But, the court found, the regulations include mechanisms to minimize the burdens the program places on non-DBE third parties. *Id.* A primary example, the court points out, is supplied in § 26.33(a), which requires states to take steps to address overconcentration of DBEs in certain types of work if the overconcentration unduly burdens non-DBEs to the point that they can no longer participate in the market. *Id.* at *8. The court concluded that standards can be relaxed if uncompromising enforcement would yield negative consequences, for example, states can obtain waivers if special circumstances make the state’s compliance with part of the federal program “impractical,” and contractors who fail to meet a DBE contract goal can still be awarded the contract if they have documented good faith efforts to meet the goal. *Id.* at *8, *citing* § 26.51(a) and § 26.53(a)(2).

Midwest Fence argued that a “mismatch” in the way contract goals are calculated results in a burden that falls disproportionately on specialty subcontractors. *Id.* at *8. Under the federal regulations, the court noted, states’ overall goals are set as a percentage of all their USDOT-assisted contracts. *Id.* However, states may set contract goals “*only* on those [USDOT]-assisted contracts that have subcontracting possibilities.” *Id.*, *quoting* § 26.51(e)(1)(emphasis added).

Midwest Fence argued that because DBEs must be small, they are generally unable to compete for prime contracts, and this they argue is the “mismatch.” *Id.* at *8. Where contract goals are necessary to meet an overall DBE participation goal, those contract goals are met almost entirely with *subcontractor* dollars, which, Midwest Fence asserts, places a heavy burden on non-DBE subcontractors while leaving non-DBE prime contractors in the clear. *Id.* at *8.

The court goes through a hypothetical example to explain the issue Midwest Fence has raised as a mismatch that imposes a disproportionate burden on specialty subcontractors like Midwest Fence. *Id.* at *8. In the example provided by the court, the overall participation goal for a state calls for DBEs to receive a certain percentage of *total* funds, but in practice in the hypothetical it requires the state to award DBEs for less than all of the available subcontractor funds because it determines that there are no subcontracting possibilities on half the contracts, thus rendering them ineligible for contract goals. *Id.* The mismatch is that the federal program requires the state to set its overall goal on all funds it will spend on contracts, but at the same time the contracts eligible for contract goals must be ones that have subcontracting possibilities. *Id.* Therefore, according to Midwest Fence, in practice the participation goals set would require the state to award DBEs from the available subcontractor funds while taking no business away from the prime contractors. *Id.*

The court stated that it found “[t]his prospect is troubling.” *Id.* at *9. The court said that the DBE program can impose a disproportionate burden on small, specialized non-DBE subcontractors, especially when compared to larger prime contractors with whom DBEs would compete less frequently. *Id.* This potential, according to the court, for a disproportionate burden, however, does not render the program facially unconstitutional. *Id.* The court said that the constitutionality of the Federal DBE Program depends on how it is implemented. *Id.*

The court pointed out that some of the suggested race- and gender-neutral means that states can use under the federal program are designed to increase DBE participation in prime contracting and other fields where DBE participation has historically been low, such as specifically encouraging states to make contracts more accessible to small businesses. *Id.* at *9, *citing* § 26.39(b). The court also noted that the federal program contemplates DBEs’ ability to compete equally requiring states to report DBE participation as prime contractors and makes efforts to develop that potential. *Id.* at *9.

The court stated that states will continue to resort to contract goals that open the door to the type of mismatch that Midwest Fence describes, but the program on its face does not compel an unfair distribution of burdens. *Id.* at *9. Small specialty contractors may have to bear at least some of the burdens created by remedying past discrimination under the Federal DBE Program, but the Supreme Court has indicated that innocent third parties may constitutionally be required to bear at least some of the burden of the remedy. *Id.* at *9.

Over-Inclusive argument. Midwest Fence also argued that the federal program is over-inclusive because it grants preferences to groups without analyzing the extent to which each group is actually disadvantaged. *Id.* at *9. In response, the court mentioned two federal-specific arguments, noting that Midwest Fence’s criticisms are best analyzed as part of its as-applied challenge against the state defendants. *Id.* First, Midwest Fence contends nothing proves that the disparities relied upon by the study consultant were caused by discrimination. *Id.* at *9. The court found that to justify its program, USDOT does not need definitive proof of discrimination, but must have a strong basis in evidence that remedial action is necessary to remedy past discrimination. *Id.*

Second, Midwest Fence attacks what it perceives as the one-size-fits-all nature of the program, suggesting that the regulations ought to provide different remedies for different groups, but instead the federal program offers a single approach to all the disadvantaged groups, regardless of the degree of disparities. *Id.* at *9. The court pointed out Midwest Fence did not argue that any of the groups were not in fact disadvantaged at all, and that the federal regulations ultimately require individualized

determinations. *Id.* at *10. Each presumptively disadvantaged firm owner must certify that he or she is, in fact, socially and economically disadvantaged, and that presumption can be rebutted. *Id.* In this way, the court said, the federal program requires states to extend benefits only to those who are actually disadvantaged. *Id.*

Therefore, the court agreed with the district court that the Federal DBE Program is narrowly tailored on its face, so it survives strict scrutiny.

Claims against IDOT and the Tollway: void for vagueness. Midwest Fence argued that the federal regulations are unconstitutionally vague as applied by IDOT because the regulations fail to specify what good faith efforts a contractor must make to qualify for a waiver, and focuses its attack on the provisions of the regulations, which address possible cost differentials in the use of DBEs. *Id.* at *11. Midwest Fence argued that Appendix A of 49 C.F.R., Part 26 at IV(D)(2) is too vague in its language on when a difference in price is significant enough to justify falling short of the DBE contract goal. *Id.* The court found if the standard seems vague, that is likely because it was meant to be flexible, and a more rigid standard could easily be too arbitrary and hinder prime contractors' ability to adjust their approaches to the circumstances of particular projects. *Id.* at *11.

The court said Midwest Fence's real argument seems to be that in practice, prime contractors err too far on the side of caution, granting significant price preferences to DBEs instead of taking the risk of losing a contract for failure to meet the DBE goal. *Id.* at *12. Midwest Fence contends this creates a *de facto* system of quotas because contractors believe they must meet the DBE goal or lose the contract. *Id.* But Appendix A to the regulations, the court noted, cautions against this very approach. *Id.* The court found flexibility and the availability of waivers affect whether a program is narrowly tailored, and that the regulations caution against quotas, provide examples of good faith efforts prime contractors can make and states can consider, and instruct a bidder to use good business judgment to decide whether a price difference is reasonable or excessive. *Id.* For purposes of contract awards, the court holds this is enough to give fair notice of conduct that is forbidden or required. *Id.* at *12.

Equal Protection challenge: compelling interest with strong basis in evidence. In ruling on the merits of Midwest Fence's equal protection claims based on the actions of IDOT and the Tollway, the first issue the court addresses is whether the state defendants had a compelling interest in enacting their programs. *Id.* at *12. The court stated that it, along with the other circuit courts of appeal, have held a state agency is entitled to rely on the federal government's compelling interest in remedying the effects of past discrimination to justify its own DBE plan for highway construction contracting. *Id.* But, since not all of IDOT's contracts are federally funded, and the Tollway did not receive federal funding at all, with respect to those contracts, the court said it must consider whether IDOT and the Tollway established a strong basis in evidence to support their programs. *Id.*

IDOT program. IDOT relied on an availability and a disparity study to support its program. The disparity study found that DBEs were significantly underutilized as prime contractors comparing firm availability of prime contractors in the construction field to the amount of dollars they received in prime contracts. The disparity study collected utilization records, defined IDOT's market area, identified businesses that were willing and able to provide needed services, weighted firm availability to reflect IDOT's contracting pattern with weights assigned to different areas based on the percentage of dollars expended in those areas, determined whether there was a statistically significant under-utilization of DBEs by calculating the dollars each group would be expected to receive based

on availability, calculated the difference between the expected and actual amount of contract dollars received, and ensured that results were not attributable to chance. *Id.* at *13.

The court said that the disparity study determined disparity ratios that were statistically significant, and the study found that DBEs were significantly underutilized as prime contractors, noting that a figure below 0.80 is generally considered “solid evidence of systematic under-utilization calling for affirmative action to correct it.” *Id.* at *13. The study found that DBEs made up 25.55 percent of prime contractors in the construction field, received 9.13 percent of prime contracts valued below \$500,000 and 8.25 percent of the available contract dollars in that range, yielding a disparity ratio of 0.32 for prime contracts under \$500,000. *Id.*

In the realm of contraction subcontracting, the study showed that DBEs may have 29.24 percent of available subcontractors, and in the construction industry they receive 44.62 percent of available subcontracts, but those subcontracts amounted to only 10.65 percent of available subcontracting dollars. *Id.* at *13. This, according to the study, yielded a statistically significant disparity ratio of 0.36, which the court found low enough to signal systemic under-utilization. *Id.*

IDOT relied on additional data to justify its program, including conducting a zero-goal experiment in 2002 and in 2003, when it did not apply DBE goals to contracts. *Id.* at *13. Without contract goals, the share of the contracts’ value that DBEs received dropped dramatically, to just 1.5 percent of the total value of the contracts. *Id.* at *13. And in those contracts advertised without a DBE goal, the DBE subcontractor participation rate was 0.84 percent.

Tollway program. Tollway also relied on a disparity study limited to the Tollway’s contracting market area. The study used a “custom census” process, creating a database of representative projects, identifying geographic and product markets, counting businesses in those markets, identifying and verifying which businesses are minority- and women-owned, and verifying the ownership status of all the other firms. *Id.* at *13. The study examined the Tollway’s historical contract data, reported its DBE utilization as a percentage of contract dollars, and compared DBE utilization and DBE availability, coming up with disparity indices divided by race and sex, as well as by industry group. *Id.*

The study found that out of 115 disparity indices, 80 showed statistically significant under-utilization of DBEs. *Id.* at *14. The study discussed statistical disparities in earnings and the formation of businesses by minorities and women, and concluded that a statistically significant adverse impact on earnings was observed in both the economy at large and in the construction and construction-related professional services sector.” *Id.* at *14. The study also found women and minorities are not as likely to start their own business, and that minority business formation rates would likely be substantially and significantly higher if markets operated in a race- and sex-neutral manner. *Id.*

The study used regression analysis to assess differences in wages, business-owner earnings, and business-formation rates between white men and minorities and women in the wider construction economy. *Id.* at *14. The study found statistically significant disparities remained between white men and other groups, controlling for various independent variables such as age, education, location, industry affiliation, and time. *Id.* The disparities, according to the study, were consistent with a market affected by discrimination. *Id.*

The Tollway also presented additional evidence, including that the Tollway set aspirational participation goals on a small number of contracts, and those attempts failed. *Id.* at *14. In 2004, the court noted the Tollway did not award a single prime contract or subcontract to a DBE, and the DBE participation rate in 2005 was 0.01 percent across all construction contracts. *Id.* In addition, the Tollway also considered, like IDOT, anecdotal evidence that provided testimony of several DBE owners regarding barriers that they themselves faced. *Id.*

Midwest Fence’s criticisms. Midwest Fence’s expert consultant argued that the study consultant failed to account for DBEs’ readiness, willingness, and ability to do business with IDOT and the Tollway, and that the method of assessing readiness and willingness was flawed. *Id.* at *14. In addition, the consultant for Midwest Fence argued that one of the studies failed to account for DBEs’ relative capacity, “meaning a firm’s ability to take on more than one contract at a time.” The court noted that one of the study consultants did not account for firm capacity and the other study consultant found no effective way to account for capacity. *Id.* at *14, n. 2. The court said one study did perform a regression analysis to measure relative capacity and limited its disparity analysis to contracts under \$500,000, which was, according to the study consultant, to take capacity into account to the extent possible. *Id.*

The court pointed out that one major problem with Midwest Fence’s report is that the consultant did not perform any substantive analysis of his own. *Id.* at *15. The evidence offered by Midwest Fence and its consultant was, according to the court, “speculative at best.” *Id.* at *15. The court said the consultant’s relative capacity analysis was similarly speculative, arguing that the assumption that firms have the same ability to provide services up to \$500,000 may not be true in practice, and that if the estimates of capacity are too low the resulting disparity index overstates the degree of disparity that exists. *Id.* at *15.

The court stated Midwest Fence’s expert similarly argued that the existence of the DBE program “may” cause an upward bias in availability, that any observations of the public sector in general “may” be affected by the DBE program’s existence, and that data become less relevant as time passes. *Id.* at *15. The court found that given the substantial utilization disparity as shown in the reports by IDOT and the Tollway defendants, Midwest Fence’s speculative critiques did not raise a genuine issue of fact as to whether the defendants had a substantial basis in evidence to believe that action was needed to remedy discrimination. *Id.* at *15.

The court rejected Midwest Fence’s argument that requiring it to provide an independent statistical analysis places an impossible burden on it due to the time and expense that would be required. *Id.* at *15. The court noted that the burden is initially on the government to justify its programs, and that since the state defendants offered evidence to do so, the burden then shifted to Midwest Fence to show a genuine issue of material fact as to whether the state defendants had a substantial basis in evidence for adopting their DBE programs. *Id.* Speculative criticism about potential problems, the court found, will not carry that burden. *Id.*

With regard to the capacity question, the court noted it was Midwest Fence’s strongest criticism and that courts had recognized it as a serious problem in other contexts. *Id.* at *15. The court said the failure to account for relative capacity did not undermine the substantial basis in evidence in this particular case. *Id.* at *15. Midwest Fence did not explain how to account for relative capacity. *Id.* In

addition, it has been recognized, the court stated, that defects in capacity analyses are not fatal in and of themselves. *Id.* at *15.

The court concluded that the studies show striking utilization disparities in specific industries in the relevant geographic market areas, and they are consistent with the anecdotal and less formal evidence defendants had offered. *Id.* at *15. The court found Midwest Fence’s expert’s “speculation” that failure to account for relative capacity might have biased DBE availability upward does not undermine the statistical core of the strong basis in evidence required. *Id.*

In addition, the court rejected Midwest Fence’s argument that the disparity studies do not prove discrimination, noting again that a state need not conclusively prove the existence of discrimination to establish a strong basis in evidence for concluding that remedial action is necessary, and that where gross statistical disparities can be shown, they alone may constitute prima facie proof of a pattern or practice of discrimination. *Id.* at *15. The court also rejected Midwest Fence’s attack on the anecdotal evidence stating that the anecdotal evidence bolsters the state defendants’ statistical analyses. *Id.* at *15.

In connection with Midwest Fence’s argument relating to the Tollway defendant, Midwest Fence argued that the Tollway’s supporting data was from before it instituted its DBE program. *Id.* at *16. The Tollway responded by arguing that it used the best data available and that in any event its data sets show disparities. *Id.* at *16. The court found this point persuasive even assuming some of the Tollway’s data were not exact. *Id.* The court said that while every single number in the Tollway’s “arsenal of evidence” may not be exact, the overall picture still shows beyond reasonable dispute a marketplace with systemic under-utilization of DBEs far below the disparity index lower than 80 as an indication of discrimination, and that Midwest Fence’s “abstract criticisms” do not undermine that core of evidence. *Id.* at *16.

Narrow Tailoring. The court applied the narrow tailoring factors to determine whether IDOT’s and the Tollway’s implementation of their DBE programs yielded a close match between the evil against which the remedy is directed and the terms of the remedy. *Id.* at *16. First the court addressed the necessity for the relief and the efficacy of alternative race-neutral remedies factor. *Id.* The court reiterated that Midwest Fence has not undermined the defendants’ strong combination of statistical and other evidence to show that their programs are needed to remedy discrimination. *Id.*

Both IDOT and the Tollway, according to the court, use race- and gender-neutral alternatives, and the undisputed facts show that those alternatives have not been sufficient to remedy discrimination. *Id.* The court noted that the record shows IDOT uses nearly all of the methods described in the federal regulations to maximize a portion of the goal that will be achieved through race-neutral means. *Id.*

As for flexibility, both IDOT and the Tollway make front-end waivers available when a contractor has made good faith efforts to comply with a DBE goal. *Id.* at *17. The court rejected Midwest Fence’s arguments that there were a low number of waivers granted, and that contractors fear of having a waiver denied showed the system was a *de facto* quota system. *Id.* The court found that IDOT and the Tollway have not granted large numbers of waivers, but there was also no evidence that they have *denied* large numbers of waivers. *Id.* The court pointed out that the evidence from

Midwest Fence does not show that defendants are responsible for failing to grant front-end waivers that the contractors do not request. *Id.*

The court stated in the absence of evidence that defendants failed to adhere to the general good faith effort guidelines and arbitrarily deny or discourage front-end waiver requests, Midwest Fence's contention that contractors fear losing contracts if they ask for a waiver does not make the system a quota system. *Id.* at *17. Midwest Fence's own evidence, the court stated, shows that IDOT granted in 2007, 57 of 63 front-end waiver requests, and in 2010, it granted 21 of 35 front-end waiver requests. *Id.* at *17. In addition, the Tollway granted at least some front-end waivers involving 1.02 percent of contract dollars. *Id.* Without evidence that far more waivers were requested, the court was satisfied that even this low total by the Tollway does not raise a genuine dispute of fact. *Id.*

The court also rejected as "underdeveloped" Midwest Fence's argument that the court should look at the dollar value of waivers granted rather than the raw number of waivers granted. *Id.* at *17. The court found that this argument does not support a different outcome in this case because the defendants grant more front-end waiver requests than they deny, regardless of the dollar amounts those requests encompass. Midwest Fence presented no evidence that IDOT and the Tollway have an unwritten policy of granting only low-value waivers. *Id.*

The court stated that Midwest's "best argument" against narrowed tailoring is its "mismatch" argument, which was discussed above. *Id.* at *17. The court said Midwest's broad condemnation of the IDOT and Tollway programs as failing to create a "light" and "diffuse" burden for third parties was not persuasive. *Id.* The court noted that the DBE programs, which set DBE goals on only some contracts and allow those goals to be waived if necessary, may end up foreclosing one of several opportunities for a non-DBE specialty subcontractor like Midwest Fence. *Id.* But, there was no evidence that they impose the entire burden on that subcontractor by shutting it out of the market entirely. *Id.* However, the court found that Midwest Fence's point that subcontractors appear to bear a disproportionate share of the burden as compared to prime contractors "is troubling." *Id.* at *17.

Although the evidence showed disparities in both the prime contracting and subcontracting markets, under the federal regulations, individual contract goals are set only for contracts that have subcontracting possibilities. *Id.* The court pointed out that some DBEs are able to bid on prime contracts, but the necessarily small size of DBEs makes that difficult in most cases. *Id.*

But, according to the court, in the end the record shows that the problem Midwest Fence raises is largely "theoretical." *Id.* at *18. Not all contracts have DBE goals, so subcontractors are on an even footing for those contracts without such goals. *Id.* IDOT and the Tollway both use neutral measures including some designed to make prime contracts more assessable to DBEs. *Id.* The court noted that DBE trucking and material suppliers count toward fulfillment of a contract's DBE goal, even though they are not used as line items in calculating the contract goal in the first place, which opens up contracts with DBE goals to non-DBE subcontractors. *Id.*

The court stated that if Midwest Fence "had presented evidence rather than theory on this point, the result might be different." *Id.* at *18. "Evidence that subcontractors were being frozen out of the market or bearing the entire burden of the DBE program would likely require a trial to determine at a minimum whether IDOT or the Tollway were adhering to their responsibility to avoid

overconcentration in subcontracting.” *Id.* at *18. The court concluded that Midwest Fence “has shown how the Illinois program *could* yield that result but not that it actually does so.” *Id.*

In light of the IDOT and Tollway programs’ mechanisms to prevent subcontractors from having to bear the entire burden of the DBE programs, including the use of DBE materials and trucking suppliers in satisfying goals, efforts to draw DBEs into prime contracting, and other mechanisms, according to the court, Midwest Fence did not establish a genuine dispute of fact on this point. *Id.* at *18. The court stated that the “theoretical possibility of a ‘mismatch’ could be a problem, but we have no evidence that it actually is.” *Id.* at *18.

Therefore, the court concluded that IDOT and the Tollway DBE programs are narrowly tailored to serve the compelling state interest in remedying discrimination in public contracting. *Id.* at *18. They include race- and gender-neutral alternatives, set goals with reference to actual market conditions, and allow for front-end waivers. *Id.* “So far as the record before us shows, they do not unduly burden third parties in service of remedying discrimination”, according to the court. Therefore, Midwest Fence failed to present a genuine dispute of fact “on this point.” *Id.*

Petition for a Writ of Certiorari. Midwest Fence filed a Petition for a Writ of Certiorari to the United States Supreme Court in 2017, and Certiorari was denied. 2017 WL 497345 (2017).

2. *Dunnet Bay Construction Company v. Borggren, Illinois DOT, et al.*, 799 F.3d 676, 2015 WL 4934560 (7th Cir. 2015), cert. denied, *Dunnet Bay Construction Co. v. Blankenhorn, Randall S., et al.*, 2016 WL 193809 (Oct. 3, 2016).

Dunnet Bay Construction Company sued the Illinois Department of Transportation (IDOT) asserting that the Illinois DOT’s DBE Program discriminates on the basis of race. The district court granted summary judgement to Illinois DOT, concluding that Dunnet Bay lacked standing to raise an equal protection challenge based on race, and held that the Illinois DOT DBE Program survived the constitutional and other challenges. 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 percent. *Id.* at *2. Under IDOT’s DBE Program, if a bidder fails to meet the DBE contract goal, it may request a modification of the goal, and provide documentation of its good faith efforts to meet the goal. *Id.* at *3. These requests for modification are also known as “waivers.” *Id.*

The record showed that IDOT historically granted goal modification request or waivers: in 2007, it granted 57 of 63 pre-award goal modification requests; the six other bidders ultimately met the contract goal with post-bid assistance. *Id.* at *3. In 2008, IDOT granted 50 of the 55 pre-award goal modification requests; the other five bidders ultimately met the DBE goal. In calendar year 2009, IDOT granted 32 of 58 goal modification requests; the other contractors ultimately met the goals. In calendar year 2010, IDOT received 35 goal modification requests; it granted 21 of them and denied the rest. *Id.*

Dunnet Bay alleged that IDOT had taken the position no waivers would be granted. *Id.* at *3-1. IDOT responded that it was not its policy to not grant waivers, but instead IDOT would aggressively pursue obtaining the DBE participation in their contract goals, including that waivers were going to be reviewed at a high level to make sure the appropriate documentation was provided in order for a waiver to be issued. *Id.*

The U.S. FHWA approved the methodology IDOT used to establish a statewide overall DBE goal of 22.77 percent. *Id.* at *5. The FHWA reviewed and approved the individual contract goals set for work on a project known as the Eisenhower project that Dunnet Bay bid on in 2010. *Id.* Dunnet Bay submitted to IDOT a bid that was the lowest bid on the project, but it was substantially over the budget estimate for the project. *Id.* at *5. Dunnet Bay did not achieve the goal of 22 percent, but three other bidders each met the DBE goal. *Id.* Dunnet Bay requested a waiver based on its good faith efforts to obtain the DBE goal. *Id.* at *6. Ultimately, IDOT determined that Dunnet Bay did not properly exercise good faith efforts and its bid was rejected. *Id.* at *6-9.

Because all the bids were over budget, IDOT decided to rebid the Eisenhower project. *Id.* at *8, *17. There were four separate Eisenhower projects advertised for bids, and IDOT granted one of the four goal modification requests from that bid letting. Dunnet Bay bid on one of the rebid projects, but it was not the lowest bid; it was the third out of five bidders. *Id.* at *9, *17. Dunnet Bay did meet the 22.77 percent contract DBE goal, on the rebid prospect, but was not awarded the contract because it was not the lowest. *Id.*

Dunnet Bay then filed its lawsuit seeking damages as well as a declaratory judgement that the IDOT DBE Program is unconstitutional and injunctive relief against its enforcement.

The district court granted the IDOT Defendants' motion for summary judgement and denied Dunnet Bay's motion. *Id.* at *9. The district court concluded that Dunnet Bay lacked Article III standing to raise an equal protection challenge because it has not suffered a particularized injury that was called by IDOT, and that Dunnet Bay was not deprived of the ability to compete on an equal basis. *Id. Dunnet Bay Construction Company v. Hannig*, 2014 WL 552213, at *30 (C.D. Ill. Feb. 12, 2014).

Even if Dunnet Bay had standing to bring an equal protection claim, the district court held that IDOT was entitled to summary judgment. The district court concluded that Dunnet Bay was held to the same standards as every other bidder, and thus could not establish that it was the victim of racial discrimination. *Id.* at *31. In addition, the district court determined that IDOT had not exceeded its federal authority under the federal rules and that Dunnet Bay's challenge to the DBE Program failed under the Seventh Circuit Court of Appeals decision in *Northern Contracting, Inc. v. Illinois*, 473 F.3d 715, 721 (7th Cir. 2007), which insulates a state DBE Program from a constitutional attack absent a showing that the state exceeded its federal authority. *Id.* at *10. (*See* discussion of the district court decision in *Dunnet Bay* below in 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 nonminority owned businesses could not even bid on certain contracts. *Id.* Under IDOT's DBE Program, all contractors, minority and nonminority contractors, can bid on all contracts. *Id.*

The court said the absence of complete exclusion from competition with minority- or women-owned businesses distinguished the IDOT DBE Program from other cases in which the court ruled there was standing to challenge a program. *Id.* at *13. Dunnet Bay, the court found, has not alleged and has not produced evidence to show that it was treated less favorably than any other contractor because of the race of its owners. *Id.* This lack of an explicit preference from minority-owned businesses distinguishes the IDOT DBE Program from other cases. *Id.* Under IDOT's DBE Program, all contractors are treated alike and subject to the same rules. *Id.*

In addition, the court distinguished other cases in which the contractors were found to have standing because in those cases standing was based in part on the fact they had lost an award of a contract for failing to meet the DBE goal or failing to show good faith efforts, despite being the low bidders on the contract, and the second lowest bidder was awarded the contract. *Id.* at *14. In contrast with these cases where the plaintiffs had standing, the court said Dunnet Bay could not establish that it would have been awarded the contract but for its failure to meet the DBE goal or demonstrate good faith efforts. *Id.* at 28.

The evidence established that Dunnet Bay's bid was substantially over the program estimated budget, and IDOT rebid the contract because the low bid was over the project estimate. *Id.* In addition, Dunnet Bay had been left off the For Bidders List that is submitted to DBEs, which was another reason IDOT decided to rebid the contract. *Id.*

The court found that even assuming Dunnet Bay could establish it was excluded from competition with DBEs or that it was disadvantaged as compared to DBEs, it could not show that any difference in treatment was because of race. *Id.* at *15. For the three years preceding 2010, the year it bid on the project, Dunnet Bay's average gross receipts were over \$52 million. *Id.* Therefore, the court found Dunnet Bay's size makes it ineligible to qualify as a DBE, regardless of the race of its owners. *Id.* Dunnet Bay did not show that any additional costs or burdens that it would incur are because of race, but the additional costs and burdens are equally attributable to Dunnet Bay's *size*. *Id.* Dunnet Bay had not established, according to the court, that the denial of equal treatment resulted from the imposition of a racial barrier. *Id.*

Dunnet Bay also alleged that it was forced to participate in a discriminatory scheme and was required to consider race in subcontracting, and thus argued that it may assert third-party rights. *Id.* at *15. The court stated that it has not adopted the broad view of standing regarding asserting third-party rights. *Id.* at *16. The court concluded that Dunnet Bay's claimed injury of being forced to participate in a discriminatory scheme amounts to a challenge to the state's application of a federally mandated program, which the Seventh Circuit Court of Appeals has determined "must be limited to the question of whether the state exceeded its authority." *Id.* quoting, *Northern Contracting*, 473 F.3d at 720-21. The court found Dunnet Bay was not denied equal treatment because of racial discrimination, but instead any difference in treatment was equally attributable to Dunnet Bay's *size*. *Id.*

The court stated that Dunnet Bay did not establish causal or redressability. *Id.* at *17. It failed to demonstrate that the DBE Program caused it any injury during the first bid process. *Id.* IDOT did not award the contract to anyone under the first bid and re-let the contract. *Id.* Therefore, Dunnet Bay suffered no injury because of the DBE Program. *Id.* The court also found that Dunnet Bay could not establish redressability because IDOT's decision to re-let the contract redressed any injury. *Id.* at *17.

In addition, the court concluded that prudential limitations preclude Dunnet Bay from bringing its claim. *Id.* at *17. The court said that a litigant generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties. *Id.* The court rejected Dunnet Bay's attempt to assert the equal protection rights of a nonminority-owned small business. *Id.* at *17-18.

Dunnet Bay did not produce sufficient evidence that IDOT's implementation of the Federal DBE Program constitutes race discrimination as it did not establish that IDOT exceeded its federal authority. The court said that in the alternative to denying Dunnet Bay standing, even if Dunnet Bay had standing, IDOT was still entitled to summary judgment. *Id.* at *18. The court stated that to establish an equal protection claim under the Fourteenth Amendment, Dunnet Bay must show that IDOT "acted with discriminatory intent." *Id.*

The court established the standard based on its previous ruling in the *Northern Contracting v. IDOT* case that in implementing its DBE Program, IDOT may properly rely on "the federal government's compelling interest in remedying the effects of past discrimination in the national construction market." *Id.* at *19, quoting *Northern Contracting*, 473 F.3d at 720. Significantly, the court held following its *Northern Contracting* decision as follows: "[A] state is insulated from [a constitutional challenge as to whether its program is narrowly tailored to achieve this compelling interest], absent a showing that the state exceeded its federal authority." *Id.* quoting *Northern Contracting*, 473 F.3d at 721.

Dunnet Bay contends that IDOT exceeded its federal authority by effectively creating racial quotas by designing the Eisenhower project to meet a pre-determined DBE goal and eliminating waivers. *Id.* at *19. Dunnet Bay asserts that IDOT exceeds its authority by: (1) setting the contract's DBE participation goal at 22 percent without the required analysis; (2) implementing a "no-waiver" policy; (3) preliminarily denying its goal modification request without assessing its good faith efforts; (4) denying it a meaningful reconsideration hearing; (5) determining that its good faith efforts were inadequate; and (6) providing no written or other explanation of the basis for its good-faith-efforts determination. *Id.*

In challenging the DBE contract goal, Dunnet Bay asserts that the 22 percent goal was "arbitrary" and that IDOT manipulated the process to justify a preordained goal. *Id.* at *20. The court stated Dunnet Bay did not identify any regulation or other authority that suggests political motivations matter, provided IDOT did not exceed its federal authority in setting the contract goal. *Id.* Dunnet Bay does not actually challenge how IDOT went about setting its DBE goal on the contract. *Id.* Dunnet Bay did not point to any evidence to show that IDOT failed to comply with the applicable regulation providing only general guidance on contract goal setting. *Id.*

The FHWA approved IDOT's methodology to establish its statewide DBE goal and approved the individual contract goals for the Eisenhower project. *Id.* at *20. Dunnet Bay did not identify any part of the regulation that IDOT allegedly violated by reevaluating and then increasing its DBE contract goal, by expanding the geographic area used to determine DBE availability, by adding pavement patching and landscaping work into the contract goal, by including items that had been set aside for small business enterprises, or by any other means by which it increased the DBE contract goal. *Id.*

The court agreed with the district court's conclusion that because the federal regulations do not specify a procedure for arriving at contract goals, it is not apparent how IDOT could have exceeded its federal authority. *Id.* at 20.

The court found Dunnet Bay did not present sufficient evidence to raise a reasonable inference that IDOT had actually implemented a no-waiver policy. *Id.* at *20. The court noted IDOT had granted waivers in 2009 and in 2010 that amounted to 60 percent of the waiver requests. *Id.* The court stated that IDOT's record of granting waivers refutes any suggestion of a no-waiver policy. *Id.*

The court did not agree with Dunnet Bay's challenge that IDOT rejected its bid without determining whether it had made good faith efforts, pointing out that IDOT in fact determined that Dunnet Bay failed to document adequate good faith efforts, and thus it had complied with the federal regulations. *Id.* at *21. The court found IDOT's determination that Dunnet Bay failed to show good faith efforts was supported in the record. *Id.* The court noted the reasons provided by IDOT, included Dunnet Bay did not utilize IDOT's supportive services, and that the other bidders all met the DBE goal, whereas Dunnet Bay did not come close to the goal in its first bid. *Id.* at 21-22.

The court said the performance of other bidders in meeting the contract goal is listed in the federal regulations as a consideration when deciding whether a bidder has made good faith efforts to obtain DBE participation goals, and was a proper consideration. *Id.* at *22. The court said Dunnet Bay's efforts to secure the DBE participation goal may have been hindered by the omission of Dunnet Bay from the For Bid List, but found the rebidding of the contract remedied that oversight. *Id.*

Conclusion. The court affirmed the district court's grant of summary judgement to the Illinois DOT, concluding that Dunnet Bay lacks standing, and that the Illinois DBE Program implementing the Federal DBE Program survived the constitutional and other challenges made by Dunnet Bay.

Petition for a Writ of Certiorari. Dunnet Bay filed a Petition for a Writ of Certiorari to the United States Supreme Court in 2016. The Petition was denied by the Supreme Court.

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

In *Northern Contracting, Inc. v. Illinois*, the Seventh Circuit affirmed the district court decision upholding the validity and constitutionality of the Illinois Department of Transportation's ("IDOT") DBE Program. Plaintiff Northern Contracting Inc. ("NCI") was a white male-owned construction company specializing in the construction of guardrails and fences for highway construction projects in Illinois. 473 F.3d 715, 717 (7th Cir. 2007). Initially, NCI challenged the constitutionality of both the federal regulations and the Illinois statute implementing these regulations. *Id.* at 719. The district court granted the USDOT's Motion for Summary Judgment, concluding that the federal government had demonstrated a compelling interest and that TEA-21 was sufficiently narrowly tailored. NCI did

not challenge this ruling and thereby forfeited the opportunity to challenge the federal regulations. *Id.* at 720. NCI also forfeited the argument that IDOT's DBE program did not serve a compelling government interest. *Id.* The sole issue on appeal to the Seventh Circuit was whether IDOT's program was narrowly tailored. *Id.*

IDOT typically adopted a new DBE plan each year. *Id.* at 718. In preparing for Fiscal Year 2005, IDOT retained a consulting firm to determine DBE availability. *Id.* The consultant first identified the relevant geographic market (Illinois) and the relevant product market (transportation infrastructure construction). *Id.* The consultant then determined availability of minority- and women-owned firms through analysis of Dun & Bradstreet's Marketplace data. *Id.* This initial list was corrected for errors in the data by surveying the D&B list. *Id.* In light of these surveys, the consultant arrived at a DBE availability of 22.77 percent. *Id.* The consultant then ran a regression analysis on earnings and business information and concluded that in the absence of discrimination, relative DBE availability would be 27.5 percent. *Id.* IDOT considered this, along with other data, including DBE utilization on IDOT's "zero goal" experiment conducted in 2002 to 2003, in which IDOT did not use DBE goals on 5 percent of its contracts (1.5% utilization) and data of DBE utilization on projects for the Illinois State Toll Highway Authority which does not receive federal funding and whose goals are completely voluntary (1.6% utilization). *Id.* at 719. On the basis of all of this data, IDOT adopted a 22.77 percent goal for 2005. *Id.*

Despite the fact the NCI forfeited the argument that IDOT's DBE program did not serve a compelling state interest, the Seventh Circuit briefly addressed the compelling interest prong of the strict scrutiny analysis, noting that IDOT had satisfied its burden. *Id.* at 720. The court noted that, post-*Adarand*, two other circuits have held that a state may rely on the federal government's compelling interest in implementing a local DBE plan. *Id.* at 720-21, citing *Western States Paving Co., Inc. v. Washington State DOT*, 407 F.3d 983, 987 (9th Cir. 2005), *cert. denied*, 126 S.Ct. 1332 (Feb. 21, 2006) and *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d 964, 970 (8th Cir. 2003), *cert. denied*, 541 U.S. 1041 (2004). The court stated that NCI had not articulated any reason to break ranks from the other circuits and explained that "[i]nsofar as the state is merely complying with federal law it is acting as the agent of the federal government If the state does exactly what the statute expects it to do, and the statute is conceded for purposes of litigation to be constitutional, we do not see how the state can be thought to have violated the Constitution." *Id.* at 721, quoting *Milwaukee County Pavers Association v. Fielder*, 922 F.2d 419, 423 (7th Cir. 1991). The court did not address whether IDOT had an independent interest that could have survived constitutional scrutiny.

In addressing the narrowly tailored prong with respect to IDOT's DBE program, the court held that IDOT had complied. *Id.* The court concluded its holding in *Milwaukee* that a state is insulated from a constitutional attack absent a showing that the state exceeded its federal authority remained applicable. *Id.* at 721-22. The court noted that the Supreme Court in *Adarand Constructors v. Peña*, 515 U.S. 200 (1995) did not seize the opportunity to overrule that decision, explaining that the Court did not invalidate its conclusion that a challenge to a state's application of a federally mandated program must be limited to the question of whether the state exceeded its authority. *Id.* at 722.

The court further clarified the *Milwaukee* opinion in light of the interpretations of the opinions offered in by the Ninth Circuit in *Western States* and Eighth Circuit in *Sherbrooke*. *Id.* The court stated that the Ninth Circuit in *Western States* misread the *Milwaukee* decision in concluding that *Milwaukee* did not address the situation of an as-applied challenge to a DBE program. *Id.* at 722, n. 5. Relatedly, the court stated that the Eighth Circuit’s opinion in *Sherbrooke* (that the *Milwaukee* decision was compromised by the fact that it was decided under the prior law “when the 10 percent federal set-aside was more mandatory”) was unconvincing since all recipients of federal transportation funds are still required to have compliant DBE programs. *Id.* at 722. Federal law makes more clear now that the compliance could be achieved even with no DBE utilization if that were the result of a good faith use of the process. *Id.* at 722, n. 5. The court stated that IDOT in this case was acting as an instrument of federal policy and NCI’s collateral attack on the federal regulations was impermissible. *Id.* at 722.

The remainder of the court’s opinion addressed the question of whether IDOT exceeded its grant of authority under federal law, and held that all of NCI’s arguments failed. *Id.* First, NCI challenged the method by which the local base figure was calculated, the first step in the goal-setting process. *Id.* NCI argued that the number of registered and prequalified DBEs in Illinois should have simply been counted. *Id.* The court stated that while the federal regulations list several examples of methods for determining the local base figure, *Id.* at 723, these examples are not intended as an exhaustive list. The court pointed out that the fifth item in the list is entitled “Alternative Methods,” and states: “You may use other methods to determine a base figure for your overall goal. Any methodology you choose must be based on demonstrable evidence of local market conditions and be designated to ultimately attain a goal that is rationally related to the relative availability of DBEs in your market.” *Id.* (citing 49 CFR § 26.45(c)(5)). According to the court, the regulations make clear that “relative availability” means “the availability of ready, willing and able DBEs relative to all business ready, willing, and able to participate” on DOT contracts. *Id.* The court stated NCI pointed to nothing in the federal regulations that indicated that a recipient must so narrowly define the scope of the ready, willing, and available firms to a simple count of the number of registered and prequalified DBEs. *Id.* The court agreed with the district court that the remedial nature of the federal scheme militates in favor of a method of DBE availability calculation that casts a broader net. *Id.*

Second, NCI argued that the IDOT failed to properly adjust its goal based on local market conditions. *Id.* The court noted that the federal regulations do not require any adjustments to the base figure, but simply provide recipients with authority to make such adjustments if necessary. *Id.* According to the court, NCI failed to identify any aspect of the regulations requiring IDOT to separate prime contractor availability from subcontractor availability, and pointed out that the regulations require the local goal to be focused on overall DBE participation. *Id.*

Third, NCI contended that IDOT violated the federal regulations by failing to meet the maximum feasible portion of its overall goal through race-neutral means of facilitating DBE participation. *Id.* at 723-24. NCI argued that IDOT should have considered DBEs who had won subcontracts on goal projects where the prime contractor did not consider DBE status, instead of only considering DBEs who won contracts on no-goal projects. *Id.* at 724. The court held that while the regulations indicate that where DBEs win subcontracts on goal projects strictly through low bid this can be counted as race-neutral participation, the regulations did not require IDOT to search for this data, for the purpose of calculating past levels of race-neutral DBE participation. *Id.* According to the court, the

record indicated that IDOT used nearly all the methods described in the regulations to maximize the portion of the goal that will be achieved through race-neutral means. *Id.*

The court affirmed the decision of the district court upholding the validity of the IDOT DBE program and found that it was narrowly tailored to further a compelling governmental interest. *Id.*

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

This case is instructive in its analysis of state DOT DBE-type programs and their evidentiary basis and implementation. This case also is instructive in its analysis of the narrowly tailored requirement for state DBE programs. In upholding the challenged Federal DBE Program at issue in this case the Eighth Circuit emphasized the race-, ethnicity- and gender-neutral elements, the ultimate flexibility of the Program, and the fact the Program was tied closely only to labor markets with identified discrimination.

In *Sherbrooke Turf, Inc. v. Minnesota DOT, and Gross Seed Company v. Nebraska Department of Roads*, the U.S. Court of Appeals for the Eighth Circuit upheld the constitutionality of the Federal DBE Program (49 CFR Part 26). The court held the Federal Program was narrowly tailored to remedy a compelling governmental interest. The court also held the federal regulations governing the states' implementation of the Federal DBE Program were narrowly tailored, and the state DOT's implementation of the Federal DBE Program was narrowly tailored to serve a compelling government interest.

Sherbrooke and *Gross Seed* both contended that the Federal DBE Program on its face and as applied in Minnesota and Nebraska violated the Equal Protection component of the Fifth Amendment's Due Process Clause. The Eighth Circuit engaged in a review of the Federal DBE Program and the implementation of the Program by the Minnesota DOT and the Nebraska Department of Roads ("Nebraska DOR") under a strict scrutiny analysis and held that the Federal DBE Program was valid and constitutional and that the Minnesota DOT's and Nebraska DOR's implementation of the Program also was constitutional and valid. Applying the strict scrutiny analysis, the court first considered whether the Federal DBE Program established a compelling governmental interest, and found that it did. It concluded that Congress had a strong basis in evidence to support its conclusion that race-based measures were necessary for the reasons stated by the Tenth Circuit in *Adarand*, 228 F.3d at 1167-76. Although the contractors presented evidence that challenged the data, they failed to present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to participation in highway contracts. Thus, the court held they failed to meet their ultimate burden to prove that the DBE Program is unconstitutional on this ground.

Finally, *Sherbrooke* and *Gross Seed* argued that the Minnesota DOT and Nebraska DOR must independently satisfy the compelling governmental interest test aspect of strict scrutiny review. The government argued, and the district courts below agreed, that participating states need not independently meet the strict scrutiny standard because under the DBE Program the state must still comply with the DOT regulations. The Eighth Circuit held that this issue was not addressed by the Tenth Circuit in *Adarand*. The Eighth Circuit concluded that neither side's position is entirely sound.

The court rejected the contention of the contractors that their facial challenges to the DBE Program must be upheld unless the record before Congress included strong evidence of race discrimination in construction contracting in Minnesota and Nebraska. On the other hand, the court held a valid race-based program must be narrowly tailored, and to be narrowly tailored, a national program must be limited to those parts of the country where its race-based measures are demonstrably needed to the extent that the federal government delegates this tailoring function, as a state's implementation becomes relevant to a reviewing court's strict scrutiny. Thus, the court left the question of state implementation to the narrow tailoring analysis.

The court held that a reviewing court applying strict scrutiny must determine if the race-based measure is narrowly tailored. That is, whether the means chosen to accomplish the government's asserted purpose are specifically and narrowly framed to accomplish that purpose. The contractors have the ultimate burden of establishing that the DBE Program is not narrowly tailored. *Id.* The compelling interest analysis focused on the record before Congress; the narrow-tailoring analysis looks at the roles of the implementing highway construction agencies.

For determining whether a race-conscious remedy is narrowly tailored, the court looked at factors such as the efficacy of alternative remedies, the flexibility and duration of the race-conscious remedy, the relationship of the numerical goals to the relevant labor market, and the impact of the remedy on third parties. *Id.* Under the DBE Program, a state receiving federal highway funds must, on an annual basis, submit to USDOT an overall goal for DBE participation in its federally-funded highway contracts. *See*, 49 CFR § 26.45(f)(1). The overall goal "must be based on demonstrable evidence" as to the number of DBEs who are ready, willing, and able to participate as contractors or subcontractors on federally-assisted contracts. 49 CFR § 26.45(b). The number may be adjusted upward to reflect the state's determination that more DBEs would be participating absent the effects of discrimination, including race-related barriers to entry. *See*, 49 CFR § 26.45(d).

The state must meet the "maximum feasible portion" of its overall goal by race-neutral means and must submit for approval a projection of the portion it expects to meet through race-neutral means. *See*, 49 CFR § 26.45(a), (c). If race-neutral means are projected to fall short of achieving the overall goal, the state must give preference to firms it has certified as DBEs. However, such preferences may not include quotas. 49 CFR § 26.45(b). During the course of the year, if a state determines that it will exceed or fall short of its overall goal, it must adjust its use of race-conscious and race-neutral methods "[t]o ensure that your DBE program continues to be narrowly tailored to overcome the effects of discrimination." 49 CFR § 26.51(f).

Absent bad faith administration of the program, a state's failure to achieve its overall goal will not be penalized. *See*, 49 CFR § 26.47. If the state meets its overall goal for two consecutive years through race-neutral means, it is not required to set an annual goal until it does not meet its prior overall goal for a year. *See*, 49 CFR § 26.51(f)(3). In addition, DOT may grant an exemption or waiver from any and all requirements of the Program. *See*, 49 CFR § 26.15(b).

Like the district courts below, the Eighth Circuit concluded that the USDOT regulations, on their face, satisfy the Supreme Court's narrowing tailoring requirements. First, the regulations place strong emphasis on the use of race-neutral means to increase minority business participation in government contracting. 345 F.3d at 972. Narrow tailoring does not require exhaustion of every conceivable

race-neutral alternative, but it does require serious good faith consideration of workable race-neutral alternatives. 345 F.3d at 971, *citing Grutter v. Bollinger*, 539 U.S. 306.

Second, the revised DBE program has substantial flexibility. A state may obtain waivers or exemptions from any requirements and is not penalized for a good faith effort to meet its overall goal. In addition, the program limits preferences to small businesses falling beneath an earnings threshold, and any individual whose net worth exceeds \$750,000.00 cannot qualify as economically disadvantaged. *See*, 49 CFR § 26.67(b). Likewise, the DBE program contains built-in durational limits. 345 F.3d at 972. A state may terminate its DBE program if it meets or exceeds its annual overall goal through race-neutral means for two consecutive years. *Id.*; 49 CFR § 26.51(f)(3).

Third, the court found, the USDOT has tied the goals for DBE participation to the relevant labor markets. The regulations require states to set overall goals based upon the likely number of minority contractors that would have received federal assisted highway contracts but for the effects of past discrimination. *See*, 49 CFR § 26.45(c)-(d)(Steps 1 and 2). Though the underlying estimates may be inexact, the exercise requires states to focus on establishing realistic goals for DBE participation in the relevant contracting markets. *Id.* at 972.

Finally, Congress and DOT have taken significant steps, the court held, to minimize the race-based nature of the DBE Program. Its benefits are directed at all small businesses owned and controlled by the socially and economically disadvantaged. While TEA-21 creates a presumption that members of certain racial minorities fall within that class, the presumption is rebuttable, wealthy minority owners and wealthy minority-owned firms are excluded, and certification is available to persons who are not presumptively disadvantaged that demonstrate actual social and economic disadvantage. Thus, race is made relevant in the Program, but it is not a determinative factor. 345 F.3d at 973. For these reasons, the court agreed with the district courts that the revised DBE Program is narrowly tailored on its face.

Sherbrooke and *Gross Seed* also argued that the DBE Program as applied in Minnesota and Nebraska is not narrowly tailored. Under the Federal Program, states set their own goals, based on local market conditions; their goals are not imposed by the federal government; nor do recipients have to tie them to any uniform national percentage. 345 F.3d at 973, *citing* 64 Fed. Reg. at 5102.

The court analyzed what Minnesota and Nebraska did in connection with their implementation of the Federal DBE Program. Minnesota DOT commissioned a disparity study of the highway contracting market in Minnesota. The study group determined that DBEs made up 11.4 percent of the prime contractors and subcontractors in a highway construction market. Of this number, 0.6 percent were minority-owned and 10.8 percent women-owned. Based upon its analysis of business formation statistics, the consultant estimated that the number of participating minority-owned business would be 34 percent higher in a race-neutral market. Therefore, the consultant adjusted its DBE availability figure from 11.4 percent to 11.6 percent. Based on the study, Minnesota DOT adopted an overall goal of 11.6 percent DBE participation for federally-assisted highway projects. Minnesota DOT predicted that it would need to meet 9 percent of that overall goal through race and gender-conscious means, based on the fact that DBE participation in State highway contracts dropped from 10.25 percent in 1998 to 2.25 percent in 1999 when its previous DBE Program was suspended by the injunction by the district court in an earlier decision in *Sherbrooke*. Minnesota DOT required each prime contract bidder to make a good faith effort to subcontract a

prescribed portion of the project to DBEs, and determined that portion based on several individualized factors, including the availability of DBEs in the extent of subcontracting opportunities on the project.

The contractor presented evidence attacking the reliability of the data in the study, but it failed to establish that better data were available or that Minnesota DOT was otherwise unreasonable in undertaking this thorough analysis and relying on its results. *Id.* The precipitous drop in DBE participation when no race-conscious methods were employed, the court concluded, supports Minnesota DOT's conclusion that a substantial portion of its overall goal could not be met with race-neutral measures. *Id.* On that record, the court agreed with the district court that the revised DBE Program serves a compelling government interest and is narrowly tailored on its face and as applied in Minnesota.

In Nebraska, the Nebraska DOR commissioned a disparity study also to review availability and capability of DBE firms in the Nebraska highway construction market. The availability study found that between 1995 and 1999, when Nebraska followed the mandatory 10 percent set-aside requirement, 9.95 percent of all available and capable firms were DBEs, and DBE firms received 12.7 percent of the contract dollars on federally assisted projects. After apportioning part of this DBE contracting to race-neutral contracting decisions, Nebraska DOR set an overall goal of 9.95 percent DBE participation and predicted that 4.82 percent of this overall goal would have to be achieved by race-and-gender conscious means. The Nebraska DOR required that prime contractors make a good faith effort to allocate a set portion of each contract's funds to DBE subcontractors. The Eighth Circuit concluded that Gross Seed, like Sherbrooke, failed to prove that the DBE Program is not narrowly tailored as applied in Nebraska. Therefore, the court affirmed the district courts' decisions in *Gross Seed* and *Sherbrooke*. (See district court opinions discussed *infra*).

5. *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000) cert. granted then dismissed as improvidently granted sub nom. *Adarand Constructors, Inc. v. Mineta*, 532 U.S. 941, 534 U.S. 103 (2001)

This is the *Adarand* decision by the United States Court of Appeals for the Tenth Circuit, which was on remand from the earlier Supreme Court decision applying the strict scrutiny analysis to any constitutional challenge to the Federal DBE Program. See *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). The decision of the Tenth Circuit in this case was considered by the United States Supreme Court, after that court granted certiorari to consider certain issues raised on appeal. The Supreme Court subsequently dismissed the writ of certiorari "as improvidently granted" without reaching the merits of the case. The court did not decide the constitutionality of the Federal DBE Program as it applies to state DOTs or local governments.

The Supreme Court held that the Tenth Circuit had not considered the issue before the Supreme Court on certiorari, namely whether a race-based program applicable to direct federal contracting is constitutional. This issue is distinguished from the issue of the constitutionality of the USDOT DBE Program as it pertains to procurement of federal funds for highway projects let by states, and the implementation of the Federal DBE Program by state DOTs. Therefore, the Supreme Court held it would not reach the merits of a challenge to federal laws relating to direct federal procurement.

Turning to the Tenth Circuit decision in *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000), the Tenth Circuit upheld in general the facial constitutionality of the Federal DBE Program. The court found that the federal government had a compelling interest in not perpetuating the effects of racial discrimination in its own distribution of federal funds and in remediating the effects of past discrimination in government contracting, and that the evidence supported the existence of past and present discrimination sufficient to justify the Federal DBE Program. The court also held that the Federal DBE Program is “narrowly tailored,” and therefore upheld the constitutionality of the Federal DBE Program.

It is significant to note that the court in determining the Federal DBE Program is “narrowly tailored” focused on the current regulations, 49 CFR Part 26, and in particular § 26.1(a), (b), and (f). The court pointed out that the federal regulations instruct recipients as follows:

[y]ou must meet the maximum feasible portion of your overall goal by using race-neutral means of facilitating DBE participation, 49 CFR § 26.51(a)(2000); see also 49 CFR § 26.51(f)(2000) (if a recipient can meet its overall goal through race-neutral means, it must implement its program without the use of race-conscious contracting measures), and enumerate a list of race-neutral measures, see 49 CFR § 26.51(b)(2000). The current regulations also outline several race-neutral means available to program recipients including assistance in overcoming bonding and financing obstacles, providing technical assistance, establishing programs to assist start-up firms, and other methods. See 49 CFR § 26.51(b). We therefore are dealing here with revisions that emphasize the continuing need to employ non-race-conscious methods even as the need for race-conscious remedies is recognized. 228 F.3d at 1178-1179.

In considering whether the Federal DBE Program is narrowly tailored, the court also addressed the argument made by the contractor that the program is over- and under-inclusive for several reasons, including that Congress did not inquire into discrimination against each particular minority racial or ethnic group. The court held that insofar as the scope of inquiry suggested was a particular state’s construction industry alone, this would be at odds with its holding regarding the compelling interest in Congress’s power to enact nationwide legislation. *Id.* at 1185-1186. The court held that because of the “unreliability of racial and ethnic categories and the fact that discrimination commonly occurs based on much broader racial classifications,” extrapolating findings of discrimination against the various ethnic groups “is more a question of nomenclature than of narrow tailoring.” *Id.* The court found that the “Constitution does not erect a barrier to the government’s effort to combat discrimination based on broad racial classifications that might prevent it from enumerating particular ethnic origins falling within such classifications.” *Id.*

Finally, the Tenth Circuit did not specifically address a challenge to the letting of federally-funded construction contracts by state departments of transportation. The court pointed out that plaintiff *Adarand* “conceded that its challenge in the instant case is to ‘the federal program, implemented by federal officials,’ and not to the letting of federally-funded construction contracts by state agencies.” 228 F.3d at 1187. The court held that it did not have before it a sufficient record to enable it to evaluate the separate question of Colorado DOT’s implementation of race-conscious policies. *Id.* at 1187-1188.

Recent District Court Decisions

6. *United States v. Taylor*, 232 F.Supp. 3d 741 (W.D. Penn 2017)

In a recent criminal case that is noteworthy because it is in the Third Circuit and involved a challenge to the Federal DBE Program, a federal district court in the Western District of Pennsylvania upheld the Indictment by the United States against Defendant Taylor who had been indicted on multiple counts arising out of a scheme to defraud the United States Department of Transportation's Disadvantaged Business Enterprise Program ("Federal DBE Program"). *United States v. Taylor*, 232 F.Supp. 3d 741, 743 (W.D. Penn. 2017). Also, the court in denying the motion to dismiss the Indictment upheld the federal regulations in issue against a challenge to the Federal DBE Program.

Procedural and case history. This was a white collar criminal case arising from a fraud on the Federal DBE Program by Century Steel Erectors ("CSE") and WMCC, Inc., and their respective principals. In this case, the Government charged one of the owners of CSE, Defendant Donald Taylor, with fourteen separate criminal offenses. The Government asserted that Defendant and CSE used WMCC, Inc., a certified DBE as a "front" to obtain 13 federally funded highway construction contracts requiring DBE status, and that CSE performed the work on the jobs while it was represented to agencies and contractors that WMCC would be performing the work. *Id.* at 743.

The Government contended that WMCC did not perform a "commercially useful function" on the jobs as the DBE regulations require and that CSE personnel did the actual work concealing from general contractors and government entities that CSE and its personnel were doing the work. *Id.* WMCC's principal was paid a relatively nominal "fixed-fee" for permitting use of WMCC's name on each of these subcontracts. *Id.* at 744.

Defendant's contentions. This case concerned *inter alia* a motion to dismiss the Indictment. Defendant argued that Count One must be dismissed because he had been mischarged under the "defraud clause" of 18 U.S.C. § 371, in that the allegations did not support a charge that he defrauded the United States. *Id.* at 745. He contended that the DBE program is administered through state and county entities, such that he could not have defrauded the United States, which he argued merely provides funding to the states to administer the DBE program. *Id.*

Defendant also argued that the Indictment must be dismissed because the underlying federal regulations, 49 C.F.R. § 26.55(c), that support the counts against him were void for vagueness as applied to the facts at issue. *Id.* More specifically, he challenged the definition of "commercially useful function" set forth in the regulations and also contended that Congress improperly delegated its duties to the Executive branch in promulgating the federal regulations at issue. *Id.* at 745.

Federal government position. The Government argued that the charge at Count One was supported by the allegations in the Indictment which made clear that the charge was for defrauding the United States' Federal DBE Program rather than the state and county entities. *Id.* The Government also argued that the challenged federal regulations are neither unconstitutionally vague nor were they promulgated in violation of the principles of separation of powers. *Id.*

Material facts in Indictment. The court pointed out that the Pennsylvania Department of Transportation (“PennDOT”) and the Pennsylvania Turnpike Commission (“PTC”) receive federal funds from FHWA for federally funded highway projects and, as a result, are required to establish goals and objectives in administering the DBE Program. *Id.* at 745. State and local authorities, the court stated, are also delegated the responsibility to administer the program by, among other things, certifying entities as DBEs; tracking the usage of DBEs on federally funded highway projects through the award of credits to general contractors on specific projects; and reporting compliance with the participation goals to the federal authorities. *Id.* at 745-746.

WMCC received 13 federally-funded subcontracts totaling approximately \$2.34 million under PennDOT’s and PTC’s DBE program and WMCC was paid a total of \$1.89 million. *Id.* at 746 . These subcontracts were between WMCC and a general contractor, and required WMCC to furnish and erect steel and/or precast concrete on federally funded Pennsylvania highway projects. *Id.* Under PennDOT’s program, the entire amount of WMCC’s subcontract with the general contractor, including the cost of materials and labor, was counted toward the general contractor’s DBE goal because WMCC was certified as a DBE and “ostensibly performed a commercially useful function in connection with the subcontract.” *Id.*

The stated purpose of the conspiracy was for Defendant and his co-conspirators to enrich themselves by using WMCC as a “front” company to fraudulently obtain the profits on DBE subcontracts slotted for legitimate DBE’s and to increase CSE profits by marketing CSE to general contractors as a “one-stop shop,” which could not only provide the concrete or steel beams, but also erect the beams and provide the general contractor with DBE credits. *Id.* at 746 .

As a result of these efforts, the court said the “conspirators” caused the general contractors to pay WMCC for DBE subcontracts and were deceived into crediting expenditures toward DBE participation goals, although they were not eligible for such credits because WMCC was not performing a commercially useful function on the jobs. *Id.* at 747. CSE also obtained profits from DBE subcontracts that it was not entitled to receive as it was not a DBE and thereby precluded legitimate DBE’s from obtaining such contracts. *Id.*

Motion to Dismiss — challenges to Federal DBE Regulations. Defendant sought dismissal of the Indictment by contesting the propriety of the underlying federal regulations in several different respects, including claiming that 49 C.F.R. § 26.55(c) was “void for vagueness” because the phrase “commercially useful function” and other phrases therein were not sufficiently defined. *Id.* at 754. Defendant also presented a non-delegation challenge to the regulatory scheme involving the DBE Program. *Id.* The Government countered that dismissal of the Indictment was not justified under these theories and that the challenges to the regulations should be overruled. The court agreed with the Government’s position and denied the motion to dismiss. *Id.* at 754.

The court disagreed with Defendant’s assessment that the challenged DBE regulations are so vague that people of ordinary intelligence cannot ascertain the meaning of same, including the phrases “commercially useful function,” “industry practices,” and “other relevant factors.” *Id.* at 755, *citing* 49 C.F.R. § 26.55(c). The court noted that other federal courts have rejected vagueness and related challenges to the federal DBE regulations in both civil, *see Midwest Fence Corp. v. United States Dep’t of Transp.*, 840 F.3d 932 (7th Cir. 2016) (rejecting vagueness challenge to 49 C.F.R. § 26.53(a) and “good

faith efforts” language), and criminal matters, *United States v. Maxwell*, 579 F.3d 1282, at 1302 (11th Cir. 2009).

With respect to the alleged vagueness of the phrase “commercially useful function,” the court found the regulations both specifically describes the types of activities that: (1) fall within the definition of that phrase in § 26.55(c)(1); and, (2) are beyond the scope of the definition of that phrase in § 26.55(c)(2). *Id.* at 755, *citing*, 49 C.F.R. §§ 26.55(c)(1)–(2). The phrases “industry practices” and “other relevant factors” are undefined, the court said, but “an undefined word or phrase does not render a statute void when a court could ascertain the term’s meaning by reading it in context.” *Id.* at 756.

The context, according to the court, is that these federal DBE regulations are used in a comprehensive regulatory scheme by the DOT and FHWA to ensure participation of DBEs in federally funded highway construction projects. *Id.* at 756. These particular phrases, the court pointed out, are also not the most prominently featured in the regulations as they are utilized in a sentence describing how to determine if the activities of a DBE constitute a “commercially useful function.” *Id.*, *citing*, 49 C.F.R. § 26.55(c).

While Defendant suggested that the language of these undefined phrases was overbroad, the court held it is necessarily limited by § 26.55(c)(2), expressly stating that “[a] DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation.” *Id.* at 756, *quoting*, 49 C.F.R. § 26.55(c).

The district court in this case also found persuasive the reasoning of both the United States District Court for the Southern District of Florida and the United States Court of Appeals for the Eleventh Circuit, construing the federal DBE regulations in *United States v. Maxwell*. *Id.* at 756. The court noted that in *Maxwell*, the defendant argued in a post-trial motion that § 26.55(c) was “ambiguous” and the evidence presented at trial showing that he violated this regulation could not support his convictions for various mail and wire fraud offenses. *Id.* at 756. The trial court disagreed, holding that:

the rules involving which entities must do the DBE/CSBE work are not ambiguous, or susceptible to different but equally plausible interpretations. Rather, the rules clearly state that a DBE [...] is required to do its own work, which includes managing, supervising and performing the work involved.... And, under the federal program, it is clear that the DBE is also required to negotiate, order, pay for, and install its own materials.

Id. at 756, *quoting*, *United States v. Maxwell*, 579 F.3d 1282, 1302 (11th Cir. 2009). The defendant in *Maxwell*, the court said, made this same argument on appeal to the Eleventh Circuit, which soundly rejected it, explaining that:

[b]oth the County and federal regulations explicitly say that a CSBE or DBE is required to perform a commercially useful function. Both regulatory schemes define a commercially useful function as being responsible for the execution of the contract and actually performing, managing, and supervising the work involved. And the DBE regulations make clear that a DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the

appearance of DBE participation. 49 C.F.R. § 26.55(c)(2). There is no obvious ambiguity about whether a CSBE or DBE subcontractor performs a commercially useful function when the job is managed by the primary contractor, the work is performed by the employees of the primary contractor, the primary contractor does all of the negotiations, evaluations, and payments for the necessary materials, and the subcontractor does nothing more than provide a minimal amount of labor and serve as a signatory on two-party checks. In short, no matter how these regulations are read, the jury could conclude that what FLP did was not the performance of a “commercially useful function.” *Id.* at 756, quoting, *United States v. Maxwell*, 579 F.3d 1282, 1302 (11th Cir. 2009).

Thus, the Western District of Pennsylvania federal district court in this case concluded the Eleventh Circuit in *Maxwell* found that the federal regulations were sufficient in the context of a scheme similar to that charged against Defendant Taylor in this case: WMCC was “fronted” as the DBE, receiving a fixed fee for passing through funds to CSE, which utilized its personnel to perform virtually all of the work under the subcontracts. *Id.* at 757.

Federal DBE regulations are authorized by Congress and the Federal DBE Program has been upheld by the courts. The court stated Defendant’s final argument to dismiss the charges relied upon his unsupported claims that the USDOT lacked the authority to promulgate the DBE regulations and that it exceeded its authority in doing so. *Id.* at 757. The court found that the Government’s exhaustive summary of the legislative history and executive rulemaking that has taken place with respect to the relevant statutory provisions and regulations suffices to demonstrate that the federal DBE regulations were made under the broad grant of rights authorized by Congressional statutes. *Id.*, citing, 49 U.S.C. § 322(a) (“The Secretary of Transportation may prescribe regulations to carry out the duties and powers of the Secretary. An officer of the Department of Transportation may prescribe regulations to carry out the duties and powers of the officer.”); 23 U.S.C. § 304 (The Secretary of Transportation “should assist, insofar as feasible, small business enterprises in obtaining contracts in connection with the prosecution of the highway system.”); 23 U.S.C. § 315 (“[Subject to certain exceptions related to tribal lands and national forests], the Secretary is authorized to prescribe and promulgate all needful rules and regulations for the carrying out of the provisions of this Title.”).

Also, significantly, the court pointed out that the Federal DBE Program has been upheld in various contexts, “even surviving strict scrutiny review,” with courts holding that the program is narrowly tailored to further compelling governmental interests. *Id.* at 757, citing, *Midwest Fence Corp.*, 840 F.3d at 942 (citing *Western States Paving Co. v. Washington State Dep’t of Transportation*, 407 F.3d 983, 993 (9th Cir. 2005)); *Sherbrooke Turf, Inc. v. Minnesota Dep’t of Transportation*, 345 F.3d 964, 973 (8th Cir. 2003); *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1155 (10th Cir. 2000)).

In light of this authority as to the validity of the federal regulations and the Federal DBE Program, the Western District of Pennsylvania federal district court in this case held that Defendant failed to meet his burden to demonstrate that dismissal of the Indictment was warranted. *Id.*

Conclusion. The court denied the Defendant’s motion to dismiss the Indictment. The Defendant subsequently pleaded guilty. Recently on March 13, 2018, the court issued the final Judgment sentencing the Defendant to Probation for 3 years; ordered Restitution in the amount of \$85,221.21; and a \$30,000 fine. The case also was terminated on March 13, 2018.

7. *Midwest Fence Corporation v. United States DOT and Federal Highway Administration, the Illinois DOT, the Illinois State Toll Highway Authority, et al.*, 84 F. Supp. 3d 705, 2015 WL 1396376 (N.D. Ill, March 24, 2015), affirmed, 840 F.3d 932 (7th Cir. 2016).

In *Midwest Fence Corporation v. USDOT, the FHWA, the Illinois DOT and the Illinois State Toll Highway Authority*, Case No. 1:10-3-CV-5627, United States District Court for the Northern District of Illinois, Eastern Division, Plaintiff Midwest Fence Corporation, which is a guardrail, bridge rail and fencing contractor owned and controlled by white males challenged the constitutionality and the application of the USDOT, Disadvantaged Business Enterprise (“DBE”) Program. In addition, Midwest Fence similarly challenged the Illinois Department of Transportation’s (“IDOT”) implementation of the Federal DBE Program for federally-funded projects, IDOT’s implementation of its own DBE Program for state-funded projects and the Illinois State Tollway Highway Authority’s (“Tollway”) separate DBE Program.

The federal district court in 2011 issued an Opinion and Order denying the Defendants’ Motion to Dismiss for lack of standing, denying the Federal Defendants’ Motion to Dismiss certain Counts of the Complaint as a matter of law, granting IDOT Defendants’ Motion to Dismiss certain Counts and granting the Tollway Defendants’ Motion to Dismiss certain Counts, but giving leave to Midwest to replead subsequent to this Order. *Midwest Fence Corp. v. United States DOT, Illinois DOT, et al.*, 2011 WL 2551179 (N.D. Ill. June 27, 2011).

Midwest Fence in its Third Amended Complaint challenged the constitutionality of the Federal DBE Program on its face and as applied, and challenged the IDOT’s implementation of the Federal DBE Program. Midwest Fence also sought a declaration that the USDOT regulations have not been properly authorized by Congress and a declaration that SAFETEA-LU is unconstitutional. Midwest Fence sought relief from the IDOT Defendants, including a declaration that state statutes authorizing IDOT’s DBE Program for State-funded contracts are unconstitutional; a declaration that IDOT does not follow the USDOT regulations; a declaration that the IDOT DBE Program is unconstitutional and other relief against the IDOT. The remaining Counts sought relief against the Tollway Defendants, including that the Tollway’s DBE Program is unconstitutional, and a request for punitive damages against the Tollway Defendants. The court in 2012 granted the Tollway Defendants’ Motion to Dismiss Midwest Fence’s request for punitive damages.

Equal protection framework, strict scrutiny and burden of proof. The court held that under a strict scrutiny analysis, the burden is on the government to show both a compelling interest and narrowly tailoring. 2015 WL 1396376 at *7. The government must demonstrate a strong basis in evidence for its conclusion that remedial action is necessary. *Id.* Since the Supreme Court decision in *Croson*, numerous courts have recognized that disparity studies provide probative evidence of discrimination. *Id.* The court stated that an inference of discrimination may be made with empirical evidence that demonstrates a significant statistical disparity between the number of qualified minority contractors and the number of such contractors actually engaged by the locality or the locality’s prime contractors. *Id.* The court said that anecdotal evidence may be used in combination with statistical evidence to establish a compelling governmental interest. *Id.*

In addition to providing “hard proof” to back its compelling interest, the court stated that the government must also show that the challenged program is narrowly tailored. *Id.* at *7. While narrow tailoring requires “serious, good faith consideration of workable race-neutral alternatives,” the court said it does not require “exhaustion of every conceivable race-neutral alternative.” *Id.*, citing *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003); *Fischer v. Univ. of Texas at Austin*, 133 S.Ct. 2411, 2420 (2013).

Once the governmental entity has shown acceptable proof of a compelling interest in remedying past discrimination and illustrated that its plan is narrowly tailored to achieve this goal, the party challenging the affirmative action plan bears the ultimate burden of proving that the plan is unconstitutional. 2015 WL 1396376 at *7. To successfully rebut the government’s evidence, a challenger must introduce “credible, particularized evidence” of its own. *Id.*

This can be accomplished, according to the court, by providing a neutral explanation for the disparity between DBE utilization and availability, showing that the government’s data is flawed, demonstrating that the observed disparities are statistically insignificant, or presenting contrasting statistical data. *Id.* Conjecture and unsupported criticisms of the government’s methodology are insufficient. *Id.*

Standing. The court found that Midwest had standing to challenge the Federal DBE Program, IDOT’s implementation of it, and the Tollway Program. *Id.* at *8. The court, however, did not find that Midwest had presented any facts suggesting its inability to compete on an equal footing for the Target Market Program contracts. The Target Market Program identified a variety of remedial actions that IDOT was authorized to take in certain Districts, which included individual contract goals, DBE participation incentives, as well as set-asides. *Id.* at *9.

The court noted that Midwest did not identify any contracts that were subject to the Target Market Program, nor identify any set-asides that were in place in these districts that would have hindered its ability to compete for fencing and guardrails work. *Id.* at *9. Midwest did not allege that it would have bid on contracts set aside pursuant to the Target Market Program had it not been prevented from doing so. *Id.* Because nothing in the record Midwest provided suggested that the Target Market Program impeded Midwest’s ability to compete for work in these Districts, the court dismissed Midwest’s claim relating to the Target Market Program for lack of standing.

Facial challenge to the Federal DBE Program. The court found that remedying the effects of race and gender discrimination within the road construction industry is a compelling governmental interest. The court also found that the Federal Defendants have supported their compelling interest with a strong basis in evidence. *Id.* at *11. The Federal Defendants, the court said, presented an extensive body of testimony, reports, and studies that they claim provided the strong basis in evidence for their conclusion that race and gender-based classifications are necessary. *Id.* The court took judicial notice of the existence of Congressional hearings and reports and the collection of evidence presented to Congress in support of the Federal DBE Program’s 2012 reauthorization under MAP-21, including both statistical and anecdotal evidence. *Id.*

The court also considered a report from a consultant who reviewed 95 disparity and availability studies concerning minority- and women-owned businesses, as well as anecdotal evidence, that were completed from 2000 to 2012. *Id.* at *11. Sixty-four of the studies had previously been presented to Congress. *Id.* The studies examine procurement for over 100 public entities and funding sources

across 32 states. *Id.* The consultant’s report opined that metrics such as firm revenue, number of employees, and bonding limits should not be considered when determining DBE availability because they are all “likely to be influenced by the presence of discrimination if it exists” and could potentially result in a built-in downward bias in the availability measure. *Id. at *11.*

To measure disparity, the consultant divided DBE utilization by availability and multiplied by 100 to calculate a “disparity index” for each study. *Id. at *11.* The report found 66 percent of the studies showed a disparity index of 80 or below, that is, significantly underutilized relative to their availability. *Id.* The report also examined data that showed lower earnings and business formation rates among women and minorities, even when variables such as age and education were held constant. *Id.* The report concluded that the disparities were not attributable to factors other than race and sex and were consistent with the presence of discrimination in construction and related professional services. *Id.*

The court distinguished the Federal Circuit decision in *Rothe Dev. Corp. v. Dep’t. of Def.*, 545 F. 3d 1023 (Fed. Cir. 2008) where the Federal Circuit Court held insufficient the reliance on only six disparity studies to support the government’s compelling interest in implementing a national program. *Id. at *12, citing Rothe*, 545 F. 3d at 1046. The court here noted the consultant report supplements the testimony and reports presented to Congress in support of the Federal DBE Program, which courts have found to establish a “strong basis in evidence” to support the conclusion that race-and gender-conscious action is necessary. *Id. at *12.*

The court found through the evidence presented by the Federal Defendants satisfied their burden in showing that the Federal DBE Program stands on a strong basis in evidence. *Id. at *12.* The Midwest expert’s suggestion that the studies used in consultant’s report do not properly account for capacity, the court stated, does not compel the court to find otherwise. The court *quoting Adarand VII*, 228 F.3d at 1173 (10th Cir. 2000) said that general criticism of disparity studies, as opposed to particular evidence undermining the reliability of the particular disparity studies relied upon by the government, is of little persuasive value and does not compel the court to discount the disparity evidence. *Id.* Midwest failed to present “affirmative evidence” that no remedial action was necessary. *Id.*

Federal DBE Program is narrowly tailored. Once the government has established a compelling interest for implementing a race-conscious program, it must show that the program is narrowly tailored to achieve this interest. *Id. at *12.* In determining whether a program is narrowly tailored, courts examine several factors, including (a) the necessity for the relief and efficacy of alternative race-neutral measures, (b) the flexibility and duration of the relief, including the availability of waiver provisions, (c) the relationship of the numerical goals to the relevant labor market, and (d) the impact of the relief on the rights of third parties. *Id.* The court stated that courts may also assess whether a program is “overinclusive.” *Id.* The court found that each of the above factors supports the conclusion that the Federal DBE Program is narrowly tailored. *Id.*

First, the court said that under the federal regulations, recipients of federal funds can only turn to race- and gender-conscious measures after they have attempted to meet their DBE participation goal through race-neutral means. *Id. at *13.* The court noted that race-neutral means include making contracting opportunities more accessible to small businesses, providing assistance in obtaining bonding and financing, and offering technical and other support services. *Id.* The court found that the regulations require serious, good faith consideration of workable race-neutral alternatives. *Id.*

Second, the federal regulations contain provisions that limit the Federal DBE Program's duration and ensure its flexibility. *Id.* at *13. The court found that the Federal DBE Program lasts only as long as its current authorizing act allows, noting that with each reauthorization, Congress must reevaluate the Federal DBE Program in light of supporting evidence. *Id.* The court also found that the Federal DBE Program affords recipients of federal funds and prime contractors substantial flexibility. *Id.* at *13. Recipients may apply for exemptions or waivers, releasing them from program requirements. *Id.* Prime contractors can apply to IDOT for a "good faith efforts waiver" on an individual contract goal. *Id.*

The court stated the availability of waivers is particularly important in establishing flexibility. *Id.* at *13. The court rejected Midwest's argument that the federal regulations impose a quota in light of the Program's explicit waiver provision. *Id.* Based on the availability of waivers, coupled with regular congressional review, the court found that the Federal DBE Program is sufficiently limited and flexible. *Id.*

Third, the court said that the Federal DBE Program employs a two-step goal-setting process that ties DBE participation goals by recipients of federal funds to local market conditions. *Id.* at *13. The court pointed out that the regulations delegate goal setting to recipients of federal funds who tailor DBE participation to local DBE availability. *Id.* The court found that the Federal DBE Program's goal-setting process requires states to focus on establishing realistic goals for DBE participation that are closely tied to the relevant labor market. *Id.*

Fourth, the federal regulations, according to the court, contain provisions that seek to minimize the Program's burden on non-DBEs. *Id.* at *13. The court pointed out the following provisions aim to keep the burden on non-DBEs minimal: the Federal DBE Program's presumption of social and economic disadvantage is rebuttable; race is not a determinative factor; in the event DBEs become "overconcentrated" in a particular area of contract work, recipients must take appropriate measures to address the overconcentration; the use of race-neutral measures; and the availability of good faith efforts waivers. *Id.* at *13.

The court said Midwest's primary argument is that the practice of states to award prime contracts to the lowest bidder, and the fact the federal regulations prescribe that DBE participation goals be applied to the value of the entire contract, unduly burdens non-DBE subcontractors. *Id.* at *14. Midwest argued that because most DBEs are small subcontractors, setting goals as a percentage of all contract dollars, while requiring a remedy to come only from subcontracting dollars, unduly burdens smaller, specialized non-DBEs. *Id.* The court found that the fact innocent parties may bear some of the burden of a DBE program is itself insufficient to warrant the conclusion that a program is not narrowly tailored. *Id.* The court also found that strong policy reasons support the Federal DBE Program's approach. *Id.*

The court stated that congressional testimony and the expert report from the Federal Defendants provide evidence that the Federal DBE Program is not overly inclusive. *Id.* at *14. The court noted the report observed statistically significant disparities in business formation and earnings rates in all 50 states for all minority groups and for nonminority women. *Id.*

The court said that Midwest did not attempt to rebut the Federal Defendants' evidence. *Id. at *14*. Therefore, because the Federal DBE Program stands on a strong basis in evidence and is narrowly tailored to achieve the goal of remedying discrimination, the court found the Program is constitutional on its face. *Id. at *14*. The court thus granted summary judgment in favor of the Federal Defendants. *Id.*

As-applied challenge to IDOT's implementation of the Federal DBE Program. In addition to challenging the Federal DBE Program on its face, Midwest also argued that it is unconstitutional as applied. *Id.* The court stated because the Federal DBE Program is applied to Midwest through IDOT, the court must examine IDOT's implementation of the Federal DBE Program. *Id.* Following the Seventh Circuit's decision in *Northern Contracting v. Illinois DOT*, the court said that whether the Federal DBE Program is unconstitutional as applied is a question of whether IDOT exceeded its authority in implementing it. *Id. at *14, citing Northern Contracting, Inc. v. Illinois*, 473 F.3d 715 at 722 (7th Cir. 2007). The court, *quoting Northern Contracting*, held that a challenge to a state's application of a federally mandated program must be limited to the question of whether the state exceeded its authority. *Id. at *14*.

IDOT not only applies the Federal DBE Program to USDOT-assisted projects, but it also applies the Federal DBE Program to state-funded projects. *Id. at *14*. The court, therefore, held it must determine whether the IDOT Defendants have established a compelling reason to apply the IDOT Program to state-funded projects in Illinois. *Id.*

The court pointed out that the Federal DBE Program delegates the narrow tailoring function to the state, and thus, IDOT must demonstrate that there is a demonstrable need for the implementation of the Federal DBE Program within its jurisdiction. *Id. at *14*. Accordingly, the court assessed whether IDOT has established evidence of discrimination in Illinois sufficient to (1) support its application of the Federal DBE Program to state-funded contracts, and (2) demonstrate that IDOT's implementation of the Federal DBE Program is limited to a place where race-based measures are demonstrably needed. *Id.*

IDOT's evidence of discrimination and DBE availability in Illinois. The evidence that IDOT has presented to establish the existence of discrimination in Illinois included two studies, one that was done in 2004 and the other in 2011. *Id. at *15*. The court said that the 2004 study uncovered disparities in earnings and business formation rates among women and minorities in the construction and engineering fields that the study concluded were consistent with discrimination. IDOT maintained that the 2004 study and the 2011 study must be read in conjunction with one another. *Id. at *15*. The court found that the 2011 study provided evidence to establish the disparity from which IDOT's inference of discrimination primarily arises. *Id. at *15*.

The 2011 study compared the proportion of contracting dollars awarded to DBEs (utilization) with the availability of DBEs. *Id.* The study determined availability through multiple sources, including bidders lists, prequalified business lists, and other methods recommended in the federal regulations. *Id.* The study applied NAICS codes to different types of contract work, assigning greater weight to categories of work in which IDOT had expended the most money. *Id.* This resulted in a "weighted" DBE availability calculation. *Id.*

The 2011 study examined prime and subcontracts and anecdotal evidence concerning race and gender discrimination in the Illinois road construction industry, including one-on-one interviews and a survey of more than 5,000 contractors. *Id.* at *15. The 2011 study, the court said, contained a regression analysis of private sector data and found disparities in earnings and business ownership rates among minorities and women, even when controlling for race- and gender-neutral variables. *Id.*

The study concluded that there was a statistically significant underutilization of DBEs in the award of both prime and subcontracts in Illinois. *Id.* For example, the court noted the difference the study found in the percentage of available prime construction contractors to the percentage of prime construction contracts under \$500,000, and the percentage of available construction subcontractors to the amount of percentage of dollars received of construction subcontracts. *Id.*

IDOT presented certain evidence to measure DBE availability in Illinois. The court pointed out that the 2004 study and two subsequent Goal-Setting Reports were used in establishing IDOT's DBE participation goal. *Id.* at *15. The 2004 study arrived at IDOT's 22.77 percent DBE participation goal in accordance with the two-step process defined in the federal regulations. *Id.* The court stated the 2004 study employed a seven-step "custom census" approach to calculate baseline DBE availability under step one of the regulations. *Id.*

The process begins by identifying the relevant markets in which IDOT operates and the categories of businesses that account for the bulk of IDOT spending. *Id.* at *15. The industries and counties in which IDOT expends relatively more contract dollars receive proportionately higher weights in the ultimate calculation of statewide DBE availability. *Id.* The study then counts the number of businesses in the relevant markets, and identifies which are minority- and women-owned. *Id.* To ensure the accuracy of this information, the study provides that it takes additional steps to verify the ownership status of each business. *Id.* Under step two of the regulations, the study adjusted this figure to 27.51 percent based on Census Bureau data. *Id.* According to the study, the adjustment takes into account its conclusion that baseline numbers are artificially lower than what would be expected in a race-neutral marketplace. *Id.*

IDOT used separate Goal-Setting Reports that calculated IDOT's DBE participation goal pursuant to the two-step process in the federal regulations, drawing from bidders lists, DBE directories, and the 2011 study to calculate baseline DBE availability. *Id.* at *16. The study and the Goal-Setting Reports gave greater weight to the types of contract work in which IDOT had expended relatively more money. *Id.*

Court rejected Midwest arguments as to the data and evidence. The court rejected the challenges by Midwest to the accuracy of IDOT's data. For example, Midwest argued that the anecdotal evidence contained in the 2011 study does not prove discrimination. *Id.* at *16. The court stated, however, where anecdotal evidence has been offered in conjunction with statistical evidence, it may lend support to the government's determination that remedial action is necessary. *Id.* at *16. The court noted that anecdotal evidence on its own could not be used to show a general policy of discrimination. *Id.*

The court rejected another argument by Midwest that the data collected after IDOT's implementation of the Federal DBE Program may be biased because anything observed about the public sector may be affected by the DBE Program. *Id.* at *16. The court rejected that argument finding post-enactment evidence of discrimination permissible. *Id.*

Midwest's main objection to the IDOT evidence, according to the court, is that it failed to account for capacity when measuring DBE availability and underutilization. *Id.* at *16. Midwest argued that IDOT's disparity studies failed to rule out capacity as a possible explanation for the observed disparities. *Id.* at *16.

IDOT argued that on prime contracts under \$500,000, capacity is a variable that makes little difference. *Id.* at *17. Prime contracts of varying sizes under \$500,000 were distributed to DBEs and non-DBEs alike at approximately the same rate. *Id.* at *17. IDOT also argued that through regression analysis, the 2011 study demonstrated factors other than discrimination did not account for the disparity between DBE utilization and availability. *Id.*

The court stated that despite Midwest's argument that the 2011 study took insufficient measures to rule out capacity as a race-neutral explanation for the underutilization of DBEs, the Supreme Court has indicated that a regression analysis need not take into account "all measurable variables" to rule out race-neutral explanations for observed disparities. *Id.* at *17 quoting *Bazemore v. Friday*, 478 U.S. 385, 400 (1986).

Midwest criticisms insufficient, speculative and conjecture — no independent statistical analysis; IDOT followed Northern Contracting and did not exceed the federal regulations. The court found Midwest's criticisms insufficient to rebut IDOT's evidence of discrimination or discredit IDOT's methods of calculating DBE availability. *Id.* at *17. First, the court said, the "evidence" offered by Midwest's expert reports "is speculative at best." *Id.* at *17. The court found that for a reasonable jury to find in favor of Midwest, Midwest would have to come forward with "credible, particularized evidence" of its own, such as a neutral explanation for the disparity, or contrasting statistical data. *Id.* at *17. The court held that Midwest failed to make the showing in this case. *Id.*

Second, the court stated that IDOT's method of calculating DBE availability is consistent with the federal regulations and has been endorsed by the Seventh Circuit. *Id.* at *17. The federal regulations, the court said, approve a variety of methods for accurately measuring ready, willing, and available DBEs, such as the use of DBE directories, Census Bureau data, and bidders lists. *Id.* The court found that these are the methods the 2011 study adopted in calculating DBE availability. *Id.*

The court said that the Seventh Circuit Court of Appeals approved the "custom census" approach as consistent with the federal regulations. *Id.* at *17, citing to *Northern Contracting v. Illinois DOT*, 473 F.3d at 723. The court noted the Seventh Circuit rejected the argument that availability should be based on a simple count of registered and prequalified DBEs under Illinois law, finding no requirement in the federal regulations that a recipient must so narrowly define the scope of ready, willing, and available firms. *Id.* The court also rejected the notion that an availability measure should distinguish between prime and subcontractors. *Id.* at *17.

The court held that through the 2004 and 2011 studies, and Goal-Setting Reports, IDOT provided evidence of discrimination in the Illinois road construction industry and a method of DBE availability calculation that is consistent with both the federal regulations and the Seventh Circuit decision in *Northern Contract v. Illinois DOT*. *Id.* at *18. The court said that in response to the Seventh Circuit decision and IDOT's evidence, Midwest offered only conjecture about how these studies supposed failure to account for capacity may or may not have impacted the studies' result. *Id.*

The court pointed out that although Midwest's expert's reports "cast doubt on the validity of IDOT's methodology, they failed to provide any independent statistical analysis or other evidence demonstrating actual bias." *Id.* at *18. Without this showing, the court stated, the record fails to demonstrate a lack of evidence of discrimination or actual flaws in IDOT's availability calculations.

Burden on non-DBE subcontractors; overconcentration. The court addressed the narrow tailoring factor concerning whether a program's burden on third parties is undue or unreasonable. The parties disagreed about whether the IDOT program resulted in an overconcentration of DBEs in the fencing and guardrail industry. *Id.* at *18. IDOT prepared an overconcentration study comparing the total number of prequalified fencing and guardrail contractors to the number of DBEs that also perform that type of work and determined that no overconcentration problem existed. Midwest presented its evidence relating to overconcentration. *Id.* The court found that Midwest did not show IDOT's determination that overconcentration does not exist among fencing and guardrail contractors to be unreasonable. *Id.* at *18.

The court stated the fact IDOT sets contract goals as a percentage of total contract dollars does not demonstrate that IDOT imposes an undue burden on non-DBE subcontractors, but to the contrary, IDOT is acting within the scope of the federal regulations that requires goals to be set in this manner. *Id.* at *19. The court noted that it recognizes setting goals as a percentage of total contract value addresses the widespread, indirect effects of discrimination that may prevent DBEs from competing as primes in the first place, and that a sharing of the burden by innocent parties, here non-DBE subcontractors, is permissible. *Id.* at *19. The court held that IDOT carried its burden in providing persuasive evidence of discrimination in Illinois, and found that such sharing of the burden is permissible here. *Id.*

Use of race-neutral alternatives. The court found that IDOT identified several race-neutral programs it used to increase DBE participation, including its Supportive Services, Mentor-Protégé, and Model Contractor Programs. *Id.* at *19. The programs provide workshops and training that help small businesses build bonding capacity, gain access to financial and project management resources, and learn about specific procurement opportunities. *Id.* IDOT conducted several studies including zero-participation goals contracts in which there was no DBE participation goal, and found that DBEs received only 0.84 percent of the total dollar value awarded. *Id.*

The court held IDOT was compliant with the federal regulations, noting that in the *Northern Contracting v. Illinois DOT* case, the Seventh Circuit found IDOT employed almost all of the methods suggested in the regulations to maximize DBE participation without resorting to race, including providing assistance in obtaining bonding and financing, implementing a supportive services program, and providing technical assistance. *Id.* at *19. The court agreed with the Seventh Circuit, and found that IDOT has made serious, good faith consideration of workable race-neutral alternatives. *Id.*

Duration and flexibility. The court pointed out that the state statute through which the Federal DBE Program is implemented is limited in duration and must be reauthorized every two to five years. *Id.* at *19. The court reviewed evidence that IDOT granted 270 of the 362 good faith waiver requests that it received from 2006 to 2014, and that IDOT granted 1,002 post-award waivers on over \$36 million in contracting dollars. *Id.* at *19. The court noted that IDOT granted the only good faith efforts waiver that Midwest requested. *Id.*

The court held the undisputed facts established that IDOT did not have a “no-waiver policy.” *Id.* at *20. The court found that it could not conclude that the waiver provisions were impermissibly vague, and that IDOT took into consideration the substantial guidance provided in the federal regulations. *Id.* Because Midwest’s own experience demonstrated the flexibility of the Federal DBE Program in practice, the court said it could not conclude that the IDOT program amounts to an impermissible quota system that is unconstitutional on its face. *Id.* at *20.

The court again stated that Midwest had not presented any affirmative evidence showing that IDOT’s implementation of the Federal DBE Program imposes an undue burden on non-DBEs, fails to employ race-neutral measures, or lacks flexibility. *Id.* at *20. Accordingly, the court granted IDOT’s motion for summary judgment.

Facial and as-applied challenges to the Tollway program. The Illinois Tollway Program exists independently of the Federal DBE Program. Midwest challenged the Tollway Program as unconstitutional on its face and as applied. *Id.* at *20. Like the Federal and IDOT Defendants, the Tollway was required to show that its compelling interest in remedying discrimination in the Illinois road construction industry rests on a strong basis in evidence. *Id.* The Tollway relied on a 2006 disparity study, which examined the disparity between the Tollway’s utilization of DBEs and their availability. *Id.*

The study employed a “custom census” approach to calculate DBE availability, and examined the Tollway’s contract data to determine utilization. *Id.* at *20. The 2006 study reported statistically significant disparities for all race and sex categories examined. *Id.* The study also conducted an “economy-wide analysis” examining other race and sex disparities in the wider construction economy from 1979 to 2002. *Id.* at *21. Controlling for race- and gender-neutral variables, the study showed a significant negative correlation between a person’s race or sex and their earning power and ability to form a business. *Id.*

Midwest’s challenges to the Tollway evidence insufficient and speculative. In 2013, the Tollway commissioned a new study, which the court noted was not complete, but there was an “economy-wide analysis” similar to the analysis done in 2006 that updated census data gathered from 2007 to 2011. *Id.* at *21. The updated census analysis, according to the court, controlled for variables such as education, age and occupation and found lower earnings and rates of business formation among women and minorities as compared to white men. *Id.*

Midwest attacked the Tollway’s 2006 study similar to how it attacked the other studies with regard to IDOT’s DBE Program. *Id.* at *21. For example, Midwest attacked the 2006 study as being biased because it failed to take into account capacity in determining the disparities. *Id.* at *21. The Tollway defended the 2006 study arguing that capacity metrics should not be taken into account because the Tollway asserted they are themselves a product of indirect discrimination, the construction industry is

elastic in nature, and that firms can easily ramp up or ratchet down to accommodate the size of a project. *Id.* The Tollway also argued that the “economy-wide analysis” revealed a negative correlation between an individual’s race and sex and their earning power and ability to own or form a business, showing that the underutilization of DBEs is consistent with discrimination. *Id.* at *21.

To successfully rebut the Tollway’s evidence of discrimination, the court stated that Midwest must come forward with a neutral explanation for the disparity, show that the Tollway’s statistics are flawed, demonstrate that the observed disparities are insignificant, or present contrasting data of its own. *Id.* at *22. Again, the court found that Midwest failed to make this showing, and that the evidence offered through the expert reports for Midwest was far too speculative to create a disputed issue of fact suitable for trial. *Id.* at *22. Accordingly, the court found the Tollway Defendants established a strong basis in evidence for the Tollway Program. *Id.*

Tollway Program is narrowly tailored. As to determining whether the Tollway Program is narrowly tailored, Midwest also argued that the Tollway Program imposed an undue burden on non-DBE subcontractors. Like IDOT, the Tollway sets individual contract goals as a percentage of the value of the entire contract based on the availability of DBEs to perform particular line items. *Id.* at *22.

The court reiterated that setting goals as a percentage of total contract dollars does not demonstrate an undue burden on non-DBE subcontractors, and that the Tollway’s method of goal setting is identical to that prescribed by the federal regulations, which the court already found to be supported by strong policy reasons. *Id.* at *22. The court stated that the sharing of a remedial program’s burden is itself insufficient to warrant the conclusion that the program is not narrowly tailored. *Id.* at *22. The court held the Tollway Program’s burden on non-DBE subcontractors to be permissible. *Id.*

In addressing the efficacy of race-neutral measures, the court found the Tollway implemented race-neutral programs to increase DBE participation, including a program that allows smaller contracts to be unbundled from larger ones, a Small Business Initiative that sets aside contracts for small businesses on a race-neutral basis, partnerships with agencies that provide support services to small businesses, and other programs designed to make it easier for smaller contractors to do business with the Tollway in general. *Id.* at *22. The court held the Tollway’s race-neutral measures are consistent with those suggested under the federal regulations and found that the availability of these programs, which mirror IDOT’s, demonstrates serious, good faith consideration of workable race-neutral alternatives. *Id.* at *22.

In considering the issue of flexibility, the court found the Tollway Program, like the Federal DBE Program, provides for waivers where prime contractors are unable to meet DBE participation goals, but have made good faith efforts to do so. *Id.* at *23. Like IDOT, the court said the Tollway adheres to the federal regulations in determining whether a bidder has made good faith efforts. *Id.* As under the Federal DBE Program, the Tollway Program also allows bidders who have been denied waivers to appeal. *Id.*

From 2006 to 2011, the court stated, the Tollway granted waivers on approximately 20 percent of the 200 prime construction contracts it awarded. *Id.* Because the Tollway demonstrated that waivers are available, routinely granted, and awarded or denied based on guidance found in the federal regulations, the court found the Tollway Program sufficiently flexible. *Id.* at *23.

Midwest presented no affirmative evidence. The court held the Tollway Defendants provided a strong basis in evidence for their DBE Program, whereas Midwest, did not come forward with any concrete, affirmative evidence to shake this foundation. *Id.* at *23. The court thus held the Tollway Program was narrowly tailored and granted the Tollway Defendants' motion for summary judgment.

8. *Dunnet Bay Construction Company v. Gary Hannig, in its official capacity as Secretary of Transportation for the Illinois DOT and the Illinois DOT*, 2014 WL 552213 (C.D. Ill. 2014), affirmed *Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al.*, 799 F.3d 676, 2015 WL 4934560 (7th Cir. 2015).

In *Dunnet Bay Construction Company v. Gary Hannig, in its official capacity as Secretary of the Illinois DOT and the Illinois DOT*, 2014 WL 552213 (C.D. Ill. Feb. 12, 2014), plaintiff Dunnet Bay Construction Company brought a lawsuit against the Illinois Department of Transportation (IDOT) and the Secretary of IDOT in his official capacity challenging the IDOT DBE Program and its implementation of the Federal DBE Program, including an alleged unwritten "no waiver" policy, and claiming that the IDOT's program is not narrowly tailored.

Motion to Dismiss certain claims granted. IDOT initially filed a Motion to Dismiss certain Counts of the Complaint. The United States District Court granted the Motion to Dismiss Counts I, II and III against IDOT primarily based on the defense of immunity under the Eleventh Amendment to the United States Constitution. The Opinion held that claims in Counts I and II against Secretary Hannig of IDOT in his official capacity remained in the case.

In addition, the other Counts of the Complaint that remained in the case not subject to the Motion to Dismiss, sought declaratory and injunctive relief and damages based on the challenge to the IDOT DBE Program and its application by IDOT. Plaintiff Dunnet Bay alleged the IDOT DBE Program is unconstitutional based on the unwritten no-waiver policy, requiring Dunnet Bay to meet DBE goals and denying Dunnet Bay a waiver of the goals despite its good faith efforts, and based on other allegations. Dunnet Bay sought a declaratory judgment that IDOT's DBE program discriminates on the basis of race in the award of federal-aid highway construction contracts in Illinois.

Motions for Summary Judgment. Subsequent to the Court's Order granting the partial Motion to Dismiss, Dunnet Bay filed a Motion for Summary Judgment, asserting that IDOT had departed from the federal regulations implementing the Federal DBE Program, that IDOT's implementation of the Federal DBE Program was not narrowly tailored to further a compelling governmental interest, and that therefore, the actions of IDOT could not withstand strict scrutiny. 2014 WL 552213 at * 1. IDOT also filed a Motion for Summary Judgment, alleging that all applicable guidelines from the federal regulations were followed with respect to the IDOT DBE Program, and because IDOT is federally mandated and did not abuse its federal authority, IDOT's DBE Program is not subject to attack. *Id.*

IDOT further asserted in its Motion for Summary Judgment that there is no Equal Protection violation, claiming that neither the rejection of the bid by Dunnet Bay, nor the decision to re-bid the project, was based upon Dunnet Bay's race. IDOT also asserted that, because Dunnet Bay was relying on the rights of others and was not denied equal opportunity to compete for government contracts, Dunnet Bay lacked standing to bring a claim for racial discrimination.

Factual background. Plaintiff Dunnet Bay Construction Company is owned by two white males and is engaged in the business of general highway construction. It has been qualified to work on IDOT highway construction projects. In accordance with the federal regulations, IDOT prepared and submitted to the USDOT for approval a DBE Program governing federally funded highway construction contracts. For fiscal year 2010, IDOT established an overall aspirational DBE goal of 22.77 percent for DBE participation, and it projected that 4.12 percent of the overall goal could be met through race neutral measures and the remaining 18.65 percent would require the use of race-conscious goals. 2014 WL 552213 at *3. IDOT normally achieved somewhere between 10 and 14 percent participation by DBEs. *Id.* The overall aspirational goal was based upon a statewide disparity study conducted on behalf of IDOT in 2004.

Utilization goals under the IDOT DBE Program Document are determined based upon an assessment for the type of work, location of the work, and the availability of DBE companies to do a part of the work. *Id.* at *4. Each pay item for a proposed contract is analyzed to determine if there are at least two ready, willing, and able DBEs to perform the pay item. *Id.* The capacity of the DBEs, their willingness to perform the work in the particular district, and their possession of the necessary workforce and equipment are also factors in the overall determination. *Id.*

Initially, IDOT calculated the DBE goal for the Eisenhower Project to be 8 percent. When goals were first set on the Eisenhower Project, taking into account every item listed for work, the maximum potential goal for DBE participation for the Eisenhower Project was 20.3 percent. Eventually, an overall goal of approximately 22 percent was set. *Id.* at *4.

At the bid opening, Dunnet Bay's bid was the lowest received by IDOT. Its low bid was over IDOT's estimate for the project. Dunnet Bay, in its bid, identified 8.2 percent of its bid for DBEs. The second low bidder projected DBE participation of 22 percent. Dunnet Bay's DBE participation bid did not meet the percentage participation in the bid documents, and thus IDOT considered Dunnet Bay's good faith efforts to meet the DBE goal. IDOT rejected Dunnet Bay's bid determining that Dunnet Bay had not demonstrated a good faith effort to meet the DBE goal. *Id.* at *9.

The Court found that although it was the low bidder for the construction project, Dunnet Bay did not meet the goal for participation of DBEs despite its alleged good faith efforts. IDOT contended it followed all applicable guidelines in handling the DBE Program, and that because it did not abuse its federal authority in administering the Program, the IDOT DBE Program is not subject to attack. *Id.* at *23. IDOT further asserted that neither rejection of Dunnet Bay's bid nor the decision to re-bid the Project was based on its race or that of its owners, and that Dunnet Bay lacked standing to bring a claim for racial discrimination on behalf of others (i.e., small businesses operated by white males). *Id.* at *23.

The Court found that the federal regulations recommend a number of non-mandatory, non-exclusive and non-exhaustive actions when considering a bidder's good faith efforts to obtain DBE participation. *Id.* at *25. The federal regulations also provide the state DOT may consider the ability of other bidders to meet the goal. *Id.*

IDOT implementing the Federal DBE Program is acting as an agent of the federal government insulated from constitutional attack absent showing the state exceeded federal authority. The Court held that a state entity such as IDOT implementing a congressionally mandated program may rely “on the federal government’s compelling interest in remedying the effects of past discrimination in the national construction market.” *Id.* at *26, quoting *Northern Contracting Co., Inc. v. Illinois*, 473 F.3d 715 at 720-21 (7th Cir. 2007). In these instances, the Court stated, the state is acting as an agent of the federal government and is “insulated from this sort of constitutional attack, absent a showing that the state exceeded its federal authority.” *Id.* at *26, quoting *Northern Contracting, Inc.*, 473 F.3d at 721. The Court held that accordingly, any “challenge to a state’s application of a federally mandated program must be limited to the question of whether the state exceeded its authority.” *Id.* at *26, quoting *Northern Contracting, Inc.*, 473 F.3d at 722. Therefore, the Court identified the key issue as determining if IDOT exceeded its authority granted under the federal rules or if Dunnet Bay’s challenges are foreclosed by *Northern Contracting*. *Id.* at *26.

The Court found that IDOT did in fact employ a thorough process before arriving at the 22 percent DBE participation goal for the Eisenhower Project. *Id.* at *26. The Court also concluded “because the federal regulations do not specify a procedure for arriving at contract goals, it is not apparent how IDOT could have exceeded its federal authority. Any challenge on this factor fails under *Northern Contracting*.” *Id.* at *26. Therefore, the Court concluded there is no basis for finding that the DBE goal was arbitrarily set or that IDOT exceeded its federal authority with respect to this factor. *Id.* at *27.

The “no-waiver” policy. The Court held that there was not a no-waiver policy considering all the testimony and factual evidence. In particular, the Court pointed out that a waiver was in fact granted in connection with the same bid letting at issue in this case. *Id.* at *27. The Court found that IDOT granted a waiver of the DBE participation goal for another construction contractor on a different contract, but under the same bid letting involved in this matter. *Id.*

Thus, the Court held that Dunnet Bay’s assertion that IDOT adopted a “no-waiver” policy was unsupported and contrary to the record evidence. *Id.* at *27. The Court found the undisputed facts established that IDOT did not have a “no-waiver” policy, and that IDOT did not exceed its federal authority because it did not adopt a “no-waiver” policy. *Id.* Therefore, the Court again concluded that any challenge by Dunnet Bay on this factor failed pursuant to the *Northern Contracting* decision.

IDOT’s decision to reject Dunnet Bay’s bid based on lack of good faith efforts did not exceed IDOT’s authority under federal law. The Court found that IDOT has significant discretion under federal regulations and is often called upon to make a “judgment call” regarding the efforts of the bidder in terms of establishing good faith attempt to meet the DBE goals. *Id.* at *28. The Court stated it was unable to conclude that IDOT erred in determining Dunnet Bay did not make adequate good faith efforts. *Id.* The Court surmised that the strongest evidence that Dunnet Bay did not take all necessary and reasonable steps to achieve the DBE goal is that its DBE participation was under 9 percent while other bidders were able to reach the 22 percent goal. *Id.* Accordingly, the Court concluded that IDOT’s decision rejecting Dunnet Bay’s bid was consistent with the regulations and did not exceed IDOT’s authority under the federal regulations. *Id.*

The Court also rejected Dunnet Bay's argument that IDOT failed to provide Dunnet Bay with a written explanation as to why its good faith efforts were not sufficient, and thus there were deficiencies with the reconsideration of Dunnet Bay's bid and efforts as required by the federal regulations. *Id.* at *29. The Court found it was unable to conclude that a technical violation such as to provide Dunnet Bay with a written explanation will provide any relief to Dunnet Bay. *Id.* Additionally, the Court found that because IDOT rebid the project, Dunnet Bay was not prejudiced by any deficiencies with the reconsideration. *Id.*

The Court emphasized that because of the decision to rebid the project, IDOT was not even required to hold a reconsideration hearing. *Id.* at *24. Because the decision on reconsideration as to good faith efforts did not exceed IDOT's authority under federal law, the Court held Dunnet Bay's claim failed under the *Northern Contracting* decision. *Id.*

Dunnet Bay lacked standing to raise an equal protection claim. The Court found that Dunnet Bay was not disadvantaged in its ability to compete against a racially favored business, and neither IDOT's rejection of Dunnet Bay's bid nor the decision to rebid was based on the race of Dunnet Bay's owners or any class-based animus. *Id.* at *29. The Court stated that Dunnet Bay did not point to any other business that was given a competitive advantage because of the DBE goals. *Id.* Dunnet Bay did not cite any cases which involve plaintiffs that are similarly situated to it — businesses that are not at a competitive disadvantage against minority-owned companies or DBEs — and have been determined to have standing. *Id.* at *30.

The Court concluded that any company similarly situated to Dunnet Bay had to meet the same DBE goal under the contract. *Id.* Dunnet Bay, the Court held, was not at a competitive disadvantage and/or unable to compete equally with those given preferential treatment. *Id.*

Dunnet Bay did not point to another contractor that did not have to meet the same requirements it did. The Court thus concluded that Dunnet Bay lacked standing to raise an equal protection challenge because it had not suffered a particularized injury that was caused by IDOT. *Id.* at *30. Dunnet Bay was not deprived of the ability to compete on an equal basis. *Id.* Also, based on the amount of its profits, Dunnet Bay did not qualify as a small business, and therefore, it lacked standing to vindicate the rights of a hypothetical white-owned small business. *Id.* at *30. Because the Court found that Dunnet Bay was not denied the ability to compete on an equal footing in bidding on the contract, Dunnet Bay lacked standing to challenge the DBE Program based on the Equal Protection Clause. *Id.* at *30.

Dunnet Bay did not establish equal protection violation even if it had standing. The Court held that even if Dunnet Bay had standing to bring an equal protection claim, IDOT still is entitled to summary judgment. The Court stated the Supreme Court has held that the "injury in fact" in an equal protection case challenging a DBE Program is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit. *Id.* at *31. Dunnet Bay, the Court said, implied that but for the alleged "no-waiver" policy and DBE goals which were not narrowly tailored to address discrimination, it would have been awarded the contract. The Court again noted the record established that IDOT did not have a "no-waiver" policy. *Id.* at *31.

The Court also found that because the gravamen of equal protection lies not in the fact of deprivation of a right but in the invidious classification of persons, it does not appear Dunnet Bay can assert a viable claim. *Id.* at *31. The Court stated it is unaware of any authority which suggests that Dunnet Bay can establish an equal protection violation even if it could show that IDOT failed to comply with the regulations relating to the DBE Program. *Id.* The Court said that even if IDOT did employ a “no-waiver policy,” such a policy would not constitute an equal protection violation because the federal regulations do not confer specific entitlements upon any individuals. *Id.* at *31.

In order to support an equal protection claim, the plaintiff would have to establish it was treated less favorably than another entity with which it was similarly situated in all material respects. *Id.* at *51. Based on the record, the Court stated it could only speculate whether Dunnet Bay or another entity would have been awarded a contract without IDOT’s DBE Program. But the Court found it need not speculate as to whether Dunnet Bay or another company would have been awarded the contract, because what is important for equal protection analysis is that Dunnet Bay was treated the same as other bidders. *Id.* at *31. Every bidder had to meet the same percentage goal for subcontracting to DBEs or make good faith efforts. *Id.* Because Dunnet Bay was held to the same standards as every other bidder, it cannot establish it was the victim of discrimination pursuant to the Equal Protection Clause. *Id.* Therefore, IDOT, the Court held, is entitled to summary judgment on Dunnet Bay’s claims under the Equal Protection Clause and under Title VI.

Conclusion. The Court concluded IDOT is entitled to summary judgment, holding Dunnet Bay lacked standing to raise an equal protection challenge based on race, and that even if Dunnet Bay had standing, Dunnet Bay was unable to show that it would have been awarded the contract in the absence of any violation. *Id.* at *32. Any other federal claims, the Court held, were foreclosed by the *Northern Contracting* decision because there is no evidence IDOT exceeded its authority under federal law. *Id.* Finally, the Court found Dunnet Bay had not established the likelihood of future harm, and thus was not entitled to injunctive relief.

9. Geyer Signal, Inc. v. Minnesota, DOT, 2014 WL 1309092 (D. Minn. March 31, 2014)

In *Geyer Signal, Inc., et al. v. Minnesota DOT, USDOT, Federal Highway Administration, et al.*, Case No. 11-CV-321, United States District Court for the District Court of Minnesota, the plaintiffs Geyer Signal, Inc. and its owner filed this lawsuit against the Minnesota DOT (MnDOT) seeking a permanent injunction against enforcement and a declaration of unconstitutionality of the Federal DBE Program and Minnesota DOT’s implementation of the DBE Program on its face and as applied. Geyer Signal sought an injunction against the Minnesota DOT prohibiting it from enforcing the DBE Program or, alternatively, from implementing the Program improperly; a declaratory judgment declaring that the DBE Program violates the Equal protection element of the Fifth Amendment of the United States Constitution and/or the Equal Protection clause of the Fourteenth Amendment to the United States Constitution and is unconstitutional, or, in the alternative that Minnesota DOT’s implementation of the Program is an unconstitutional violation of the Equal Protection Clause, and/or that the Program is void for vagueness; and other relief.

Procedural background. Plaintiff Geyer Signal is a small, family-owned business that performs traffic control work generally on road construction projects. Geyer Signal is a firm owned by a Caucasian male, who also is a named plaintiff.

Subsequent to the lawsuit filed by Geyer Signal, the USDOT and the Federal Highway Administration filed their Motion to permit them to intervene as defendants in this case. The Federal Defendant-Intervenors requested intervention on the case in order to defend the constitutionality of the Federal DBE Program and the federal regulations at issue. The Federal Defendant-Intervenors and the plaintiffs filed a Stipulation that the Federal Defendant-Intervenors have the right to intervene and should be permitted to intervene in the matter, and consequently the plaintiffs did not contest the Federal Defendant-Intervenor's Motion for Intervention. The Court issued an Order that the Stipulation of Intervention, agreeing that the Federal Defendant-Intervenors may intervene in this lawsuit, be approved and that the Federal Defendant-Intervenors are permitted to intervene in this case.

The Federal Defendants moved for summary judgment and the State defendants moved to dismiss, or in the alternative for summary judgment, arguing that the DBE Program on its face and as implemented by MnDOT is constitutional. The Court concluded that the plaintiffs, Geyer Signal and its white male owner, Kevin Kissner, raised no genuine issue of material fact with respect to the constitutionality of the DBE Program facially or as applied. Therefore, the Court granted the Federal Defendants and the State defendants' motions for summary judgment in their entirety.

Plaintiffs alleged that there is insufficient evidence of a compelling governmental interest to support a race based program for DBE use in the fields of traffic control or landscaping. (2014 WL 1309092 at *10) Additionally, plaintiffs alleged that the DBE Program is not narrowly tailored because it (1) treats the construction industry as monolithic, leading to an overconcentration of DBE participation in the areas of traffic signal and landscaping work; (2) allows recipients to set contract goals; and (3) sets goals based on the number of DBEs there are, not the amount of work those DBEs can actually perform. *Id.* *10. Plaintiffs also alleged that the DBE Program is unconstitutionally vague because it allows prime contractors to use bids from DBEs that are higher than the bids of non-DBEs, provided the increase in price is not unreasonable, without defining what increased costs are "reasonable." *Id.*

Constitutional claims. The Court states that the "heart of plaintiffs' claims is that the DBE Program and MnDOT's implementation of it are unconstitutional because the impact of curing discrimination in the construction industry is overconcentrated in particular sub-categories of work." *Id.* at *11. The Court noted that because DBEs are, by definition, small businesses, plaintiffs contend they "simply cannot perform the vast majority of the types of work required for federally-funded MnDOT projects because they lack the financial resources and equipment necessary to conduct such work. *Id.*

As a result, plaintiffs claimed that DBEs only compete in certain small areas of MnDOT work, such as traffic control, trucking, and supply, but the DBE goals that prime contractors must meet are spread out over the entire contract. *Id.* Plaintiffs asserted that prime contractors are forced to disproportionately use DBEs in those small areas of work, and that non-DBEs in those areas of work are forced to bear the entire burden of "correcting discrimination", while the vast majority of non-DBEs in MnDOT contracting have essentially no DBE competition. *Id.*

Plaintiffs therefore argued that the DBE Program is not narrowly tailored because it means that any DBE goals are only being met through a few areas of work on construction projects, which burden non-DBEs in those sectors and do not alleviate any problems in other sectors. *Id.* at #11.

Plaintiffs brought two facial challenges to the Federal DBE Program. *Id.* Plaintiffs allege that the DBE Program is facially unconstitutional because it is “fatally prone to overconcentration” where DBE goals are met disproportionately in areas of work that require little overhead and capital. *Id.* at 11. Second, plaintiffs alleged that the DBE Program is unconstitutionally vague because it requires prime contractors to accept DBE bids even if the DBE bids are higher than those from non-DBEs, provided the increased cost is “reasonable” without defining a reasonable increase in cost. *Id.*

Plaintiffs also brought three as-applied challenges based on MnDOT’s implementation of the DBE Program. *Id.* at 12. First, plaintiffs contended that MnDOT has unconstitutionally applied the DBE Program to its contracting because there is no evidence of discrimination against DBEs in government contracting in Minnesota. *Id.* Second, they contended that MnDOT has set impermissibly high goals for DBE participation. Finally, plaintiffs argued that to the extent the DBE Federal Program allows MnDOT to correct for overconcentration, it has failed to do so, rendering its implementation of the Program unconstitutional. *Id.*

Strict scrutiny. It is undisputed that strict scrutiny applied to the Court’s evaluation of the Federal DBE Program, whether the challenge is facial or as - applied. *Id.* at *12. Under strict scrutiny, a “statute’s race-based measures ‘are constitutional only if they are narrowly tailored to further compelling governmental interests.’” *Id.* at *12, quoting *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

The Court notes that the DBE Program also contains a gender conscious provision, a classification the Court says that would be subject to intermediate scrutiny. *Id.* at *12, at n.4. Because race is also used by the Federal DBE Program, however, the Program must ultimately meet strict scrutiny, and the Court therefore analyzes the entire Program for its compliance with strict scrutiny. *Id.*

Facial challenge based on overconcentration. The Court says that in order to prevail on a facial challenge, the plaintiff must establish that no set of circumstances exist under which the Federal DBE Program would be valid. *Id.* at *12. The Court states that plaintiffs bear the ultimate burden to prove that the DBE Program is unconstitutional. *Id.* at *.

Compelling governmental interest. The Court points out that the Eighth Circuit Court of Appeals has already held the federal government has a compelling interest in not perpetuating the effects of racial discrimination in its own distribution of federal funds and in remediating the effects of past discrimination in the government contracting markets created by its disbursements. *Id.* *13, quoting *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1165 (10th Cir. 2000). The plaintiffs did not dispute that remedying discrimination in federal transportation contracting is a compelling governmental interest. *Id.* at *13. In 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 nonminorities. *Id.* at *6.

The Federal Defendants' consultant also described studies supporting the conclusion that there is credit discrimination against minority- and women-owned businesses, concluded that there is a consistent and statistically significant underutilization of minority- and women-owned businesses in public contracting, and specifically found that discrimination existed in MnDOT contracting when no race-conscious efforts were utilized. *Id.* *6. The Court notes that Congress had considered a plethora of evidence documenting the continued presence of discrimination in transportation projects utilizing Federal dollars. *Id.* at *5.

The Court concluded that neither of the plaintiffs' contentions established that Congress lacked a substantial basis in the evidence to support its conclusion that race-based remedial action was necessary to address discrimination in public construction contracting. *Id.* at *14. The Court rejected plaintiffs' argument that because Congress found multiple forms of discrimination against minority- and women-owned business, that evidence showed Congress failed to also find that such businesses specifically face discrimination in public contracting, or that such discrimination is not relevant to the effect that discrimination has on public contracting. *Id.*

The Court referenced the decision in *Adarand Constructors, Inc.* 228 F.3d at 1175-1176. In *Adarand*, the Court found evidence relevant to Congressional enactment of the DBE Program to include that both race-based barriers to entry and the ongoing race-based impediments to success faced by minority subcontracting enterprises are caused either by continuing discrimination or the lingering effects of past discrimination on the relevant market. *Id.* at *14.

The Court, citing again with approval the decision in *Adarand Constructors, Inc.*, found the evidence presented by the federal government demonstrates the existence of two kinds of discriminatory barriers to minority subcontracting enterprises, both of which show a strong link between racial disparities in the federal government's disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination. *Id.* at *14, quoting, *Adarand Constructors, Inc.* 228 F.3d at 1167-68. The first discriminatory barriers are to the formation of qualified minority subcontracting enterprises due to private discrimination. *Id.* The second discriminatory barriers are to fair competition between minority and nonminority subcontracting enterprises, again due to private discrimination. *Id.* Both kinds of discriminatory barriers preclude existing minority firms from effectively competing for public construction contracts. *Id.*

Accordingly, the Court found that Congress' consideration of discriminatory barriers to entry for DBEs as well as discrimination in existing public contracting establish a strong basis in the evidence for reauthorization of the Federal DBE Program. *Id.* at *14.

Court rejects Plaintiffs' general critique of evidence as failing to meet their burden of proof. The Court held that plaintiffs' general critique of the methodology of the studies relied upon by the Federal Defendants is similarly insufficient to demonstrate that Congress lacked a substantial basis in the evidence. *Id.* at *14. The Court stated that the Eighth Circuit Court of Appeals has already rejected plaintiffs' argument that Congress was required to find specific evidence of discrimination in Minnesota in order to enact the national Program. *Id.* at *14.

Finally, the Court pointed out that plaintiffs have failed to present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to and participation in highway contracts. *Id.* at *15. Thus, the Court concluded that plaintiffs failed to meet their ultimate burden to prove that the Federal DBE Program is unconstitutional on this ground. *Id.* at *15, quoting *Sherbrooke Turf, Inc.*, 345 F.3d at 971–73.

Therefore, the Court held that plaintiffs did not meet their burden of raising a genuine issue of material fact as to whether the government met its evidentiary burden in reauthorizing the DBE Federal Program, and granted summary judgment in favor of the Federal Defendants with respect to the government's compelling interest. *Id.* at *15.

Narrowly tailored. The Court states that several factors are examined in determining whether race-conscious remedies are narrowly tailored, and that numerous Federal Courts have already concluded that the DBE Federal Program is narrowly tailored. *Id.* at *15. Plaintiffs in this case did not dispute the various aspects of the Federal DBE Program that courts have previously found to demonstrate narrowly tailoring. *Id.* Instead, plaintiffs argue only that the Federal DBE Program is not narrowly tailored on its face because of overconcentration.

Overconcentration. Plaintiffs argued that if the recipients of federal funds use overall industry participation of minorities to set goals, yet limit actual DBE participation to only defined small businesses that are limited in the work they can perform, there is no way to avoid overconcentration of DBE participation in a few, limited areas of MnDOT work. *Id.* at *15. Plaintiffs asserted that small businesses cannot perform most of the types of work needed or necessary for large highway projects, and if they had the capital to do it, they would not be small businesses. *Id.* at *16. Therefore, plaintiffs argued the DBE Program will always be overconcentrated. *Id.*

The Court states that in order for plaintiffs to prevail on this facial challenge, plaintiffs must establish that the overconcentration it identifies is unconstitutional, and that there are no circumstances under which the Federal DBE Program could be operated without overconcentration. *Id.* The Court concludes that plaintiffs' claim fails on the basis that there are circumstances under which the Federal DBE Program could be operated without overconcentration. *Id.*

First, the Court found that plaintiffs fail to establish that the DBE Program goals will always be fulfilled in a manner that creates overconcentration, because they misapprehend the nature of the goal setting mandated by the DBE Program. *Id.* at *16. The Court states that recipients set goals for DBE participation based on evidence of the availability of ready, willing and able DBEs to participate

on DOT-assisted contracts. *Id.* The DBE Program, according to the Court, necessarily takes into account, when determining goals, that there are certain types of work that DBEs may never be able to perform because of the capital requirements. *Id.* In other words, if there is a type of work that no DBE can perform, there will be no demonstrable evidence of the availability of ready, willing and able DBEs in that type of work, and those non-existent DBEs will not be factored into the level of DBE participation that a locality would expect absent the effects of discrimination. *Id.*

Second, the Court found that even if the DBE Program could have the incidental effect of overconcentration in particular areas, the DBE Program facially provides ample mechanisms for a recipient of federal funds to address such a problem. *Id.* at *16. The Court notes that a recipient retains substantial flexibility in setting individual contract goals and specifically may consider the type of work involved, the location of the work, and the availability of DBEs for the work of the particular contract. *Id.* If overconcentration presents itself as a problem, the Court points out that a recipient can alter contract goals to focus less on contracts that require work in an already overconcentrated area and instead involve other types of work where overconcentration of DBEs is not present. *Id.*

The federal regulations also require contractors to engage in good faith efforts that require breaking out the contract work items into economically feasible units to facilitate DBE participation. *Id.* Therefore, the Court found, the regulations anticipate the possible issue identified by plaintiffs and require prime contractors to subdivide projects that would otherwise typically require more capital or equipment than a single DBE can acquire. *Id.* Also, the Court, states that recipients may obtain waivers of the DBE Program's provisions pertaining to overall goals, contract goals, or good faith efforts, if, for example, local conditions of overconcentration threaten operation of the DBE Program. *Id.*

The Court also rejects plaintiffs claim that 49 CFR § 26.45(h), which provides that recipients are not allowed to subdivide their annual goals into "group-specific goals", but rather must provide for participation by all certified DBEs, as evidence that the DBE Program leads to overconcentration. *Id.* at *16. The Court notes that other courts have interpreted this provision to mean that recipients cannot apportion its DBE goal among different minority groups, and therefore the provision does not appear to prohibit recipients from identifying particular overconcentrated areas and remedying overconcentration in those areas. *Id.* at *16. And, even if the provision operated as plaintiffs suggested, that provision is subject to waiver and does not affect a recipient's ability to tailor specific contract goals to combat overconcentration. *Id.* at *16, n. 5.

The Court states with respect to overconcentration specifically, the federal regulations provide that recipients may use incentives, technical assistance, business development programs, mentor-protégé programs, and other appropriate measures designed to assist DBEs in performing work outside of the specific field in which the recipient has determined that non-DBEs are unduly burdened. *Id.* at *17. All of these measures could be used by recipients to shift DBEs from areas in which they are overconcentrated to other areas of work. *Id.* at *17.

Therefore, the Court held that because the DBE Program provides numerous avenues for recipients of federal funds to combat overconcentration, the Court concluded that plaintiffs' facial challenge to the Program fails, and granted the Federal Defendants' motion for summary judgment. *Id.*

C. Facial challenged based on vagueness. The Court held that plaintiffs could not maintain a facial challenge against the Federal DBE Program for vagueness, as their constitutional challenges to the Program are not based in the First Amendment. *Id.* at *17. The Court states that the Eighth Circuit Court of Appeals has held that courts need not consider facial vagueness challenges based upon constitutional grounds other than the First Amendment. *Id.*

The Court thus granted Federal Defendants’ motion for summary judgment with respect to plaintiffs’ facial claim for vagueness based on the allegation that the Federal DBE Program does not define “reasonable” for purposes of when a prime contractor is entitled to reject a DBEs’ bid on the basis of price alone. *Id.*

As-Applied Challenges to MnDOT’s DBE Program: MnDOT’s program held narrowly tailored.

Plaintiffs brought three as-applied challenges against MnDOT’s implementation of the Federal DBE Program, alleging that MnDOT has failed to support its implementation of the Program with evidence of discrimination in its contracting, sets inappropriate goals for DBE participation, and has failed to respond to overconcentration in the traffic control industry. *Id.* at *17.

Alleged failure to find evidence of discrimination. The Court held that a state’s implementation of the Federal DBE Program must be narrowly tailored. *Id.* at *18. To show that a state has violated the narrow tailoring requirement of the Federal DBE Program, the Court says a challenger must demonstrate that “better data was available” and the recipient of federal funds “was otherwise unreasonable in undertaking [its] thorough analysis and in relying on its results.” *Id.*, quoting *Sherbrooke Turf, Inc.* at 973.

Plaintiffs’ expert critiqued the statistical methods used and conclusions drawn by the consultant for MnDOT in finding that discrimination against DBEs exists in MnDOT contracting sufficient to support operation of the DBE Program. *Id.* at *18. Plaintiffs’ expert also critiqued the measures of DBE availability employed by the MnDOT consultant and the fact he measured discrimination in both prime and subcontracting markets, instead of solely in subcontracting markets. *Id.*

Plaintiffs present no affirmative evidence that discrimination does not exist. The Court held that plaintiffs’ disputes with MnDOT’s conclusion that discrimination exists in public contracting are insufficient to establish that MnDOT’s implementation of the Federal DBE Program is not narrowly tailored. *Id.* at *18. First, the Court found that it is insufficient to show that “data was susceptible to multiple interpretations,” instead, plaintiffs must “present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to and participation in highway contracts.” *Id.* at *18, quoting *Sherbrooke Turf, Inc.*, 345 F.3d at 970. Here, the Court found, plaintiffs’ expert has not presented affirmative evidence upon which the Court could conclude that no discrimination exists in Minnesota’s public contracting. *Id.* at *18.

As for the measures of availability and measurement of discrimination in both prime and subcontracting markets, both of these practices are included in the federal regulations as part of the mechanisms for goal setting. *Id.* at *18. The Court found that it would make little sense to separate prime contractor and subcontractor availability, when DBEs will also compete for prime contracts and any success will be reflected in the recipient’s calculation of success in meeting the overall goal. *Id.* at *18, quoting *Northern Contracting, Inc. v. Illinois*, 473 F.3d 715, 723 (7th Cir. 2007). Because these factors are part of the federal regulations defining state goal setting that the Eighth Circuit Court of

Appeals has already approved in assessing MnDOT's compliance with narrow tailoring in *Sherbrooke Turf*, the Court concluded these criticisms do not establish that MnDOT has violated the narrow tailoring requirement. *Id.* at *18.

In addition, the Court held these criticisms fail to establish that MnDOT was unreasonable in undertaking its thorough analysis and relying on its results, and consequently do not show lack of narrow tailoring. *Id.* at *18. Accordingly, the Court granted the State defendants' motion for summary judgment with respect to this claim.

Alleged inappropriate goal setting. Plaintiffs second challenge was to the aspirational goals MnDOT has set for DBE performance between 2009 and 2015. *Id.* at *19. The Court found that the goal setting violations the plaintiffs alleged are not the types of violations that could reasonably be expected to recur. *Id.* Plaintiffs raised numerous arguments regarding the data and methodology used by MnDOT in setting its earlier goals. *Id.* But, plaintiffs did not dispute that every three years MnDOT conducts an entirely new analysis of discrimination in the relevant market and establishes new goals. *Id.* Therefore, disputes over the data collection and calculations used to support goals that are no longer in effect are moot. *Id.* Thus, the Court only considered plaintiffs' challenges to the 2013–2015 goals. *Id.*

Plaintiffs raised the same challenges to the 2013–2015 goals as it did to MnDOT's finding of discrimination, namely that the goals rely on multiple approaches to ascertain the availability of DBEs and rely on a measurement of discrimination that accounts for both prime and subcontracting markets. *Id.* at *19. Because these challenges identify only a different interpretation of the data and do not establish that MnDOT was unreasonable in relying on the outcome of the consultants' studies, plaintiffs have failed to demonstrate a material issue of fact related to MnDOT's narrow tailoring as it relates to goal setting. *Id.*

Alleged overconcentration in the traffic control market. Plaintiffs' final argument was that MnDOT's implementation of the DBE Program violates the Equal Protection Clause because MnDOT has failed to find overconcentration in the traffic control market and correct for such overconcentration. *Id.* at *20. MnDOT presented an expert report that reviewed four different industries into which plaintiffs' work falls based on NAICs codes that firms conducting traffic control-type work identify themselves by. *Id.* After conducting a disproportionality comparison, the consultant concluded that there was not statistically significant overconcentration of DBEs in plaintiffs' type of work.

Plaintiffs' expert found that there is overconcentration, but relied upon six other contractors that have previously bid on MnDOT contracts, which plaintiffs believe perform the same type of work as plaintiff. *Id.* at *20. But the Court found plaintiffs have provided no authority for the proposition that the government must conform its implementation of the DBE Program to every individual business' self-assessment of what industry group they fall into and what other businesses are similar. *Id.*

The Court held that to require the State to respond to and adjust its calculations on account of such a challenge by a single business would place an impossible burden on the government because an individual business could always make an argument that some of the other entities in the work area the government has grouped it into are not alike. *Id.* at *20. This, the Court states, would require the

government to run endless iterations of overconcentration analyses to satisfy each business that non-DBEs are not being unduly burdened in its self-defined group, which would be quite burdensome. *Id.*

Because plaintiffs did not show that MnDOT's reliance on its overconcentration analysis using NAICs codes was unreasonable or that overconcentration exists in its type of work as defined by MnDOT, it has not established that MnDOT has violated narrow tailoring by failing to identify overconcentration or failing to address it. *Id.* at *20. Therefore, the Court granted the State defendants' motion for summary judgment with respect to this claim.

III. Claims Under 42 U.S.C. § 1981 and 42 U.S.C. § 2000. Because the Court concluded that MnDOT's actions are in compliance with the Federal DBE Program, its adherence to that Program cannot constitute a basis for a violation of § 1981. *Id.* at *21. In addition, because the Court concluded that plaintiffs failed to establish a violation of the Equal Protection Clause, it granted the defendants' motions for summary judgment on the 42 U.S.C. § 2000d claim.

Holding. Therefore, the Court granted the Federal Defendants' motion for summary judgment and the States' defendants' motion to dismiss/motion for summary judgment, and dismissed all the claims asserted by the plaintiffs.

10. *Geod Corporation v. New Jersey Transit Corporation, et al.*, 746 F. Supp.2d 642, 2010 WL 4193051 (D. N. J. October 19, 2010)

Plaintiffs, white male owners of Geod Corporation ("Geod"), brought this action against the New Jersey Transit Corporation ("NJT") alleging discriminatory practices by NJT in designing and implementing the Federal DBE Program. 746 F. Supp 2d at 644. The plaintiffs alleged that the NJT's DBE program violated the United States Constitution, 42 U.S.C. § 1981, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d) and state law. The district court previously dismissed the complaint against all Defendants except for NJT and concluded that a genuine issue material fact existed only as to whether the method used by NJT to determine its DBE goals during 2010 were sufficiently narrowly tailored, and thus constitutional. *Id.*

New Jersey Transit Program and Disparity Study. NJT relied on the analysis of consultants for the establishment of their goals for the DBE program. The study established the effects of past discrimination, the district court found, by looking at the disparity and utilization of DBEs compared to their availability in the market. *Id.* at 648. The study used several data sets and averaged the findings in order to calculate this ratio, including: (1) the New Jersey DBE vendor List; (2) a Survey of Minority-Owned Business Enterprises (SMOBE) and a Survey of Women-Owned Enterprises (SWOBE) as determined by the U.S. Census Bureau; and (3) detailed contract files for each racial group. *Id.*

The court found the study determined an average annual utilization of 23 percent for DBEs, and to examine past discrimination, several analyses were run to measure the disparity among DBEs by race. *Id.* at 648. The Study found that all but one category was underutilized among the racial and ethnic groups. *Id.* All groups other than Asian DBEs were found to be underutilized. *Id.*

The court held that the test utilized by the study, “conducted to establish a pattern of discrimination against DBEs, proved that discrimination occurred against DBEs during the pre-qualification process and in the number of contracts that are awarded to DBEs. *Id.* at 649. The court found that DBEs are more likely than non-DBEs to be pre-qualified for small construction contracts, but are less likely to pre-qualify for larger construction projects. *Id.*

For fiscal year 2010, the study consultant followed the “three-step process pursuant to USDOT regulations to establish the NJT DBE goal.” *Id.* at 649. First, the consultant determined “the base figure for the relative availability of DBEs in the specific industries and geographical market from which DBE and non-DBE contractors are drawn.” *Id.* In determining the base figure, the consultant (1) defined the geographic marketplace, (2) identified “the relevant industries in which NJ Transit contracts,” and (3) calculated “the weighted availability measure.” *Id.* at 649.

The court found that the study consultant used political jurisdictional methods and virtual methods to pinpoint the location of contracts and/or contractors for NJT, and determined that the geographical marketplace for NJT contracts included New Jersey, New York and Pennsylvania. *Id.* at 649. The consultant used contract files obtained from NJT and data obtained from Dun & Bradstreet to identify the industries with which NJT contracts in these geographical areas. *Id.* The consultant then used existing and estimated expenditures in these particular industries to determine weights corresponding to NJT contracting patterns in the different industries for use in the availability analysis. *Id.*

The availability of DBEs was calculated by using the following data: Unified Certification Program Business Directories for the states of New Jersey, New York and Pennsylvania; NJT Vendor List; Dun & Bradstreet database; 2002 Survey of Small Business Owners; and NJT Pre-Qualification List. *Id.* at 649-650. The availability rates were then “calculated by comparing the number of ready, willing, and able minority and women-owned firms in the defined geographic marketplace to the total number of ready, willing, and able firms in the same geographic marketplace. *Id.* The availability rates in each industry were weighed in accordance with NJT expenditures to determine a base figure. *Id.*

Second, the consultant adjusted the base figure due to evidence of discrimination against DBE prime contractors and disparities in small purchases and construction pre-qualification. *Id.* at 650. The discrimination analysis examined discrimination in small purchases, discrimination in pre-qualification, two regression analyses, an Essex County disparity study, market discrimination, and previous utilization. *Id.* at 650.

The Final Recommendations Report noted that there were sizeable differences in the small purchase awards to DBEs and non-DBEs with the awards to DBEs being significantly smaller. *Id.* at 650. DBEs were also found to be less likely to be pre-qualified for contracts over \$1 million in comparison to similarly situated non-DBEs. *Id.* The regression analysis using the dummy variable method yielded an average estimate of a discriminatory effect of -28.80 percent. *Id.* The discrimination regression analysis using the residual difference method showed that on average 12.2 percent of the contract amount disparity awarded to DBEs and non-DBEs was unexplained. *Id.*

The consultant also considered evidence of discrimination in the local market in accordance with 49 CFR § 26.45(d). The Final Recommendations Report cited in the 2005 Essex County Disparity Study suggested that discrimination in the labor market contributed to the unexplained portion of the self-employment, employment, unemployment, and wage gaps in Essex County, New Jersey. *Id.* at 650.

The consultant recommended that NJT focus on increasing the number of DBE prime contractors. Because qualitative evidence is difficult to quantify, according to the consultant, only the results from the regression analyses were used to adjust the base goal. *Id.* The base goal was then adjusted from 19.74 percent to 23.79 percent. *Id.*

Third, in order to partition the DBE goal by race-neutral and race-conscious methods, the consultant analyzed the share of all DBE contract dollars won with no goals. *Id.* at 650. He also performed two different regression analyses: one involving predicted DBE contract dollars and DBE receipts if the goal was set at zero. *Id.* at 651. The second method utilized predicted DBE contract dollars with goals and predicted DBE contract dollars without goals to forecast how much firms with goals would receive had they not included the goals. *Id.* The consultant averaged his results from all three methods to conclude that the fiscal year 2010 NJT a portion of the race-neutral DBE goal should be 11.94 percent and a portion of the race-conscious DBE goal should be 11.84 percent. *Id.* at 651.

The district court applied the strict scrutiny standard of review. The district court already decided, in the course of the motions for summary judgment, that compelling interest was satisfied as New Jersey was entitled to adopt the federal government's compelling interest in enacting TEA-21 and its implementing regulations. *Id.* at 652, citing *Geod v. N.J. Transit Corp.*, 678 F.Supp.2d 276, 282 (D.N.J. 2009). Therefore, the court limited its analysis to whether NJT's DBE program was narrowly tailored to further that compelling interest in accordance with "its grant of authority under federal law." *Id.* at 652 citing *Northern Contracting, Inc. v. Illinois Department of Transportation*, 473 F.3d 715, 722 (7th Cir. 2007).

Applying Northern Contracting v. Illinois. The district court clarified its prior ruling in 2009 (see 678 F.Supp.2d 276) regarding summary judgment, that the court agreed with the holding in *Northern Contracting, Inc. v. Illinois*, that "a challenge to a state's application of a federally mandated program must be limited to the question of whether the state exceeded its authority." *Id.* at 652 quoting *Northern Contracting*, 473 F.3d at 721. The district court in *Geod* followed the Seventh Circuit explanation that when a state department of transportation is acting as an instrument of federal policy, a plaintiff cannot collaterally attack the federal regulations through a challenge to a state's program. *Id.* at 652, citing *Northern Contracting*, 473 F.3d at 722. Therefore, the district court held that the inquiry is limited to the question of whether the state department of transportation "exceeded its grant of authority under federal law." *Id.* at 652-653, quoting *Northern Contracting*, 473 F.3d at 722 and citing also *Tennessee Asphalt Co. v. Farris*, 942 F.2d 969, 975 (6th Cir. 1991).

The district court found that the holding and analysis in *Northern Contracting* does not contradict the Eighth Circuit's analysis in *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964, 970-71 (8th Cir. 2003). *Id.* at 653. The court held that the Eighth Circuit's discussion of whether the DBE programs as implemented by the State of Minnesota and the State of Nebraska were narrowly tailored focused on whether the states were following the USDOT regulations. *Id.* at 653 citing *Sherbrooke Turf*, 345 F.3d 973-74. Therefore, "only when the state exceeds its federal authority is it

susceptible to an as-applied constitutional challenge.” *Id.* at 653 quoting *Western States Paving Co., Inc. v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005)(McKay, C.J.)(concurring in part and dissenting in part) and citing *South Florida Chapter of the Associated General Contractors v. Broward County*, 544 F.Supp.2d 1336, 1341 (S.D.Fla.2008).

The court held the initial burden of proof falls on the government, but once the government has presented proof that its affirmative action plan is narrowly tailored, the party challenging the affirmative action plan bears the ultimate burden of proving that the plan is unconstitutional. *Id.* at 653.

In analyzing whether NJT’s DBE program was constitutionally defective, the district court focused on the basis of plaintiffs’ argument that it was not narrowly tailored because it includes in the category of DBEs racial or ethnic groups as to which the plaintiffs alleged NJT had no evidence of past discrimination. *Id.* at 653. The court found that most of plaintiffs’ arguments could be summarized as questioning whether NJT presented demonstrable evidence of the availability of ready, willing and able DBEs as required by 49 CFR § 26.45. *Id.* The court held that NJT followed the goal setting process required by the federal regulations. *Id.* The court stated that NJT began this process with the 2002 disparity study that examined past discrimination and found that all of the groups listed in the regulations were underutilized with the exception of Asians. *Id.* at 654. In calculating the fiscal year 2010 goals, the consultant used contract files and data from Dun & Bradstreet to determine the geographical location corresponding to NJT contracts and then further focused that information by weighting the industries according to NJT’s use. *Id.*

The consultant used various methods to calculate the availability of DBEs, including: the UCP Business Directories for the states of New Jersey, New York and Pennsylvania; NJT Vendor List; Dun & Bradstreet database; 2002 Survey of Small Business Owners; and NJT Pre-Qualification List. *Id.* at 654. The court stated that NJT only utilized one of the examples listed in 49 CFR § 26.45(c), the DBE directories method, in formulating the fiscal year 2010 goals. *Id.*

The district court pointed out, however, the regulations state that the “examples are provided as a starting point for your goal setting process and that the examples are not intended as an exhaustive list. *Id.* at 654, citing 46 CFR § 26.45(c). The court concluded the regulations clarify that other methods or combinations of methods to determine a base figure may be used. *Id.* at 654.

The court stated that NJT had used these methods in setting goals for prior years as demonstrated by the reports for 2006 and 2009. *Id.* at 654. In addition, the court noted that the Seventh Circuit held that a custom census, the Dun & Bradstreet database, and the IDOT’s list of DBEs were an acceptable combination of methods with which to determine the base figure for TEA-21 purposes. *Id.* at 654, citing *Northern Contracting*, 473 F.3d at 718.

The district court found that the expert witness for plaintiffs had not convinced the court that the data were faulty, and the testimony at trial did not persuade the court that the data or regression analyses relied upon by NJT were unreliable or that another method would provide more accurate results. *Id.* at 654-655.

The court in discussing step two of the goals setting process pointed out that the data examined by the consultant is listed in the regulations as proper evidence to be used to adjust the base figure. *Id.* at 655, *citing* 49 CFR § 26.45(d). These data included evidence from disparity studies and statistical disparities in the ability of DBEs to get pre-qualification. *Id.* at 655. The consultant stated that evidence of societal discrimination was not used to adjust the base goal and that the adjustment to the goal was based on the discrimination analysis, which controls for size of firm and effect of having a DBE goal. *Id.* at 655.

The district court then analyzed NJT's division of the adjusted goal into race-conscious and race-neutral portions. *Id.* at 655. The court noted that narrowly tailoring does not require exhaustion of every conceivable race-neutral alternative, but instead requires serious, good faith consideration of workable race-neutral alternatives. *Id.* at 655. The court agreed with *Western States Paving* that only "when race-neutral efforts prove inadequate do these regulations authorize a State to resort to race-conscious measures to achieve the remainder of its DBE utilization goal." *Id.* at 655, *quoting Western States Paving*, 407 F.3d at 993-94.

The court found that the methods utilized by NJT had been used by it on previous occasions, which were approved by the USDOT. *Id.* at 655. The methods used by NJT, the court found, also complied with the examples listed in 49 CFR § 26.51, including arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate DBE participation; providing pre-qualification assistance; implementing supportive services programs; and ensuring distribution of DBE directories. *Id.* at 655. The court held that based on these reasons and following the *Northern Contracting, Inc. v. Illinois* line of cases, NJT's DBE program did not violate the Constitution as it did not exceed its federal authority. *Id.* at 655.

However, the district court also found that even under the *Western States Paving Co., Inc. v. Washington State DOT* standard, the NJT program still was constitutional. *Id.* at 655. Although the court found that the appropriate inquiry is whether NJT exceeded its federal authority as detailed in *Northern Contracting, Inc. v. Illinois*, the court also examined the NJT DBE program under *Western States Paving Co. v. Washington State DOT*. *Id.* at 655-656. The court stated that under *Western States Paving*, a Court must "undertake an as-applied inquiry into whether [the state's] DBE program is narrowly tailored." *Id.* at 656, *quoting Western States Paving*, 407 F.3d at 997.

Applying *Western States Paving*. The district court then analyzed whether the NJT program was narrowly tailored applying *Western States Paving*. Under the first prong of the narrowly tailoring analysis, a remedial program is only narrowly tailored if its application is limited to those minority groups that have actually suffered discrimination. *Id.* at 656, *citing Western States Paving*, 407 F.3d at 998. The court acknowledged that according to the 2002 Final Report, the ratios of DBE utilization to DBE availability was 1.31. *Id.* at 656. However, the court found that the plaintiffs' argument failed as the facts in *Western States Paving* were distinguishable from those of NJT, because NJT did receive complaints, i.e., anecdotal evidence, of the lack of opportunities for Asian firms. *Id.* at 656. NJT employees testified that Asian firms informally and formally complained of a lack of opportunity to grow and indicated that the DBE Program was assisting with this issue. *Id.* In addition, plaintiff's expert conceded that Asian firms have smaller average contract amounts in comparison to non-DBE firms. *Id.*

The plaintiff relied solely on the utilization rate as evidence that Asians are not discriminated against in NJT contracting. *Id.* at 656. The court held this was insufficient to overcome the consultant's determination that discrimination did exist against Asians, and thus this group was properly included in the DBE program. *Id.* at 656.

The district court rejected Plaintiffs' argument that the first step of the narrow tailoring analysis was not met because NJT focuses its program on sub-contractors when NJT's expert identified "prime contracting" as the area in which NJT procurements evidence discrimination. *Id.* at 656. The court held that narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, but it does require serious, good faith consideration of workable race-neutral alternatives. *Id.* at 656, citing *Sherbrook Turf*, 345 F.3d at 972 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 339, (2003)). In its efforts to implement race-neutral alternatives, the court found NJT attempted to break larger contracts up in order to make them available to smaller contractors and continues to do so when logistically possible and feasible to the procurement department. *Id.* at 656-657.

The district court found NJT satisfied the third prong of the narrowly tailored analysis, the "relationship of the numerical goals to the relevant labor market." *Id.* at 657. Finally, under the fourth prong, the court addressed the impact on third-parties. *Id.* at 657. The court noted that placing a burden on third parties is not impermissible as long as that burden is minimized. *Id.* at 657, citing *Western States Paving*, 407 F.3d at 995. The court stated that instances will inevitably occur where non-DBEs will be bypassed for contracts that require DBE goals. However, TEA-21 and its implementing regulations contain provisions intended to minimize the burden on non-DBEs. *Id.* at 657, citing *Western States Paving*, 407 F.3d at 994-995.

The court pointed out the Ninth Circuit in *Western States Paving* found that inclusion of regulations allowing firms that were not presumed to be DBEs to demonstrate that they were socially and economically disadvantaged, and thus qualified for DBE programs, as well as the net worth limitations, were sufficient to minimize the burden on DBEs. *Id.* at 657, citing *Western States Paving*, 407 F.3d at 955. The court held that the plaintiffs did not provide evidence that NJT was not complying with implementing regulations designed to minimize harm to third parties. *Id.*

Therefore, even if the district court utilized the as-applied narrow tailoring inquiry set forth in *Western States Paving*, NJT's DBE program would not be found to violate the Constitution, as the court held it was narrowly tailored to further a compelling governmental interest. *Id.* at 657.

11. *Geod Corporation v. New Jersey Transit Corporation, et. seq.* 678 F.Supp.2d 276, 2009 WL 2595607 (D.N.J. August 20, 2009)

Plaintiffs Geod and its officers, who are white males, sued the NJT and state officials seeking a declaration that NJT's DBE program was unconstitutional and in violation of the United States 5th and 14th Amendment to the United States Constitution and the Constitution of the State of New Jersey, and seeking a permanent injunction against NJT for enforcing or utilizing its DBE program. The NJT's DBE program was implemented in accordance with the Federal DBE Program and TEA-21 and 49 CFR Part 26.

The parties filed cross Motions for Summary Judgment. The plaintiff Geod challenged the constitutionality of NJT's DBE program for multiple reasons, including alleging NJT could not justify establishing a program using race- and sex-based preferences; the NJT's disparity study did not provide a sufficient factual predicate to justify the DBE Program; NJT's statistical evidence did not establish discrimination; NJT did not have anecdotal data evidencing a "strong basis in evidence" of discrimination which justified a race- and sex-based program; NJT's program was not narrowly tailored and over-inclusive; NJT could not show an exceedingly persuasive justification for gender preferences; and that NJT's program was not narrowly tailored because race-neutral alternatives existed. In opposition, NJT filed a Motion for Summary Judgment asserting that its DBE program was narrowly tailored because it fully complied with the requirements of the Federal DBE Program and TEA-21.

The district court held that states and their agencies are entitled to adopt the federal governments' compelling interest in enacting TEA-21 and its implementing regulations. 2009 WL 2595607 at *4. The court stated that plaintiff's argument that NJT cannot establish the need for its DBE program was a "red herring, which is unsupported." The plaintiff did not question the constitutionality of the compelling interest of the Federal DBE Program. The court held that all states "inherit the federal governments' compelling interest in establishing a DBE program." *Id.*

The court found that establishing a DBE program "is not contingent upon a state agency demonstrating a need for same, as the federal government has already done so." *Id.* The court concluded that this reasoning rendered plaintiff's assertions that NJT's disparity study did not have sufficient factual predicate for establishing its DBE program, and that no exceedingly persuasive justification was found to support gender based preferences, as without merit. *Id.* The court held that NJT does not need to justify establishing its DBE program, as it has already been justified by the legislature. *Id.*

The court noted that both plaintiff's and defendant's arguments were based on an alleged split in the Federal Circuit Courts of Appeal. Plaintiff Geod relies on *Western States Paving Company v. Washington State DOT*, 407 F.3d 983(9th Cir. 2005) for the proposition that an as-applied challenge to the constitutionality of a particular DBE program requires a demonstration by the recipient of federal funds that the program is narrowly tailored. *Id.* at *5. In contrast, the NJT relied primarily on *Northern Contracting, Inc. v. State of Illinois*, 473 F.3d 715 (7th Cir. 2007) for the proposition that if a DBE program complies with TEA-21, it is narrowly tailored. *Id.*

The court viewed the various Federal Circuit Court of Appeals decisions as fact specific determinations which have led to the parties distinguishing cases without any substantive difference in the application of law. *Id.*

The court reviewed the decisions by the Ninth Circuit in *Western States Paving* and the Seventh Circuit of *Northern Contracting*. In *Western States Paving*, the district court stated that the Ninth Circuit held for a DBE program to pass constitutional muster, it must be narrowly tailored; specifically, the recipient of federal funds must evidence past discrimination in the relevant market in order to utilize race conscious DBE goals. *Id.* at *5. The Ninth Circuit, according to district court, made a fact specific determination as to whether the DBE program complied with TEA-21 in order to decide if the program was narrowly tailored to meet the federal regulation's requirements. The district court stated

that the requirement that a recipient must evidence past discrimination “is nothing more than a requirement of the regulation.” *Id.*

The court stated that the Seventh Circuit in *Northern Contracting* held a recipient must demonstrate that its program is narrowly tailored, and that generally a recipient is insulated from this sort of constitutional attack absent a showing that the state exceeded its federal authority. *Id.*, citing *Northern Contracting*, 473 F.3d at 721. The district court held that implicit in *Northern Contracting* is the fact one may challenge the constitutionality of a DBE program, as it is applied, to the extent that the program exceeds its federal authority. *Id.*

The court, therefore, concluded that it must determine first whether NJT’s DBE program complies with TEA-21, then whether NJT exceeded its federal authority in its application of its DBE program. In other words, the district court stated it must determine whether the NJT DBE program complies with TEA-21 in order to determine whether the program, as implemented by NJT, is narrowly tailored. *Id.*

The court pointed out that the Eighth Circuit Court of Appeals in *Sherbrooke 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 *Sherbrooke*, according to the district court, analyzed the application of Minnesota’s DBE program to ensure compliance with TEA-21’s requirements to ensure that the DBE program implemented by Minnesota DOT was narrowly tailored. *Id.* at *5.

The court held that TEA-21 delegates to each state that accepts federal transportation funds the responsibility of implementing a DBE program that comports with TEA-21. In order to comport with TEA-21, the district court stated a recipient must (1) determine an appropriate DBE participation goal, (2) examine all evidence and evaluate whether an adjustment, if any, is needed to arrive at their goal, and (3) if the adjustment is based on continuing effects of past discrimination, provide demonstrable evidence that is logically and directly related to the effect for which the adjustment is sought. *Id.* at *6, citing *Western States Paving Company*, 407 F.3d at 983, 988.

First, the district court stated a recipient of federal funds must determine, at the local level, the figure that would constitute an appropriate DBE involvement goal, based on their relative availability of DBEs. *Id.* at *6, citing 49 CFR § 26.45(c). In this case, the court found that NJT did determine a base figure for the relative availability of DBEs, which accounted for demonstrable evidence of local market conditions and was designed to be rationally related to the relative availability of DBEs. *Id.* The court pointed out that NJT conducted a disparity study, and the disparity study utilized NJT’s DBE lists from fiscal years 1995-1999 and Census Data to determine its base DBE goal. The court noted that the plaintiffs’ argument that the data used in the disparity study were stale was without merit and had no basis in law. The court found that the disparity study took into account the primary industries, primary geographic market, and race neutral alternatives, then adjusted its goal to encompass these characteristics. *Id.* at *6.

The court stated that the use of DBE directories and Census data are what the legislature intended for state agencies to utilize in making a base DBE goal determination. *Id.* Also, the court stated that “perhaps more importantly, NJT’s DBE goal was approved by the USDOT every year from 2002 until 2008.” *Id.* at *6. Thus, the court found NJT appropriately determined their DBE availability,

which was approved by the USDOT, pursuant to 49 CFR § 26.45(c). *Id.* at *6. The court held that NJT demonstrated its overall DBE goal is based on demonstrable evidence of the availability of ready, willing, and able DBEs relative to all businesses ready, willing, and able to participate in DOT assisted contracts and reflects its determination of the level of DBE participation it would expect absent the effects of discrimination. *Id.*

Also of significance, the court pointed out that plaintiffs did not provide any evidence that NJT did not set a DBE goal based upon 49 C.F. § 26.45(c). The court thus held that genuine issues of material fact remain only as to whether a reasonable jury may find that the method used by NJT to determine its DBE goal was sufficiently narrowly tailored. *Id.* at *6.

The court pointed out that to determine what adjustment to make, the disparity study examined qualitative data such as focus groups on the pre-qualification status of DBEs, working with prime contractors, securing credit, and its effect on DBE participation, as well as procurement officer interviews to analyze, and compare and contrast their relationships with non-DBE vendors and DBE vendors. *Id.* at *7. This qualitative information was then compared to DBE bids and DBE goals for each year in question. NJT's adjustment to its DBE goal also included an analysis of the overall disparity ratio, as well as, DBE utilization based on race, gender and ethnicity. *Id.* A decomposition analysis was also performed. *Id.*

The court concluded that NJT provided evidence that it, at a minimum, examined the current capacity of DBEs to perform work in its DOT-assisted contracting program, as measured by the volume of work DBEs have performed in recent years, as well as utilizing the disparity study itself. The court pointed out there were two methods specifically approved by 49 CFR § 26.45(d). *Id.*

The court also found that NJT took into account race neutral measures to ensure that the greatest percentage of DBE participation was achieved through race and gender neutral means. The district court concluded that “critically,” plaintiffs failed to provide evidence of another, more perfect, method that could have been utilized to adjust NJT’s DBE goal. *Id.* at *7. The court held that genuine issues of material fact remain only as to whether NJT’s adjustment to its DBE goal is sufficiently narrowly tailored and thus constitutional. *Id.*

NJT, the court found, adjusted its DBE goal to account for the effects of past discrimination, noting the disparity study took into account the effects of past discrimination in the pre-qualification process of DBEs. *Id.* at *7. The court quoted the disparity study as stating that it found non-trivial and statistically significant measures of discrimination in contract amounts awarded during the study period. *Id.* at *8.

The court found, however, that what was “gravely critical” about the finding of the past effects of discrimination is that it only took into account six groups including American Indian, Hispanic, Asian, blacks, women and “unknown,” but did not include an analysis of past discrimination for the ethnic group “Iraqi,” which is now a group considered to be a DBE by the NJT. *Id.* Because the disparity report included a category entitled “unknown,” the court held a genuine issue of material fact remains as to whether “Iraqi” is legitimately within NJT’s defined DBE groups and whether a demonstrable finding of discrimination exists for Iraqis. Therefore, the court denied both plaintiffs’ and defendants’ Motions for Summary Judgment as to the constitutionality of NJT’s DBE program.

The court also held that because the law was not clearly established at the time NJT established its DBE program to comply with TEA-21, the individual state defendants were entitled to qualified immunity and their Motion for Summary Judgment as to the state officials was granted. The court, in addition, held that plaintiff's Title VI claims were dismissed because the individual defendants were not recipients of federal funds, and that the NJT as an instrumentality of the State of New Jersey is entitled to sovereign immunity. Therefore, the court held that the plaintiff's claims based on the violation of 42 U.S.C. § 1983 were dismissed and NJT's Motion for Summary Judgment was granted as to that claim.

12. South Florida Chapter of the Associated General Contractors v. Broward County, Florida, 544 F. Supp.2d 1336 (S.D. Fla. 2008)

Plaintiff, the South Florida Chapter of the Associated General Contractors, brought suit against the Defendant, Broward County, Florida challenging Broward County's implementation of the Federal DBE Program and Broward County's issuance of contracts pursuant to the Federal DBE Program. Plaintiff filed a Motion for a Preliminary Injunction. The court considered only the threshold legal issue raised by plaintiff in the Motion, namely whether or not the decision in *Western States Paving Company v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005) should govern the Court's consideration of the merits of plaintiff's claim. 544 F.Supp.2d at 1337. The court identified the threshold legal issue presented as essentially, "whether compliance with the federal regulations is all that is required of Defendant Broward County." *Id.* at 1338.

The Defendant County contended that as a recipient of federal funds implementing the Federal DBE Program, all that is required of the County is to comply with the federal regulations, relying on case law from the Seventh Circuit in support of its position. 544 F.Supp.2d at 1338, *citing Northern Contracting v. Illinois*, 473 F.3d 715 (7th Cir. 2007). The plaintiffs disagreed, and contended that the County must take additional steps beyond those explicitly provided for in the federal regulations to ensure the constitutionality of the County's implementation of the Federal DBE Program, as administered in the County, *citing Western States Paving*, 407 F.3d 983. The court found that there was no case law on point in the Eleventh Circuit Court of Appeals. *Id.* at 1338.

Ninth Circuit Approach: *Western States*. The district court analyzed the Ninth Circuit Court of Appeals approach in *Western States Paving* and the Seventh Circuit approach in *Milwaukee County Pavers Association v. Fiedler*, 922 F.2d 419 (7th Cir. 1991) and *Northern Contracting*, 473 F.3d 715. The district court in Broward County concluded that the Ninth Circuit in *Western States Paving* held that whether Washington's DBE program is narrowly tailored to further Congress's remedial objective depends upon the presence or absence of discrimination in the State's transportation contracting industry, and that it was error for the district court in *Western States Paving* to uphold Washington's DBE program simply because the state had complied with the federal regulations. 544 F.Supp.2d at 1338-1339. The district court in Broward County pointed out that the Ninth Circuit in *Western States Paving* concluded it would be necessary to undertake an as-applied inquiry into whether the state's program is narrowly tailored. 544 F.Supp.2d at 1339, *citing Western States Paving*, 407 F.3d at 997.

In a footnote, the district court in *Broward County* noted that the USDOT "appears not to be of one mind on this issue, however." 544 F.Supp.2d at 1339, n. 3. The district court stated that the "United States DOT has, in analysis posted on its Web site, implicitly instructed states and localities outside of the Ninth Circuit to ignore the *Western States Paving* decision, which would tend to indicate that this

agency may not concur with the ‘opinion of the United States’ as represented in *Western States*.” 544 F.Supp.2d at 1339, n. 3. The district court noted that the United States took the position in the *Western States Paving* case that the “state would have to have evidence of past or current effects of discrimination to use race-conscious goals.” 544 F.Supp.2d at 1338, quoting *Western States Paving*.

The Court also pointed out that the Eighth Circuit Court of Appeals in *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964 (8th Cir. 2003) reached a similar conclusion as in *Western States Paving*. 544 F.Supp.2d at 1339. The Eighth Circuit in *Sherbrooke*, like the court in *Western States Paving*, “concluded that the federal government had delegated the task of ensuring that the state programs are narrowly tailored, and looked to the underlying data to determine whether those programs were, in fact, narrowly tailored, rather than simply relying on the states’ compliance with the federal regulations.” 544 F.Supp.2d at 1339.

Seventh Circuit Approach: Milwaukee County and Northern Contracting. The district court in Broward County next considered the Seventh Circuit approach. The Defendants in Broward County agreed that the County must make a local finding of discrimination for its program to be constitutional. 544 F.Supp.2d at 1339. The County, however, took the position that it must make this finding through the process specified in the federal regulations, and should not be subject to a lawsuit if that process is found to be inadequate. *Id.* In support of this position, the County relied primarily on the Seventh Circuit’s approach, first articulated in *Milwaukee County Pavers Association v. Fiedler*, 922 F.2d 419 (7th Cir. 1991), then reaffirmed in *Northern Contracting*, 473 F.3d 715 (7th Cir. 2007). 544 F.Supp.2d at 1339.

Based on the Seventh Circuit approach, insofar as the state is merely doing what the statute and federal regulations envisage and permit, the attack on the state is an impermissible collateral attack on the federal statute and regulations. 544 F.Supp.2d at 1339-1340. This approach concludes that a state’s role in the federal program is simply as an agent, and insofar “as the state is merely complying with federal law it is acting as the agent of the federal government and is no more subject to being enjoined on equal protection grounds than the federal civil servants who drafted the regulations.” 544 F.Supp.2d at 1340, quoting *Milwaukee County Pavers*, 922 F.2d at 423.

The Ninth Circuit addressed the *Milwaukee County Pavers* case in *Western States Paving*, and attempted to distinguish that case, concluding that the constitutionality of the federal statute and regulations were not at issue in *Milwaukee County Pavers*. 544 F.Supp.2d at 1340. In 2007, the Seventh Circuit followed up the critiques made in *Western States Paving* in the *Northern Contracting* decision. *Id.* The Seventh Circuit in *Northern Contracting* concluded that the majority in *Western States Paving* misread its decision in *Milwaukee County Pavers* as did the Eighth Circuit Court of Appeals in *Sherbrooke*. 544 F.Supp.2d at 1340, citing *Northern Contracting*, 473 F.3d at 722, n.5. The district court in Broward County pointed out that the Seventh Circuit in *Northern Contracting* emphasized again that the state DOT is acting as an instrument of federal policy, and a plaintiff cannot collaterally attack the federal regulations through a challenge to the state DOT’s program. 544 F.Supp.2d at 1340, citing *Northern Contracting*, 473 F.3d at 722.

The district court in *Broward County* stated that other circuits have concurred with this approach, including the Sixth Circuit Court of Appeals decision in *Tennessee Asphalt Company v. Farris*, 942 F.2d 969 (6th Cir. 1991). 544 F.Supp.2d at 1340. The district court in *Broward County* held that the Tenth Circuit Court of Appeals took a similar approach in *Ellis v. Skinner*, 961 F.2d 912 (10th Cir. 1992).

544 F.Supp.2d at 1340. The district court in *Broward County* held that these Circuit Courts of Appeal have concluded that “where a state or county fully complies with the federal regulations, it cannot be enjoined from carrying out its DBE program, because any such attack would simply constitute an improper collateral attack on the constitutionality of the regulations.” 544 F.Supp.2d at 1340-41.

The district court in *Broward County* held that it agreed with the approach taken by the Seventh Circuit Court of Appeals in *Milwaukee County Pavers* and *Northern Contracting* and concluded that “the appropriate factual inquiry in the instant case is whether or not Broward County has fully complied with the federal regulations in implementing its DBE program.” 544 F.Supp.2d at 1341. It is significant to note that the plaintiffs did not challenge the as-applied constitutionality of the federal regulations themselves, but rather focused their challenge on the constitutionality of Broward County’s actions in carrying out the DBE program. 544 F.Supp.2d at 1341. The district court in *Broward County* held that this type of challenge is “simply an impermissible collateral attack on the constitutionality of the statute and implementing regulations.” *Id.*

The district court concluded that it would apply the case law as set out in the Seventh Circuit Court of Appeals and concurring circuits, and that the trial in this case would be conducted solely for the purpose of establishing whether or not the County has complied fully with the federal regulations in implementing its DBE program. 544 F.Supp.2d at 1341.

Subsequently, there was a Stipulation of Dismissal filed by all parties in the district court, and an Order of Dismissal was filed without a trial of the case in November 2008.

13. *Northern Contracting, Inc. v. Illinois*, 2005 WL 2230195 (N.D. Ill. Sept. 8, 2005), aff’d 473 F.3d 715 (7th Cir. 2007)

This decision is the district court’s order that was affirmed by the Seventh Circuit Court of Appeals. This decision is instructive in that it is one of the recent cases to address the validity of the Federal DBE Program and local and state governments’ implementation of the program as recipients of federal funds. The case also is instructive in that the court set forth a detailed analysis of race-, ethnicity- and gender-neutral measures as well as evidentiary data required to satisfy constitutional scrutiny.

The district court conducted a trial after denying the parties’ Motions for Summary Judgment in *Northern Contracting, Inc. v. State of Illinois, Illinois DOT, and USDOT*, 2004 WL 422704 (N.D. Ill. March 3, 2004), discussed *infra*. The following summarizes the opinion of the district court.

Northern Contracting, Inc. (the “plaintiff”), an Illinois highway contractor, sued the State of Illinois, the Illinois DOT, the United States DOT, and federal and state officials seeking a declaration that federal statutory provisions, the federal implementing regulations (“TEA-21”), the state statute authorizing the DBE program, and the Illinois DBE program itself were unlawful and unconstitutional. 2005 WL 2230195 at *1 (N.D. Ill. Sept. 8, 2005).

Under TEA-21, a recipient of federal funds is required to meet the “maximum feasible portion” of its DBE goal through race-neutral means. *Id.* at *4 (citing regulations). If a recipient projects that it cannot meet its overall DBE goal through race-neutral means, it must establish contract goals to the extent necessary to achieve the overall DBE goal. *Id.* (citing regulation). [The court provided an

overview of the pertinent regulations including compliance requirements and qualifications for DBE status.]

Statistical evidence. To calculate its 2005 DBE participation goals, IDOT followed the two-step process set forth in TEA-21: (1) calculation of a base figure for the relative availability of DBEs, and (2) consideration of a possible adjustment of the base figure to reflect the effects of the DBE program and the level of participation that would be expected but for the effects of past and present discrimination. *Id.* at *6. IDOT engaged in a study to calculate its base figure and conduct a custom census to determine whether a more reliable method of calculation existed as opposed to its previous method of reviewing a bidder's list. *Id.*

In compliance with TEA-21, IDOT used a study to evaluate the base figure using a six-part analysis: (1) the study identified the appropriate and relevant geographic market for its contracting activity and its prime contractors; (2) the study identified the relevant product markets in which IDOT and its prime contractors contract; (3) the study sought to identify all available contractors and subcontractors in the relevant industries within Illinois using Dun & Bradstreet's *Marketplace*; (4) the study collected lists of DBEs from IDOT and 20 other public and private agencies; (5) the study attempted to correct for the possibility that certain businesses listed as DBEs were no longer qualified or, alternatively, businesses not listed as DBEs but qualified as such under the federal regulations; and (6) the study attempted to correct for the possibility that not all DBE businesses were listed in the various directories. *Id.* at *6-7. The study utilized a standard statistical sampling procedure to correct for the latter two biases. *Id.* at *7. The study thus calculated a weighted average base figure of 22.7 percent. *Id.*

IDOT then adjusted the base figure based upon two disparity studies and some reports considering whether the DBE availability figures were artificially low due to the effects of past discrimination. *Id.* at *8. One study examined disparities in earnings and business formation rates as between DBEs and their white male-owned counterparts. *Id.* Another study included a survey reporting that DBEs are rarely utilized in non-goals projects. *Id.*

IDOT considered three reports prepared by expert witnesses. *Id.* at *9. The first report concluded that minority- and women-owned businesses were underutilized relative to their capacity and that such underutilization was due to discrimination. *Id.* The second report concluded, after controlling for relevant variables such as credit worthiness, "that minorities and women are less likely to form businesses, and that when they do form businesses, those businesses achieve lower earnings than did businesses owned by white males." *Id.* The third report, again controlling for relevant variables (education, age, marital status, industry and wealth), concluded that minority- and female-owned businesses' formation rates are lower than those of their white male counterparts, and that such businesses engage in a disproportionate amount of government work and contracts as a result of their inability to obtain private sector work. *Id.*

IDOT also conducted a series of public hearings in which a number of DBE owners who testified that they "were rarely, if ever, solicited to bid on projects not subject to disadvantaged-firm hiring goals." *Id.* Additionally, witnesses identified 20 prime contractors in IDOT District 1 alone who rarely or never solicited bids from DBEs on non-goals projects. *Id.* The prime contractors did not respond to IDOT's requests for information concerning their utilization of DBEs. *Id.*

Finally, IDOT reviewed unremediated market data from four different markets (the Illinois State Toll Highway Authority, the Missouri DOT, Cook County’s public construction contracts, and a “non-goals” experiment conducted by IDOT between 2001 and 2002), and considered past utilization of DBEs on IDOT projects. *Id.* at *11. After analyzing all of the data, the study recommended an upward adjustment to 27.51 percent. However, IDOT decided to maintain its figure at 22.77 percent. *Id.*

IDOT’s representative testified that the DBE program was administered on a “contract-by-contract basis.” *Id.* She testified that DBE goals have no effect on the award of prime contracts but that contracts are awarded exclusively to the “lowest responsible bidder.” IDOT also allowed contractors to petition for a waiver of individual contract goals in certain situations (e.g., where the contractor has been unable to meet the goal despite having made reasonable good faith efforts). *Id.* at *12. Between 2001 and 2004, IDOT received waiver requests on 8.53 percent of its contracts and granted three out of four; IDOT also provided an appeal procedure for a denial from a waiver request. *Id.*

IDOT implemented a number of race- and gender-neutral measures both in its fiscal year 2005 plan and in response to the district court’s earlier summary judgment order, including:

1. A “prompt payment provision” in its contracts, requiring that subcontractors be paid promptly after they complete their work, and prohibiting prime contractors from delaying such payments;
2. An extensive outreach program seeking to attract and assist DBE and other small firms enter and achieve success in the industry (including retaining a network of consultants to provide management, technical and financial assistance to small businesses, and sponsoring networking sessions throughout the state to acquaint small firms with larger contractors and to encourage the involvement of small firms in major construction projects);
3. Reviewing the criteria for prequalification to reduce any unnecessary burdens;
4. “Unbundling” large contracts; and
5. Allocating some contracts for bidding only by firms meeting the SBA’s definition of small businesses.

Id. (internal citations omitted). IDOT was also in the process of implementing bonding and financing initiatives to assist emerging contractors obtain guaranteed bonding and lines of credit, and establishing a mentor-protégé program. *Id.*

The court found that IDOT attempted to achieve the “maximum feasible portion” of its overall DBE goal through race- and gender-neutral measures. *Id.* at *13. The court found that IDOT determined that race- and gender-neutral measures would account for 6.43 percent of its DBE goal, leaving 16.34 percent to be reached using race- and gender-conscious measures. *Id.*

Anecdotal evidence. A number of DBE owners testified to instances of perceived discrimination and to the barriers they face. *Id.* The DBE owners also testified to difficulties in obtaining work in the private sector and “unanimously reported that they were rarely invited to bid on such contracts.” *Id.* The DBE owners testified to a reluctance to submit unsolicited bids due to the expense involved and identified specific firms that solicited bids from DBEs for goals projects but not for non-goals projects. *Id.* A number of the witnesses also testified to specific instances of discrimination in bidding, on specific contracts, and in the financing and insurance markets. *Id.* at *13-14. One witness acknowledged that all small firms face difficulties in the financing and insurance markets, but testified that it is especially burdensome for DBEs who “frequently are forced to pay higher insurance rates due to racial and gender discrimination.” *Id.* at *14. The DBE witnesses also testified they have obstacles in obtaining prompt payment. *Id.*

The plaintiff called a number of non-DBE business owners who unanimously testified that they solicit business equally from DBEs and non-DBEs on non-goals projects. *Id.* Some non-DBE firm owners testified that they solicit bids from DBEs on a goals project for work they would otherwise complete themselves absent the goals; others testified that they “occasionally award work to a DBE that was not the low bidder in order to avoid scrutiny from IDOT.” *Id.* A number of non-DBE firm owners accused of failing to solicit bids from DBEs on non-goals projects testified and denied the allegations. *Id.* at *15.

Strict scrutiny. The court applied strict scrutiny to the program as a whole (including the gender-based preferences). *Id.* at *16. The court, however, set forth a different burden of proof, finding that the government must demonstrate identified discrimination with specificity and must have a “‘strong basis in evidence’ to conclude that remedial action was necessary, before it embarks on an affirmative action program ... If the government makes such a showing, the party challenging the affirmative action plan bears the ‘ultimate burden’ of demonstrating the unconstitutionality of the program.” *Id.* The court held that challenging party’s burden “can only be met by presenting credible evidence to rebut the government’s proffered data.” *Id.* at *17.

To satisfy strict scrutiny, the court found that IDOT did not need to demonstrate an independent compelling interest; however, as part of the narrowly tailored prong, IDOT needed to show “that there is a demonstrable need for the implementation of the Federal DBE Program within its jurisdiction.” *Id.* at *16.

The court found that IDOT presented “an abundance” of evidence documenting the disparities between DBEs and non-DBEs in the construction industry. *Id.* at *17. The plaintiff argued that the study was “erroneous because it failed to limit its DBE availability figures to those firms ... registered and pre-qualified with IDOT.” *Id.* The plaintiff also alleged the calculations of the DBE utilization rate were incorrect because the data included IDOT subcontracts and prime contracts, despite the fact that the latter are awarded to the lowest bidder as a matter of law. *Id.* Accordingly, the plaintiff alleged that IDOT’s calculation of DBE availability and utilization rates was incorrect. *Id.*

The court found that other jurisdictions had utilized the custom census approach without successful challenge. *Id.* at *18. Additionally, the court found “that the remedial nature of the federal statutes counsels for the casting of a broader net when measuring DBE availability.” *Id.* at *19. The court found that IDOT presented “an array of statistical studies concluding that DBEs face disproportionate hurdles in the credit, insurance, and bonding markets.” *Id.* at *21. The court also

found that the statistical studies were consistent with the anecdotal evidence. *Id.* The court did find, however, that “there was no evidence of even a single instance in which a prime contractor failed to award a job to a DBE that offered the low bid. This ... is [also] supported by the statistical data ... which shows that at least at the level of subcontracting, DBEs are generally utilized at a rate in line with their ability.” *Id.* at *21, n. 31. Additionally, IDOT did not verify the anecdotal testimony of DBE firm owners who testified to barriers in financing and bonding. However, the court found that such verification was unnecessary. *Id.* at *21, n. 32.

The court further found:

*That such discrimination indirectly affects the ability of DBEs to compete for prime contracts, despite the fact that they are awarded solely on the basis of low bid, cannot be doubted: ‘[E]xperience and size are not race- and gender-neutral variables ... [DBE] construction firms are generally smaller and less experienced because of industry discrimination.’ *Id.* at *21, citing Concrete Works of Colorado, Inc. v. City and County of Denver, 321 F.3d 950 (10th Cir. 2003).*

The parties stipulated to the fact that DBE utilization goals exceed DBE availability for 2003 and 2004. *Id.* at *22. IDOT alleged, and the court so found, that the high utilization on goals projects was due to the success of the DBE program, and not to an absence of discrimination. *Id.* The court found that the statistical disparities coupled with the anecdotal evidence indicated that IDOT’s fiscal year 2005 goal was a “‘plausible lower-bound estimate’ of DBE participation in the absence of discrimination.” *Id.* The court found that the plaintiff did not present persuasive evidence to contradict or explain IDOT’s data. *Id.*

The plaintiff argued that even if accepted at face value, IDOT’s marketplace data did not support the imposition of race- and gender-conscious remedies because there was no evidence of direct discrimination by prime contractors. *Id.* The court found first that IDOT’s indirect evidence of discrimination in the bonding, financing, and insurance markets was sufficient to establish a compelling purpose. *Id.* Second, the court found:

[M]ore importantly, plaintiff fails to acknowledge that, in enacting its DBE program, IDOT acted not to remedy its own prior discriminatory practices, but pursuant to federal law, which both authorized and required IDOT to remediate the effects of *private* discrimination on federally-funded highway contracts. This is a fundamental distinction ... [A] state or local government need not independently identify a compelling interest when its actions come in the course of enforcing a federal statute.

Id. at *23. The court distinguished *Builders Ass’n of Greater Chicago v. County of Cook*, 123 F. Supp.2d 1087 (N.D. Ill. 2000), *aff’d* 256 F.3d 642 (7th Cir. 2001), noting that the program in that case was not federally-funded. *Id.* at *23, n. 34.

The court also found that “IDOT has done its best to maximize the portion of its DBE goal” through race- and gender-neutral measures, including anti-discrimination enforcement and small business initiatives. *Id.* at *24. The anti-discrimination efforts included: an internet website where a DBE can file an administrative complaint if it believes that a prime contractor is discriminating on the basis of race or gender in the award of sub-contracts; and requiring contractors seeking prequalification to maintain and produce solicitation records on all projects, both public and private,

with and without goals, as well as records of the bids received and accepted. *Id.* The small business initiative included: “unbundling” large contracts; allocating some contracts for bidding only by firms meeting the SBA’s definition of small businesses; a “prompt payment provision” in its contracts, requiring that subcontractors be paid promptly after they complete their work, and prohibiting prime contractors from delaying such payments; and an extensive outreach program seeking to attract and assist DBE and other small firms DBE and other small firms enter and achieve success in the industry (including retaining a network of consultants to provide management, technical and financial assistance to small businesses, and sponsoring networking sessions throughout the state to acquaint small firms with larger contractors and to encourage the involvement of small firms in major construction projects). *Id.*

The court found “[s]ignificantly, plaintiff did not question the efficacy or sincerity of these race- and gender-neutral measures.” *Id.* at *25. Additionally, the court found the DBE program had significant flexibility in that utilized contract-by-contract goal setting (without a fixed DBE participation minimum) and contained waiver provisions. *Id.* The court found that IDOT approved 70 percent of waiver requests although waivers were requested on only 8 percent of all contracts. *Id.*, citing *Adarand Constructors, Inc. v. Slater* “*Adarand VII*”, 228 F.3d 1147, 1177 (10th Cir. 2000) (citing for the proposition that flexibility and waiver are critically important).

The court held that IDOT’s DBE plan was narrowly tailored to the goal of remedying the effects of racial and gender discrimination in the construction industry, and was therefore constitutional.

14. *Northern Contracting, Inc. v. State of Illinois, Illinois DOT, and USDOT*, 2004 WL 422704 (N.D. Ill. March 3, 2004)

This is the earlier decision in *Northern Contracting, Inc.*, 2005 WL 2230195 (N.D. Ill. Sept. 8, 2005), *see* above, which resulted in the remand of the case to consider the implementation of the Federal DBE Program by the IDOT. This case involves the challenge to the Federal DBE Program. The plaintiff contractor sued the IDOT and the USDOT challenging the facial constitutionality of the Federal DBE Program (TEA-21 and 49 CFR Part 26) as well as the implementation of the Federal Program by the IDOT (i.e., the IDOT DBE Program). The court held valid the Federal DBE Program, finding there is a compelling governmental interest and the federal program is narrowly tailored. The court also held there are issues of fact regarding whether IDOT’s DBE Program is narrowly tailored to achieve the federal government’s compelling interest. The court denied the Motions for Summary Judgment filed by the plaintiff and by IDOT, finding there were issues of material fact relating to IDOT’s implementation of the Federal DBE Program.

The court in *Northern Contracting*, held that there is an identified compelling governmental interest for implementing the Federal DBE Program and that the Federal DBE Program is narrowly tailored to further that interest. Therefore, the court granted the Federal defendants’ Motion for Summary Judgment challenging the validity of the Federal DBE Program. In this connection, the district court followed the decisions and analysis in *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964 (8th Cir. 2003) and *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000) (“*Adarand VII*”), *cert. granted then dismissed as improvidently granted*, 532 U.S. 941, 534 U.S. 103 (2001). The court held, like these two Courts of Appeals that have addressed this issue, that Congress had a strong basis in evidence to conclude that the DBE Program was necessary to redress private discrimination in federally-assisted highway subcontracting. The court agreed with the *Adarand VII*

and *Sherbrooke Turf* courts that the evidence presented to Congress is sufficient to establish a compelling governmental interest, and that the contractors had not met their burden of introducing credible particularized evidence to rebut the Government's initial showing of the existence of a compelling interest in remedying the nationwide effects of past and present discrimination in the federal construction procurement subcontracting market. 2004 WL422704 at *34, *citing Adarand VII*, 228 F.3d at 1175.

In addition, the court analyzed the second prong of the strict scrutiny test, whether the government provided sufficient evidence that its program is narrowly tailored. In making this determination, the court looked at several factors, such as the efficacy of alternative remedies; the flexibility and duration of the race-conscious remedies, including the availability of waiver provisions; the relationships between the numerical goals and relevant labor market; the impact of the remedy on third parties; and whether the program is over-or-under-inclusive. The narrow tailoring analysis with regard to the as-applied challenge focused on IDOT's implementation of the Federal DBE Program.

First, the court held that the Federal DBE Program does not mandate the use of race-conscious measures by recipients of federal dollars, but in fact requires only that the goal reflect the recipient's determination of the level of DBE participation it would expect absent the effects of the discrimination. 49 CFR § 26.45(b). The court recognized, as found in the *Sherbrooke Turf* and *Adarand VII* cases, that the Federal Regulations place strong emphasis on the use of race-neutral means to increase minority business participation in government contracting, that although narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, it does require "serious, good faith consideration of workable race-neutral alternatives." 2004 WL422704 at *36, *citing and quoting Sherbrooke Turf*, 345 F.3d at 972, *quoting Grutter v. Bollinger*, 539 U.S. 306 (2003). The court held that the Federal regulations, which prohibit the use of quotas and severely limit the use of set-asides, meet this requirement. The court agreed with the *Adarand VII* and *Sherbrooke Turf* courts that the Federal DBE Program does require recipients to make a serious good faith consideration of workable race-neutral alternatives before turning to race-conscious measures.

Second, the court found that because the Federal DBE Program is subject to periodic reauthorization, and requires recipients of Federal dollars to review their programs annually, the Federal DBE scheme is appropriately limited to last no longer than necessary.

Third, the court held that the Federal DBE Program is flexible for many reasons, including that the presumption that women and minority are socially disadvantaged is deemed rebutted if an individual's personal net worth exceeds \$750,000.00, and a firm owned by individual who is not presumptively disadvantaged may nevertheless qualify for such status if the firm can demonstrate that its owners are socially and economically disadvantaged. 49 CFR § 26.67(b)(1)(d). The court found other aspects of the Federal Regulations provide ample flexibility, including recipients may obtain waivers or exemptions from any requirements. Recipients are not required to set a contract goal on every USDOT-assisted contract. If a recipient estimates that it can meet the entirety of its overall goals for a given year through race-neutral means, it must implement the Program without setting contract goals during the year. If during the course of any year in which it is using contract goals a recipient determines that it will exceed its overall goals, it must adjust the use of race-conscious contract goals accordingly. 49 CFR § 26.51(e)(f). Recipients also administering a DBE Program in good faith cannot be penalized for failing to meet their DBE goals, and a recipient may

terminate its DBE Program if it meets its annual overall goal through race-neutral means for two consecutive years. 49 CFR § 26.51(f). Further, a recipient may award a contract to a bidder/offeror that does not meet the DBE Participation goals so long as the bidder has made adequate good faith efforts to meet the goals. 49 CFR § 26.53(a)(2). The regulations also prohibit the use of quotas. 49 CFR § 26.43.

Fourth, the court agreed with the *Sherbrooke Turf* court's assessment that the Federal DBE Program requires recipients to base DBE goals on the number of ready, willing and able disadvantaged business in the local market, and that this exercise requires recipients to establish realistic goals for DBE participation in the relevant labor markets.

Fifth, the court found that the DBE Program does not impose an unreasonable burden on third parties, including non-DBE subcontractors and taxpayers. The court found that the Federal DBE Program is a limited and properly tailored remedy to cure the effects of prior discrimination, a sharing of the burden by parties such as non-DBEs is not impermissible.

Finally, the court found that the Federal DBE Program was not over-inclusive because the regulations do not provide that every woman and every member of a minority group is disadvantaged. Preferences are limited to small businesses with a specific average annual gross receipts over three fiscal years of \$16.6 million or less (at the time of this decision), and businesses whose owners' personal net worth exceed \$750,000.00 are excluded. 49 CFR § 26.67(b)(1). In addition, a firm owned by a white male may qualify as socially and economically disadvantaged. 49 CFR § 26.67(d).

The court analyzed the constitutionality of the IDOT DBE Program. The court adopted the reasoning of the Eighth Circuit in *Sherbrooke Turf*, that a recipient's implementation of the Federal DBE Program must be analyzed under the narrow tailoring analysis but not the compelling interest inquiry. Therefore, the court agreed with *Sherbrooke Turf* that a recipient need not establish a distinct compelling interest before implementing the Federal DBE Program, but did conclude that a recipient's implementation of the Federal DBE Program must be narrowly tailored. The court found that issues of fact remain in terms of the validity of the IDOT's DBE Program as implemented in terms of whether it was narrowly tailored to achieve the Federal Government's compelling interest. The court, therefore, denied the contractor plaintiff's Motion for Summary Judgment and the Illinois DOT's Motion for Summary Judgment.

15. *Klaver Construction, Inc. v. Kansas DOT*, 211 F. Supp.2d 1296 (D. Kan. 2002)

This is another case that involved a challenge to the USDOT Regulations that implement TEA-21 (49 CFR Part 26), in which the plaintiff contractor sought to enjoin the Kansas Department of Transportation ("DOT") from enforcing its DBE Program on the grounds that it violates the Equal Protection Clause under the Fourteenth Amendment. This case involves a direct constitutional challenge to racial and gender preferences in federally-funded state highway contracts. This case concerned the constitutionality of the Kansas DOT's implementation of the Federal DBE Program, and the constitutionality of the gender-based policies of the federal government and the race- and gender-based policies of the Kansas DOT. The court granted the federal and state defendants' (USDOT and Kansas DOT) Motions to Dismiss based on lack of standing. The court held the

contractor could not show the specific aspects of the DBE Program that it contends are unconstitutional have caused its alleged injuries.

16. *Sherbrooke Turf, Inc. v. Minnesota DOT*, 2001 WL 1502841, No. 00-CV-1026 (D. Minn. 2001) (unpublished opinion), aff'd 345 F.3d 964 (8th Cir. 2003)

Sherbrooke involved a landscaping service contractor owned and operated by Caucasian males. The contractor sued the Minnesota DOT claiming the Federal DBE provisions of the TEA-21 are unconstitutional. *Sherbrooke* challenged the “federal affirmative action programs,” the USDOT implementing regulations, and the Minnesota DOT’s participation in the DBE Program. The USDOT and the FHWA intervened as Federal defendants in the case. *Sherbrooke*, 2001 WL 1502841 at *1.

The United States District Court in *Sherbrooke* relied substantially on the Tenth Circuit Court of Appeals decision in *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000), in holding that the Federal DBE Program is constitutional. The district court addressed the issue of “random inclusion” of various groups as being within the Program in connection with whether the Federal DBE Program is “narrowly tailored.” The court held that Congress cannot enact a national program to remedy discrimination without recognizing classes of people whose history has shown them to be subject to discrimination and allowing states to include those people in its DBE Program.

The court held that the Federal DBE Program attempts to avoid the “potentially invidious effects of providing blanket benefits to minorities” in part, by restricting a state’s DBE preference to identified groups actually appearing in the target state. In practice, this means Minnesota can only certify members of one or another group as potential DBEs if they are present in the local market. This minimizes the chance that individuals — simply on the basis of their birth — will benefit from Minnesota’s DBE program. If a group is not present in the local market, or if they are found in such small numbers that they cannot be expected to be able to participate in the kinds of construction work TEA-21 covers, that group will not be included in the accounting used to set Minnesota’s overall DBE contracting goal.

Sherbrooke, 2001 WL 1502841 at *10 (D. Minn.). The court rejected plaintiff’s claim that the Minnesota DOT must independently demonstrate how its program comports with *Croson*’s strict scrutiny standard. The court held that the “Constitution calls out for different requirements when a state implements a federal affirmative action program, as opposed to those occasions when a state or locality initiates the Program.” *Id.* at *11 (emphasis added). The court in a footnote ruled that TEA-21, being a federal program, “relieves the state of any burden to independently carry the strict scrutiny burden.” *Id.* at *11 n. 3. The court held states that establish DBE programs under TEA-21 and 49 CFR Part 26 are implementing a Congressionally-required program and not establishing a local one. As such, the court concluded that the state need not independently prove its DBE program meets the strict scrutiny standard. *Id.*

17. *Gross Seed Co. v. Nebraska Department of Roads*, Civil Action File No. 4:00CV3073 (D. Neb. May 6, 2002), *aff'd* 345 F.3d 964 (8th Cir. 2003)

The United States District Court for the District of Nebraska held in *Gross Seed Co. v. Nebraska* (with the USDOT and FHWA as Interveners), that the Federal DBE Program (codified at 49 CFR Part 26) is constitutional. The court also held that the Nebraska Department of Roads (“Nebraska DOR”) DBE Program adopted and implemented solely to comply with the Federal DBE Program is “approved” by the court because the court found that 49 CFR Part 26 and TEA-21 were constitutional.

The court concluded, similar to the court in *Sherbrooke Turf*, that the State of Nebraska did not need to independently establish that its program met the strict scrutiny requirement because the Federal DBE Program satisfied that requirement, and was therefore constitutional. The court did not engage in a thorough analysis or evaluation of the Nebraska DOR Program or its implementation of the Federal DBE Program. The court points out that the Nebraska DOR Program is adopted in compliance with the Federal DBE Program, and that the USDOT approved the use of Nebraska DOR’s proposed DBE goals for fiscal year 2001, pending completion of USDOT’s review of those goals. Significantly, however, the court in its findings does note that the Nebraska DOR established its overall goals for fiscal year 2001 based upon an independent availability/disparity study.

The court upheld the constitutionality of the Federal DBE Program by finding the evidence presented by the federal government and the history of the federal legislation are sufficient to demonstrate that past discrimination does exist “in the construction industry” and that racial and gender discrimination “within the construction industry” is sufficient to demonstrate a compelling interest in individual areas, such as highway construction. The court held that the Federal DBE Program was sufficiently “narrowly tailored” to satisfy a strict scrutiny analysis based again on the evidence submitted by the federal government as to the Federal DBE Program.

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

Recent Decisions in Federal Circuit Courts of Appeal

1. *H. B. Rowe Co., Inc. v. W. Lyndo 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. Estepp*, 95 F.3d 312, 315 (4th Cir. 1996). In so acting, a governmental entity must demonstrate it had a compelling interest in “remedying the effects of past or present racial discrimination.” *Id.*, *quoting Shaw v. Hunt*, 517 U.S. 899, 909 (1996).

Thus, the Court found that to justify a race-conscious measure, a state must identify that discrimination, public or private, with some specificity, and must have a strong basis in evidence for its conclusion that remedial action is necessary. 615 F.3d 233 at 241 *quoting Croson*, 488 U.S. at 504 and *Wygant v. Jackson Board of Education*, 476 U.S. 267, 277 (1986)(plurality opinion).

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

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

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

the Court stated “that mere speculation that the state’s evidence is insufficient or methodologically flawed does not suffice to rebut a state’s showing. *Id.* at 242, citing *Concrete Works*, 321 F.3d at 991.

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

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

In defining what constitutes “something less” than a ‘strong basis in evidence,’ the courts, ... also agree that the party defending the statute must ‘present [] sufficient probative evidence in support of its stated rationale for enacting a gender preference, i.e.,...the evidence [must be] sufficient to show that the preference rests on evidence-informed analysis rather than on stereotypical generalizations.’ 615 F.3d 233 at 242 quoting *Engineering Contractors*, 122 F.3d at 910 and *Concrete Works*, 321 F.3d at 959. The gender-based measures must be based on “reasoned analysis rather than on the mechanical application of traditional, often inaccurate, assumptions.” *Id.* at 242 quoting *Hogan*, 458 U.S. at 726.

Plaintiff’s burden. The Court found that when a plaintiff alleges that a statute violates the Equal Protection Clause as applied and, on its face, the plaintiff bears a heavy burden. In its facial challenge, the Court held that a plaintiff “has a very heavy burden to carry, and must show that [a statutory scheme] cannot operate constitutionally under any circumstance.” *Id.* at 243, quoting *West Virginia v. U.S. Department of Health & Human Services*, 289 F.3d 281, 292 (4th Cir. 2002).

Statistical evidence. The Court examined the State’s statistical evidence of discrimination in public-sector subcontracting, including its disparity evidence and regression analysis. The Court noted that the statistical analysis analyzed the difference or disparity between the amount of subcontracting dollars minority- and women-owned businesses actually won in a market and the amount of subcontracting dollars they would be expected to win given their presence in that market. 615 F.3d 233 at 243. The Court found that the study grounded its analysis in the “disparity index,” which measures the participation of a given racial, ethnic, or gender group engaged in subcontracting. *Id.* In calculating a disparity index, the study divided the percentage of total subcontracting dollars that a particular group won by the percent that group represents in the available labor pool, and multiplied the result by 100. *Id.* The closer the resulting index is to 100, the greater that group’s participation. *Id.*

The Court held that after *Croson*, a number of our sister circuits have recognized the utility of the disparity index in determining statistical disparities in the utilization of minority- and women-owned businesses. *Id.* at 243-244 (Citations to multiple federal circuit court decisions omitted.) The Court also found that generally “courts consider a disparity index lower than 80 as an indication of discrimination.” *Id.* at 244. Accordingly, the study considered only a disparity index lower than 80 as warranting further investigation. *Id.*

The Court pointed out that after calculating the disparity index for each relevant racial or gender group, the consultant tested for the statistical significance of the results by conducting standard deviation analysis through the use of t-tests. The Court noted that standard deviation analysis “describes the probability that the measured disparity is the result of mere chance.” 615 F.3d 233 at 244, quoting *Eng’g Contractors*, 122 F.3d at 914. The consultant considered the finding of two standard deviations to demonstrate “with 95 percent certainty that disparity, as represented by either overutilization or underutilization, is actually present.” *Id.*, citing *Eng’g Contractors*, 122 F.3d at 914.

The study analyzed the participation of minority and women subcontractors in construction contracts awarded and managed from the central NCDOT office in Raleigh, North Carolina. 615 F.3d 233 at 244. To determine utilization of minority and women subcontractors, the consultant developed a master list of contracts mainly from State-maintained electronic databases and hard copy files; then selected from that list a statistically valid sample of contracts, and calculated the percentage of subcontracting dollars awarded to minority- and women-owned businesses during the 5-year period ending in June 2003. (The study was published in 2004). *Id.* at 244.

The Court found that the use of data for centrally-awarded contracts was sufficient for its analysis. It was noted that data from construction contracts awarded and managed from the NCDOT divisions across the state and from preconstruction contracts, which involve work from engineering firms and architectural firms on the design of highways, was incomplete and not accurate. 615 F.3d 233 at 244, n.6. These data were not relied upon in forming the opinions relating to the study. *Id.* at 244, n. 6.

To estimate availability, which the Court defined as the percentage of a particular group in the relevant market area, the consultant created a vendor list comprising: (1) subcontractors approved by the department to perform subcontract work on state-funded projects, (2) subcontractors that performed such work during the study period, and (3) contractors qualified to perform prime construction work on state-funded contracts. 615 F.3d 233 at 244. The Court noted that prime construction work on state-funded contracts was included based on the testimony by the consultant that prime contractors are qualified to perform subcontracting work and often do perform such work. *Id.* at 245. The Court also noted that the consultant submitted its master list to the NCDOT for verification. *Id.* at 245.

Based on the utilization and availability figures, the study prepared the disparity analysis comparing the utilization based on the percentage of subcontracting dollars over the five year period, determining the availability in numbers of firms and their percentage of the labor pool, a disparity index which is the percentage of utilization in dollars divided by the percentage of availability multiplied by 100, and a T Value. 615 F.3d 233 at 245.

The Court concluded that the figures demonstrated prime contractors underutilized all of the minority subcontractor classifications on state-funded construction contracts during the study period. 615 F.3d 233 245. The disparity index for each group was less than 80 and, thus, the Court found warranted further investigation. *Id.* The t-test results, however, demonstrated marked underutilization only of African American and Native American subcontractors. *Id.* For African Americans the t-value fell outside of two standard deviations from the mean and, therefore, was statistically significant at a 95 percent confidence level. *Id.* The Court found there was at least a 95 percent probability that prime contractors' underutilization of African American subcontractors was *not* the result of mere chance. *Id.*

For Native American subcontractors, the t-value of 1.41 was significant at a confidence level of approximately 85 percent. 615 F.3d 233 at 245. The t-values for Hispanic American and Asian American subcontractors, demonstrated significance at a confidence level of approximately 60 percent. The disparity index for women subcontractors found that they were overutilized during the study period. The overutilization was statistically significant at a 95 percent confidence level. *Id.*

To corroborate the disparity study, the consultant conducted a regression analysis studying the influence of certain company and business characteristics — with a particular focus on owner race and gender — on a firm's gross revenues. 615 F.3d 233 at 246. The consultant obtained the data from a telephone survey of firms that conducted or attempted to conduct business with the NCDOT. The survey pool consisted of a random sample of such firms. *Id.*

The consultant used the firms' gross revenues as the dependent variable in the regression analysis to test the effect of other variables, including company age and number of full-time employees, and the owners' years of experience, level of education, race, ethnicity, and gender. 615 F.3d 233 at 246. The analysis revealed that minority and women ownership universally had a negative effect on revenue, and African American ownership of a firm had the largest negative effect on that firm's gross revenue of all the independent variables included in the regression model. *Id.* These findings led to the conclusion that for African Americans the disparity in firm revenue was not due to capacity-related or managerial characteristics alone. *Id.*

The Court rejected the arguments by the plaintiffs attacking the availability estimates. The Court rejected the plaintiff's expert, Dr. George LaNoue, who testified that bidder data — reflecting the number of subcontractors that actually bid on Department subcontracts — estimates availability better than “vendor data.” 615 F.3d 233 at 246. Dr. LaNoue conceded, however, that the State does not compile bidder data and that bidder data actually reflects skewed availability in the context of a goals program that urges prime contractors to solicit bids from minority and women subcontractors. *Id.* The Court found that the plaintiff's expert did not demonstrate that the vendor data used in the study was unreliable, or that the bidder data would have yielded less support for the conclusions reached. In sum, the Court held that the plaintiffs challenge to the availability estimate failed because it could not demonstrate that the 2004 study's availability estimate was inadequate. *Id.* at 246. The Court cited *Concrete Works*, 321 F.3d at 991 for the proposition that a challenger cannot meet its burden of proof through conjecture and unsupported criticisms of the state's evidence, and that the plaintiff Rowe presented no viable alternative for determining availability. *Id.* at 246-247, citing *Concrete Works*, 321 F.3d 991 and *Sherbrooke Turf, Inc. v. Minn. Department of Transportation*, 345 F.3d 964, 973 (8th Cir. 2003).

The Court also rejected the plaintiff's argument that minority subcontractors participated on state-funded projects at a level consistent with their availability in the relevant labor pool, based on the state's response that evidence as to the *number* of minority subcontractors working with state-funded projects does not effectively rebut the evidence of discrimination in terms of subcontracting *dollars*. 615 F.3d 233 at 247. The State pointed to evidence indicating that prime contractors used minority businesses for low-value work in order to comply with the goals, and that African American ownership had a significant negative impact on firm revenue unrelated to firm capacity or experience. *Id.* The Court concluded plaintiff did not offer any contrary evidence. *Id.*

The Court found that the State bolstered its position by presenting evidence that minority subcontractors have the capacity to perform higher-value work. 615 F.3d 233 at 247. The study concluded, based on a sample of subcontracts and reports of annual firm revenue, that exclusion of minority subcontractors from contracts under \$500,000 was not a function of capacity. *Id.* at 247. Further, the State showed that over 90 percent of the NCDOT's subcontracts were valued at \$500,000 or less, and that capacity constraints do not operate with the same force on subcontracts as they may on prime contracts because subcontracts tend to be relatively small. *Id.* at 247. The Court pointed out that the Court in *Rothe II*, 545 F.3d at 1042-45, faulted disparity analyses of total construction dollars, including prime contracts, for failing to account for the relative capacity of firms in that case. *Id.* at 247.

The Court pointed out that in addition to the statistical evidence, the State also presented evidence demonstrating that from 1991 to 1993, during the Program's suspension, prime contractors awarded substantially fewer subcontracting dollars to minority and women subcontractors on state-funded projects. The Court rejected the plaintiff's argument that evidence of a decline in utilization does not raise an inference of discrimination. 615 F.3d 233 at 247-248. The Court held that the very significant decline in utilization of minority and women-subcontractors — nearly 38 percent — “surely provides a basis for a fact finder to infer that discrimination played some role in prime contractors’ reduced utilization of these groups during the suspension.” *Id.* at 248, *citing Adarand v. Slater*, 228 F.3d at 1174 (finding that evidence of declining minority utilization after a program has been discontinued “strongly supports the government’s claim that there are significant barriers to minority competition in the public subcontracting market, raising the specter of racial discrimination.”) The Court found such an inference is particularly compelling for minority-owned businesses because, even during the study period, prime contractors continue to underutilize them on state-funded road projects. *Id.* at 248.

Anecdotal evidence. The State additionally relied on three sources of anecdotal evidence contained in the study: a telephone survey, personal interviews, and focus groups. The Court found the anecdotal evidence showed an informal “good old boy” network of white contractors that discriminated against minority subcontractors. 615 F.3d 233 at 248. The Court noted that three-quarters of African American respondents to the telephone survey agreed that an informal network of prime and subcontractors existed in the State, as did the majority of other minorities, that more than half of African American respondents believed the network excluded their companies from bidding or awarding a contract as did many of the other minorities. *Id.* at 248. The Court found that nearly half of nonminority male respondents corroborated the existence of an informal network, however, only 17 percent of them believed that the network excluded their companies from bidding or winning contracts. *Id.*

Anecdotal evidence also showed a large majority of African American respondents reported that double standards in qualifications and performance made it more difficult for them to win bids and contracts, that prime contractors view minority firms as being less competent than nonminority firms, and that nonminority firms change their bids when not required to hire minority firms. 615 F.3d 233 at 248. In addition, the anecdotal evidence showed African American and Native American respondents believed that prime contractors sometimes dropped minority subcontractors after winning contracts. *Id.* at 248. The Court found that interview and focus-group responses echoed and underscored these reports. *Id.*

The anecdotal evidence indicated that prime contractors already know who they will use on the contract before they solicit bids: that the “good old boy network” affects business because prime contractors just pick up the phone and call their buddies, which excludes others from that market completely; that prime contractors prefer to use other less qualified minority-owned firms to avoid subcontracting with African American-owned firms; and that prime contractors use their preferred subcontractor regardless of the bid price. 615 F.3d 233 at 248-249. Several minority subcontractors reported that prime contractors do not treat minority firms fairly, pointing to instances in which prime contractors solicited quotes the day before bids were due, did not respond to bids from minority subcontractors, refused to negotiate prices with them, or gave minority subcontractors insufficient information regarding the project. *Id.* at 249.

The Court rejected the plaintiffs’ contention that the anecdotal data was flawed because the study did not verify the anecdotal data and that the consultant oversampled minority subcontractors in collecting the data. The Court stated that the plaintiffs offered no rationale as to why a fact finder could not rely on the State’s “unverified” anecdotal data, and pointed out that a fact finder could very well conclude that anecdotal evidence need not- and indeed cannot-be verified because it “is nothing more than a witness’ narrative of an incident told from the witness’ perspective and including the witness’ perceptions.” 615 F.3d 233 at 249, *quoting Concrete Works*, 321 F.3d at 989.

The Court held that anecdotal evidence simply supplements statistical evidence of discrimination. *Id.* at 249. The Court rejected plaintiffs’ argument that the study oversampled representatives from minority groups, and found that surveying more nonminority men would not have advanced the inquiry. *Id.* at 249. It was noted that the samples of the minority groups were randomly selected. *Id.* The Court found the state had compelling anecdotal evidence that minority subcontractors face race-based obstacles to successful bidding. *Id.* at 249.

Strong basis in evidence that the minority participation goals were necessary to remedy discrimination. The Court held that the State presented a “strong basis in evidence” for its conclusion that minority participation goals were necessary to remedy discrimination against African American and Native American subcontractors. 615 F.3d 233 at 250. Therefore, the Court held that the State satisfied the strict scrutiny test. The Court found that the State’s data demonstrated that prime contractors grossly underutilized African American and Native American subcontractors in public sector subcontracting during the study. *Id.* at 250. The Court noted that these findings have particular resonance because since 1983, North Carolina has encouraged minority participation in state-funded highway projects, and yet African American and Native American subcontractors continue to be underutilized on such projects. *Id.* at 250.

In addition, the Court found the disparity index in the study demonstrated statistically significant underutilization of African American subcontractors at a 95 percent confidence level, and of Native American subcontractors at a confidence level of approximately 85 percent. 615 F.3d 233 at 250. The Court concluded the State bolstered the disparity evidence with regression analysis demonstrating that African American ownership correlated with a significant, negative impact on firm revenue, and demonstrated there was a dramatic decline in the utilization of minority subcontractors during the suspension of the program in the 1990s. *Id.*

Thus, the Court held the State's evidence showing a gross statistical disparity between the availability of qualified American and Native American subcontractors and the amount of subcontracting dollars they win on public sector contracts established the necessary statistical foundation for upholding the minority participation goals with respect to these groups. 615 F.3d 233 at 250. The Court then found that the State's anecdotal evidence of discrimination against these two groups sufficiently supplemented the State's statistical showing. *Id.* The survey in the study exposed an informal, racially exclusive network that systemically disadvantaged minority subcontractors. *Id.* at 251. The Court held that the State could conclude with good reason that such networks exert a chronic and pernicious influence on the marketplace that calls for remedial action. *Id.* The Court found the anecdotal evidence indicated that racial discrimination is a critical factor underlying the gross statistical disparities presented in the study. *Id.* at 251. Thus, the Court held that the State presented substantial statistical evidence of gross disparity, corroborated by "disturbing" anecdotal evidence.

The Court held in circumstances like these, the Supreme Court has made it abundantly clear a state can remedy a public contracting system that withholds opportunities from minority groups because of their race. 615 F.3d 233 at 251-252.

Narrowly tailored. The Court then addressed whether the North Carolina statutory scheme was narrowly tailored to achieve the State's compelling interest in remedying discrimination against African American and Native American subcontractors in public-sector subcontracting. The following factors were considered in determining whether the statutory scheme was narrowly tailored.

Neutral measures. The Court held that narrowly tailoring requires "serious, good faith consideration of workable race-neutral alternatives," but a state need not "exhaust [] ... every conceivable race-neutral alternative." 615 F.3d 233 at 252 quoting *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003). The Court found that the study details numerous alternative race-neutral measures aimed at enhancing the development and competitiveness of small or otherwise disadvantaged businesses in North Carolina. *Id.* at 252. The Court pointed out various race-neutral alternatives and measures, including a Small Business Enterprise Program; waiving institutional barriers of bonding and licensing requirements on certain small business contracts of \$500,000 or less; and the Department contracts for support services to assist disadvantaged business enterprises with bookkeeping and accounting, taxes, marketing, bidding, negotiation, and other aspects of entrepreneurial development. *Id.* at 252.

The Court found that plaintiff identified no viable race-neutral alternatives that North Carolina had failed to consider and adopt. The Court also found that the State had undertaken most of the race-neutral alternatives identified by USDOT in its regulations governing the Federal DBE Program. 615 F.3d 233 at 252, *citing* 49 CFR § 26.51(b). The Court concluded that the State gave

serious good faith consideration to race-neutral alternatives prior to adopting the statutory scheme. *Id.*

The Court concluded that despite these race-neutral efforts, the study demonstrated disparities continue to exist in the utilization of African American and Native American subcontractors in state-funded highway construction subcontracting, and that these “persistent disparities indicate the necessity of a race-conscious remedy.” 615 F.3d 233 at 252.

Duration. The Court agreed with the district court that the program was narrowly tailored in that it set a specific expiration date and required a new disparity study every five years. 615 F.3d 233 at 253. The Court found that the program’s inherent time limit and provisions requiring regular reevaluation ensure it is carefully designed to endure only until the discriminatory impact has been eliminated. *Id.* at 253, citing *Adarand Constructors v. Slater*, 228 F.3d at 1179 (quoting *United States v. Paradise*, 480 U.S. 149, 178 (1987)).

Program’s goals related to percentage of minority subcontractors. The Court concluded that the State had demonstrated that the Program’s participation goals are related to the percentage of minority subcontractors in the relevant markets in the State. 615 F.3d 233 at 253. The Court found that the NCDOT had taken concrete steps to ensure that these goals accurately reflect the availability of minority-owned businesses on a project-by-project basis. *Id.*

Flexibility. The Court held that the Program was flexible and thus satisfied this indicator of narrow tailoring. 615 F.3d 233 at 253. The Program contemplated a waiver of project-specific goals when prime contractors make good faith efforts to meet those goals, and that the good faith efforts essentially require only that the prime contractor solicit and consider bids from minorities. *Id.* The State does not require or expect the prime contractor to accept any bid from an unqualified bidder, or any bid that is not the lowest bid. *Id.* The Court found there was a lenient standard and flexibility of the “good faith” requirement, and noted the evidence showed only 13 of 878 good faith submissions failed to demonstrate good faith efforts. *Id.*

Burden on non-MWBE/DBEs. The Court rejected the two arguments presented by plaintiff that the Program created onerous solicitation and follow-up requirements, finding that there was no need for additional employees dedicated to the task of running the solicitation program to obtain MBE/WBEs, and that there was no evidence to support the claim that plaintiff was required to subcontract millions of dollars of work that it could perform itself for less money. 615 F.3d 233 at 254. The State offered evidence from the study that prime contractors need not submit subcontract work that they can self-perform. *Id.*

Overinclusive. The Court found by its own terms the statutory scheme is not overinclusive because it limited relief to only those racial or ethnicity classifications that have been subjected to discrimination in the relevant marketplace and that had been adversely affected in their ability to obtain contracts with the Department. 615 F.3d 233 at 254. The Court concluded that in tailoring the remedy this way, the legislature did not randomly include racial groups that may never have suffered from discrimination in the construction industry, but rather, contemplated participation goals only for those groups shown to have suffered discrimination. *Id.*

In sum, the Court held that the statutory scheme is narrowly tailored to achieve the State's compelling interest in remedying discrimination in public-sector subcontracting against African American and Native American subcontractors. *Id.* at 254.

Women-owned businesses overutilized. The study's public-sector disparity analysis demonstrated that women-owned businesses won far more than their expected share of subcontracting dollars during the study period. 615 F.3d 233 at 254. In other words, the Court concluded that prime contractors substantially overutilized women subcontractors on public road construction projects. *Id.* The Court found the public-sector evidence did not evince the "exceedingly persuasive justification" the Supreme Court requires. *Id.* at 255.

The Court noted that the State relied heavily on private-sector data from the study attempting to demonstrate that prime contractors significantly underutilized women subcontractors in the general construction industry statewide and in the Charlotte, North Carolina area. 615 F.3d 233 at 255. However, because the study did not provide a t-test analysis on the private-sector disparity figures to calculate statistical significance, the Court could not determine whether this private underutilization was "the result of mere chance." *Id.* at 255. The Court found troubling the "evidentiary gap" that there was no evidence indicating the extent to which women-owned businesses competing on public-sector road projects vied for private-sector subcontracts in the general construction industry. *Id.* at 255. The Court also found that the State did not present any anecdotal evidence indicating that women subcontractors successfully bidding on State contracts faced private-sector discrimination. *Id.* In addition, the Court found missing any evidence prime contractors that discriminate against women subcontractors in the private sector nevertheless win public-sector contracts. *Id.*

The Court pointed out that it did not suggest that the proponent of a gender-conscious program "must always tie private discrimination to public action." 615 F.3d 233 at 255, n. 11. But the Court held where, as here, there existed substantial probative evidence of overutilization in the relevant public sector, a state must present something more than generalized private-sector data unsupported by compelling anecdotal evidence to justify a gender-conscious program. *Id.* at 255, n. 11.

Moreover, the Court found the state failed to establish the amount of overlap between general construction and road construction subcontracting. 615 F.3d 233 at 256. The Court said that the dearth of evidence as to the correlation between public road construction subcontracting and private general construction subcontracting severely limits the private data's probative value in this case. *Id.*

Thus, the Court held that the State could not overcome the strong evidence of overutilization in the public sector in terms of gender participation goals, and that the proffered private-sector data failed to establish discrimination in the particular field in question. 615 F.3d 233 at 256. Further, the anecdotal evidence, the Court concluded, indicated that most women subcontractors do not experience discrimination. *Id.* Thus, the Court held that the State failed to present sufficient evidence to support the Program's current inclusion of women subcontractors in setting participation goals. *Id.*

Holding. The Court held that the state legislature had crafted legislation that withstood the constitutional scrutiny. 615 F.3d 233 at 257. The Court concluded that in light of the statutory scheme's flexibility and responsiveness to the realities of the marketplace, and given the State's strong evidence of discrimination against African American and Native American subcontractors in public-sector subcontracting, the State's application of the statute to these groups is constitutional. *Id.*

at 257. However, the Court also held that because the State failed to justify its application of the statutory scheme to women, Asian American, and Hispanic American subcontractors, the Court found those applications were not constitutional.

Therefore, the Court affirmed the judgment of the district court with regard to the facial validity of the statute, and with regard to its application to African American and Native American subcontractors. 615 F.3d 233 at 258. The Court reversed the district court's judgment insofar as it upheld the constitutionality of the state legislature as applied to women, Asian American and Hispanic American subcontractors. *Id.* The Court thus remanded the case to the district court to fashion an appropriate remedy consistent with the opinion. *Id.*

Concurring opinions. It should be pointed out that there were two concurring opinions by the three Judge panel: one judge concurred in the judgment, and the other judge concurred fully in the majority opinion and the judgment.

2. *Jana-Rock Construction, Inc. v. New York State Dept. of Economic Development*, 438 F.3d 195 (2d Cir. 2006)

This recent case is instructive in connection with the determination of the groups that may be included in an 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. *Virdi v. DeKalb County School District*, 135 Fed. Appx. 262, 2005 WL 138942 (11th Cir. 2005) (unpublished opinion)

Although it is an unpublished opinion, *Virdi v. DeKalb County School District* is a recent Eleventh Circuit decision reviewing a challenge to a local government MBE/WBE-type program, which is instructive to the disparity study. In *Virdi*, the Eleventh Circuit struck down an MBE/WBE goal program that the court held contained racial classifications. The court based its ruling primarily on the failure of the DeKalb County School District (the “District”) to seriously consider and implement a race-neutral program and to the infinite duration of the program.

Plaintiff Virdi, an Asian American architect of Indian descent, filed suit against the District, members of the DeKalb County Board of Education (both individually and in their official capacities) (the “Board”) and the Superintendent (both individually and in his official capacity) (collectively “defendants”) pursuant to 42 U.S.C. §§ 1981 and 1983 and the Fourteenth Amendment alleging that they discriminated against him on the basis of race when awarding architectural contracts. 135 Fed. Appx. 262, 264 (11th Cir. 2005). Virdi also alleged the school district’s Minority Vendor Involvement Program was facially unconstitutional. *Id.*

The district court initially granted the defendants’ Motions for Summary Judgment on all of Virdi’s claims and the Eleventh Circuit Court of Appeals reversed in part, vacated in part, and remanded. *Id.* On remand, the district court granted the defendants’ Motion for Partial Summary Judgment on the facial challenge, and then granted the defendants’ motion for a judgment as a matter of law on the remaining claims at the close of Virdi’s case. *Id.*

In 1989, the Board appointed the Tillman Committee (the “Committee”) to study participation of female- and minority-owned businesses with the District. *Id.* The Committee met with various District departments and a number of minority contractors who claimed they had unsuccessfully attempted to solicit business with the District. *Id.* Based upon a “general feeling” that minorities were under-represented, the Committee issued the Tillman Report (the “Report”) stating “the Committee’s impression that [m]inorities ha[d] not participated in school board purchases and contracting in a ratio reflecting the minority make-up of the community.” *Id.* The Report contained no specific evidence of past discrimination nor any factual findings of discrimination. *Id.*

The Report recommended that the District: (1) Advertise bids and purchasing opportunities in newspapers targeting minorities, (2) conduct periodic seminars to educate minorities on doing business with the District, (3) notify organizations representing minority firms regarding bidding and purchasing opportunities, and (4) publish a “how to” booklet to be made available to any business interested in doing business with the District.

Id. The Report also recommended that the District adopt annual, aspirational participation goals for women- and minority-owned businesses. *Id.* The Report contained statements indicating the selection process should remain neutral and recommended that the Board adopt a non-discrimination statement. *Id.*

In 1991, the Board adopted the Report and implemented several of the recommendations, including advertising in the AJC, conducting seminars, and publishing the “how to” booklet. *Id.* The Board also implemented the Minority Vendor Involvement Program (the “MVP”) which adopted the participation goals set forth in the Report. *Id.* at 265.

The Board delegated the responsibility of selecting architects to the Superintendent. *Id.* Virdi sent a letter to the District in October 1991 expressing interest in obtaining architectural contracts. *Id.* Virdi sent the letter to the District Manager and sent follow-up literature; he re-contacted the District Manager in 1992 and 1993. *Id.* In August 1994, Virdi sent a letter and a qualifications package to a project manager employed by Heery International. *Id.* In a follow-up conversation, the project manager allegedly told Virdi that his firm was not selected not based upon his qualifications, but because the “District was only looking for ‘black-owned firms.’” *Id.* Virdi sent a letter to the project manager requesting confirmation of his statement in writing and the project manager forwarded the letter to the District. *Id.*

After a series of meetings with District officials, in 1997, Virdi met with the newly hired Executive Director. *Id.* at 266. Upon request of the Executive Director, Virdi re-submitted his qualifications but was informed that he would be considered only for future projects (Phase III SPLOST projects). *Id.* Virdi then filed suit before any Phase III SPLOST projects were awarded. *Id.*

The Eleventh Circuit considered whether the MVP was facially unconstitutional and whether the defendants intentionally discriminated against Virdi on the basis of his race. The court held that strict scrutiny applies to all racial classifications and is not limited to merely set-asides or mandatory quotas; therefore, the MVP was subject to strict scrutiny because it contained racial classifications. *Id.* at 267. The court first questioned whether the identified government interest was compelling. *Id.* at 268. However, the court declined to reach that issue because it found the race-based participation goals were not narrowly tailored to achieving the identified government interest. *Id.*

The court held the MVP was not narrowly tailored for two reasons. *Id.* First, because no evidence existed that the District considered race-neutral alternatives to “avoid unwitting discrimination.” The court found that “[w]hile narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, it does require serious, good faith consideration of whether such alternatives could serve the governmental interest at stake.” *Id.*, citing *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003), and *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509-10 (1989). The court found that District could have engaged in any number of equally effective race-neutral alternatives, including using its outreach procedure and tracking the participation and success of minority-owned business as compared to

nonminority-owned businesses. *Id.* at 268, n.8. Accordingly, the court held the MVP was not narrowly tailored. *Id.* at 268.

Second, the court held that the unlimited duration of the MVP's racial goals negated a finding of narrow tailoring. *Id.* "[R]ace conscious ... policies must be limited in time." *Id.*, citing *Grutter*, 539 U.S. at 342, and *Walker v. City of Mesquite, TX*, 169 F.3d 973, 982 (5th Cir. 1999). The court held that because the government interest could have been achieved utilizing race-neutral measures, and because the racial goals were not temporally limited, the MVP could not withstand strict scrutiny and was unconstitutional on its face. *Id.* at 268.

With respect to Viridi'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 Viridi to lose a contract that he would have otherwise received. *Id.* Thus, because Viridi failed to establish a causal connection between the unconstitutional aspect of the MVP and his own injuries, the court affirmed the district court's grant of judgment on that issue. *Id.* at 269. Similarly, the court found that Viridi presented insufficient evidence to sustain his claims against the Superintendent for intentional discrimination. *Id.*

The court reversed the district court's order pertaining to the facial constitutionality of the MVP's racial goals, and affirmed the district court's order granting defendants' motion on the issue of intentional discrimination against Viridi. *Id.* at 270.

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

This case is instructive to the disparity study because it is one of the only recent decisions to uphold the validity of a local government MBE/WBE program. It is significant to note that the Tenth Circuit did not apply the narrowly tailored test and thus did not rule on an application of the narrowly tailored test, instead finding that the plaintiff had waived that challenge in one of the earlier decisions in the case. This case also is one of the only cases to have found private sector marketplace discrimination as a basis to uphold an MBE/WBE-type program.

In *Concrete Works* the United States Court of Appeals for the Tenth Circuit held that the City and County of Denver had a compelling interest in limiting race discrimination in the construction industry, that the City had an important governmental interest in remedying gender discrimination in the construction industry, and found that the City and County of Denver had established a compelling governmental interest to have a race- and gender-based program. In *Concrete Works*, the Court of Appeals did not address the issue of whether the MWBE Ordinance was narrowly tailored because it held the district court was barred under the law of the case doctrine from considering that issue since it was not raised on appeal by the plaintiff construction companies after they had lost that issue on summary judgment in an earlier decision. Therefore, the Court of Appeals did not reach a decision as to narrowly tailoring or consider that issue in the case.

Case history. Plaintiff, Concrete Works of Colorado, Inc. (“CWC”) challenged the constitutionality of an “affirmative action” ordinance enacted by the City and County of Denver (hereinafter the “City” or “Denver”). 321 F.3d 950, 954 (10th Cir. 2003). The ordinance established participation goals for racial minorities and women on certain City construction and professional design projects. *Id.*

The City enacted an Ordinance No. 513 (“1990 Ordinance”) containing annual goals for MBE/WBE utilization on all competitively bid projects. *Id.* at 956. A prime contractor could also satisfy the 1990 Ordinance requirements by using “good faith efforts.” *Id.* In 1996, the City replaced the 1990 Ordinance with Ordinance No. 304 (the “1996 Ordinance”). The district court stated that the 1996 Ordinance differed from the 1990 Ordinance by expanding the definition of covered contracts to include some privately financed contracts on City-owned land; added updated information and findings to the statement of factual support for continuing the program; refined the requirements for MBE/WBE certification and graduation; mandated the use of MBEs and WBEs on change orders; and expanded sanctions for improper behavior by MBEs, WBEs or majority-owned contractors in failing to perform the affirmative action commitments made on City projects. *Id.* at 956-57.

The 1996 Ordinance was amended in 1998 by Ordinance No. 948 (the “1998 Ordinance”). The 1998 Ordinance reduced annual percentage goals and prohibited an MBE or a WBE, acting as a bidder, from counting self-performed work toward project goals. *Id.* at 957.

CWC filed suit challenging the constitutionality of the 1990 Ordinance. *Id.* The district court conducted a bench trial on the constitutionality of the three ordinances. *Id.* The district court ruled in favor of CWC and concluded that the ordinances violated the Fourteenth Amendment. *Id.* The City then appealed to the Tenth Circuit Court of Appeals. *Id.* The Court of Appeals reversed and remanded. *Id.* at 954.

The Court of Appeals applied strict scrutiny to race-based measures and intermediate scrutiny to the gender-based measures. *Id.* at 957-58, 959. The Court of Appeals also cited *Richmond v. J.A. Croson Co.*, for the proposition that a governmental entity “can use its spending powers to remedy private discrimination, if it identifies that discrimination with the particularity required by the Fourteenth Amendment.” 488 U.S. 469, 492 (1989) (plurality opinion). Because “an effort to alleviate the effects of societal discrimination is not a compelling interest,” the Court of Appeals held that Denver could demonstrate that its interest is compelling only if it (1) identified the past or present discrimination “with some specificity,” and (2) demonstrated that a “strong basis in evidence” supports its conclusion that remedial action is necessary. *Id.* at 958, quoting *Shaw v. Hunt*, 517 U.S. 899, 909-10 (1996).

The court held that Denver could meet its burden without conclusively proving the existence of past or present racial discrimination. *Id.* Rather, Denver could rely on “empirical evidence that demonstrates ‘a significant statistical disparity between the number of qualified minority contractors ... and the number of such contractors actually engaged by the locality or the locality’s prime contractors.’” *Id.*, quoting *Croson*, 488 U.S. at 509 (plurality opinion). Furthermore, the Court of Appeals held that Denver could rely on statistical evidence gathered from the six-county Denver Metropolitan Statistical Area (MSA) and could supplement the statistical evidence with anecdotal evidence of public and private discrimination. *Id.*

The Court of Appeals held that Denver could establish its compelling interest by presenting evidence of its own direct participation in racial discrimination or its passive participation in private discrimination. *Id.* The Court of Appeals held that once Denver met its burden, CWC had to introduce “credible, particularized evidence to rebut [Denver’s] initial showing of the existence of a compelling interest, which could consist of a neutral explanation for the statistical disparities.” *Id.* (internal citations and quotations omitted). The Court of Appeals held that CWC could also rebut Denver’s statistical evidence “by (1) showing that the statistics are flawed; (2) demonstrating that the disparities shown by the statistics are not significant or actionable; or (3) presenting contrasting statistical data.” *Id.* (internal citations and quotations omitted). The Court of Appeals held that the burden of proof at all times remained with CWC to demonstrate the unconstitutionality of the ordinances. *Id.* at 960.

The Court of Appeals held that to meet its burden of demonstrating an important governmental interest per the intermediate scrutiny analysis, Denver must show that the gender-based measures in the ordinances were based on “reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions.” *Id.*, quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 726 (1982).

The studies. Denver presented historical, statistical and anecdotal evidence in support of its MBE/WBE programs. Denver commissioned a number of studies to assess its MBE/WBE programs. *Id.* at 962. The consulting firm hired by Denver utilized disparity indices in part. *Id.* at 962. The 1990 Study also examined MBE and WBE utilization in the overall Denver MSA construction market, both public and private. *Id.* at 963.

The consulting firm also interviewed representatives of MBEs, WBEs, majority-owned construction firms, and government officials. *Id.* Based on this information, the 1990 Study concluded that, despite Denver’s efforts to increase MBE and WBE participation in Denver Public Works projects, some Denver employees and private contractors engaged in conduct designed to circumvent the goals program. *Id.* After reviewing the statistical and anecdotal evidence contained in the 1990 Study, the City Council enacted the 1990 Ordinance. *Id.*

After the Tenth Circuit decided *Concrete Works II*, Denver commissioned another study (the “1995 Study”). *Id.* at 963. Using 1987 Census Bureau data, the 1995 Study again examined utilization of MBEs and WBEs in the construction and professional design industries within the Denver MSA. *Id.* The 1995 Study concluded that MBEs and WBEs were more likely to be one-person or family-run businesses. The Study concluded that Hispanic-owned firms were less likely to have paid employees than white-owned firms but that Asian/Native American-owned firms were more likely to have paid employees than white- or other minority-owned firms. To determine whether these factors explained overall market disparities, the 1995 Study used the Census data to calculate disparity indices for all firms in the Denver MSA construction industry and separately calculated disparity indices for firms with paid employees and firms with no paid employees. *Id.* at 964.

The Census Bureau information was also used to examine average revenues per employee for Denver MSA construction firms with paid employees. Hispanic-, Asian-, Native American-, and women-owned firms with paid employees all reported lower revenues per employee than majority-owned firms. The 1995 Study also used 1990 Census data to calculate rates of self-employment within the Denver MSA construction industry. The Study concluded that the

disparities in the rates of self-employment for blacks, Hispanics, and women persisted even after controlling for education and length of work experience. The 1995 Study controlled for these variables and reported that blacks and Hispanics working in the Denver MSA construction industry were less than half as likely to own their own businesses as were whites of comparable education and experience. *Id.*

In late 1994 and early 1995, a telephone survey of construction firms doing business in the Denver MSA was conducted. *Id.* at 965. Based on information obtained from the survey, the consultant calculated percentage utilization and percentage availability of MBEs and WBEs. Percentage utilization was calculated from revenue information provided by the responding firms. Percentage availability was calculated based on the number of MBEs and WBEs that responded to the survey question regarding revenues. Using these utilization and availability percentages, the 1995 Study showed disparity indices of 64 for MBEs and 70 for WBEs in the construction industry. In the professional design industry, disparity indices were 67 for MBEs and 69 for WBEs. The 1995 Study concluded that the disparity indices obtained from the telephone survey data were more accurate than those obtained from the 1987 Census data because the data obtained from the telephone survey were more recent, had a narrower focus, and included data on C corporations. Additionally, it was possible to calculate disparity indices for professional design firms from the survey data. *Id.*

In 1997, the City conducted another study to estimate the availability of MBEs and WBEs and to examine, *inter alia*, whether race and gender discrimination limited the participation of MBEs and WBEs in construction projects of the type typically undertaken by the City (the “1997 Study”). *Id.* at 966. The 1997 Study used geographic and specialization information to calculate MBE/WBE availability. Availability was defined as “the ratio of MBE/WBE firms to the total number of firms in the four-digit SIC codes and geographic market area relevant to the City’s contracts.” *Id.*

The 1997 Study compared MBE/WBE availability and utilization in the Colorado construction industry. *Id.* The statewide market was used because necessary information was unavailable for the Denver MSA. *Id.* at 967. Additionally, data collected in 1987 by the Census Bureau was used because more current data was unavailable. The Study calculated disparity indices for the statewide construction market in Colorado as follows: 41 for African American firms, 40 for Hispanic firms, 14 for Asian and other minorities, and 74 for women-owned firms. *Id.*

The 1997 Study also contained an analysis of whether African Americans, Hispanics, or Asian Americans working in the construction industry are less likely to be self-employed than similarly situated whites. *Id.* Using data from the Public Use Microdata Samples (“PUMS”) of the 1990 Census of Population and Housing, the Study used a sample of individuals working in the construction industry. The Study concluded that in both Colorado and the Denver MSA, African Americans, Hispanics, and Native Americans working in the construction industry had lower self-employment rates than whites. Asian Americans had higher self-employment rates than whites.

Using the availability figures calculated earlier in the Study, the Study then compared the actual availability of MBE/WBEs in the Denver MSA with the potential availability of MBE/WBEs if they formed businesses at the same rate as whites with the same characteristics. *Id.* Finally, the Study examined whether self-employed minorities and women in the construction industry have lower earnings than white males with similar characteristics. *Id.* at 968. Using linear regression analysis, the Study compared business owners with similar years of education, of similar age, doing business in the

same geographic area, and having other similar demographic characteristics. Even after controlling for several factors, the results showed that self-employed African Americans, Hispanics, Native Americans, and women had lower earnings than white males. *Id.*

The 1997 Study also conducted a mail survey of both MBE/WBEs and non-MBE/WBEs to obtain information on their experiences in the construction industry. Of the MBE/WBEs who responded, 35 percent indicated that they had experienced at least one incident of disparate treatment within the last five years while engaged in business activities. The survey also posed the following question: “How often do prime contractors who use your firm as a subcontractor on public sector projects with [MBE/WBE] goals or requirements ... also use your firm on public sector or private sector projects without [MBE/WBE] goals or requirements?” Fifty-eight percent of minorities and 41 percent of white women who responded to this question indicated they were “seldom or never” used on non-goals projects. *Id.*

MBE/WBEs were also asked whether the following aspects of procurement made it more difficult or impossible to obtain construction contracts: (1) bonding requirements, (2) insurance requirements, (3) large project size, (4) cost of completing proposals, (5) obtaining working capital, (6) length of notification for bid deadlines, (7) prequalification requirements, and (8) previous dealings with an agency. This question was also asked of non-MBE/WBEs in a separate survey. With one exception, MBE/WBEs considered each aspect of procurement more problematic than non-MBE/WBEs. To determine whether a firm’s size or experience explained the different responses, a regression analysis was conducted that controlled for age of the firm, number of employees, and level of revenues. The results again showed that with the same, single exception, MBE/WBEs had more difficulties than non-MBE/WBEs with the same characteristics. *Id.* at 968-69.

After the 1997 Study was completed, the City enacted the 1998 Ordinance. The 1998 Ordinance reduced the annual goals to 10 percent for both MBEs and WBEs and eliminated a provision which previously allowed MBE/WBEs to count their own work toward project goals. *Id.* at 969.

The anecdotal evidence included the testimony of the senior vice-president of a large, majority-owned construction firm who stated that when he worked in Denver, he received credible complaints from minority and women-owned construction firms that they were subject to different work rules than majority-owned firms. *Id.* He also testified that he frequently observed graffiti containing racial or gender epithets written on job sites in the Denver metropolitan area. Further, he stated that he believed, based on his personal experiences, that many majority-owned firms refused to hire minority- or women-owned subcontractors because they believed those firms were not competent. *Id.*

Several MBE/WBE witnesses testified that they experienced difficulty prequalifying for private sector projects and projects with the City and other governmental entities in Colorado. One individual testified that her company was required to prequalify for a private sector project while no similar requirement was imposed on majority-owned firms. Several others testified that they attempted to prequalify for projects, but their applications were denied even though they met the prequalification requirements. *Id.*

Other MBE/WBEs testified that their bids were rejected even when they were the lowest bidder; that they believed they were paid more slowly than majority-owned firms on both City projects and private sector projects; that they were charged more for supplies and materials; that they were required to do additional work not part of the subcontracting arrangement; and that they found it difficult to join unions and trade associations. *Id.* There was testimony detailing the difficulties MBE/WBEs experienced in obtaining lines of credit. One WBE testified that she was given a false explanation of why her loan was declined; another testified that the lending institution required the co-signature of her husband even though her husband, who also owned a construction firm, was not required to obtain her co-signature; a third testified that the bank required her father to be involved in the lending negotiations. *Id.*

The court also pointed out anecdotal testimony involving recitations of racially- and gender-motivated harassment experienced by MBE/WBEs at work sites. There was testimony that minority and female employees working on construction projects were physically assaulted and fondled, spat upon with chewing tobacco, and pelted with two-inch bolts thrown by males from a height of 80 feet. *Id.* at 969-70.

The legal framework applied by the court. The Court held that the district court incorrectly believed Denver was required to prove the existence of discrimination. Instead of considering whether Denver had demonstrated strong evidence from which an inference of past or present discrimination could be drawn, the district court analyzed whether Denver's evidence showed that there is pervasive discrimination. *Id.* at 970. The court, quoting *Concrete Works II*, stated that "the Fourteenth Amendment does not require a court to make an ultimate finding of discrimination before a municipality may take affirmative steps to eradicate discrimination." *Id.* at 970, quoting *Concrete Works II*, 36 F.3d 1513, 1522 (10th Cir. 1994). Denver's initial burden was to demonstrate that strong evidence of discrimination supported its conclusion that remedial measures were necessary. Strong evidence is that "approaching a prima facie case of a constitutional or statutory violation," not irrefutable or definitive proof of discrimination. *Id.* at 97, quoting *Croson*, 488 U.S. at 500. The burden of proof at all times remained with the contractor plaintiff to prove by a preponderance of the evidence that Denver's "evidence did not support an inference of prior discrimination and thus a remedial purpose." *Id.*, quoting *Adarand VII*, 228 F.3d at 1176.

Denver, the Court held, did introduce evidence of discrimination against each group included in the ordinances. *Id.* at 971. Thus, Denver's evidence did not suffer from the problem discussed by the court in *Croson*. The Court held the district court erroneously concluded that Denver must demonstrate that the private firms directly engaged in any discrimination in which Denver passively participates do so intentionally, with the purpose of disadvantaging minorities and women. The *Croson* majority concluded that a "city would have a compelling interest in preventing its tax dollars from assisting [local trade] organizations in maintaining a racially segregated construction market." *Id.* at 971, quoting *Croson*, 488 U.S. 503. Thus, the Court held Denver's burden was to introduce evidence which raised the inference of discriminatory exclusion in the local construction industry and linked its spending to that discrimination. *Id.*

The Court noted the Supreme Court has stated that the inference of discriminatory exclusion can arise from statistical disparities. *Id.*, citing *Croson*, 488 U.S. at 503. Accordingly, it concluded that Denver could meet its burden through the introduction of statistical and anecdotal evidence. To the extent the district court required Denver to introduce additional evidence to show discriminatory motive or intent on the part of private construction firms, the district court erred. Denver, according to the Court, was under no burden to identify any specific practice or policy that resulted in discrimination. Neither was Denver required to demonstrate that the purpose of any such practice or policy was to disadvantage women or minorities. *Id.* at 972.

The court found Denver’s statistical and anecdotal evidence relevant because it identifies discrimination in the local construction industry, not simply discrimination in society. The court held the genesis of the identified discrimination is irrelevant and the district court erred when it discounted Denver’s evidence on that basis. *Id.*

The court held the district court erroneously rejected the evidence Denver presented on marketplace discrimination. *Id.* at 973. The court rejected the district court’s erroneous legal conclusion that a municipality may only remedy its own discrimination. The court stated this conclusion is contrary to the holdings in *Concrete Works II* and the plurality opinion in *Croson*. *Id.* The court held it previously recognized in this case that “a municipality has a compelling interest in taking affirmative steps to remedy both public *and private* discrimination specifically identified in its area.” *Id.*, quoting *Concrete Works II*, 36 F.3d at 1529 (emphasis added). In *Concrete Works II*, the court stated that “we do not read *Croson* as requiring the municipality to identify an exact linkage between its award of public contracts and private discrimination.” *Id.*, quoting *Concrete Works II*, 36 F.3d at 1529.

The court stated that Denver could meet its burden of demonstrating its compelling interest with evidence of private discrimination in the local construction industry coupled with evidence that it has become a passive participant in that discrimination. *Id.* at 973. Thus, Denver was not required to demonstrate that it is “guilty of prohibited discrimination” to meet its initial burden. *Id.*

Additionally, the court had previously concluded that Denver’s statistical studies, which compared utilization of MBE/WBEs to availability, supported the inference that “local prime contractors” are engaged in racial and gender discrimination. *Id.* at 974, quoting *Concrete Works II*, 36 F.3d at 1529. Thus, the court held Denver’s disparity studies should not have been discounted because they failed to specifically identify those individuals or firms responsible for the discrimination. *Id.*

The Court’s rejection of CWC’s arguments and the district court findings.

Use of marketplace data. The court held the district court, inter alia, erroneously concluded that the disparity studies upon which Denver relied were significantly flawed because they measured discrimination in the overall Denver MSA construction industry, not discrimination by the City itself. *Id.* at 974. The court found that the district court’s conclusion was directly contrary to the holding in *Adarand VII* that evidence of both public and private discrimination in the construction industry is relevant. *Id.*, citing *Adarand VII*, 228 F.3d at 1166-67).

The court held the conclusion reached by the majority in *Croson* that marketplace data are relevant in equal protection challenges to affirmative action programs was consistent with the approach later taken by the court in *Shaw v. Hunt*. *Id.* at 975. In *Shaw*, a majority of the court relied on the majority opinion in *Croson* for the broad proposition that a governmental entity’s “interest in remedying the effects of past or present racial discrimination may in the proper case justify a government’s use of racial distinctions.” *Id.*, quoting *Shaw*, 517 U.S. at 909. The *Shaw* court did not adopt any requirement that only discrimination by the governmental entity, either directly or by utilizing firms engaged in discrimination on projects funded by the entity, was remediable. The court, however, did set out two conditions that must be met for the governmental entity to show a compelling interest. “First, the discrimination must be identified discrimination.” *Id.* at 976, quoting *Shaw*, 517 U.S. at 910. The City can satisfy this condition by identifying the discrimination, “‘public or private, with some specificity.’” *Id.* at 976, citing *Shaw*, 517 U.S. at 910, quoting *Croson*, 488 U.S. at 504 (emphasis added). The governmental entity must also have a “strong basis in evidence to conclude that remedial action was necessary.” *Id.* Thus, the court concluded *Shaw* specifically stated that evidence of either public or private discrimination could be used to satisfy the municipality’s burden of producing strong evidence. *Id.* at 976.

In *Adarand VII*, the court noted it concluded that evidence of marketplace discrimination can be used to support a compelling interest in remedying past or present discrimination through the use of affirmative action legislation. *Id.*, citing *Adarand VII*, 228 F.3d at 1166-67 (“[W]e may consider public and private discrimination not only in the specific area of government procurement contracts but also in the construction industry generally; thus *any findings Congress has made as to the entire construction industry are relevant.*” (emphasis added)). Further, the court pointed out in this case it earlier rejected the argument CWC reasserted here that marketplace data are irrelevant and remanded the case to the district court to determine whether Denver could link its public spending to “the Denver MSA evidence of industry-wide discrimination.” *Id.*, quoting *Concrete Works II*, 36 F.3d at 1529. The court stated that evidence explaining “the Denver government’s role in contributing to the underutilization of MBEs and WBEs in the *private construction market in the Denver MSA*” was relevant to Denver’s burden of producing strong evidence. *Id.*, quoting *Concrete Works II*, 36 F.3d at 1530 (emphasis added).

Consistent with the court’s mandate in *Concrete Works II*, the City attempted to show at trial that it “indirectly contributed to private discrimination by awarding public contracts to firms that in turn discriminated against MBE and/or WBE subcontractors in other private portions of their business.” *Id.* The City can demonstrate that it is a “‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry” by compiling evidence of marketplace discrimination and then linking its spending practices to the private discrimination. *Id.*, quoting *Croson*, 488 U.S. at 492.

The court rejected CWC’s argument that the lending discrimination studies and business formation studies presented by Denver were irrelevant. In *Adarand VII*, the court concluded that evidence of discriminatory barriers to the formation of businesses by minorities and women and fair competition between MBE/WBEs and majority-owned construction firms shows a “strong link” between a government’s “disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination.” *Id.* at 977, quoting *Adarand VII*, 228 F.3d at 1167-68. The court found that evidence that private discrimination resulted in barriers to business formation is relevant because it demonstrates that MBE/WBEs are precluded *at the outset* from competing for public

construction contracts. The court also found that evidence of barriers to fair competition is relevant because it again demonstrates that *existing* MBE/WBEs are precluded from competing for public contracts. Thus, like the studies measuring disparities in the utilization of MBE/WBEs in the Denver MSA construction industry, studies showing that discriminatory barriers to business formation exist in the Denver construction industry are relevant to the City's showing that it indirectly participates in industry discrimination. *Id.* at 977.

The City presented evidence of lending discrimination to support its position that MBE/WBEs in the Denver MSA construction industry face discriminatory barriers to business formation. Denver introduced a disparity study prepared in 1996 and sponsored by the Denver Community Reinvestment Alliance, Colorado Capital Initiatives, and the City. The Study ultimately concluded that “despite the fact that loan applicants of three different racial/ethnic backgrounds in this sample were not appreciably different as businesspeople, they were ultimately treated differently by the lenders on the crucial issue of loan approval or denial.” *Id.* at 977-78. In *Adarand VII*, the court concluded that this study, among other evidence, “strongly support[ed] an initial showing of discrimination in lending.” *Id.* at 978, *quoting*, *Adarand VII*, 228 F.3d at 1170, n. 13 (“Lending discrimination alone of course does not justify action in the construction market. However, the persistence of such discrimination ... supports the assertion that the formation, as well as utilization, of minority-owned construction enterprises has been impeded.”). The City also introduced anecdotal evidence of lending discrimination in the Denver construction industry.

CWC did not present any evidence that undermined the reliability of the lending discrimination evidence but simply repeated the argument, foreclosed by circuit precedent, that it is irrelevant. The court rejected the district court criticism of the evidence because it failed to determine whether the discrimination resulted from discriminatory attitudes or from the neutral application of banking regulations. The court concluded that discriminatory motive can be inferred from the results shown in disparity studies. The court held the district court's criticism did not undermine the study's reliability as an indicator that the City is passively participating in marketplace discrimination. The court noted that in *Adarand VII* it took “judicial notice of the obvious causal connection between access to capital and ability to implement public works construction projects.” *Id.* at 978, *quoting* *Adarand VII*, 228 F.3d at 1170.

Denver also introduced evidence of discriminatory barriers to competition faced by MBE/WBEs in the form of business formation studies. The 1990 Study and the 1995 Study both showed that all minority groups in the Denver MSA formed their own construction firms at rates lower than the total population but that women formed construction firms at higher rates. The 1997 Study examined self-employment rates and controlled for gender, marital status, education, availability of capital, and personal/family variables. As discussed, *supra*, the Study concluded that African Americans, Hispanics, and Native Americans working in the construction industry have lower rates of self-employment than similarly situated whites. Asian Americans had higher rates. The 1997 Study also concluded that minority and female business owners in the construction industry, with the exception of Asian American owners, have lower earnings than white male owners. This conclusion was reached after controlling for education, age, marital status, and disabilities. *Id.* at 978.

The court held that the district court's conclusion that the business formation studies could not be used to justify the ordinances conflicts with its holding in *Adarand VII*. "[T]he existence of evidence indicating that the number of [MBEs] would be significantly (but unquantifiably) higher but for such barriers is nevertheless relevant to the assessment of whether a disparity is sufficiently significant to give rise to an inference of discriminatory exclusion." *Id.* at 979, quoting *Adarand VII*, 228 F.3d at 1174.

In sum, the court held the district court erred when it refused to consider or give sufficient weight to the lending discrimination study, the business formation studies, and the studies measuring marketplace discrimination. That evidence was legally relevant to the City's burden of demonstrating a strong basis in evidence to support its conclusion that remedial legislation was necessary. *Id.* at 979-80.

Variables. CWC challenged Denver's disparity studies as unreliable because the disparities shown in the studies may be attributable to firm size and experience rather than discrimination. Denver countered, however, that a firm's size has little effect on its qualifications or its ability to provide construction services and that MBE/WBEs, like all construction firms, can perform most services either by hiring additional employees or by employing subcontractors. CWC responded that elasticity itself is relative to size and experience; MBE/WBEs are less capable of expanding because they are smaller and less experienced. *Id.* at 980.

The court concluded that even if it assumed that MBE/WBEs are less able to expand because of their smaller size and more limited experience, CWC did not respond to Denver's argument and the evidence it presented showing that experience and size are not race- and gender-neutral variables and that MBE/WBE construction firms are generally smaller and less experienced *because* of industry discrimination. *Id.* at 981. The lending discrimination and business formation studies, according to the court, both strongly supported Denver's argument that MBE/WBEs are smaller and less experienced because of marketplace and industry discrimination. In addition, Denver's expert testified that discrimination by banks or bonding companies would reduce a firm's revenue and the number of employees it could hire. *Id.*

Denver also argued its Studies controlled for size and the 1995 Study controlled for experience. It asserted that the 1990 Study measured revenues per employee for construction for MBE/WBEs and concluded that the resulting disparities, "suggest[] that even among firms of the same employment size, industry utilization of MBEs and WBEs was lower than that of nonminority male-owned firms." *Id.* at 982. Similarly, the 1995 Study controlled for size, calculating, *inter alia*, disparity indices for firms with no paid employees which presumably are the same size.

Based on the uncontroverted evidence presented at trial, the court concluded that the district court did not give sufficient weight to Denver's disparity studies because of its erroneous conclusion that the studies failed to adequately control for size and experience. The court held that Denver is permitted to make assumptions about capacity and qualification of MBE/WBEs to perform construction services if it can support those assumptions. The court found the assumptions made in this case were consistent with the evidence presented at trial and supported the City's position that a firm's size does not affect its qualifications, willingness, or ability to perform construction services and that the smaller size and lesser experience of MBE/WBEs are, themselves, the result of industry discrimination. Further, the court pointed out CWC did not conduct its own disparity study using

marketplace data and thus did not demonstrate that the disparities shown in Denver’s studies would decrease or disappear if the studies controlled for size and experience to CWC’s satisfaction. Consequently, the court held CWC’s rebuttal evidence was insufficient to meet its burden of discrediting Denver’s disparity studies on the issue of size and experience. *Id.* at 982.

Specialization. The district court also faulted Denver’s disparity studies because they did not control for firm specialization. The court noted the district court’s criticism would be appropriate only if there was evidence that MBE/WBEs are more likely to specialize in certain construction fields. *Id.* at 982.

The court found there was no identified evidence showing that certain construction specializations require skills less likely to be possessed by MBE/WBEs. The court found relevant the testimony of the City’s expert, that the data he reviewed showed that MBEs were represented “widely across the different [construction] specializations.” *Id.* at 982-83. There was no contrary testimony that aggregation bias caused the disparities shown in Denver’s studies. *Id.* at 983.

The court held that CWC failed to demonstrate that the disparities shown in Denver’s studies are eliminated when there is control for firm specialization. In contrast, one of the Denver studies, which controlled for SIC-code subspecialty and still showed disparities, provided support for Denver’s argument that firm specialization does not explain the disparities. *Id.* at 983.

The court pointed out that disparity studies may make assumptions about availability as long as the same assumptions can be made for all firms. *Id.* at 983.

Utilization of MBE/WBEs on City projects. CWC argued that Denver could not demonstrate a compelling interest because it overutilized MBE/WBEs on City construction projects. This argument, according to the court, was an extension of CWC’s argument that Denver could justify the ordinances only by presenting evidence of discrimination by the City itself or by contractors while working on City projects. Because the court concluded that Denver could satisfy its burden by showing that it is an indirect participant in industry discrimination, CWC’s argument relating to the utilization of MBE/WBEs on City projects goes only to the weight of Denver’s evidence. *Id.* at 984.

Consistent with the court’s mandate in *Concrete Works II*, at trial Denver sought to demonstrate that the utilization data from projects subject to the goals program were tainted by the program and “reflect[ed] the intended remedial effect on MBE and WBE utilization.” *Id.* at 984, quoting *Concrete Works II*, 36 F.3d at 1526. Denver argued that the non-goals data were the better indicator of past discrimination in public contracting than the data on all City construction projects. *Id.* at 984-85. The court concluded that Denver presented ample evidence to support the conclusion that the evidence showing MBE/WBE utilization on City projects not subject to the ordinances or the goals programs is the better indicator of discrimination in City contracting. *Id.* at 985.

The court rejected CWC’s argument that the marketplace data were irrelevant but agreed that the non-goals data were also relevant to Denver’s burden. The court noted that Denver did not rely heavily on the non-goals data at trial but focused primarily on the marketplace studies to support its burden. *Id.* at 985.

In sum, the court held Denver demonstrated that the utilization of MBE/WBEs on City projects had been affected by the affirmative action programs that had been in place in one form or another since 1977. Thus, the non-goals data were the better indicator of discrimination in public contracting. The court concluded that, on balance, the non-goals data provided some support for Denver's position that racial and gender discrimination existed in public contracting before the enactment of the ordinances. *Id.* at 987-88.

Anecdotal evidence. The anecdotal evidence, according to the court, included several incidents involving profoundly disturbing behavior on the part of lenders, majority-owned firms, and individual employees. *Id.* at 989. The court found that the anecdotal testimony revealed behavior that was not merely sophomoric or insensitive, but which resulted in real economic or physical harm. While CWC also argued that all new or small contractors have difficulty obtaining credit and that treatment the witnesses characterized as discriminatory is experienced by all contractors, Denver's witnesses specifically testified that they believed the incidents they experienced were motivated by race or gender discrimination. The court found they supported those beliefs with testimony that majority-owned firms were not subject to the same requirements imposed on them. *Id.*

The court held there was no merit to CWC's argument that the witnesses' accounts must be verified to provide support for Denver's burden. The court stated that anecdotal evidence is nothing more than a witness' narrative of an incident told from the witness' perspective and including the witness' perceptions. *Id.*

After considering Denver's anecdotal evidence, the district court found that the evidence "shows that race, ethnicity and gender affect the construction industry and those who work in it" and that the egregious mistreatment of minority and women employees "had direct financial consequences" on construction firms. *Id.* at 989, quoting *Concrete Works III*, 86 F. Supp.2d at 1074, 1073. Based on the district court's findings regarding Denver's anecdotal evidence and its review of the record, the court concluded that the anecdotal evidence provided persuasive, un rebutted support for Denver's initial burden. *Id.* at 989-90, citing *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977) (concluding that anecdotal evidence presented in a pattern or practice discrimination case was persuasive because it "brought the cold [statistics] convincingly to life").

Summary. The court held the record contained extensive evidence supporting Denver's position that it had a strong basis in evidence for concluding that the 1990 Ordinance and the 1998 Ordinance were necessary to remediate discrimination against both MBEs and WBEs. *Id.* at 990. The information available to Denver and upon which the ordinances were predicated, according to the court, indicated that discrimination was persistent in the local construction industry and that Denver was, at least, an indirect participant in that discrimination.

To rebut Denver's evidence, the court stated CWC was required to "establish that Denver's evidence did not constitute strong evidence of such discrimination." *Id.* at 991, quoting *Concrete Works II*, 36 F.3d at 1523. CWC could not meet its burden of proof through conjecture and unsupported criticisms of Denver's evidence. Rather, it must present "credible, particularized evidence." *Id.*, quoting *Adarand VII*, 228 F.3d at 1175. The court held that CWC did not meet its burden. CWC *hypothesized* that the disparities shown in the studies on which Denver relies could be explained by any number of factors other than racial discrimination. However, the court found it did not conduct its own

marketplace disparity study controlling for the disputed variables and presented no other evidence from which the court could conclude that such variables explain the disparities. *Id.* at 991-92.

Narrow tailoring. Having concluded that Denver demonstrated a compelling interest in the race-based measures and an important governmental interest in the gender-based measures, the court held it must examine whether the ordinances were narrowly tailored to serve the compelling interest and are substantially related to the achievement of the important governmental interest. *Id.* at 992.

The court stated it had previously concluded in its earlier decisions that Denver's program was narrowly tailored. CWC appealed the grant of summary judgment and that appeal culminated in the decision in *Concrete Works II*. The court reversed the grant of summary judgment on the compelling-interest issue and concluded that CWC had waived any challenge to the narrow tailoring conclusion reached by the district court. Because the court found Concrete Works did not challenge the district court's conclusion with respect to the second prong of *Croson's* strict scrutiny standard — i.e., that the Ordinance is narrowly tailored to remedy past and present discrimination — the court held it need not address this issue. *Id.* at 992, *citing Concrete Works II*, 36 F.3d at 1531, n. 24.

The court concluded that the district court lacked authority to address the narrow tailoring issue on remand because none of the exceptions to the law of the case doctrine are applicable. The district court's earlier determination that Denver's affirmative-action measures were narrowly tailored is law of the case and binding on the parties.

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

This case is instructive to the disparity study based on its holding that a local or state government may be prohibited from utilizing post-enactment evidence in support of an MBE/WBE-type program. 293 F.3d at 350-351. The United States Court of Appeals for the Sixth Circuit held that pre-enactment evidence was required to justify the City of Memphis' MBE/WBE Program. *Id.* The Sixth Circuit held that a government must have had sufficient evidentiary justification for a racially conscious statute in *advance* of its passage.

The district court had ruled that the City could not introduce a post-enactment study as evidence of a compelling interest to justify its MBE/WBE Program. *Id.* at 350-351. The Sixth Circuit denied the City's application for an interlocutory appeal on the district court's order and refused to grant the City's request to appeal this issue. *Id.* at 350-351.

The City argued that a substantial ground for difference of opinion existed in the federal courts of appeal. 293 F.3d at 350. The court stated some circuits permit post-enactment evidence to supplement pre-enactment evidence. *Id.* This issue, according to the Court, appears to have been resolved in the Sixth Circuit. *Id.* The Court noted the Sixth Circuit decision in *AGC v. Drabik*, 214 F.3d 730 (6th Cir. 2000), which held that under *Croson* a State must have sufficient evidentiary justification for a racially-conscious statute in advance of its enactment, and that governmental entities must identify that discrimination with some specificity *before* they may use race-conscious relief. *Memphis*, 293 F.3d at 350-351, *citing Drabik*, 214 F.3d at 738.

The Court in *Memphis* said that although *Drabik* did not directly address the admissibility of post-enactment evidence, it held a governmental entity must have pre-enactment evidence sufficient to justify a racially-conscious statute. 293 R.3d at 351. The court concluded *Drabik* indicates the Sixth Circuit would not favor using post-enactment evidence to make that showing. *Id.* at 351. Under *Drabik*, the Court in *Memphis* held the City must present pre-enactment evidence to show a compelling state interest. *Id.* at 351.

7. Builders Ass'n of Greater Chicago v. County of Cook, Chicago, 256 F.3d 642 (7th Cir. 2001)

This case is instructive to the disparity study because of its analysis of the Cook County MBE/WBE program and the evidence used to support that program. The decision emphasizes the need for any race-conscious program to be based upon credible evidence of discrimination by the local government against MBE/WBEs and to be narrowly tailored to remedy only that identified discrimination.

In *Builders Ass'n of Greater Chicago v. County of Cook, Chicago*, 256 F.3d 642 (7th Cir. 2001) the United States Court of Appeals for the Seventh Circuit held the Cook County, Chicago MBE/WBE Program was unconstitutional. The court concluded there was insufficient evidence of a compelling interest. The court held there was no credible evidence that Cook County in the award of construction contracts discriminated against any of the groups “favored” by the Program. The court also found that the Program was not “narrowly tailored” to remedy the wrong sought to be redressed, in part because it was over-inclusive in the definition of minorities. The court noted the list of minorities included groups that have not been subject to discrimination by Cook County.

The court considered as an unresolved issue whether a different, and specifically a more permissive, standard than strict scrutiny is applicable to preferential treatment on the basis of sex, rather than race or ethnicity. 256 F.3d at 644. The court noted that the United States Supreme Court in *United States v. Virginia* (“*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 nonminority-owned firms were statutorily excluded from participating under Ohio’s state Minority Business Enterprise Act. 214 F.3d at 733.

AGC of Ohio and AGC of Northwest Ohio (Plaintiffs-Appellees) claimed the Ohio Minority Business Enterprise Act (“MBEA”) was unconstitutional in violation of the Equal Protection Clause of the Fourteenth Amendment. The district court agreed, and permanently enjoined the state from awarding any construction contracts under the MBEA. Drabik, Director of the Ohio Department of Administrative Services and others appealed the district court’s Order. *Id.* at 733. The Sixth Circuit Court of Appeals affirmed the Order of the district court, holding unconstitutional the MBEA and enjoining the state from awarding any construction contracts under that statute. *Id.*

Ohio passed the MBEA in 1980. *Id.* at 733. This legislation “set aside” 5 percent, by value, of all state construction projects for bidding by certified MBEs exclusively. *Id.* Pursuant to the MBEA, the state decided to set aside, for MBEs only, bidding for construction of the Toledo Correctional Facility’s Administration Building. Non-MBEs were excluded on racial grounds from bidding on that aspect of the project and restricted in their participation as subcontractors. *Id.*

The Court noted it ruled in 1983 that the MBEA was constitutional, see *Ohio Contractors Ass’n v. Keip*, 713 F.2d 167 (6th Cir. 1983). *Id.* Subsequently, the United States Supreme Court in two landmark decisions applied the criteria of strict scrutiny under which such “racially preferential set-asides” were to be evaluated. *Id.* (see *City of Richmond v. J.A. Croson Co.* (1989) and *Adarand Constructors, Inc. v. Peña* (1995), citation omitted.) The Court noted that the decision in *Keip* was a more relaxed treatment accorded to equal protection challenges to state contracting disputes prior to *Croson*. *Id.* at 733-734.

Strict scrutiny. The Court found it is clear a government has a compelling interest in assuring that public dollars do not serve to finance the evil of private prejudice. *Id.* at 734-735, *citing Croson*, 488 U.S. at 492. But, the Court stated, “statistical disparity in the proportion of contracts awarded to a particular group, standing alone does not demonstrate such an evil.” *Id.* at 735.

The Court said there is no question that remedying the effects of past discrimination constitutes a compelling governmental interest. *Id.* at 735. The Court stated to make this showing, a state cannot rely on mere speculation, or legislative pronouncements, of past discrimination, but rather, the Supreme Court has held the state bears the burden of demonstrating a strong basis in evidence for its conclusion that remedial action was necessary by proving either that the state itself discriminated in the past or was a passive participant in private industry’s discriminatory practices. *Id.* at 735, *quoting Croson*, 488 U.S. at 486-92.

Thus, the Court concluded that the linchpin of the *Croson* analysis is its mandating of strict scrutiny, the requirement that a program be narrowly tailored to achieve a compelling government interest, but above all its holding that governments must identify discrimination with some specificity before they may use race-conscious relief; explicit findings of a constitutional or statutory violation must be made. *Id.* at 735, *quoting Croson*, 488 U.S. at 497.

Statistical evidence: compelling interest. The Court pointed out that proponents of “racially discriminatory systems” such as the MBEA have sought to generate the necessary evidence by a variety of means, however, such efforts have generally focused on “mere underrepresentation” by showing a lesser percentage of contracts awarded to a particular group than that group’s percentage in the general population. *Id.* at 735. “Raw statistical disparity” of this sort is part of the evidence offered by Ohio in this case, according to the Court. *Id.* at 736. The Court stated however, “such evidence of mere statistical disparities has been firmly rejected as insufficient by the Supreme Court, particularly in a context such as contracting, where special qualifications are so relevant.” *Id.*

The Court said that although Ohio’s most “compelling” statistical evidence in this case compared the percentage of contracts awarded to minorities to the percentage of minority-owned businesses in Ohio, which the Court noted provided stronger statistics than the statistics in *Croson*, it was still insufficient. *Id.* at 736. The Court found the problem with Ohio’s statistical comparison was that the percentage of minority-owned businesses in Ohio “did not take into account how many of those businesses were construction companies of any sort, let alone how many were qualified, willing, and able to perform state construction contracts.” *Id.*

The Court held the statistical evidence that the Ohio legislature had before it when the MBEA was enacted consisted of data that was deficient. *Id.* at 736. The Court said that much of the data was severely limited in scope (ODOT contracts) or was irrelevant to this case (ODOT purchasing contracts). *Id.* The Court again noted the data did not distinguish minority construction contractors from minority businesses generally, and therefore “made no attempt to identify minority construction contracting firms that are ready, willing, and able to perform state construction contracts of any particular size.” *Id.* The Court also pointed out the program was not narrowly tailored, because the state conceded the AGC showed that the State had not performed a recent study. *Id.*

The Court also concluded that even statistical comparisons that might be apparently more pertinent, such as with the percentage of all firms qualified, in some minimal sense, to perform the work in question, would also fail to satisfy the Court's criteria. *Id.* at 736. "If MBEs comprise 10 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 percent of state contracts, while African Americans receive none. *Id.*

In addition, the Court found that Ohio's own underutilization statistics suffer from a fatal conceptual flaw: they do not report the actual use of minority firms; they only report the use of minority firms who have gone to the trouble of being certified and listed among the state's 1,180 MBEs. *Id.* at 737. The Court said there was no examination of whether contracts are being awarded to minority firms who have never sought such preference to take advantage of the special minority program, for whatever reason, and who have been awarded contracts in open bidding. *Id.*

The Court pointed out the district court took note of the outdated character of any evidence that might have been marshaled in support of the MBEA, and added that even if such data had been sufficient to justify the statute twenty years ago, it would not suffice to continue to justify it forever. *Id.* at 737-738. The MBEA, the Court noted, has remained in effect for twenty years and has no set expiration. *Id.* at 738. The Court reiterated a race-based preference program must be appropriately limited such that it will not last longer than the discriminatory effects it is designed to eliminate. *Id.* at 737.

Finally, the Court mentioned that one of the factors *Croson* identified as indicative of narrow tailoring is whether non-race-based means were considered as alternatives to the goal. *Id.* at 738. The Court concluded the historical record contained no evidence that the Ohio legislature gave any consideration to the use of race-neutral means to increase minority participation in state contracting before resorting to race-based quotas. *Id.* at 738.

The district court had found that the supplementation of the state's existing data which might be offered given a continuance of the case would not sufficiently enhance the relevance of the evidence to justify delay in the district court's hearing. *Id.* at 738. The Court stated that under *Croson*, the state must have had sufficient evidentiary justification for a racially-conscious statute in *advance* of its passage. *Id.* The Court said that *Croson* required governmental entities must identify that discrimination with some specificity *before* they may use race-conscious relief. *Id.* at 738.

The Court also referenced the district court finding that the state had been lax in maintaining the type of statistics that would be necessary to undergird its affirmative action program, and that the proper maintenance of current statistics is relevant to the requisite narrow tailoring of such a program. *Id.* at 738-739. But the Court noted the state does not know how many minority-owned businesses are not certified as MBEs, and how many of them have been successful in obtaining state contracts. *Id.* at 739.

The court was mindful of the fact it was striking down an entire class of programs by declaring the State of Ohio MBE statute in question unconstitutional, and noted that its decision was "not reconcilable" with the Ohio Supreme Court's decision in *Ritchie Produce*, 707 N.E.2d 871 (Ohio 1999) (upholding the Ohio State MBE Program).

9. *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206 (5th Cir. 1999)

This case is instructive to the disparity study because the decision highlights the evidentiary burden imposed by the courts necessary to support a local MBE/WBE program. In addition, the Fifth Circuit permitted the aggrieved contractor to recover lost profits from the City of Jackson, Mississippi due to the City's enforcement of the MBE/WBE program that the court held was unconstitutional.

The Fifth Circuit, applying strict scrutiny, held that the City of Jackson, Mississippi failed to establish a compelling governmental interest to justify its policy placing 15 percent minority participation goals for City construction contracts. In addition, the court held the evidence upon which the City relied was faulty for several reasons, including because it was restricted to the letting of prime contracts by the City under the City's Program, and it did not include an analysis of the availability and utilization of qualified minority subcontractors, the relevant statistical pool in the City's construction projects. Significantly, the court also held that the plaintiff in this case could recover lost profits against the City as damages as a result of being denied a bid award based on the application of the MBE/WBE program.

10. *Monterey Mechanical v. Wilson*, 125 F.3d 702 (9th Cir. 1997)

This case is instructive in that the Ninth Circuit analyzed and held invalid the enforcement of an MBE/WBE-type program. Although the program at issue utilized the term “goals” as opposed to “quotas,” the Ninth Circuit rejected such a distinction, holding “[t]he relevant question is not whether a statute requires the use of such measures, but whether it authorizes or encourages them.” The case also is instructive because it found the use of “goals” and the application of “good faith efforts” in connection with achieving goals to trigger strict scrutiny.

Monterey Mechanical Co. (the “plaintiff”) submitted the low bid for a construction project for the California Polytechnic State University (the “University”). 125 F.3d 702, 704 (9th Cir. 1994). The University rejected the plaintiff’s bid because the plaintiff failed to comply with a state statute requiring prime contractors on such construction projects to subcontract 23 percent of the work to MBE/WBEs or, alternatively, demonstrate good faith outreach efforts. *Id.* The plaintiff conducted good faith outreach efforts but failed to provide the requisite documentation; the awardee prime contractor did not subcontract any portion of the work to MBE/WBEs but did include documentation of good faith outreach efforts. *Id.*

Importantly, the University did not conduct a disparity study, and instead argued that because “the ‘goal requirements’ of the scheme [did] not involve racial or gender quotas, set-asides or preferences,” the University did not need a disparity study. *Id.* at 705. The plaintiff protested the contract award and sued the University’s trustees, and a number of other individuals (collectively the “defendants”) alleging the state law was violative of the Equal Protection Clause. *Id.* The district court denied the plaintiff’s motion for an interlocutory injunction and the plaintiff appealed to the Ninth Circuit Court of Appeals. *Id.*

The defendants first argued that the statute was constitutional because it treated all general contractors alike, by requiring all to comply with the MBE/WBE participation goals. *Id.* at 708. The court held, however, that a minority or women business enterprise could satisfy the participation goals by allocating the requisite percentage of work to itself. *Id.* at 709. The court held that contrary to the district court’s finding, such a difference was not *de minimis*. *Id.*

The defendants also argued that the statute was not subject to strict scrutiny because the statute did not impose rigid quotas, but rather only required good faith outreach efforts. *Id.* at 710. The court rejected the argument finding that although the statute permitted awards to bidders who did not meet the percentage goals, “they are rigid in requiring precisely described and monitored efforts to attain those goals.” *Id.* The court cited its own earlier precedent to hold that “the provisions are not immunized from scrutiny because they purport to establish goals rather than quotas ... [T]he relevant question is not whether a statute requires the use of such measures, but whether it authorizes or encourages them.” *Id.* at 710-11 (internal citations and quotations omitted). The court found that the statute encouraged set asides and cited *Concrete Works of Colorado v. Denver*, 36 F.3d 1512 (10th Cir. 1994), as analogous support for the proposition. *Id.* at 711.

The court found that the statute treated contractors differently based upon their race, ethnicity and gender, and although “worded in terms of goals and good faith, the statute imposes mandatory requirements with concreteness.” *Id.* The court also noted that the statute may impose additional compliance expenses upon non-MBE/WBE firms who are required to make good faith outreach efforts (e.g., advertising) to MBE/WBE firms. *Id.* at 712.

The court then conducted strict scrutiny (race), and an intermediate scrutiny (gender) analyses. *Id.* at 712-13. The court found the University presented “no evidence” to justify the race- and gender-based classifications and thus did not consider additional issues of proof. *Id.* at 713. The court found that the statute was not narrowly tailored because the definition of “minority” was overbroad (e.g., inclusion of Aleuts). *Id.* at 714, citing *Wygant v. Jackson Board of Education*, 476 U.S. 267, 284, n. 13 (1986) and *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 505-06 (1989). The court found “[a] broad program that sweeps in all minorities with a remedy that is in no way related to past harms cannot survive constitutional scrutiny.” *Id.* at 714, citing *Hopwood v. State of Texas*, 78 F.3d 932, 951 (5th Cir. 1996). The court held that the statute violated the Equal Protection Clause.

11. Eng’g Contractors Ass’n of S. Florida v. Metro. Dade County, 122 F.3d 895 (11th Cir. 1997)

Engineering Contractors Association of South Florida v. Metropolitan Engineering Contractors Association is a paramount case in the Eleventh Circuit and is instructive to the disparity study. This decision has been cited and applied by the courts in various circuits that have addressed MBE/WBE-type programs or legislation involving local government contracting and procurement.

In *Engineering Contractors Association*, six trade organizations (the “plaintiffs”) filed suit in the district court for the Southern District of Florida, challenging three affirmative action programs administered by Engineering Contractors Association, Florida, (the “County”) as violative of the Equal Protection Clause. 122 F.3d 895, 900 (11th Cir. 1997). The three affirmative action programs challenged were the Black Business Enterprise program (“BBE”), the Hispanic Business Enterprise program (“HBE”), and the Woman Business Enterprise program, (“WBE”), (collectively “MWBE” programs). *Id.* The plaintiffs challenged the application of the program to County construction contracts. *Id.*

For certain classes of construction contracts valued over \$25,000, the County set participation goals of 15 percent for BBEs, 19 percent for HBEs, and 11 percent for WBEs. *Id.* at 901. The County established five “contract measures” to reach the participation goals: (1) set asides, (2) subcontractor goals, (3) project goals, (4) bid preferences, and (5) selection factors. Once a contract was identified as covered by a participation goal, a review committee would determine whether a contract measure should be utilized. *Id.* The County Commission would make the final determination and its decision was appealable to the County Manager. *Id.* The County reviewed the efficacy of the MWBE programs annually, and reevaluated the continuing viability of the MWBE programs every five years. *Id.*

In a bench trial, the district court applied strict scrutiny to the BBE and HBE programs and held that the County lacked the requisite “strong basis in evidence” to support the race- and ethnicity-conscious measures. *Id.* at 902. The district court applied intermediate scrutiny to the WBE program and found that the “County had presented insufficient probative evidence to support its stated rationale for implementing a gender preference.” *Id.* Therefore, the County had failed to

demonstrate a “compelling interest” necessary to support the BBE and HBE programs, and failed to demonstrate an “important interest” necessary to support the WBE program. *Id.* The district court assumed the existence of a sufficient evidentiary basis to support the existence of the MWBE programs but held the BBE and HBE programs were not narrowly tailored to the interests they purported to serve; the district court held the WBE program was not substantially related to an important government interest. *Id.* The district court entered a final judgment enjoining the County from continuing to operate the MWBE programs and the County appealed. The Eleventh Circuit Court of Appeals affirmed. *Id.* at 900, 903.

On appeal, the Eleventh Circuit considered four major issues:

1. Whether the plaintiffs had standing. [The Eleventh Circuit answered this in the affirmative and that portion of the opinion is omitted from this summary];
2. Whether the district court erred in finding the County lacked a “strong basis in evidence” to justify the existence of the BBE and HBE programs;
3. Whether the district court erred in finding the County lacked a “sufficient probative basis in evidence” to justify the existence of the WBE program; and
4. Whether the MWBE programs were narrowly tailored to the interests they were purported to serve. *Id.* at 903.

The Eleventh Circuit held that the BBE and HBE programs were subject to the strict scrutiny standard enunciated by the U.S. Supreme Court in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). *Id.* at 906. Under this standard, “an affirmative action program must be based upon a ‘compelling government interest’ and must be ‘narrowly tailored’ to achieve that interest.” *Id.* The Eleventh Circuit further noted:

“In practice, the interest that is alleged in support of racial preferences is almost always the same — remedying past or present discrimination. That interest is widely accepted as compelling. As a result, the true test of an affirmative action program is usually not the nature of the government’s interest, but rather the adequacy of the evidence of discrimination offered to show that interest.” Id. (internal citations omitted).

Therefore, strict scrutiny requires a finding of a “‘strong basis in evidence’ to support the conclusion that remedial action is necessary.” *Id.*, citing *Croson*, 488 U.S. at 500). The requisite “‘strong basis in evidence’ cannot rest on ‘an amorphous claim of societal discrimination, on simple legislative assurances of good intention, or on congressional findings of discrimination in the national economy.’” *Id.* at 907, citing *Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548, 1565 (11th Cir. 1994) (citing and applying *Croson*). However, the Eleventh Circuit found that a governmental entity can “justify affirmative action by demonstrating ‘gross statistical disparities’ between the proportion of minorities hired ... and the proportion of minorities willing and able to do the work ... Anecdotal evidence may also be used to document discrimination, especially if buttressed by relevant statistical evidence.” *Id.* (internal citations omitted).

Notwithstanding the “exceedingly persuasive justification” language utilized by the Supreme Court in *United States v. Virginia*, 116 S. Ct. 2264 (1996) (evaluating gender-based government action), the Eleventh Circuit held that the WBE program was subject to traditional intermediate scrutiny. *Id.* at 908. Under this standard, the government must provide “sufficient probative evidence” of discrimination, which is a lesser standard than the “strong basis in evidence” under strict scrutiny. *Id.* at 910.

The County provided two types of evidence in support of the MWBE programs: (1) statistical evidence, and (2) non-statistical “anecdotal” evidence. *Id.* at 911. As an initial matter, the Eleventh Circuit found that in support of the BBE program, the County permissibly relied on substantially “post-enactment” evidence (i.e., evidence based on data related to years following the initial enactment of the BBE program). *Id.* However, “such evidence carries with it the hazard that the program at issue may itself be masking discrimination that might otherwise be occurring in the relevant market.” *Id.* at 912. A district court should not “speculate about what the data *might* have shown had the BBE program never been enacted.” *Id.*

The statistical evidence. The County presented five basic categories of statistical evidence: (1) County contracting statistics; (2) County subcontracting statistics; (3) marketplace data statistics; (4) The Wainwright Study; and (5) The Brimmer Study. *Id.* In summary, the Eleventh Circuit held that the County’s statistical evidence (described more fully below) was subject to more than one interpretation. *Id.* at 924. The district court found that the evidence was “insufficient to form the requisite strong basis in evidence for implementing a racial or ethnic preference, and that it was insufficiently probative to support the County’s stated rationale for imposing a gender preference.” *Id.* The district court’s view of the evidence was a permissible one. *Id.*

County contracting statistics. The County presented a study comparing three factors for County non-procurement Construction contracts over two time periods (1981-1991 and 1993): (1) the percentage of bidders that were MWBE firms; (2) the percentage of awardees that were MWBE firms; and (3) the proportion of County contract dollars that had been awarded to MWBE firms. *Id.* at 912.

The Eleventh Circuit found that notably, for the BBE and HBE statistics, generally there were no “consistently negative disparities between the bidder and awardee percentages. In fact, by 1993, the BBE and HBE bidders are being awarded *more* than their proportionate ‘share’ ... when the bidder percentages are used as the baseline.” *Id.* at 913. For the WBE statistics, the bidder/awardee statistics were “decidedly mixed” as across the range of County construction contracts. *Id.*

The County then refined those statistics by adding in the total percentage of annual County construction dollars awarded to MBE/WBEs, by calculating “disparity indices” for each program and classification of construction contract. The Eleventh Circuit explained:

“[A] disparity index compares the amount of contract awards a group actually got to the amount we would have expected it to get based on that group’s bidding activity and awardee success rate. More specifically, a disparity index measures the participation of a group in County contracting dollars by dividing that group’s contract dollar percentage by the related bidder or awardee percentage, and multiplying that number by 100 percent.” *Id.* at 914. “The utility of disparity

indices or similar measures ... has been recognized by a number of federal circuit courts.” *Id.*

The Eleventh Circuit found that “[i]n general ... disparity indices of 80 percent or greater, which are close to full participation, are not considered indications of discrimination.” *Id.* The Eleventh Circuit noted that “the EEOC’s disparate impact guidelines use the 80 percent test as the boundary line for determining a prima facie case of discrimination.” *Id.*, citing 29 CFR § 1607.4D. In addition, no circuit that has “explicitly endorsed the use of disparity indices [has] indicated that an index of 80 percent or greater might be probative of discrimination.” *Id.*, citing *Concrete Works v. City & County of Denver*, 36 F.3d 1513, 1524 (10th Cir. 1994) (crediting disparity indices ranging from 0% to 3.8%); *Contractors Ass’n v. City of Philadelphia*, 6 F.3d 990 (3d Cir. 1993) (crediting disparity index of 4%).

After calculation of the disparity indices, the County applied a standard deviation analysis to test the statistical significance of the results. *Id.* at 914. “The standard deviation figure describes the probability that the measured disparity is the result of mere chance.” *Id.* The Eleventh Circuit had previously recognized “[s]ocial scientists consider a finding of two standard deviations significant, meaning there is about one chance in 20 that the explanation for the deviation could be random and the deviation must be accounted for by some factor other than chance.” *Id.*

The statistics presented by the County indicated “statistically significant underutilization of BBEs in County construction contracting.” *Id.* at 916. The results were “less dramatic” for HBEs and mixed as between favorable and unfavorable for WBEs. *Id.*

The Eleventh Circuit then explained the burden of proof:

“[O]nce the proponent of affirmative action introduces its statistical proof as evidence of its remedial purpose, thereby supplying the [district] court with the means for determining that [it] had a firm basis for concluding that remedial action was appropriate, it is incumbent upon the [plaintiff] to prove their case; they continue to bear the ultimate burden of persuading the [district] court that the [defendant’s] evidence did not support an inference of prior discrimination and thus a remedial purpose, or that the plan instituted on the basis of this evidence was not sufficiently ‘narrowly tailored.’” *Id.* (internal citations omitted).

The Eleventh Circuit noted that a plaintiff has at least three methods to rebut the inference of discrimination with a “neutral explanation” by: “(1) showing that the statistics are flawed; (2) demonstrating that the disparities shown by the statistics are not significant or actionable; or (3) presenting contrasting statistical data.” *Id.* (internal quotations and citations omitted). The Eleventh Circuit held that the plaintiffs produced “sufficient evidence to establish a neutral explanation for the disparities.” *Id.*

The plaintiffs alleged that the disparities were “better explained by firm size than by discrimination ... [because] minority and female-owned firms tend to be smaller, and that it stands to reason smaller firms will win smaller contracts.” *Id.* at 916-17. The plaintiffs produced Census data indicating, on average, minority- and female-owned construction firms in Engineering Contractors Association were smaller than non-MBE/WBE firms. *Id.* at 917. The Eleventh Circuit found that the plaintiff’s explanation of the disparities was a “plausible one, in light of the uncontroverted evidence that MBE/WBE construction firms tend to be substantially smaller than non-MBE/WBE firms.” *Id.*

Additionally, the Eleventh Circuit noted that the County’s own expert admitted that “firm size plays a significant role in determining which firms win contracts.” *Id.* The expert stated:

The size of the firm has got to be a major determinant because of course some firms are going to be larger, are going to be better prepared, are going to be in a greater natural capacity to be able to work on some of the contracts while others simply by virtue of their small size simply would not be able to do it. Id.

The Eleventh Circuit then summarized:

Because they are bigger, bigger firms have a bigger chance to win bigger contracts. It follows that, all other factors being equal and in a perfectly nondiscriminatory market, one would expect the bigger (on average) non-MWBE firms to get a disproportionately higher percentage of total construction dollars awarded than the smaller MWBE firms. Id.

In anticipation of such an argument, the County conducted a regression analysis to control for firm size. *Id.* A regression analysis is “a statistical procedure for determining the relationship between a dependent and independent variable, e.g., the dollar value of a contract award and firm size.” *Id.* (internal citations omitted). The purpose of the regression analysis is “to determine whether the relationship between the two variables is statistically meaningful.” *Id.*

The County’s regression analysis sought to identify disparities that could not be explained by firm size, and theoretically instead based on another factor, such as discrimination. *Id.* The County conducted two regression analyses using two different proxies for firm size: (1) total awarded value of all contracts bid on; and (2) largest single contract awarded. *Id.* The regression analyses accounted for most of the negative disparities regarding MBE/WBE participation in County construction contracts (i.e., most of the unfavorable disparities became statistically insignificant, corresponding to standard deviation values less than two). *Id.*

Based on an evaluation of the regression analysis, the district court held that the demonstrated disparities were attributable to firm size as opposed to discrimination. *Id.* at 918. The district court concluded that the few unexplained disparities that remained after regressing for firm size were insufficient to provide the requisite “strong basis in evidence” of discrimination of BBEs and HBEs. *Id.* The Eleventh Circuit held that this decision was not clearly erroneous. *Id.*

With respect to the BBE statistics, the regression analysis explained all but one negative disparity, for one type of construction contract between 1989-1991. *Id.* The Eleventh Circuit held the district court permissibly found that this did not constitute a “strong basis in evidence” of discrimination. *Id.*

With respect to the HBE statistics, one of the regression methods failed to explain the unfavorable disparity for one type of contract between 1989-1991, and both regression methods failed to explain the unfavorable disparity for another type of contract during that same time period. *Id.* However, by 1993, both regression methods accounted for all of the unfavorable disparities, and one of the disparities for one type of contract was actually favorable for HBEs. *Id.* The Eleventh Circuit held the district court permissibly found that this did not constitute a “strong basis in evidence” of discrimination. *Id.*

Finally, with respect to the WBE statistics, the regression analysis explained all but one negative disparity, for one type of construction contract in the 1993 period. *Id.* The regression analysis explained all of the other negative disparities, and in the 1993 period, a disparity for one type of contract was actually favorable to WBEs. *Id.* The Eleventh Circuit held the district court permissibly found that this evidence was not “sufficiently probative of discrimination.” *Id.*

The County argued that the district court erroneously relied on the disaggregated data (i.e., broken down by contract type) as opposed to the consolidated statistics. *Id.* at 919. The district court declined to assign dispositive weight to the aggregated data for the BBE statistics for 1989-1991 because (1) the aggregated data for 1993 did not show negative disparities when regressed for firm size, (2) the BBE disaggregated data left only one unexplained negative disparity for one type of contract for 1989-1991 when regressed for firm size, and (3) “the County’s own expert testified as to the utility of examining the disaggregated data ‘insofar as they reflect different kinds of work, different bidding practices, perhaps a variety of other factors that could make them heterogeneous with one another.’” *Id.*

Additionally, the district court noted, and the Eleventh Circuit found that “the aggregation of disparity statistics for nonheterogenous data populations can give rise to a statistical phenomenon known as ‘Simpson’s Paradox,’ which leads to illusory disparities in improperly aggregated data that disappear when the data are disaggregated.” *Id.* at 919, n. 4 (internal citations omitted). “Under those circumstances,” the Eleventh Circuit held that the district court did not err in assigning less weight to the aggregated data, in finding the aggregated data for BBEs for 1989-1991 did not provide a “strong basis in evidence” of discrimination, or in finding that the disaggregated data formed an insufficient basis of support for any of the MBE/WBE programs given the applicable constitutional requirements. *Id.* at 919.

County subcontracting statistics. The County performed a subcontracting study to measure MBE/WBE participation in the County’s subcontracting businesses. For each MBE/WBE category (BBE, HBE, and WBE), “the study compared the proportion of the designated group that filed a subcontractor’s release of lien on a County construction project between 1991 and 1994 with the proportion of sales and receipt dollars that the same group received during the same time period.” *Id.*

The district court found the statistical evidence insufficient to support the use of race- and ethnicity-conscious measures, noting problems with some of the data measures. *Id.* at 920.

Most notably, the denominator used in the calculation of the MWBE sales and receipts percentages is based upon the total sales and receipts from all sources for the firm filing a subcontractor’s release of lien with the County. That means, for instance, that if a nationwide non-MWBE company performing 99 percent of its business outside of Dade County filed a single subcontractor’s release of lien with the County during the relevant time frame, all of its sales and receipts for that time frame would be counted in the denominator against which MWBE sales and receipts are compared. As the district court pointed out, that is not a reasonable way to measure Dade County subcontracting participation. *Id.* The County’s argument that a strong majority (72%) of the subcontractors were located in Dade County did not render the district court’s decision to fail to credit the study erroneous. *Id.*

Marketplace data statistics. The County conducted another statistical study “to see what the differences are in the marketplace and what the relationships are in the marketplace.” *Id.* The study was based on a sample of 568 contractors, from a pool of 10,462 firms, that had filed a “certificate of competency” with Dade County as of January 1995. *Id.* The selected firms participated in a telephone survey inquiring about the race, ethnicity, and gender of the firm’s owner, and asked for information on the firm’s total sales and receipts from all sources. *Id.* The County’s expert then studied the data to determine “whether meaningful relationships existed between (1) the race, ethnicity, and gender of the surveyed firm owners, and (2) the reported sales and receipts of that firm. *Id.* The expert’s hypothesis was that unfavorable disparities may be attributable to marketplace discrimination. The expert performed a regression analysis using the number of employees as a proxy for size. *Id.*

The Eleventh Circuit first noted that the statistical pool used by the County was substantially larger than the actual number of firms, willing, able, and qualified to do the work as the statistical pool represented all those firms merely licensed as a construction contractor. *Id.* Although this factor did not render the study meaningless, the district court was entitled to consider that in evaluating the weight of the study. *Id.* at 921. The Eleventh Circuit quoted the Supreme Court for the following proposition: “[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value.” *Id.*, quoting *Croson*, 488 U.S. at 501, quoting *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308 n. 13 (1977).

The Eleventh Circuit found that after regressing for firm size, neither the BBE nor WBE data showed statistically significant unfavorable disparities. *Id.* Although the marketplace data did reveal unfavorable disparities even after a regression analysis, the district court was not required to assign those disparities controlling weight, especially in light of the dissimilar results of the County Contracting Statistics, discussed *supra*. *Id.*

The Wainwright Study. The County also introduced a statistical analysis prepared by Jon Wainwright, analyzing “the personal and financial characteristics of self-employed persons working full-time in the Dade County construction industry, based on data from the 1990 Public Use Microdata Sample database” (derived from the decennial census). *Id.* The study “(1) compared construction business ownership rates of MBE/WBEs to those of non-MBE/WBEs, and (2) analyzed disparities in personal income between MBE/WBE and non-MBE/WBE business owners.” *Id.* “The study concluded that blacks, Hispanics, and women are less likely to own construction businesses than similarly situated white males, and MBE/WBEs that do enter the construction business earn less money than similarly situated white males.” *Id.*

With respect to the first conclusion, Wainwright controlled for “human capital” variables (education, years of labor market experience, marital status, and English proficiency) and “financial capital” variables (interest and dividend income, and home ownership). *Id.* The analysis indicated that blacks, Hispanics and women enter the construction business at lower rates than would be expected, once numerosity, and identified human and financial capital are controlled for. *Id.* The disparities for blacks and women (but not Hispanics) were substantial and statistically significant. *Id.* at 922. The underlying theory of this business ownership component of the study is that any significant disparities remaining after control of variables are due to the ongoing effects of past and present discrimination. *Id.*

The Eleventh Circuit held, in light of *Croson*, the district court need not have accepted this theory. *Id.* The Eleventh Circuit quoted *Croson*, in which the Supreme Court responded to a similar argument advanced by the plaintiffs in that case: “There are numerous explanations for this dearth of minority participation, including past societal discrimination in education and economic opportunities *as well as both black and white career and entrepreneurial choices. Blacks may be disproportionately attracted to industries other than construction.*” *Id.*, quoting *Croson*, 488 U.S. at 503. Following the Supreme Court in *Croson*, the Eleventh Circuit held “the disproportionate attraction of a minority group to non-construction industries does not mean that discrimination in the construction industry is the reason.” *Id.*, quoting *Croson*, 488 U.S. at 503. Additionally, the district court had evidence that between 1982 and 1987, there was a substantial growth rate of MBE/WBE firms as opposed to non-MBE/WBE firms, which would further negate the proposition that the construction industry was discriminating against minority- and women-owned firms. *Id.* at 922.

With respect to the personal income component of the Wainwright study, after regression analyses were conducted, only the BBE statistics indicated a statistically significant disparity ratio. *Id.* at 923. However, the Eleventh Circuit held the district court was not required to assign the disparity controlling weight because the study did not regress for firm size, and in light of the conflicting statistical evidence in the County Contracting Statistics and Marketplace Data Statistics, discussed *supra*, which did regress for firm size. *Id.*

The Brimmer Study. The final study presented by the County was conducted under the supervision of Dr. Andrew F. Brimmer and concerned only black-owned firms. *Id.* The key component of the study was an analysis of the business receipts of black-owned construction firms for the years of 1977, 1982 and 1987, based on the Census Bureau’s Survey of Minority- and Women-Owned Businesses, produced every five years. *Id.* The study sought to determine the existence of disparities between sales and receipts of black-owned firms in Dade County compared to the sales and receipts of all construction firms in Dade County. *Id.*

The study indicated substantial disparities in 1977 and 1987 but not 1982. *Id.* The County alleged that the absence of disparity in 1982 was due to substantial race-conscious measures for a major construction contract (Metrorail project), and not due to a lack of discrimination in the industry. *Id.* However, the study made no attempt to filter for the Metrorail project and “complete[ly] fail[ed]” to account for firm size. *Id.* Accordingly, the Eleventh Circuit found the district court permissibly discounted the results of the Brimmer study. *Id.* at 924.

Anecdotal evidence. In addition, the County presented a substantial amount of anecdotal evidence of perceived discrimination against BBes, a small amount of similar anecdotal evidence pertaining to WBEs, and no anecdotal evidence pertaining to HBes. *Id.* The County presented three basic forms of anecdotal evidence: “(1) the testimony of two County employees responsible for administering the MBE/WBE programs; (2) the testimony, primarily by affidavit, of twenty-three MBE/WBE contractors and subcontractors; and (3) a survey of black-owned construction firms.” *Id.*

The County employees testified that the decentralized structure of the County construction contracting system affords great discretion to County employees, which in turn creates the opportunity for discrimination to infect the system. *Id.* They also testified to specific incidents of discrimination, for example, that MBE/WBEs complained of receiving lengthier punch lists than

their non-MBE/WBE counterparts. *Id.* They also testified that MBE/WBEs encounter difficulties in obtaining bonding and financing. *Id.*

The MBE/WBE contractors and subcontractors testified to numerous incidents of perceived discrimination in the Dade County construction market, including:

*Situations in which a project foreman would refuse to deal directly with a black or female firm owner, instead preferring to deal with a white employee; instances in which an MWBE owner knew itself to be the low bidder on a subcontracting project, but was not awarded the job; instances in which a low bid by an MWBE was “shopped” to solicit even lower bids from non-MWBE firms; instances in which an MWBE owner received an invitation to bid on a subcontract within a day of the bid due date, together with a “letter of unavailability” for the MWBE owner to sign in order to obtain a waiver from the County; and instances in which an MWBE subcontractor was hired by a prime contractor, but subsequently was replaced with a non-MWBE subcontractor within days of starting work on the project. *Id.* at 924-25.*

Finally, the County submitted a study prepared by Dr. Joe E. Feagin, comprised of interviews of 78 certified black-owned construction firms. *Id.* at 925. The interviewees reported similar instances of perceived discrimination, including: “difficulty in securing bonding and financing; slow payment by general contractors; unfair performance evaluations that were tainted by racial stereotypes; difficulty in obtaining information from the County on contracting processes; and higher prices on equipment and supplies than were being charged to non-MBE/WBE firms.” *Id.*

The Eleventh Circuit found that numerous black- and some female-owned construction firms in Dade County perceived that they were the victims of discrimination and two County employees also believed that discrimination could taint the County’s construction contracting process. *Id.* However, such anecdotal evidence is helpful “only when it [is] combined with and reinforced by sufficiently probative statistical evidence.” *Id.* In her plurality opinion in *Croson*, Justice O’Connor found that “evidence of a pattern of individual discriminatory acts can, *if supported by appropriate statistical proof*, lend support to a local government’s determination that broader remedial relief is justified.” *Id.*, quoting *Croson*, 488 U.S. at 509 (emphasis added by the Eleventh Circuit). Accordingly, the Eleventh Circuit held that “anecdotal evidence can play an important role in bolstering statistical evidence, but that only in the rare case will anecdotal evidence suffice standing alone.” *Id.* at 925. The Eleventh Circuit also cited to opinions from the Third, Ninth and Tenth Circuits as supporting the same proposition. *Id.* at 926. The Eleventh Circuit affirmed the decision of the district court enjoining the continued operation of the MBE/WBE programs because they did not rest on a “constitutionally sufficient evidentiary foundation.” *Id.*

Although the Eleventh Circuit determined that the MBE/WBE program did not survive constitutional muster due to the absence of a sufficient evidentiary foundation, the Eleventh Circuit proceeded with the second prong of the strict scrutiny analysis of determining whether the MBE/WBE programs were narrowly tailored (BBE and HBE programs) or substantially related (WBE program) to the legitimate government interest they purported to serve, i.e., “remedying the effects of present and past discrimination against blacks, Hispanics, and women in the Dade County construction market.” *Id.*

Narrow tailoring. “The essence of the ‘narrowly tailored’ inquiry is the notion that explicitly racial preferences ... must only be a ‘last resort’ option.” *Id.*, quoting *Hayes v. North Side Law Enforcement Officers Ass’n*, 10 F.3d 207, 217 (4th Cir. 1993) and citing *Croson*, 488 U.S. at 519 (Kennedy, J., concurring in part and concurring in the judgment) (“[T]he strict scrutiny standard ... forbids the use of even narrowly drawn racial classifications except as a last resort.”).

The Eleventh Circuit has identified four factors to evaluate whether a race- or ethnicity-conscious affirmative action program is narrowly tailored: (1) “the necessity for the relief and the efficacy of alternative remedies; (2) the flexibility and duration of the relief; (3) the relationship of numerical goals to the relevant labor market; and (4) the impact of the relief on the rights of innocent third parties.” *Id.* at 927, citing *Ensley Branch*, 31 F.3d at 1569. The four factors provide “a useful analytical structure.” *Id.* at 927. The Eleventh Circuit focused only on the first factor in the present case “because that is where the County’s MBE/WBE programs are most problematic.” *Id.*

The Eleventh Circuit flatly reject[ed] the County’s assertion that ‘given a strong basis in evidence of a race-based problem, a race-based remedy is necessary.’ That is simply not the law. If a race-neutral remedy is sufficient to cure a race-based problem, then a race-conscious remedy can never be narrowly tailored to that problem.” *Id.*, citing *Croson*, 488 U.S. at 507 (holding that affirmative action program was not narrowly tailored where “there does not appear to have been any consideration of the use of race-neutral means to increase minority business participation in city contracting”) ... Supreme Court decisions teach that a race-conscious remedy is not merely one of many equally acceptable medications the government may use to treat a race-based problem. Instead, it is the strongest of medicines, with many potential side effects, and must be reserved for those severe cases that are highly resistant to conventional treatment. *Id.* at 927.

The Eleventh Circuit held that the County “clearly failed to give serious and good faith consideration to the use of race- and ethnicity-neutral measures.” *Id.* Rather, the determination of the necessity to establish the MWBE programs was based upon a conclusory legislative statement as to its necessity, which in turn was based upon an “equally conclusory analysis” in the Brimmer study, and a report that the SBA only was able to direct 5 percent of SBA financing to black-owned businesses between 1968-1980. *Id.*

The County admitted, and the Eleventh Circuit concluded, that the County failed to give any consideration to any alternative to the HBE affirmative action program. *Id.* at 928. Moreover, the Eleventh Circuit found that the testimony of the County’s own witnesses indicated the viability of race- and ethnicity-neutral measures to remedy many of the problems facing black- and Hispanic-owned construction firms. *Id.* The County employees identified problems, virtually all of which were related to the County’s own processes and procedures, including: “the decentralized County contracting system, which affords a high level of discretion to County employees; the complexity of County contract specifications; difficulty in obtaining bonding; difficulty in obtaining financing; unnecessary bid restrictions; inefficient payment procedures; and insufficient or inefficient exchange of information.” *Id.* The Eleventh Circuit found that the problems facing MBE/WBE contractors were “institutional barriers” to entry facing every new entrant into the construction market, and were perhaps affecting the MBE/WBE contractors disproportionately due to the “institutional youth” of black- and Hispanic-owned construction firms. *Id.* “It follows that those firms should be helped the most by dismantling those barriers, something the County could do at least in substantial part.” *Id.*

The Eleventh Circuit noted that the race- and ethnicity-neutral options available to the County mirrored those available and cited by Justice O'Connor in *Croson*:

[T]he city has at its disposal a whole array of race-neutral measures to increase the accessibility of city contracting opportunities to small entrepreneurs of all races. Simplification of bidding procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races would open the public contracting market to all those who have suffered the effects of past societal discrimination and neglect ... The city may also act to prohibit discrimination in the provision of credit or bonding by local suppliers and banks. Id., quoting Croson, 488 U.S. at 509-10.

The Eleventh Circuit found that except for some “half-hearted programs” consisting of “limited technical and financial aid that might benefit BBEs and HBEs,” the County had not “seriously considered” or tried most of the race- and ethnicity-neutral alternatives available. *Id.* at 928. “Most notably ... the County has not taken any action whatsoever to ferret out and respond to instances of discrimination if and when they have occurred in the County’s own contracting process.” *Id.*

The Eleventh Circuit found that the County had taken no steps to “inform, educate, discipline, or penalize” discriminatory misconduct by its own employees. *Id.* at 929. Nor had the County passed any local ordinances expressly prohibiting discrimination by local contractors, subcontractors, suppliers, bankers, or insurers. *Id.* “Instead of turning to race- and ethnicity-conscious remedies as a last resort, the County has turned to them as a first resort.” Accordingly, the Eleventh Circuit held that even if the BBE and HBE programs were supported by the requisite evidentiary foundation, they violated the Equal Protection Clause because they were not narrowly tailored. *Id.*

Substantial relationship. The Eleventh Circuit held that due to the relaxed “substantial relationship” standard for gender-conscious programs, if the WBE program rested upon a sufficient evidentiary foundation, it could pass the substantial relationship requirement. *Id.* However, because it did not rest upon a sufficient evidentiary foundation, the WBE program could not pass constitutional muster. *Id.*

For all of the foregoing reasons, the Eleventh Circuit affirmed the decision of the district court declaring the MBE/WBE programs unconstitutional and enjoining their continued operation.

12. Contractor’s Association of E. Pennsylvania v. City of Philadelphia, 91 F.3d 586 (3d Cir. 1996)

The City of Philadelphia (City) and intervening defendant United Minority Enterprise Associates (UMEA) appealed from the district court’s judgment declaring that the City’s DBE/MBE/WBE program for black construction contractors, violated the Equal Protection rights of the Contractors Association of Eastern Pennsylvania (CAEP) and eight other contracting associations (Contractors). The Third Circuit affirmed the district court that the Ordinance was not narrowly tailored to serve a compelling state interest. 91 F. 3d 586, 591 (3d Cir. 1996), *affirming, Contractors Ass’n of Eastern Pa. v. City of Philadelphia*, 893 F.Supp. 419 (E.D.Pa.1995).

The Ordinance. The City’s Ordinance sought to increase the participation of “disadvantaged business enterprises” (DBEs) in City contracting. *Id.* at 591. DBEs are businesses defined as those at least 51 percent owned by “socially and economically disadvantaged” persons. “Socially and economically disadvantaged” persons are, in turn, defined as “individuals who have . . . been subjected to racial, sexual or ethnic prejudice because of their identity as a member of a group or differential treatment because of their handicap without regard to their individual qualities, and whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged. *Id.* The Third Circuit found in *Contractors Ass’n of Eastern Pa. v. City of Philadelphia*, 6 F.3d 990, 999 (3d Cir.1993) (*Contractors II*), this definition “includes only individuals who are both victims of prejudice based on status and economically deprived.” Businesses majority-owned by racial minorities (minority business enterprises or MBEs) and women are rebuttably presumed to be DBEs, but businesses that would otherwise qualify as DBEs are rebuttably presumed not to be DBEs if they have received more than \$5 million in City contracts. *Id.* at 591-592.

The Ordinance set participation “goals” for different categories of DBEs: racial minorities (15%), women (10%) and handicapped (2%). *Id.* at 592. These percentage goals were percentages of the total dollar amount spent by the City in each of the three contract categories: vending contracts, construction contracts, and personal and professional service contracts. Dollars received by DBE *subcontractors* in connection with City financed prime contracts are counted towards the goals as well as dollars received by DBE *prime* contractors. *Id.*

Two different strategies were authorized. When there were sufficient DBEs qualified to perform a City contract to ensure competitive bidding, a contract could be let on a sheltered market basis — i.e., only DBEs will be permitted to bid. In other instances, the contract would be let on a non-sheltered basis — i.e., any firm may bid — with the goals requirements being met through subcontracting. *Id.* at 592 The sheltered market strategy saw little use. It was attempted on a trial basis, but there were too few DBEs in any given area of expertise to ensure reasonable prices, and the program was abandoned. *Id.* Evidence submitted by the City indicated that no construction contract was let on a sheltered market basis from 1988 to 1990, and there was no evidence that the City had since pursued that approach. *Id.* Consequently, the Ordinance’s participation goals were achieved almost entirely by requiring that prime contractors subcontract work to DBEs in accordance with the goals. *Id.*

The Court stated that the significance of complying with the goals is determined by a series of presumptions. *Id.* at 593. Where at least one bidding contractor submitted a satisfactory Schedule for Participation, it was presumed that all contractors who did not submit a satisfactory Schedule did not exert good faith efforts to meet the program goals, and the “lowest responsible, responsive contractor” received the contract. *Id.* Where none of the bidders submitted a satisfactory Schedule, it was presumed that all but the bidder who proposed “the highest goals” of DBE participation at a “reasonable price” did not exert good faith efforts, and the contract was awarded to the “lowest, responsible, responsive contractor” who was granted a Waiver and proposed the highest level of DBE participation at a reasonable price. *Id.* Non-complying bidders in either situation must rebut the presumption in order to secure a waiver.

Procedural History. This appeal is the third appeal to consider this challenge to the Ordinance. On the first appeal, the Third Circuit affirmed the district court’s ruling that the Contractors had standing to challenge the set-aside program, but reversed the grant of summary judgment in their favor because UMEA had not been afforded a fair opportunity to develop the record. *Id.* at 593 citing, *Contractors Ass’n of Eastern Pa. v. City of Philadelphia*, 945 F.2d 1260 (3d Cir.1991) (*Contractors I*).

On the second appeal, the Third Circuit reviewed a second grant of summary judgment for the Contractors. *Id.*, citing, *Contractors II*, 6 F.3d 990. The Court in that appeal concluded that the Contractors had standing to challenge the program only as it applied to the award of construction contracts, and held that the pre-enactment evidence available to the City Council in 1982 did “not provide a sufficient evidentiary basis” for a conclusion that there had been discrimination against women and minorities in the construction industry. *Id.* citing, 6 F.3d at 1003. The Court further held, however, that evidence of discrimination obtained after 1982 could be considered in determining whether there was a sufficient evidentiary basis for the Ordinance. *Id.*

In the second appeal, 6 F.3d 990 (3d. Cir. 1993), after evaluating both the pre-enactment and post-enactment evidence in the summary judgment record, the Court affirmed the grant of summary judgment insofar as it declared to be unconstitutional those portions of the program requiring set-asides for women and non-black minority contractors. *Id.* at 594. The Court also held that the 2 percent set-aside for the handicapped passed rational basis review and ordered the court to enter summary judgment for the City with respect to that portion of the program. *Id.* In addition, the Court concluded that the portions of the program requiring a set-aside for black contractors could stand only if they met the “strict scrutiny” standard of Equal Protection review and that the record reflected a genuine issue of material fact as to whether they were narrowly tailored to serve a compelling interest of the City as required under that standard. *Id.*

This third appeal followed a nine-day bench trial and a resolution by the district court of the issues thus presented. That trial and this appeal thus concerned only the constitutionality of the Ordinance’s preferences for black contractors. *Id.*

Trial. At trial, the City presented a study done in 1992 after the filing of this suit, which was reflected in two pretrial affidavits by the expert study consultant and his trial testimony. *Id.* at 594. The core of his analysis concerning discrimination by the City centered on disparity indices prepared using data from fiscal years 1979–1981. The disparity indices were calculated by dividing the percentage of all City construction dollars received by black construction firms by their percentage representation among all area construction firms, multiplied by 100.

The consultant testified that the disparity index for black construction firms in the Philadelphia metropolitan area for the period studied was about 22.5. According to the consultant, the smaller the resulting figure was, the greater the inference of discrimination, and he believed that 22.5 was a disparity attributable to discrimination. *Id.* at 595. A number of witnesses testified to discrimination in City contracting before the City Council, prior to the enactment of the Ordinance, and the consultant testified that his statistical evidence was corroborated by their testimony. *Id.* at 595.

Based on information provided in an affidavit by a former City employee (John Macklin), the study consultant also concluded that black representation in contractor associations was disproportionately low in 1981 and that between 1979 and 1981 black firms had received no subcontracts on City-financed construction projects. *Id.* at 595. The City also offered evidence concerning two programs instituted by others prior to 1982 which were intended to remedy the effects of discrimination in the construction industry but which, according to the City, had been unsuccessful. *Id.* The first was the Philadelphia Plan, a program initiated in the late 1960s to increase the hiring of minorities on public construction sites.

The second program was a series of programs implemented by the Philadelphia Urban Coalition, a non-profit organization (Urban Coalition programs). These programs were established around 1970, and offered loans, loan guarantees, bonding assistance, training, and various forms of non-financial assistance concerning the management of a construction firm and the procurement of public contracts. *Id.* According to testimony from a former City Council member and others, neither program succeeded in eradicating the effects of discrimination. *Id.*

The City pointed to the waiver and exemption sections of the Ordinance as proof that there was adequate flexibility in its program. The City contended that its 15 percent goal was appropriate. The City maintained that the goal of 15 percent may be required to account for waivers and exemptions allowed by the City, was a flexible goal rather than a rigid quota in light of the waivers and exemptions allowed by the Ordinance, and was justified in light of the discrimination in the construction industry. *Id.* at 595.

The Contractors presented testimony from an expert witness challenging the validity and reliability of the study and its conclusions, including, *inter alia*, the data used, the assumptions underlying the study, and the failure to include federally-funded contracts let through the City Procurement Department. *Id.* at 595. The Contractors relied heavily on the legislative history of the Ordinance, pointing out that it reflected no identification of any specific discrimination against black contractors and no data from which a Council person could find that specific discrimination against black contractors existed or that it was an appropriate remedy for any such discrimination. *Id.* at 595 They pointed as well to the absence of any consideration of race-neutral alternatives by the City Council prior to enacting the Ordinance. *Id.* at 596.

On cross-examination, the Contractors elicited testimony that indicated that the Urban Coalition programs were relatively successful, which the Court stated undermined the contention that race-based preferences were needed. *Id.* The Contractors argued that the 15 percent figure must have been simply picked from the air and had no relationship to any legitimate remedial goal because the City Council had no evidence of identified discrimination before it. *Id.*

At the conclusion of the trial, the district court made findings of fact and conclusions of law. It determined that the record reflected no “strong basis in evidence” for a conclusion that discrimination against black contractors was practiced by the City, nonminority prime contractors, or contractors associations during any relevant period. *Id.* at 596 *citing*, 893 F.Supp. at 447. The court also determined that the Ordinance was “not ‘narrowly tailored’ to even the perceived objective declared by City Council as the reason for the Ordinance.” *Id.* at 596, *citing*, 893 F. Supp. at 441.

Burden of Persuasion. The Court held affirmative action programs, when challenged, must be subjected to “strict scrutiny” review. *Id.* at 596. Accordingly, a program can withstand a challenge only if it is narrowly tailored to serve a compelling state interest. The municipality has a compelling state interest that can justify race-based preferences only when it has acted to remedy identified present or past discrimination in which it engaged or was a “passive participant;” race-based preferences cannot be justified by reference to past “societal” discrimination in which the municipality played no material role. *Id.* Moreover, the Court found the remedy must be tailored to the discrimination identified. *Id.*

The Court said that a municipality must justify its conclusions regarding discrimination in connection with the award of its construction contracts and the necessity for a remedy of the scope chosen. *Id.* at 597. While this does not mean the municipality must convince a court of the accuracy of its conclusions, the Court stated that it does mean the program cannot be sustained unless there is a strong basis in evidence for those conclusions. *Id.* The party challenging the race-based preferences can succeed by showing either (1) the subjective intent of the legislative body was not to remedy race discrimination in which the municipality played a role, or (2) there is no “strong basis in evidence” for the conclusions that race-based discrimination existed and that the remedy chosen was necessary. *Id.*

The Third Circuit noted it and other courts have concluded that when the race-based classifications of an affirmative action plan are challenged, the proponents of the plan have the burden of coming forward with evidence providing a firm basis for inferring that the legislatively identified discrimination in fact exists or existed and that the race-based classifications are necessary to remedy the effects of the identified discrimination. *Id.* at 597. Once the proponents of the program meet this burden of production, the opponents of the program must be permitted to attack the tendered evidence and offer evidence of their own tending to show that the identified discrimination did or does not exist and/or that the means chosen as a remedy do not “fit” the identified discrimination. *Id.*

Ultimately, however, the Court found that plaintiffs challenging the program retain the burden of persuading the district court that a violation of the Equal Protection Clause has occurred. *Id.* at 597. This means that the plaintiffs bear the burden of persuading the court that the race-based preferences were not intended to serve the identified compelling interest or that there is no strong basis in the evidence as a whole for the conclusions the municipality needed to have reached with respect to the identified discrimination and the necessity of the remedy chosen. *Id.*

The Court explained the significance of the allocation of the burden of persuasion differs depending on the theory of constitutional invalidity that is being considered. If the theory is that the race-based preferences were adopted by the municipality with an intent unrelated to remedying its past discrimination, the plaintiff has the burden of convincing the court that the identified remedial motivation is a pretext and that the real motivation was something else. *Id.* at 597. As noted in *Contractors II*, the Third Circuit held the burden of persuasion here is analogous to the burden of persuasion in Title VII cases. *Id.* at 598, *citing*, 6 F.3d at 1006. The ultimate issue under this theory is one of fact, and the burden of persuasion on that ultimate issue can be very important. *Id.*

The Court said the situation is different when the plaintiff's theory of constitutional invalidity is that, although the municipality may have been thinking of past discrimination and a remedy therefor, its conclusions with respect to the existence of discrimination and the necessity of the remedy chosen have no strong basis in evidence. In such a situation, when the municipality comes forward with evidence of facts alleged to justify its conclusions, the Court found that the plaintiff has the burden of persuading the court that those facts are not accurate. *Id.* The ultimate issue as to whether a strong basis in evidence exists is an issue of law, however. The burden of persuasion in the traditional sense plays no role in the court's resolution of that ultimate issue. *Id.*

The Court held the district court's opinion explicitly demonstrates its recognition that the plaintiffs bore the burden of persuading it that an equal protection violation occurred. *Id.* at 598. The Court found the district court applied the appropriate burdens of production and persuasion, conducted the required evaluation of the evidence, examined the credited record evidence as a whole, and concluded that the "strong basis in evidence" for the City's position did not exist. *Id.*

Three forms of discrimination advanced by the City. The Court pointed out that several distinct forms of racial discrimination were advanced by the City as establishing a pattern of discrimination against minority contractors. The first was discrimination by prime contractors in the awarding of subcontracts. The second was discrimination by contractor associations in admitting members. The third was discrimination by the City in the awarding of prime contracts. The City and UMEA argued that the City may have "passively participated" in the first two forms of discrimination. *Id.* at 599.

A. The evidence of discrimination by private prime contractors. One of the City's theories is that discrimination by prime contractors in the selection of subcontractors existed and may be remedied by the City. The Court noted that as Justice O'Connor observed in *Croson*: if the city could show that it had essentially become a "passive participant" in a system of racial exclusion practiced by elements of the local construction industry, ... the city could take affirmative steps to dismantle such a system. It is beyond dispute that any public entity ... has a compelling government interest in assuring that public dollars ... do not serve to finance the evil of private prejudice. *Id.* at 599, *citing*, 488 U.S. at 492.

The Court found the disparity study focused on just one aspect of the Philadelphia construction industry — the award of prime contracts by the City. *Id.* at 600. The City's expert consultant acknowledged that the only information he had about subcontracting came from an affidavit of one person, John Macklin, supplied to him in the course of his study. As he stated on cross-examination, "I have made no presentation to the Court as to participation by black minorities or blacks in subcontracting." *Id.* at 600. The only record evidence with respect to black participation in the subcontracting market comes from Mr. Macklin who was a member of the MBEC staff and a proponent of the Ordinance. *Id.* Based on a review of City records, found by the district court to be "cursory," Mr. Macklin reported that not a single subcontract was awarded to minority subcontractors in connection with City-financed construction contracts during fiscal years 1979 through 1981. The district court did not credit this assertion. *Id.*

Prior to 1982, for solely City-financed projects, the City did not require subcontractors to prequalify, did not keep consolidated records of the subcontractors working on prime contracts let by the City, and did not record whether a particular contractor was an MBE. *Id.* at 600. To prepare a report concerning the participation of minority businesses in public works, Mr. Macklin examined the records at the City's Procurement Department. The department kept procurement logs, project

engineer logs, and contract folders. The subcontractors involved in a project were only listed in the engineer's log. The court found Mr. Macklin's testimony concerning his methodology was hesitant and unclear, but it does appear that he examined only 25 to 30 percent of the project engineer logs, and that his only basis for identifying a name in that segment of the logs as an MBE was his personal memory of the information he had received in the course of approximately a year of work with the OMO that certified minority contractors. *Id.* The Court quoted the district court finding as to Macklin's testimony:

Macklin] went to the contract files and looked for contracts in excess of \$30,000.00 that in his view appeared to provide opportunities for subcontracting. (*Id.* at 13.) With that information, Macklin examined some of the project engineer logs for those projects to determine whether minority subcontractors were used by the prime contractors. (*Id.*) Macklin did not look at every available project engineer log. (*Id.*) Rather, he looked at a random 25 to 30 percent of all the project engineer logs. (*Id.*) As with his review of the Procurement Department log, Macklin determined that a minority subcontractor was used on the project only if he personally recognized the firm to be a minority. (*Id.*) Quite plainly, Macklin was unable to determine whether minorities were used on the remaining 65 to 70 percent of the projects that he did not review. When questioned whether it was possible that minority subcontractors did perform work on some City public works projects during fiscal years 1979 to 1981, and that he just did not see them in the project logs that he looked at, Macklin answered "it is a very good possibility." 893 F.Supp. at 434. *Id.* at 600.

The district court found two other portions of the record significant on this point. First, during the trial, the City presented Oscar Gaskins ("Gaskins"), former general counsel to the General and Specialty Contractors Association of Philadelphia ("GASCAP") and the Philadelphia Urban Coalition, to testify about minority participation in the Philadelphia construction industry during the 1970s and early 1980s. Gaskins testified that, in his opinion, black contractors are still being subjected to racial discrimination in the private construction industry, and in subcontracting within the City limits. However, the Court pointed out, when Gaskins was asked by the district court to identify even one instance where a minority contractor was denied a private contract or subcontract after submitting the lowest bid, Gaskins was unable to do so. *Id.* at 600-601.

Second, the district court noted that since 1979 the City's "standard requirements warn [would-be prime contractors] that discrimination will be deemed a 'substantial breach' of the public works contract which could subject the prime contractor to an investigation by the Commission and, if warranted, fines, penalties, termination of the contract and forfeiture of all money due." Like the Supreme Court in *Crosson*, the Court stated the district court found significant the City's inability to point to any allegations that this requirement was being violated. *Id.* at 601.

The Court held the district court did not err by declining to accept Mr. Macklin's conclusion that there were no subcontracts awarded to black contractors in connection with City-financed construction contracts in fiscal years 1979 to 1981. *Id.* at 601. Accepting that refusal, the Court agreed with the district court's conclusion that the record provides no firm basis for inferring discrimination by prime contractors in the subcontracting market during that period. *Id.*

B. The evidence of discrimination by contractor associations. The Court stated that a city may seek to remedy discrimination by local trade associations to prevent its passive participation in a system of private discrimination. Evidence of “extremely low” membership by MBEs, standing by itself, however, is not sufficient to support remedial action; the city must “link [low MBE membership] to the number of local MBEs eligible for membership.” *Id.* at 601.

The City’s expert opined that there was statistically low representation of eligible MBEs in the local trade associations. He testified that, while numerous MBEs were eligible to join these associations, three such associations had only one MBE member, and one had only three MBEs. In concluding that there were many eligible MBEs not in the associations, however, he again relied entirely upon the work of Mr. Macklin. The district court rejected the expert’s conclusions because it found his reliance on Mr. Macklin’s work misplaced. *Id.* at 601. Mr. Macklin formed an opinion that a listed number of MBE and WBE firms were eligible to be members of the plaintiff Associations. *Id.* Because Mr. Macklin did not set forth the criteria for association membership and because the OMO certification list did not provide any information about the MBEs and WBEs other than their names and the fact that they were such, the Court found the district court was without a basis for evaluating Mr. Macklin’s opinions. *Id.*

On the other hand, the district court credited “the uncontroverted testimony of John Smith [a former general manager of the CAEP and member of the MBEC] that no black contractor who has ever applied for membership in the CAEP has been denied.” *Id.* at 601 *citing*, 893 F.Supp. at 440. The Court pointed out the district court noted as well that the City had not “identified even a single black contractor who was eligible for membership in any of the plaintiffs’ associations, who applied for membership, and was denied.” *Id.* at 601, *quoting*, 893 F.Supp at 441.

The Court held that given the City’s failure to present more than the essentially unexplained opinion of Mr. Macklin, the opposing, uncontradicted testimony of Mr. Smith, and the failure of anyone to identify a single victim of the alleged discrimination, it was appropriate for the district court to conclude that a constitutionally sufficient basis was not established in the evidence. *Id.* at 601. The Court found that even if it accepted Mr. Macklin’s opinions, however, it could not hold that the Ordinance was justified by that discrimination. *Id.* at 602. Racial discrimination can justify a race-based remedy only if the City has somehow participated in or supported that discrimination. *Id.* The Court said that this record would not support a finding that this occurred. *Id.*

Contrary to the City’s argument, the Court stated nothing in *Croson* suggests that awarding contracts pursuant to a competitive bidding scheme and without reference to association membership could alone constitute passive participation by the City in membership discrimination by contractor associations. *Id.* Prior to 1982, the City let construction contracts on a competitive bid basis. It did not require bidders to be association members, and nothing in the record suggests that it otherwise favored the associations or their members. *Id.*

C. The evidence of discrimination by the City. The Court found the record provided substantially more support for the proposition that there was discrimination on the basis of race in the award of prime contracts by the City in the fiscal 1979–1981 period. *Id.* The Court also found the Contractors’ critique of that evidence less cogent than did the district court. *Id.*

The centerpiece of the City's evidence was its expert's calculation of disparity indices which gauge the disparity in the award of prime contracts by the City. *Id.* at 602. Following *Contractors II*, the expert calculated a disparity index for black construction firms of 11.4, based on a figure of 114 such firms available to perform City contracts. At trial, he recognized that the 114 figure included black engineering and architecture firms, so he recalculated the index, using only black construction firms (i.e., 57 firms). This produced a disparity index of 22.5. Thus, based on this analysis, black construction firms would have to have received approximately 4.5 times more public works dollars than they did receive in order to have achieved an amount proportionate to their representation among all construction firms. The expert found the disparity sufficiently large to be attributable to discrimination against black contractors. *Id.*

The district court found the study did not provide a strong basis in evidence for an inference of discrimination in the prime contract market. It reached this conclusion primarily for three reasons. The study, in the district court's view, (1) did not take into account whether the black construction firms were qualified and willing to perform City contracts; (2) mixed statistical data from different sources; and (3) did not account for the "neutral" explanation that qualified black firms were too preoccupied with large, federally-assisted projects to perform City projects. *Id.* at 602-3.

The Court said the district court was correct in concluding that a statistical analysis should focus on the minority population capable of performing the relevant work. *Id.* at 603. As *Croson* indicates, "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." *Id.*, citing 488 U.S. at 501. In *Croson* and other cases, the Court pointed out, however, the discussion by the Supreme Court concerning qualifications came in the context of a rejection of an analysis using the percentage of a particular minority in the general population. *Id.*

The issue of qualifications can be approached at different levels of specificity, however, the Court stated, and some consideration of the practicality of various approaches is required. An analysis is not devoid of probative value, the Court concluded, simply because it may theoretically be possible to adopt a more refined approach. *Id.* at 603.

To the extent the district court found fault with the analysis for failing to limit its consideration to those black contractors "willing" to undertake City work, the Court found its criticism more problematic. *Id.* at 603. In the absence of some reason to believe otherwise, the Court said one can normally assume that participants in a market with the ability to undertake gainful work will be "willing" to undertake it. Moreover, past discrimination in a marketplace may provide reason to believe the minorities who would otherwise be willing are discouraged from trying to secure the work. *Id.* at 603.

The Court stated that it seemed a substantial overstatement to assert that the study failed to take into account the qualifications and willingness of black contractors to participate in public works. *Id.* at 603. During the time period in question, fiscal years 1979–1981, those firms seeking to bid on City contracts had to prequalify for *each and every* contract they bid on, and the criteria could be set differently from contract to contract. *Id.* The Court said it would be highly impractical to review the hundreds of contracts awarded each year and compare them to each and every MBE. *Id.* The expert chose instead to use as the relevant minority population the black firms listed in the 1982 OMO

Directory. The Court found this would appear to be a reasonable choice that, if anything, may have been on the conservative side. *Id.*

When a firm applied to be certified, the OMO required it to detail its bonding experience, prior experience, the size of prior contracts, number of employees, financial integrity, and equipment owned. *Id.* at 603. The OMO visited each firm to substantiate its claims. Although this additional information did not go into the final directory, the OMO was confident that those firms on the list were capable of doing the work required on large scale construction projects. *Id.*

The Contractors point to the small number of black firms that sought to prequalify for City-funded contracts as evidence that black firms were unwilling to work on projects funded solely by the City. *Id.* at 603. During the time period in question, City records showed that only seven black firms sought to prequalify, and only three succeeded in prequalifying. The Court found it inappropriate, however, to conclude that this evidence undermines the inference of discrimination. As the expert indicated in his testimony, the Court noted, if there has been discrimination in City contracting, it is to be expected that black firms may be discouraged from applying, and the low numbers may tend to corroborate the existence of discrimination rather than belie it. The Court stated that in a sense, to weigh this evidence for or against either party required it to presume the conclusion to be proved. *Id.* at 604.

The Court found that while it was true that the study “mixed data,” the weight given that fact by the district court seemed excessive. *Id.* at 604. The study expert used data from only two sources in calculating the disparity index of 22.5. He used data that originated from the City to determine the total amount of contract dollars awarded by the City, the amount that went to MBEs, and the number of black construction firms. *Id.* He “mixed” this with data from the Bureau of the Census concerning the number of total construction firms in the Philadelphia Standard Metropolitan Statistical Area (PSMSA). The data from the City is not geographically bounded to the same extent that the Census information is. *Id.* Any firm could bid on City work, and any firm could seek certification from the OMO.

Nevertheless, the Court found that due to the burdens of conducting construction at a distant location, the vast majority of the firms were from the Philadelphia region and the Census data offers a reasonable approximation of the total number of firms that might vie for City contracts. *Id.* Although there is a minor mismatch in the geographic scope of the data, given the size of the disparity index calculated by the study, the Court was not persuaded that it was significant. *Id.* at 604.

Considering the use of the OMO Directory and the Census data, the Court found that the index of 22.5 may be a conservative estimate of the actual disparity. *Id.* at 604. While the study used a figure for black firms that took into account qualifications and willingness, it used a figure for total firms that did not. *Id.* If the study under-counted the number of black firms qualified and willing to undertake City construction contracts or over-counted the total number of firms qualified and willing to undertake City construction contracts, the actual disparity would be greater than 22.5. *Id.* Further, while the study limited the index to black firms, the study did not similarly reduce the dollars awarded to minority firms. The study used the figure of \$667,501, which represented the total amount going to all MBEs. If minorities other than blacks received some of that amount, the actual disparity would again be greater. *Id.* at 604.

The Court then considered the district court’s suggestion that the extensive participation of black firms in federally-assisted projects, which were also procured through the City’s Procurement Office, accounted for their low participation in the other construction contracts awarded by the City. *Id.* The Court found the district court was right in suggesting that the availability of substantial amounts of federally funded work and the federal set-aside undoubtedly had an impact on the number of black contractors available to bid on other City contracts. *Id.* at 605.

The extent of that impact, according to the Court, was more difficult to gauge, however. That such an impact existed does not necessarily mean that the study’s analysis was without probative force. *Id.* at 605. If, the Court noted for example, one reduced the 57 available black contractors by the 20 to 22 that participated in federally assisted projects in fiscal years 1979–1981 and used 35 as a fair approximation of the black contractors available to bid on the remaining City work, the study’s analysis produces a disparity index of 37, which the Court found would be a disparity that still suggests a substantial under-participation of black contractors among the successful bidders on City prime contracts. *Id.*

The court in conclusion stated whether this record provided a strong basis in evidence for an inference of discrimination in the prime contract market “was a close call.” *Id.* at 605. In the final analysis, however, the Court held it was a call that it found unnecessary to make, and thus it chose not to make it. *Id.* Even assuming that the record presents an adequately firm basis for that inference, the Court held the judgment of the district court must be affirmed because the Ordinance was clearly not narrowly tailored to remedy that discrimination. *Id.*

Narrowly Tailored. The Court said that strict scrutiny review requires it to examine the “fit” between the identified discrimination and the remedy chosen in an affirmative action plan. *Crosson* teaches that there must be a strong basis in evidence not only for a conclusion that there is, or has been, discrimination, but also for a conclusion that the particular remedy chosen is made “necessary” by that discrimination. *Id.* at 605. The Court concluded that issue is shaped by its prior conclusions regarding the absence of a strong basis in evidence reflecting discrimination by prime contractors in selecting subcontractors and by contractor associations in admitting members. *Id.* at 606.

This left as a possible justification for the Ordinance only the assumption that the record provided a strong basis in evidence for believing the City discriminated against black contractors in the award of prime contracts during fiscal years 1979 to 1981. *Id.* at 606. If the remedy reflected in the Ordinance cannot fairly be said to be necessary in light of the assumed discrimination in awarding prime construction projects, the Court said that the Ordinance cannot stand. The Court held, as did the district court, that the Ordinance was not narrowly tailored. *Id.*

A. Inclusion of preferences in the subcontracting market. The Court found the primary focus of the City’s program was the market for subcontracts to perform work included in prime contracts awarded by the City. *Id.* at 606. While the program included authorization for the award of prime contracts on a “sheltered market” basis, that authorization had been sparsely invoked by the City. Its goal with respect to dollars for black contractors had been pursued primarily through requiring that bidding prime contractors subcontract to black contractors in stipulated percentages. *Id.* The 15 percent participation goal and the system of presumptions, which in practice required non-black contractors to meet the goal on virtually every contract, the Court found resulted in a 15 percent set-aside for black contractors in the subcontracting market. *Id.*

Here, as in *Croson*, the Court stated “[t]o a large extent, the set aside of subcontracting dollars seems to rest on the unsupported assumption that white contractors simply will not hire minority firms.” *Id.* at 606, *citing*, 488 U.S. at 502. Here, as in *Croson*, the Court found there is no firm evidentiary basis for believing that nonminority contractors will not hire black subcontractors. *Id.* Rather, the Court concluded the evidence, to the extent it suggests that racial discrimination had occurred, suggested discrimination by the City’s Procurement Department against black contractors who were capable of bidding on prime City construction contracts. *Id.* To the considerable extent that the program sought to constrain decision making by private contractors and favor black participation in the subcontracting market, the Court held it was ill-suited as a remedy for the discrimination identified. *Id.*

The Court pointed out it did not suggest that an appropriate remedial program for discrimination by a municipality in the award of primary contracts could never include a component that affects the subcontracting market in some way. *Id.* at 606. It held, however, that a program, like Philadelphia’s program, which focused almost exclusively on the subcontracting market, was not narrowly tailored to address discrimination by the City in the market for prime contracts. *Id.*

B. The amount of the set-aside in the prime contract market. Having decided that the Ordinance is overbroad in its inclusion of subcontracting, the Court considered whether the 15 percent goal was narrowly tailored to address discrimination in prime contracting. *Id.* at 606. The Court found the record supported the district court’s findings that the Council’s attention at the time of the original enactment and at the time of the subsequent extension was focused solely on the percentage of minorities and women in the general population, and that Council made no effort at either time to determine how the Ordinance might be drafted to remedy particular discrimination to achieve, for example, the approximate market share for black contractors that would have existed, had the purported discrimination not occurred. *Id.* at 607. While the City Council did not tie the 15 percent participation goal directly to the proportion of minorities in the local population, the Court said the goal was either arbitrarily chosen or, at least, the Council’s sole reference point was the minority percentage in the local population. *Id.*

The Court stated that it was clear that the City, in the entire course of this litigation, had been unable to provide an evidentiary basis from which to conclude that a 15 percent set-aside was necessary to remedy discrimination against black contractors in the market for prime contracts. *Id.* at 607. The study data indicated that, at most, only 0.7 percent of the construction firms qualified to perform City-financed prime contracts in the 1979–1981 period were black construction firms. *Id.* at 607. This, the Court found, indicated that the 15 percent figure chosen is an impermissible one. *Id.*

The Court said it was not suggesting that the percentage of the preferred group in the universe of qualified contractors is necessarily the ceiling for all set-asides. It well may be that some premium could be justified under some circumstances. *Id.* at 608. However, the Court noted that the *only* evidentiary basis in the record that appeared at all relevant to fashioning a remedy for discrimination in the prime contracting market was the 0.7 percent figure. That figure did not provide a strong basis in evidence for concluding that a 15 percent set-aside was necessary to remedy discrimination against black contractors in the prime contract market. *Id.*

C. Program alternatives that are either race-neutral or less burdensome to nonminority contractors. In holding that the Richmond plan was not narrowly tailored, the Court pointed out, the Supreme Court in *Crosson* considered it significant that race-neutral remedial alternatives were available and that the City had not considered the use of these means to increase minority business participation in City contracting. *Id.* at 608. It noted, in particular, that barriers to entry like capital and bonding requirements could be addressed by a race-neutral program of city financing for small firms and could be expected to lead to greater minority participation. Nevertheless, such alternatives were not pursued or even considered in connection with the Richmond’s efforts to remedy past discrimination. *Id.*

The district court found that the City’s procurement practices created significant barriers to entering the market for City-awarded construction contracts. *Id.* at 608. Small contractors, in particular, were deterred by the City’s prequalification and bonding requirements from competing in that market. *Id.* Relaxation of those requirements, the district court found, was an available race-neutral alternative that would be likely to lead to greater participation by black contractors. No effort was made by the City, however, to identify barriers to entry in its procurement process and that process was not altered before or in conjunction with the adoption of the Ordinance. *Id.*

The district court also found that the City could have implemented training and financial assistance programs to assist disadvantaged contractors of all races. *Id.* at 608. The record established that certain neutral City programs had achieved substantial success in fulfilling its goals. The district court concluded, however, that the City had not supported the programs and had not considered emulating and/or expanding the programs in conjunction with the adoption of the Ordinance. *Id.*

The Court held the record provided ample support for the finding of the district court that alternatives to race-based preferences were available in 1982, which would have been either race neutral or, at least, less burdensome to nonminority contractors. *Id.* at 609. The Court found the City could have lowered administrative barriers to entry, instituted a training and financial assistance program, and carried forward the OMO’s certification of minority contractor qualifications. *Id.* The record likewise provided ample support for the district court’s conclusion that the “City Council was not interested in considering race-neutral measures, and it did not do so.” *Id.* at 609. To the extent the City failed to consider or adopt these alternatives, the Court held it failed to narrowly tailor its remedy to prior or existing discrimination against black contractors. *Id.*

The Court found it particularly noteworthy that the Ordinance, since its extension, in 1987, for an additional 12 years, had been targeted exclusively toward benefiting only minority and women contractors “whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged.” *Id.* at 609. The City’s failure to consider a race-neutral program designed to encourage investment in and/or credit extension to small contractors or minority contractors, the Court stated, seemed particularly telling in light of the limited classification of victims of discrimination that the Ordinance sought to favor. *Id.*

Conclusion. The Court held the remedy provided by the program substantially exceeds the limited justification that the record provided. *Id.* at 609. The program provided race-based preferences for blacks in the market for subcontracts where the Court found there was no strong basis in the evidence for concluding that discrimination occurred. *Id.* at 610. The program authorized a

15 percent set-aside applicable to all prime City contracts for black contractors when, the Court concluded there was no basis in the record for believing that such a set-aside of that magnitude was necessary to remedy discrimination by the City in that market. *Id.* Finally, the Court stated the City's program failed to include race-neutral or less burdensome remedial steps to encourage and facilitate greater participation of black contractors, measures that the record showed to be available. *Id.*

The Court concluded that a city may adopt race-based preferences only when there is a "strong basis in evidence for its conclusion that [the] remedial action was necessary." *Id.* at 610. Only when such a basis exists is there sufficient assurance that the racial classification is not "merely the product of unthinking stereotypes or a form of racial politics." *Id.* at 610. That assurance, the Court held was lacking here, and, accordingly, found that the race-based preferences provided by the Ordinance could not stand. *Id.*

13. *Contractor's Association of Eastern Pennsylvania v. City of Philadelphia*, 6 F.3d 996 (3d Cir. 1993)

An association of construction contractors filed suit challenging, on equal protection grounds, a city of Philadelphia ordinance that established a set-aside program for "disadvantaged business enterprises" owned by minorities, women, and handicapped persons. 6 F.3d. at 993. The United States District Court for the Eastern District of Pennsylvania, 735 F.Supp. 1274 (E.D. Phila. 1990), granted summary judgment for the contractors 739 F.Supp. 227, and denied the City's motion to stay the injunctive relief. Appeal was taken. The Third Circuit Court of Appeals, 945 F.2d 1260 (3d Cir. 1991), affirmed in part and vacated in part the district court's decision. *Id.* On remand, the district court again granted summary judgment for the contractors. The City appealed. The Third Circuit Court of Appeals held that: (1) the contractors association had standing, but only to challenge the portions of the ordinance that applied to construction contracts; (2) the City presented sufficient evidence to withstand summary judgment with respect to the race and gender preferences; and (3) the preference for businesses owned by handicapped persons was rationally related to a legitimate government purpose and, thus, did not violate equal protection. *Id.*

Procedural history. Nine associations of construction contractors challenged on equal protection grounds a City of Philadelphia ordinance creating preferences in City contracting for businesses owned by racial and ethnic minorities, women, and handicapped persons. *Id.* at 993. The district court granted summary judgment to the Contractors, holding they had standing to bring this lawsuit and invalidating the Ordinance in all respects. *Contractors Association v. City of Philadelphia*, 735 F.Supp. 1274 (E.D.Pa.1990). In an earlier opinion, the Third Circuit affirmed the district court's ruling on standing, but vacated summary judgment on the merits because the City had outstanding discovery requests. *Contractors Association v. City of Philadelphia*, 945 F.2d 1260 (3d Cir.1991). On remand after discovery, the district court again entered summary judgment for the Contractors. The Third Circuit in this case affirmed in part, vacated in part, and reversed in part. 6 F.3d 990, 993.

In 1982, the Philadelphia City Council enacted an ordinance to increase participation in City contracts by minority-owned and women-owned businesses. Phila.Code § 17-500. *Id.* The Ordinance established "goals" for the participation of "disadvantaged business enterprises." § 17-503. "Disadvantaged business Disadvantaged business enterprises" (DBEs) were defined as those enterprises at least 51 percent owned by "socially and economically disadvantaged individuals," defined in turn as: those individuals who have been subjected to racial, sexual or ethnic prejudice

because of their identity as a member of a group or differential treatment because of their handicap without regard to their individual qualities, and whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged. *Id.* at 994. The Ordinance further provided that racial minorities and women are rebuttably presumed to be socially and economically disadvantaged individuals, § 17–501(11)(a), but that a business which has received more than \$5 million in City contracts, even if owned by such an individual, is rebuttably presumed not to be a DBE, § 17–501(10). *Id.* at 994.

The Ordinance set goals for participation of DBEs in city contracts: 15 percent for minority-owned businesses, 10 percent for women-owned businesses, and 2 percent for businesses owned by handicapped persons. § 17–503(1). *Id.* at 994. The Ordinance applied to all City contracts, which are divided into three types — vending, construction, and personal and professional services. § 17–501(6). The percentage goals related to the total dollar amounts of City contracts and are calculated separately for each category of contracts and each City agency. *Id.* at 994.

In 1989, nine contractors associations brought suit in the Eastern District of Pennsylvania against the City of Philadelphia and two city officials, challenging the Ordinance as a facial violation of the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 994. After the City moved for judgment on the pleadings contending the Contractors lacked standing, the Contractors moved for summary judgment on the merits. The district court granted the Contractors’ motion. It ruled the Contractors had standing, based on affidavits of individual association members alleging they had been denied contracts for failure to meet the DBE goals despite being low bidders. *Id.* at 995 *citing*, 735 F.Supp. at 1283 & n. 3.

Turning to the merits of the Contractors’ equal protection claim, the district court held that *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), required it to apply the strict scrutiny standard to review the sections of the Ordinance creating a preference for minority-owned businesses. *Id.* Under that standard, the Third Circuit held a law will be invalidated if it is not “narrowly tailored” to a “compelling government interest.” *Id.* at 995.

Applying *Croson*, the district court struck down the Ordinance because the City had failed to adduce sufficiently specific evidence of past racial discrimination against minority construction contractors in Philadelphia to establish a “compelling government interest.” *Id.* at 995, *quoting*, 735 F.Supp. at 1295–98. The court also held the Ordinance was not “narrowly tailored,” emphasizing the City had not considered using race-neutral means to increase minority participation in City contracting and had failed to articulate a rationale for choosing 15 percent as the goal for minority participation. *Id.* at 995; 735 F.Supp. at 1298–99. The court held the Ordinance’s preferences for businesses owned by women and handicapped persons were similarly invalid under the less rigorous intermediate scrutiny and rational basis standards of review. *Id.* at 995 *citing*, 735 F.Supp. at 1299–1309.

On appeal, the Third Circuit in 1991 affirmed the district court’s ruling on standing, but vacated its judgment on the merits as premature because the Contractors had not responded to certain discovery requests at the time the court ruled. 945 F.2d 1260 (3d Cir.1991). The Court remanded so discovery could be completed and explicitly reserved judgment on the merits. *Id.* at 1268. On remand, all parties moved for summary judgment, and the district court reaffirmed its prior decision, holding discovery had not produced sufficient evidence of discrimination in the Philadelphia construction

industry against businesses owned by racial minorities, women, and handicapped persons to withstand summary judgment. The City and United Minority Enterprise Associates, Inc. (UMEA), which had intervened filed an appeal. *Id.*

This appeal, the Court said, presented three sets of questions: whether and to what extent the Contractors have standing to challenge the Ordinance, which standards of equal protection review govern the different sections of the Ordinance, and whether these standards justify invalidation of the Ordinance in whole or in part. *Id.* at 995.

Standing. The Supreme Court has confirmed that construction contractors have standing to challenge a minority preference ordinance upon a showing they are “able and ready to bid on contracts [subject to the ordinance] and that a discriminatory policy prevents [them] from doing so on an equal basis.” *Id.* at 995. Because the affidavits submitted to the district court established the Contractors were able and ready to bid on construction contracts, but could not do so for failure to meet the DBE percentage requirements, the court held they had standing to challenge the sections of the Ordinance covering construction contracts. *Id.* at 996.

Standards of equal protection review. The Contractors challenge the preferences given by the Ordinance to businesses owned and operated by minorities, women, and handicapped persons. In analyzing these classifications separately, the Court first considered which standard of equal protection review applies to each classification. *Id.* at 999.

Race, ethnicity, and gender. The Court found that choice of the appropriate standard of review turns on the nature of the classification. *Id.* at 999. Because under equal protection analysis classifications based on race, ethnicity, or gender are inherently suspect, they merit closer judicial attention. *Id.* Accordingly, the Court determined whether the Ordinance contains race- or gender-based classifications. The Ordinance’s classification scheme is spelled out in its definition of “socially and economically disadvantaged.” *Id.* The district court interpreted this definition to apply only to minorities, women, and handicapped persons and viewed the definition’s economic criteria as in addition to rather than in lieu of race, ethnicity, gender, and handicap. *Id.* Therefore, it applied strict scrutiny to the racial preference under *Croson* and intermediate scrutiny to the gender preference under *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982). *Id.* at 999.

A. Strict scrutiny. Under strict scrutiny, a law may only stand if it is “narrowly tailored” to a “compelling government interest.” *Id.* at 999. Under intermediate scrutiny, a law must be “substantially related” to the achievement of “important government objectives.” *Id.*

The Court agreed with the district court that the definition of “socially and economically disadvantaged individuals” included only individuals who are both victims of prejudice based on status and economically deprived. *Id.* at 999. Additionally, the last clause of the definition described economically disadvantaged individuals as those “whose ability to compete in the free enterprise system has been impaired ... as compared to others ... who are not socially disadvantaged.” *Id.* This clause, the Court found, demonstrated the drafters wished to rectify only economic disadvantage that results from social disadvantage, i.e., prejudice based on race, ethnicity, gender, or handicapped status. *Id.* The Court said the plain language of the Ordinance foreclosed the City’s argument that a white male contractor could qualify for preferential treatment solely on the basis of economic disadvantage. *Id.* at 1000.

B. Intermediate scrutiny. The Court considered the proper standard of review for the Ordinance's gender preference. The Court held a gender-based classification favoring women merited intermediate scrutiny. *Id.* at 1000, *citing*, Hogan 458 U.S. at 728. The Ordinance, the Court stated, is such a program. *Id.* Several federal courts, the Court noted, have applied intermediate scrutiny to similar gender preferences contained in state and municipal affirmative action contracting programs. *Id.* at 1001, *citing*, Coral Constr. Co. v. King County, 941 F.2d 910, 930 (9th Cir.1991), *cert. denied*, 502 U.S. 1033 (1992); Michigan Road Builders Ass'n, Inc. v. Milliken, 834 F.2d 583, 595 (6th Cir.1987), *aff'd mem.*, 489 U.S. 1061(1989); Associated General Contractors of Cal. v. City and County of San Francisco, 813 F.2d 922, 942 (9th Cir.1987); Main Line Paving Co. v. Board of Educ., 725 F.Supp. 1349, 1362 (E.D.Pa.1989).

Application of intermediate scrutiny to the Ordinance's gender preference, the Court said, also follows logically from *Croson*, which held municipal affirmative action programs benefiting racial minorities merit the same standard of review as that given other race-based classifications. *Id.* For these reasons, the Third Circuit rejected, as did the district court, those cases applying strict scrutiny to gender-based classifications. Cone Corp. v. Hillsborough County, 908 F.2d 908 (11th Cir.), *cert. denied*, 498 U.S. 983, 111 S.Ct. 516, 112 L.Ed.2d 528 (1990). *Id.* at 1000-1001. The Court agreed with the district court's choice of intermediate scrutiny to review the Ordinance's gender preference. *Id.*

Handicap. The district court reviewed the preference for handicapped business owners under the rational basis test. *Id.* at 1000, *citing* 735 F.Supp. at 1307. That standard validates the classification if it is "rationally related to a legitimate governmental purpose." *Id.* at 1001, *citing* Cleburne, 473 U.S. at 445. The Court held the district court properly chose the rational basis standard in reviewing the Ordinance's preference for handicapped persons. *Id.*

Constitutionality of the ordinance: race and ethnicity. Because strict scrutiny applies to the Ordinance's racial and ethnic preferences, the Court stated it may only uphold them if they are "narrowly tailored" to a "compelling government interest." *Id.* at 1001-2. The Court noted that in *Croson*, the Supreme Court made clear that combatting racial discrimination is a "compelling government interest." *Id.* at 1002, *quoting*, 488 U.S. at 492, 509. It also held a city can enact such a preference to remedy past or present discrimination where it has actively discriminated in its award of contracts or has been a "passive participant" in a system of racial exclusion practiced by elements of the local construction industry." *Id.* at 1002, *quoting*, 488 U.S. at 492.

In the Supreme Court's view, the "relevant statistical pool" was not the minority population, but the number of qualified minority contractors. It stressed the city did not know the number of qualified minority businesses in the area and had offered no evidence of the percentage of contract dollars minorities received as subcontractors. *Id.* at 1002, *citing* 488 U.S. at 502.

Ruling the Philadelphia Ordinance's racial preference failed to overcome strict scrutiny, the district court concluded the Ordinance "possesses four of the five characteristics fatal to the constitutionality of the Richmond Plan," *Id.* at 1002, *quoting*, 735 F.Supp. at 1298. As in *Croson*, the district court reasoned, the City relied on national statistics, a comparison between prime contract awards and the percentage of minorities in Philadelphia's population, the Ordinance's declaration it was remedial, and "conclusory" testimony of witnesses regarding discrimination in the Philadelphia construction industry. *Id.* at 1002, *quoting*, 1295-98.

In a footnote, the Court pointed out the district court also interpreted *Croson* to require “specific evidence of systematic prior discrimination in the industry in question by th[e] governmental unit” enacting the ordinance. 735 F.Supp. at 1295. The Court said this reading overlooked the statement in *Croson* that a City can be a “*passive participant*” in private discrimination by awarding contracts to firms that practice racial discrimination, and that a city “has a compelling interest in assuring that public dollars ... do not serve to finance the evil of private prejudice.” *Id.* at 1002, n. 10, *quoting*, 488 U.S. at 492.

Anecdotal evidence of racial discrimination. The City contended the district court understated the evidence of prior discrimination available to the Philadelphia City Council when it enacted the 1982 ordinance. The City Council Finance Committee received testimony from at least fourteen minority contractors who recounted personal experiences with racial discrimination. *Id.* at 1002. In certain instances, these contractors lost out despite being low bidders. The Court found this anecdotal evidence significantly outweighed that presented in *Croson*, where the Richmond City Council heard “no direct evidence of race discrimination on the part of the city in letting contracts or any evidence that the city’s prime contractors had discriminated against minority-owned subcontractors.” *Id.*, *quoting*, 488 U.S. at 480.

Although the district court acknowledged the minority contractors’ testimony was relevant under *Croson*, it discounted this evidence because “other evidence of the type deemed impermissible by the Supreme Court ... unsupported general testimony, impermissible statistics and information on the national set-aside program, ... overwhelmingly formed the basis for the enactment of the set-aside ... and therefore taint[ed] the minds of city councilmembers.” *Id.* at 1002, *quoting*, 735 F.Supp. at 1296.

The Third Circuit held, however, given *Croson*’s emphasis on statistical evidence, even had the district court credited the City’s anecdotal evidence, the Court did not believe this amount of anecdotal evidence was sufficient to satisfy strict scrutiny. *Id.* at 1003, *quoting*, *Coral Constr.*, 941 F.2d at 919 (“anecdotal evidence ... rarely, if ever, can ... show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan.”). Although anecdotal evidence alone may, the Court said, in an exceptional case, be so dominant or pervasive that it passes muster under *Croson*, it is insufficient here. *Id.* But because the combination of “anecdotal and statistical evidence is potent,” *Coral Constr.*, 941 F.2d at 919, the Court considered the statistical evidence proffered in support of the Ordinance.

Statistical evidence of racial discrimination. There are two categories of statistical evidence here, evidence undisputedly considered by City Council before it enacted the Ordinance in 1982 (the “pre-enactment” evidence), and evidence developed by the City on remand (the “post-enactment” evidence). *Id.* at 1003.

Pre-enactment statistical evidence. The principal pre-enactment statistical evidence appeared in the 1982 Report of the City Council Finance Committee and recited that minority contractors were awarded only 0.09 percent of City contract dollars during the preceding three years, 1979 through 1981, although businesses owned by blacks and Hispanics accounted for 6.4 percent of all businesses licensed to operate in Philadelphia. The Court found these statistics did not satisfy *Croson* because they did not indicate what proportion of the 6.4 percent of minority-owned businesses were available or qualified to perform City construction contracts. *Id.* at 1003. Under *Croson*, available minority-

owned businesses comprise the “relevant statistical pool.” *Id.* at 1003. Therefore, the Court held the data in the Finance Committee Report did not provide a sufficient evidentiary basis for the Ordinance.

Post-enactment statistical evidence. The “post-enactment” evidence consists of a study conducted by an economic consultant to demonstrate the disproportionately low share of public and private construction contracts awarded to minority-owned businesses in Philadelphia. The study provided the “relevant statistical pool” needed to satisfy *Croson* — the percentage of minority businesses engaged in the Philadelphia construction industry. *Id.* at 1003. The study also presented data showing that minority subcontractors were underrepresented in the private sector construction market. This data may be relevant, the Court said, if at trial the City can link it to discrimination occurring in the public sector construction market because the Ordinance covers subcontracting. *Id.* at n. 13.

The Court noted that several courts have held post-enactment evidence is admissible in determining whether an Ordinance satisfies *Croson*. *Id.* at 1004. Consideration of post-enactment evidence, the Court found was appropriate here, where the principal relief sought and the only relief granted by the district court, was an injunction. Because injunctions are prospective only, it makes sense the Court said to consider all available evidence before the district court, including the post-enactment evidence, which the district court did. *Id.*

Sufficiency of the statistical and anecdotal evidence and burden of proof. In determining whether the statistical evidence was adequate, the Court looked to what it referred to as its critical component — the “disparity index.” The index consists of the percentage of minority contractor participation in City contracts divided by the percentage of minority contractor availability or composition in the “population” of Philadelphia area construction firms. This equation yields a percentage figure which is then multiplied by 100 to generate a number between 0 and 100, with 100 consisting of full participation by minority contractors given the amount of the total contracting population they comprise. *Id.* at 1005.

The Court noted that other courts considering equal protection challenges to similar ordinances have relied on disparity indices in determining whether *Croson*’s evidentiary burden is satisfied. *Id.* Disparity indices are highly probative evidence of discrimination because they ensure that the “relevant statistical pool” of minority contractors is being considered. *Id.*

A. Statistical evidence. The study reported a disparity index for City of Philadelphia construction contracts during the years 1979 through 1981 of 4 out of a possible 100. This index, the Court stated, was significantly worse than that in other cases where ordinances have withstood constitutional attack. *Id.* at 1004, *citing*, *Cone Corp.*, 908 F.2d at 916 (10.78 disparity index); *AGC of California*, 950 F.2d at 1414 (22.4 disparity index); *Concrete Works*, 823 F.Supp. at 834 (disparity index “significantly less than” 100); *see also* *Stuart*, 951 F.2d at 451 (disparity index of 10 in police promotion program); *compare* *O’Donnell*, 963 F.2d at 426 (striking down ordinance given disparity indices of approximately 100 in two categories). Therefore, the Court found the disparity index probative of discrimination in City contracting in the Philadelphia construction industry prior to enactment of the Ordinance. *Id.*

The Contractors contended the study was methodologically flawed because it considered only prime contractors and because it failed to consider the qualifications of the minority businesses or their interest in performing City contracts. The Contractors maintained the study did not indicate why

there was a disparity between available minority contractors and their participation in contracting. The Contractors contended that these objections, without more, entitled them to summary judgment, arguing that under the strict scrutiny standard they do not bear the burden of proof, and therefore need not offer a neutral explanation for the disparity to prevail. *Id.* at 1005.

The Contractors, the Court found, misconceived the allocation of the burden of proof in affirmative action cases. *Id.* at 1005. The Supreme Court has indicated that “[t]he ultimate burden remains with [plaintiffs] to demonstrate the unconstitutionality of an affirmative action program.” *Id.* 1005. Thus, the Court held the Contractors, not the City, bear the burden of proof. *Id.* Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of contractors actually engaged by the locality or the locality’s prime contractors, an inference of discriminatory exclusion could arise. *Id.* Moreover, evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government’s determination that broader remedial relief is justified. *Id.*

The Court, following *Croson*, held where a city defends an affirmative action ordinance as a remedy for past discrimination, issues of proof are handled as they are in other cases involving a pattern or practice of discrimination. *Id.* at 1006. *Croson*’s reference to an “inference of discriminatory exclusion” based on statistics, as well as its citation to Title VII pattern cases, the Court stated, supports this interpretation. *Id.* The plaintiff bears the burden in such a case. *Id.* The Court noted the Third Circuit has indicated statistical proof of discrimination is handled similarly under Title VII and equal protection principles. *Id.*

The Court found the City’s statistical evidence had created an inference of discrimination which the Contractors would have to rebut at trial either by proving a “neutral explanation” for the disparity, “showing the statistics are flawed, ... demonstrating that the disparities shown by the statistics are not significant or actionable, ... or presenting contrasting statistical data.” *Id.* at 1007. *A fortiori*, this evidence, the Court said is sufficient for the City to withstand summary judgment. The Court stated that the Contractors’ objections to the study were properly presented to the trier of fact. *Id.* Accordingly, the Court found the City’s statistical evidence established a prima facie case of racial discrimination in the award of City of Philadelphia construction contracts. *Id.*

Consistent with strict scrutiny, the Court stated it must examine the data for each minority group contained in the Ordinance. *Id.* The Census data on which the study relied demonstrated that in 1982, the year the Ordinance was enacted, there were construction firms owned in Philadelphia by blacks, Hispanics, and Asian-Americans, but not Native Americans. *Id.* Therefore, the Court held neither the City nor prime contractors could have discriminated against construction companies owned by Native Americans at the time of the Ordinance, and the Court affirmed summary judgment as to them. *Id.*

The Census Report indicated there were 12 construction firms owned by Hispanic persons, 6 firms owned by Asian-American persons, 3 firms owned by persons of Pacific Islands descent, and 1 other minority-owned firm. *Id.* at 1008. The study calculated Hispanic firms represented 0.15 percent of the available firms and Asian-American, Pacific-Islander, and “other” minorities represented 0.12 percent of the available firms, and that these firms received no City contracts during the years 1979 through 1981. The Court did not believe these numbers were large enough to create a triable issue of discrimination. The mere fact that 0.27 percent of City construction firms — the percentage

of all of these groups combined — received no contracts does not rise to the “significant statistical disparity.” *Id.* at 1008.

B. Anecdotal evidence. Nor, the Court found, does it appear that there was any anecdotal evidence of discrimination against construction businesses owned by people of Hispanic or Asian-American descent. *Id.* at 1008. The district court found “there is no evidence whatsoever in the legislative history of the Philadelphia Ordinance that an American Indian, Eskimo, Aleut or Native Hawaiian has ever been discriminated against in the procurement of city contracts,” *Id.* at 1008, *quoting*, 735 F.Supp. at 1299, and there was no evidence of any witnesses who were members of these groups or who were Hispanic. *Id.*

The Court recognized that the small number of Philadelphia-area construction businesses owned by Hispanic or Asian-American persons did not eliminate the possibility of discrimination against these firms. *Id.* at 1008. The small number itself, the Court said, may reflect barriers to entry caused in part by discrimination. *Id.* But, the Court held, plausible hypotheses are not enough to satisfy strict scrutiny, even at the summary judgment stage. *Id.*

Conclusion on compelling government interest. The Court found that nothing in its decision prevented the City from re-enacting a preference for construction firms owned by Hispanic, Asian-American, or Native American persons based on more concrete evidence of discrimination. *Id.* In sum, the Court held, the City adduced enough evidence of racial discrimination against blacks in the award of City construction contracts to withstand summary judgment on the compelling government interest prong of the *Croson* test. *Id.*

Narrowly Tailored. The Court then decided whether the Ordinance’s racial preference was “narrowly tailored” to the compelling government interest of eradicating racial discrimination in the award of City construction contracts. *Id.* at 1008. *Croson* held this inquiry turns on four factors: (1) whether the city has first considered and found ineffective “race-neutral measures,” such as enhanced access to capital and relaxation of bonding requirements, (2) the basis offered for the percentage selected, (3) whether the program provides for waivers of the preference or other means of affording individualized treatment to contractors, and (4) whether the Ordinance applies only to minority businesses who operate in the geographic jurisdiction covered by the Ordinance. *Id.*

The City contended it enacted the Ordinance only after race-neutral alternatives proved insufficient to improve minority participation in City contracting. *Id.* It relied on the affidavits of City Council President and former Philadelphia Urban Coalition General Counsel who testified regarding the race-neutral precursors of the Ordinance — the Philadelphia Plan, which set goals for employment of minorities on public construction sites, and the Urban Coalition’s programs, which included such race-neutral measures as a revolving loan fund, a technical assistance and training program, and bonding assistance efforts. *Id.* The Court found the information in these affidavits sufficiently established the City’s prior consideration of race-neutral programs to withstand summary judgment. *Id.* at 1009.

Unlike the Richmond Ordinance, the Philadelphia Ordinance provided for several types of waivers of the 15 percent goal. *Id.* at 1009. It exempted individual contracts or classes of contracts from the Ordinance where there were an insufficient number of available minority-owned businesses “to ensure adequate competition and an expectation of reasonable prices on bids or proposals,” and

allowed a prime contractor to request a waiver of the 15 percent requirement where the contractor shows he has been unable after “a good faith effort to comply with the goals for DBE participation.” *Id.*

Furthermore, as the district court noted, the Ordinance eliminated from the program successful minority businesses — those who have won \$5 million in city contracts. *Id.* Also unlike the Richmond program, the City’s program was geographically targeted to Philadelphia businesses, as waivers and exemptions are permitted where there exist an insufficient number of MBEs “within the Philadelphia Standard Metropolitan Statistical Area.” *Id.* The Court noted other courts have found these targeting mechanisms significant in concluding programs are narrowly tailored. *Id.*

The Court said a closer question was presented by the Ordinance’s 15 percent goal. The City’s data demonstrated that, prior to the Ordinance, only 2.4 percent of available construction contractors were minority-owned. The Court found that the goal need not correspond precisely to the percentage of available contractors. *Id.* *Croson* does not impose this requirement, the Third Circuit concluded, as the Supreme Court stated only that Richmond’s 30 percent goal inappropriately assumed “minorities [would] choose a particular trade in lockstep proportion to their representation in the local population.” *Id.*, quoting, 488 U.S. at 507.

The Court pointed out that imposing a 15 percent goal for each contract may reflect the need to account for those contractors who received a waiver because insufficient minority businesses were available, and the contracts exempted from the program. *Id.* Given the strength of the Ordinance’s showing with respect to other *Croson* factors, the Court concluded the City had created a dispute of fact on whether the minority preference in the Ordinance was “narrowly tailored.” *Id.*

Gender and intermediate scrutiny. Under the intermediate scrutiny standard, the gender preference is valid if it was “substantially related to an important governmental objective.” *Id.*, at 1009.

The City contended the gender preference was aimed at the “important government objective” of remedying economic discrimination against women, and that the 10 percent goal was substantially related to this objective. In assessing this argument, the Court noted that “[i]n the context of women-business enterprise preferences, the two prongs of this intermediate scrutiny test tend to converge into one.” *Id.* at 1009. The Court held it could uphold the construction provisions of this program if the City had established a sufficient factual predicate for the claim that women-owned construction businesses have suffered economic discrimination and the 10 percent gender preference is an appropriate response. *Id.* at 1010.

Few cases have considered the evidentiary burden needed to satisfy intermediate scrutiny in this context, the Court pointed out, and there is no *Croson* analogue to provide a ready reference point. *Id.* at 1010. In particular, the Court said, it is unclear whether statistical evidence as well as anecdotal evidence is required to establish the discrimination necessary to satisfy intermediate scrutiny, and if so, how much statistical evidence is necessary. *Id.* The Court stated that the Supreme Court gender-preference cases are inconclusive. The Supreme Court, the Court concluded, had not squarely ruled on the necessity of statistical evidence of gender discrimination, and its decisions, according to the Court, were difficult to reconcile on the point. *Id.* The Court noted the Supreme Court has upheld gender preferences where no statistics were offered. *Id.*

The Supreme Court has stated that an affirmative action program survives intermediate scrutiny if the proponent can show it was “a product of analysis rather than a stereotyped reaction based on habit.” *Id.* at 1010. The Third Circuit found this standard requires the City to present probative evidence in support of its stated rationale for the gender preference, discrimination against women-owned contractors. *Id.* The Court held the City had not produced enough evidence of discrimination, noting that in its brief, the City relied on statistics in the City Council Finance Committee Report and one affidavit from a woman engaged in the catering business. *Id.* But the Court found this evidence only reflected the participation of women in City contracting generally, rather than in the construction industry, which was the only cognizable issue in this case. *Id.* at 1011.

The Court concluded the evidence offered by the City regarding women-owned construction businesses was insufficient to create an issue of fact. *Id.* at 1011. Significantly, the Court said the study contained no disparity index for women-owned construction businesses in City contracting, such as that presented for minority-owned businesses. *Id.* at 1011. Given the absence of probative statistical evidence, the City, according to the Court, must rely solely on anecdotal evidence to establish gender discrimination necessary to support the Ordinance. *Id.* But the record contained only one three-page affidavit alleging gender discrimination in the construction industry. *Id.* The only other testimony on this subject, the Court found, consisted of a single, conclusory sentence of one witness who appeared at a City Council hearing. *Id.*

This evidence the Court held was not enough to create a triable issue of fact regarding gender discrimination under the intermediate scrutiny standard. Therefore, the Court affirmed the grant of summary judgment invalidating the gender preference for construction contracts. *Id.* at 1011. The Court noted that it saw no impediment to the City re-enacting the preference if it can provide probative evidence of discrimination *Id.* at 1011.

Handicap and rational basis. The Court then addressed the 2 percent preference for businesses owned by handicapped persons. *Id.* at 1011. The district court struck down this preference under the rational basis test, based on the belief according to the Third Circuit, that *Crosson* required some evidence of discrimination against business enterprises owned by handicapped persons and therefore that the City could not rely on testimony of discrimination against handicapped individuals. *Id.*, citing 735 F.Supp. at 1308. The Court stated that a classification will pass the rational basis test if it is “rationally related to a legitimate government purpose,” *Id.*, citing, Cleburne, 473 U.S. at 440.

The Court pointed out that the Supreme Court had affirmed the permissiveness of the rational basis test in Heller v. Doe, 509 U.S. 312–43 (1993), indicating that “a [statutory] classification” subject to rational basis review “is accorded a strong presumption of validity,” and that “a state ... has no obligation to produce evidence to sustain the rationality of [the] classification.” *Id.* at 1011. Moreover, “the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record.” *Id.* at 1011.

The City stated it sought to minimize discrimination against businesses owned by handicapped persons and encouraged them to seek City contracts. The Court agreed with the district court that these are legitimate goals, but unlike the district court, the Court held the 2 percent preference was rationally related to this goal. *Id.* at 1011.

The City offered anecdotal evidence of discrimination against handicapped persons. *Id.* at 1011. Prior to amending the Ordinance in 1988 to include the preference, City Council held a hearing where eight witnesses testified regarding employment discrimination against handicapped persons both nationally and in Philadelphia. *Id.* Four witnesses spoke of discrimination against blind people, and three testified to discrimination against people with other physical handicaps. *Id.* Two of the witnesses, who were physically disabled, spoke of discrimination they and others had faced in the work force. *Id.* One of these disabled witnesses testified he was in the process of forming his own residential construction company. *Id.* at 1011-12. Additionally, two witnesses testified that the preference would encourage handicapped persons to own and operate their own businesses. *Id.* at 1012.

The Court held that under the rational basis standard, the Contractors did not carry their burden of negating every basis which supported the legislative arrangement, and that City Council was entitled to infer discrimination against the handicapped from this evidence and was entitled to conclude the Ordinance would encourage handicapped persons to form businesses to win City contracts. *Id.* at 1012. Therefore, the Court reversed the district court's grant of summary judgment invalidating this aspect of the Ordinance and remanded for entry of an order granting summary judgment to the City on this issue. *Id.*

Holding. The Court vacated the district court's grant of summary judgment on the non-construction provisions of the Ordinance, reversed the grant of summary judgment to plaintiff contractors on the construction provisions of the Ordinance as applied to businesses owned by black persons and handicapped persons, affirmed the grant of summary judgment to the plaintiff contractors on the construction provisions of the Ordinance as applied to businesses owned by Hispanic, Asian-American, or Native American persons or women, and remanded the case for further proceedings and a trial in accordance with the opinion.

Recent District Court Decisions

14. *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. March 22, 2016).

Plaintiff Kossmann 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. Kossmann 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.*

Kossmann 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 Kossmann. *Id.* at *1. Kossmann filed a motion for summary judgment; Houston filed a motion to exclude the testimony of Kossmann's expert; and Houston filed a motion for summary judgment. *Id.*

The district court referred these motions to the Magistrate Judge. The Magistrate Judge, on February 17, 2016, issued its Memorandum & Recommendation to the district court in which it found that Houston's motion to exclude Kossman's expert should be granted because the expert articulated no method and had no training in statistics or economics that would allow him to comment on the validity of the disparity study. *Id.* at *1 The Magistrate Judge also found that the MWBE program was constitutional under strict scrutiny, except with respect to the inclusion of Native American-owned businesses. *Id.* The Magistrate Judge found there was insufficient evidence to establish a need for remedial action for businesses owned by Native Americans, but found there was sufficient evidence to justify remedial action and inclusion of other racial and ethnic minorities and women-owned businesses. *Id.*

After the Magistrate Judge issued its Memorandum & Recommendation, Kossman filed objections, which the district court subsequently in its order adopting Memorandum & Recommendation, decided on March 22, 2016, affirmed and adopted the Memorandum & Recommendation of the magistrate judge and overruled the objections by Kossman. *Id.* at *2.

District court order adopting Memorandum & Recommendation of Magistrate Judge.

Dun & Bradstreet underlying data properly withheld and Kossman's proposed expert properly excluded. The district court first rejected Kossman's objection that the City of Houston improperly withheld the Dun & Bradstreet data that was utilized in the disparity study. This ruling was in connection with the district court's affirming the decision of the Magistrate Judge granting the motion of Houston to exclude the testimony of Kossman's proposed expert. Kossman had conceded that the Magistrate Judge correctly determined that Kossman's proposed expert articulated no method and relied on untested hypotheses. *Id.* at *2. Kossman also acknowledged that the expert was unable to produce data to confront the disparity study. *Id.*

Kossman had alleged that Houston withheld the underlying data from Dun & Bradstreet. The court found that under the contractual agreement between Houston and its consultant, the consultant for Houston had a licensing agreement with Dun & Bradstreet that prohibited it from providing the Dun & Bradstreet data to any third-party. *Id.* at *2. In addition, the court agreed with Houston that Kossman would not be able to offer admissible analysis of the Dun & Bradstreet data, even if it had access to the data. *Id.* As the Magistrate Judge pointed out, the court found Kossman's expert had no training in statistics or economics, and thus would not be qualified to interpret the Dun & Bradstreet data or challenge the disparity study's methods. *Id.* Therefore, the court affirmed the grant of Houston's motion to exclude Kossman's expert.

Dun & Bradstreet data is reliable and accepted by courts; bidding data rejected as problematic. The court rejected Kossman's argument that the disparity study was based on insufficient, unverified information furnished by others, and rejected Kossman's argument that bidding data is a superior measure of determining availability. *Id.* at *3.

The district court held that because the disparity study consultant did not collect the data, but instead utilized data that Dun & Bradstreet had collected, the consultant could not guarantee the information it relied on in creating the study and recommendations. *Id.* at *3. The consultant's role was to analyze that data and make recommendations based on that analysis, and it had no reason to doubt the authenticity or accuracy of the Dun & Bradstreet data, nor had Kossman presented any evidence that

would call that data into question. *Id.* As Houston pointed out, Dun & Bradstreet data is extremely reliable, is frequently used in disparity studies, and has been consistently accepted by courts throughout the country. *Id.*

Kossman presented no evidence indicating that bidding data is a comparably more accurate indicator of availability than the Dun & Bradstreet data, but rather Kossman relied on pure argument. *Id.* at *3. The court agreed with the Magistrate Judge that bidding data is inherently problematic because it reflects only those firms actually solicited for bids. *Id.* Therefore, the court found the bidding data would fail to identify those firms that were not solicited for bids due to discrimination. *Id.*

The anecdotal evidence is valid and reliable. The district court rejected Kossman's argument that the study improperly relied on anecdotal evidence, in that the evidence was unreliable and unverified. *Id.* at *3. The district court held that anecdotal evidence is a valid supplement to the statistical study. *Id.* The MWBE program is supported by both statistical and anecdotal evidence, and anecdotal evidence provides a valuable narrative perspective that statistics alone cannot provide. *Id.*

The district court also found that Houston was not required to independently verify the anecdotes. *Id.* at *3. Kossman, the district court concluded, could have presented contrary evidence, but it did not. *Id.* The district court cited other courts for the proposition that the combination of anecdotal and statistical evidence is potent, and that anecdotal evidence is nothing more than a witness's narrative of an incident told from the witness's perspective and including the witness's perceptions. *Id.* Also, the court held the city was not required to present corroborating evidence, and the plaintiff was free to present its own witness to either refute the incident described by the city's witnesses or to relate their own perceptions on discrimination in the construction industry. *Id.*

The data relied upon by the study was not stale. The court rejected Kossman's argument that the study relied on data that is too old and no longer relevant. *Id.* at *4. The court found that the data was not stale and that the study used the most current available data at the time of the study, including Census Bureau data (2006-2008) and Federal Reserve data (1993, 1998 and 2003), and the study performed regression analyses on the data. *Id.*

Moreover, Kossman presented no evidence to suggest that Houston's consultant could have accessed more recent data or that the consultant would have reached different conclusions with more recent data. *Id.*

The Houston MWBE program is narrowly tailored. The district court agreed with the Magistrate Judge that the study provided substantial evidence that Houston engaged in race-neutral alternatives, which were insufficient to eliminate disparities, and that despite race-neutral alternatives in place in Houston, adverse disparities for MWBEs were consistently observed. *Id.* at *4. Therefore, the court found there was strong evidence that a remedial program was necessary to address discrimination against MWBEs. *Id.* Moreover, Houston was not required to exhaust every possible race-neutral alternative before instituting the MWBE program. *Id.*

The district court also found that the MWBE program did not place an undue burden on Kossman or similarly situated companies. *Id.* at *4. Under the MWBE program, a prime contractor may substitute a small business enterprise like Kossman for an MWBE on a race and gender-neutral basis for up to 4 percent of the value of a contract. *Id.* Kossman did not present evidence that he ever bid

on more than 4 percent of a Houston contract. *Id.* In addition, the court stated the fact the MWBE program placed *some* burden on Kossman is insufficient to support the conclusion that the program is not nearly tailored. *Id.* The court concurred with the Magistrate Judge's observation that the proportional sharing of opportunities is, at the core, the point of a remedial program. *Id.* The district court agreed with the Magistrate Judge's conclusion that the MWBE program is nearly tailored.

Native American-owned businesses. The study found that Native American-owned businesses were utilized at a higher rate in Houston's construction contracts than would be anticipated based on their rate of availability in the relevant market area. *Id.* at *4. The court noted this finding would tend to negate the presence of discrimination against Native Americans in Houston's construction industry. *Id.*

This Houston disparity study consultant stated that the high utilization rate for Native Americans stems largely from the work of two Native American-owned firms. *Id.* The Houston consultant suggested that without these two firms, the utilization rate for Native Americans would decline significantly, yielding a statistically significant disparity ratio. *Id.*

The Magistrate Judge, according to the district court, correctly held and found that there was insufficient evidence to support including Native Americans in the MWBE program. *Id.* The court approved and adopted the Magistrate Judge explanation that the opinion of the disparity study consultant that a significant statistical disparity would exist if two of the contracting Native American-owned businesses were disregarded, is not evidence of the need for remedial action. *Id.* at *5. The district court found no equal-protection significance to the fact the majority of contracts let to Native American-owned businesses were to only two firms. *Id.* Therefore, the utilization goal for businesses owned by Native Americans is not supported by a strong evidentiary basis. *Id.* at *5.

The district court agreed with the Magistrate Judge's recommendation that the district court grant summary judgment in favor of Kossman with respect to the utilization goal for Native American-owned business. *Id.* The court found there was limited significance to the Houston consultant's opinion that utilization of Native American-owned businesses would drop to statistically significant levels if two Native American-owned businesses were ignored. *Id.* at *5.

The court stated the situation presented by the Houston disparity study consultant of a "hypothetical non-existence" of these firms is not evidence and cannot satisfy strict scrutiny. *Id.* at *5. Therefore, the district court adopted the Magistrate Judge's recommendation with respect to excluding the utilization goal for Native American-owned businesses. *Id.* The court noted that a preference for Native American-owned businesses could become constitutionally valid in the future if there were sufficient evidence of discrimination against Native American-owned businesses in Houston's construction contracts. *Id.* at *5.

Conclusion. The district court held that the Memorandum & Recommendation of the Magistrate Judge is adopted in full; Houston's motion to exclude the Kossman's proposed expert witness is granted; Kossman's motion for summary judgment is granted with respect to excluding the utilization goal for Native American-owned businesses and denied in all other respects; Houston's motion for summary judgment is denied with respect to including the utilization goal for Native American-owned businesses and granted in all other respects as to the MWBE program for other minorities and women-owned firms. *Id.* at *5.

Memorandum and Recommendation by Magistrate Judge, dated February 17, 2016, S.D. Texas, Civil Action No. H-14-1203.

Kossman’s proposed expert excluded and not admissible. Kossman in its motion for summary judgment solely relied on the testimony of its proposed expert, and submitted no other evidence in support of its motion. The Magistrate Judge (hereinafter “MJ”) granted Houston’s motion to exclude testimony of Kossman’s proposed expert, which the district court adopted and approved, for multiple reasons. The MJ found that his experience does not include designing or conducting statistical studies, and he has no education or training in statistics or economics. *See*, MJ, Memorandum and Recommendation (“M&R”) by MJ, dated February 17, 2016, at 31, S.D. Texas, Civil Action No. H-14-1203. The MJ found he was not qualified to collect, organize or interpret numerical data, has no experience extrapolating general conclusions about a subset of the population by sampling it, has demonstrated no knowledge of sampling methods or understanding of the mathematical concepts used in the interpretation of raw data, and thus, is not qualified to challenge the methods and calculations of the disparity study. *Id.*

The MJ found that the proposed expert report is only a theoretical attack on the study with no basis and objective evidence, such as data or testimony of construction firms in the relative market area that support his assumptions regarding available MWBEs or comparative studies that control the factors about which he complained. *Id.* at 31. The MJ stated that the proposed expert is not an economist and thus is not qualified to challenge the disparity study explanation of its economic considerations. *Id.* at 31. The proposed expert failed to provide econometric support for the use of bidder data, which he argued was the better source for determining availability, cited no personal experience for the use of bidder data, and provided no proof that would more accurately reflect availability of MWBEs absent discriminatory influence. *Id.* Moreover, he acknowledged that no bidder data had been collected for the years covered by the study. *Id.*

The court found that the proposed expert articulated no method at all to do a disparity study, but merely provided untested hypotheses. *Id.* at 33. The proposed expert’s criticisms of the study, according to the MJ, were not founded in cited professional social science or econometric standards. *Id.* at 33. The MJ concludes that the proposed expert is not qualified to offer the opinions contained in his report, and that his report is not relevant, not reliable, and, therefore, not admissible. *Id.* at 34.

Relevant geographic market area. The MJ found the market area of the disparity analysis was geographically confined to area codes in which the majority of the public contracting construction firms were located. *Id.* at 3-4, 51. The relevant market area, the MJ said, was weighted by industry, and therefore the study limited the relevant market area by geography and industry based on Houston’s past years’ records from prior construction contracts. *Id.* at 3-4, 51.

Availability of MWBEs. The MJ concluded disparity studies that compared the availability of MWBEs in the relevant market with their utilization in local public contracting have been widely recognized as strong evidence to find a compelling interest by a governmental entity for making sure that its public dollars do not finance racial discrimination. *Id.* at 52-53. Here, the study defined the market area by reviewing past contract information, and defined the relevant market according to two critical factors, geography and industry. *Id.* at 3-4, 53. Those parameters, weighted by dollars attributable to each industry, were used to identify for comparison MWBEs that were available and MWBEs that had been utilized in Houston’s construction contracting over the last five and one-half

years. *Id.* at 4-6, 53. The study adjusted for owner labor market experience and educational attainment in addition to geographic location and industry affiliation. *Id.* at 6, 53.

Kossman produced no evidence that the availability estimate was inadequate. *Id.* at 53. Plaintiff's criticisms of the availability analysis, including for capacity, the court stated was not supported by any contrary evidence or expert opinion. *Id.* at 53-54. The MJ rejected Plaintiff's proposed expert's suggestion that analysis of bidder data is a better way to identify MWBEs. *Id.* at 54. The MJ noted that Kossman's proposed expert presented no comparative evidence based on bidder data, and the MJ found that bidder data may produce availability statistics that are skewed by active and passive discrimination in the market. *Id.*

In addition to being underinclusive due to discrimination, the MJ said bidder data may be overinclusive due to inaccurate self-evaluation by firms offering bids despite the inability to fulfill the contract. *Id.* at 54. It is possible that unqualified firms would be included in the availability figure simply because they bid on a particular project. *Id.* The MJ concluded that the law does not require an individualized approach that measures whether MWBEs are qualified on a contract-by-contract basis. *Id.* at 55.

Disparity analysis. The study indicated significant statistical adverse disparities as to businesses owned by African Americans and Asians, which the MJ found provided a *prima facie* case of a strong basis in evidence that justified the Program's utilization goals for businesses owned by African Americans, Asian-Pacific Americans, and subcontinent Asian Americans. *Id.* at 55.

The disparity analysis did not reflect significant statistical disparities as to businesses owned by Hispanic Americans, Native Americans or nonminority women. *Id.* at 55-56. The MJ found, however, the evidence of significant statistical adverse disparity in the utilization of Hispanic-owned businesses in the unremediated, private sector met Houston's *prima facie* burden of producing a strong evidentiary basis for the continued inclusion of businesses owned by Hispanic Americans. *Id.* at 56. The MJ said the difference between the private sector and Houston's construction contracting was especially notable because the utilization of Hispanic-owned businesses by Houston has benefitted from Houston's remedial program for many years. *Id.* Without a remedial program, the MJ stated the evidence suggests, and no evidence contradicts, a finding that utilization would fall back to private sector levels. *Id.*

With regard to businesses owned by Native Americans, the study indicated they were utilized to a higher percentage than their availability in the relevant market area. *Id.* at 56. Although the consultant for Houston suggested that a significant statistical disparity would exist if two of the contracting Native American-owned businesses were disregarded, the MJ found that opinion is not evidence of the need for remedial action. *Id.* at 56. The MJ concluded there was no-equal protection significance to the fact the majority of contracts let to Native American-owned businesses were to only two firms, which was indicated by Houston's consultant. *Id.*

The utilization of women-owned businesses (WBEs) declined by 50 percent when they no longer benefitted from remedial goals. *Id.* at 57. Because WBEs were eliminated during the period studied, the significance of statistical disparity, according to the MJ, is not reflected in the numbers for the period as a whole. *Id.* at 57. The MJ said during the time WBEs were not part of the program, the statistical disparity between availability and utilization was significant. *Id.* The precipitous decline in

the utilization of WBEs after WBEs were eliminated and the significant statistical disparity when WBEs did not benefit from preferential treatment, the MJ found, provided a strong basis in evidence for the necessity of remedial action. *Id.* at 57. Kossman, the MJ pointed out, offered no evidence of a gender-neutral reason for the decline. *Id.*

The MJ rejected Plaintiff's argument that prime contractor and subcontractor data should not have been combined. *Id.* at 57. The MJ said that prime contractor and subcontractor data is not required to be evaluated separately, but that the evidence should contain reliable subcontractor data to indicate discrimination by prime contractors. *Id.* at 58. Here, the study identified the MWBEs that contracted with Houston by industry and those available in the relevant market by industry. *Id.* at 58. The data, according to the MJ, was specific and complete, and separately considering prime contractors and subcontractors is not only unnecessary but may be misleading. *Id.* The anecdotal evidence indicated that construction firms had served, on different contracts, in both roles. *Id.*

The MJ stated the law requires that the targeted discrimination be identified with particularity, not that every instance of explicit or implicit discrimination be exposed. *Id.* at 58. The study, the MJ found, defined the relevant market at a sufficient level of particularity to produce evidence of past discrimination in Houston's awarding of construction contracts and to reach constitutionally sound results. *Id.*

Anecdotal evidence. Kossman criticized the anecdotal evidence with which a study supplemented its statistical analysis as not having been verified and investigated. *Id.* at 58-59. The MJ said that Kossman could have presented its own evidence, but did not. *Id.* at 59. Kossman presented no contrary body of anecdotal evidence and pointed to nothing that called into question the specific results of the market surveys and focus groups done in the study. *Id.* The court rejected any requirement that the anecdotal evidence be verified and investigated. *Id.* at 59.

Regression analyses. Kossman challenged the regression analyses done in the study of business formation, earnings and capital markets. *Id.* at 59. Kossman criticized the regression analyses for failing to precisely point to where the identified discrimination was occurring. *Id.* The MJ found that the focus on identifying where discrimination is occurring misses the point, as regression analyses is not intended to point to specific sources of discrimination, but to eliminate factors other than discrimination that might explain disparities. *Id.* at 59-60. Discrimination, the MJ said, is not revealed through evidence of explicit discrimination, but is revealed through unexplainable disparity. *Id.* at 60.

The MJ noted that data used in the regression analyses were the most current available data at the time, and for the most part data dated from within a couple of years or less of the start of the study period. *Id.* at 60. Again, the MJ stated, Kossman produced no evidence that the data on which the regression analyses were based were invalid. *Id.*

Narrow Tailoring factors. The MJ found that the Houston MWBE program satisfied the narrow tailoring prong of a strict scrutiny analysis. The MJ said that the 2013 MWBE program contained a variety of race-neutral remedies, including many educational opportunities, but that the evidence of their efficacy or lack thereof is found in the disparity analyses. *Id.* at 60-61. The MJ concluded that while the race-neutral remedies may have a positive effect, they have not eliminated the discrimination. *Id.* at 61. The MJ found Houston's race-neutral programming sufficient to satisfy the requirements of narrow tailoring. *Id.*

As to the factors of flexibility and duration of the 2013 Program, the MJ also stated these aspects satisfy narrow tailoring. *Id.* at 61. The 2013 Program employs goals as opposed to quotas, sets goals on a contract-by-contract basis, allows substitution of small business enterprises for MWBEs for up to 4 percent of the contract, includes a process for allowing good-faith waivers, and builds in due process for suspensions of contractors who fail to make good-faith efforts to meet contract goals or MWSBEs that fail to make good-faith efforts to meet all participation requirements. *Id.* at 61. Houston committed to review the 2013 Program at least every five years, which the MJ found to be a reasonably brief duration period. *Id.*

The MJ concluded that the 34 percent annual goal is proportional to the availability of MWBEs historically suffering discrimination. *Id.* at 61. Finally, the MJ found that the effect of the 2013 Program on third parties is not so great as to impose an unconstitutional burden on nonminorities. *Id.* at 62. The burden on nonminority SBEs, such as Kossman, is lessened by the 4 percent substitution provision. *Id.* at 62. The MJ noted another district court’s opinion that the mere possibility that innocent parties will share the burden of a remedial program is itself insufficient to warrant the conclusion that the program is not narrowly tailored. *Id.* at 62.

Holding. The MJ held that Houston established a *prima facie* case of compelling interest and narrow tailoring for all aspects of the MWBE program, except goals for Native American-owned businesses. *Id.* at 62. The MJ also held that Plaintiff failed to produce any evidence, much less the greater weight of evidence, that would call into question the constitutionality of the 2013 MWBE program. *Id.* at 62.

15. *H.B. Rowe Corp., Inc. v. W. Lyndo Tippet, North Carolina DOT, et al.*, 589 F. Supp.2d 587 (E.D.N.C. 2008), affirmed in part, reversed in part, and remanded, 615 F.3d 233 (4th Cir. 2010)

In *H.B. Rowe Company v. Tippet, North Carolina Department of Transportation, et al.* (“*Rowe*”), the United States District Court for the Eastern District of North Carolina, Western Division, heard a challenge to the State of North Carolina MBE and WBE Program, which is a State of North Carolina “affirmative action” program administered by the NCDOT. The NCDOT MWBE Program challenged in *Rowe* involves projects funded solely by the State of North Carolina and not funded by the USDOT. 589 F.Supp.2d 587.

Background. In this case plaintiff, a family-owned road construction business, bid on a NCDOT initiated state-funded project. NCDOT rejected plaintiff’s bid in favor of the next low bid that had proposed higher minority participation on the project as part of its bid. According to NCDOT, plaintiff’s bid was rejected because of plaintiff’s failure to demonstrate “good faith efforts” to obtain pre-designated levels of minority participation on the project.

As a prime contractor, plaintiff Rowe was obligated under the MWBE Program to either obtain participation of specified levels of MBE and WBE participation as subcontractors, or to demonstrate good faith efforts to do so. For this particular project, NCDOT had set MBE and WBE subcontractor participation goals of 10 percent and 5 percent, respectively. Plaintiff’s bid included 6.6 percent WBE participation, but no MBE participation. The bid was rejected after a review of plaintiff’s good faith efforts to obtain MBE participation. The next lowest bidder submitted a bid including 3.3 percent MBE participation and 9.3 percent WBE participation, and although not obtaining a specified level of MBE participation, it was determined to have made good faith efforts to do so. (Order of the District Court, dated March 29, 2007).

NCDOT's MWBE Program "largely mirrors" the Federal DBE Program, which NCDOT is required to comply with in awarding construction contracts that utilize Federal funds. (589 F.Supp.2d 587; Order of the District Court, dated September 28, 2007). Like the Federal DBE Program, under NCDOT's MWBE Program, the goals for minority and female participation are aspirational rather than mandatory. *Id.* An individual target for MBE participation was set for each project. *Id.*

Historically, NCDOT had engaged in several disparity studies. The most recent study was done in 2004. *Id.* The 2004 study, which followed the study in 1998, concluded that disparities in utilization of MBEs persist and that a basis remains for continuation of the MWBE Program. The new statute as revised was approved in 2006, which modified the previous MBE statute by eliminating the 10 percent and 5 percent goals and establishing a fixed expiration date of 2009.

Plaintiff filed its complaint in this case in 2003 against the NCDOT and individuals associated with the NCDOT, including the Secretary of NCDOT, W. Lyndo Tippett. In its complaint, plaintiff alleged that the MWBE statute for NCDOT was unconstitutional on its face and as applied. 589 F.Supp.2d 587.

March 29, 2007 Order of the District Court. The matter came before the district court initially on several motions, including the defendants' Motion to Dismiss or for Partial Summary Judgment, defendants' Motion to Dismiss the Claim for Mootness and plaintiff's Motion for Summary Judgment. The court in its October 2007 Order granted in part and denied in part defendants' Motion to Dismiss or for partial summary judgment; denied defendants' Motion to Dismiss the Claim for Mootness; and dismissed without prejudice plaintiff's Motion for Summary Judgment.

The court held the Eleventh Amendment to the United States Constitution bars plaintiff from obtaining any relief against defendant NCDOT, and from obtaining a retrospective damages award against any of the individual defendants in their official capacities. The court ruled that plaintiff's claims for relief against the NCDOT were barred by the Eleventh Amendment, and the NCDOT was dismissed from the case as a defendant. Plaintiff's claims for interest, actual damages, compensatory damages and punitive damages against the individual defendants sued in their official capacities also was held barred by the Eleventh Amendment and were dismissed. But the court held that plaintiff was entitled to sue for an injunction to prevent state officers from violating a federal law, and under the *Ex Parte Young* exception, plaintiff's claim for declaratory and injunctive relief was permitted to go forward as against the individual defendants who were acting in an official capacity with the NCDOT. The court also held that the individual defendants were entitled to qualified immunity, and therefore dismissed plaintiff's claim for money damages against the individual defendants in their individual capacities. Order of the District Court, dated March 29, 2007.

Defendants argued that the recent amendment to the MWBE statute rendered plaintiff's claim for declaratory injunctive relief moot. The new MWBE statute adopted in 2006, according to the court, does away with many of the alleged shortcomings argued by the plaintiff in this lawsuit. The court found the amended statute has a sunset date in 2009; specific aspirational participation goals by women and minorities are eliminated; defines "minority" as including only those racial groups which disparity studies identify as subject to underutilization in state road construction contracts; explicitly references the findings of the 2004 Disparity Study and requires similar studies to be conducted at least once every five years; and directs NCDOT to enact regulations targeting discrimination identified in the 2004 and future studies.

The court held, however, that the 2004 Disparity Study and amended MWBE statute do not remedy the primary problem which the plaintiff complained of: the use of remedial race- and gender- based preferences allegedly without valid evidence of past racial and gender discrimination. In that sense, the court held the amended MWBE statute continued to present a live case or controversy, and accordingly denied the defendants' Motion to Dismiss Claim for Mootness as to plaintiff's suit for prospective injunctive relief. Order of the District Court, dated March 29, 2007.

The court also held that since there had been no analysis of the MWBE statute apart from the briefs regarding mootness, plaintiff's pending Motion for Summary Judgment was dismissed without prejudice. Order of the District Court, dated March 29, 2007.

September 28, 2007 Order of the District Court. On September 28, 2007, the district court issued a new order in which it denied both the plaintiff's and the defendants' Motions for Summary Judgment. Plaintiff claimed that the 2004 Disparity Study is the sole basis of the MWBE statute, that the study is flawed, and therefore it does not satisfy the first prong of strict scrutiny review. Plaintiff also argued that the 2004 study tends to prove non-discrimination in the case of women; and finally, the MWBE Program fails the second prong of strict scrutiny review in that it is not narrowly tailored.

The court found summary judgment was inappropriate for either party and that there are genuine issues of material fact for trial. The first and foremost issue of material fact, according to the court, was the adequacy of the 2004 Disparity Study as used to justify the MWBE Program. Therefore, because the court found there was a genuine issue of material fact regarding the 2004 Study, summary judgment was denied on this issue.

The court also held there was confusion as to the basis of the MWBE Program, and whether it was based solely on the 2004 Study or also on the 1993 and 1998 Disparity Studies. Therefore, the court held a genuine issue of material fact existed on this issue and denied summary judgment. Order of the District Court, dated September 28, 2007.

December 9, 2008 Order of the District Court (589 F.Supp.2d 587). The district court on December 9, 2008, after a bench trial, issued an Order that found as a fact and concluded as a matter of law that plaintiff failed to satisfy its burden of proof that the North Carolina Minority and Women's Business Enterprise program, enacted by the state legislature to affect the awarding of contracts and subcontracts in state highway construction, violated the United States Constitution.

Plaintiff, in its complaint filed against the NCDOT alleged that N.C. Gen. St. § 136-28.4 is unconstitutional on its face and as applied, and that the NCDOT while administering the MWBE program violated plaintiff's rights under the federal law and the United States Constitution. Plaintiff requested a declaratory judgment that the MWBE program is invalid and sought actual and punitive damages.

As a prime contractor, plaintiff was obligated under the MWBE program to either obtain participation of specified levels of MBE and WBE subcontractors, or to demonstrate that good faith efforts were made to do so. Following a review of plaintiff's good faith efforts to obtain minority participation on the particular contract that was the subject of plaintiff's bid, the bid was rejected. Plaintiff's bid was rejected in favor of the next lowest bid, which had proposed higher minority participation on the project as part of its bid. According to NCDOT, plaintiff's bid was rejected

because of plaintiff's failure to demonstrate good faith efforts to obtain pre-designated levels of minority participation on the project. 589 F.Supp.2d 587.

North Carolina's MWBE program. The MWBE program was implemented following amendments to N.C. Gen. Stat. §136-28.4. Pursuant to the directives of the statute, the NCDOT promulgated regulations governing administration of the MWBE program. See N.C. Admin. Code tit. 19A, § 2D.1101, et seq. The regulations had been amended several times and provide that NCDOT shall ensure that MBEs and WBEs have the maximum opportunity to participate in the performance of contracts financed with non-federal funds. N.C. Admin. Code Tit. 19A § 2D.1101.

North Carolina's MWBE program, which affected only highway bids and contracts funded solely with state money, according to the district court, largely mirrored the Federal DBE Program which NCDOT is required to comply with in awarding construction contracts that utilize federal funds. 589 F.Supp.2d 587. Like the Federal DBE Program, under North Carolina's MWBE program, the targets for minority and female participation were aspirational rather than mandatory, and individual targets for disadvantaged business participation were set for each individual project. N.C. Admin. Code tit. 19A § 2D.1108. In determining what level of MBE and WBE participation was appropriate for each project, NCDOT would take into account "the approximate dollar value of the contract, the geographical location of the proposed work, a number of the eligible funds in the geographical area, and the anticipated value of the items of work to be included in the contract." *Id.* NCDOT would also consider "the annual goals mandated by Congress and the North Carolina General Assembly." *Id.*

A firm could be certified as an MBE or WBE by showing NCDOT that it is "owner controlled by one or more socially and economically disadvantaged individuals." NC Admin. Code tit. 1980, § 2D.1102.

The district court stated the MWBE program did not directly discriminate in favor of minority and women contractors, but rather "encouraged prime contractors to favor MBEs and WBEs in subcontracting before submitting bids to NCDOT." 589 F.Supp.2d 587. In determining whether the lowest bidder is "responsible," NCDOT would consider whether the bidder obtained the level of certified MBE and WBE participation previously specified in the NCDOT project proposal. If not, NCDOT would consider whether the bidder made good faith efforts to solicit MBE and WBE participation. N.C. Admin. Code tit. 19A § 2D.1108.

There were multiple studies produced and presented to the North Carolina General Assembly in the years 1993, 1998 and 2004. The 1998 and 2004 studies concluded that disparities in the utilization of minority and women contractors persist, and that there remains a basis for continuation of the MWBE program. The MWBE program as amended after the 2004 study includes provisions that eliminated the 10 percent and 5 percent goals and instead replaced them with contract-specific participation goals created by NCDOT; established a sunset provision that has the statute expiring on August 31, 2009; and provides reliance on a disparity study produced in 2004.

The MWBE program, as it stood at the time of this decision, provides that NCDOT "dictates to prime contractors the express goal of MBE and WBE subcontractors to be used on a given project. However, instead of the state hiring the MBE and WBE subcontractors itself, the NCDOT makes the prime contractor solely responsible for vetting and hiring these subcontractors. If a prime

contractor fails to hire the goal amount, it must submit efforts of ‘good faith’ attempts to do so.” 589 F.Supp.2d 587.

Compelling interest. The district court held that NCDOT established a compelling governmental interest to have the MWBE program. The court noted that the United States Supreme Court in *Croson* made clear that a state legislature has a compelling interest in eradicating and remedying private discrimination in the private subcontracting inherent in the letting of road construction contracts. 589 F.Supp.2d 587, *citing Croson*, 488 U.S. at 492. The district court found that the North Carolina Legislature established it relied upon a strong basis of evidence in concluding that prior race discrimination in North Carolina’s road construction industry existed so as to require remedial action.

The court held that the 2004 Disparity Study demonstrated the existence of previous discrimination in the specific industry and locality at issue. The court stated that disparity ratios provided for in the 2004 Disparity Study highlighted the underutilization of MBEs by prime contractors bidding on state funded highway projects. In addition, the court found that evidence relied upon by the legislature demonstrated a dramatic decline in the utilization of MBEs during the program’s suspension in 1991. The court also found that anecdotal support relied upon by the legislature confirmed and reinforced the general data demonstrating the underutilization of MBEs. The court held that the NCDOT established that, “based upon a clear and strong inference raised by this Study, they concluded minority contractors suffer from the lingering effects of racial discrimination.” 589 F.Supp.2d 587.

With regard to WBEs, the court applied a different standard of review. The court held the legislative scheme as it relates to MWBEs must serve an important governmental interest and must be substantially related to the achievement of those objectives. The court found that NCDOT established an important governmental interest. The 2004 Disparity Study provided that the average contracts awarded WBEs are significantly smaller than those awarded non-WBEs. The court held that NCDOT established based upon a clear and strong inference raised by the Study, women contractors suffer from past gender discrimination in the road construction industry.

Narrowly tailored. The district court noted that the Fourth Circuit of Appeals lists a number of factors to consider in analyzing a statute for narrow tailoring: (1) the necessity of the policy and the efficacy of alternative race neutral policies; (2) the planned duration of the policy; (3) the relationship between the numerical goal and the percentage of minority group members in the relevant population; (4) the flexibility of the policy, including the provision of waivers if the goal cannot be met; and (5) the burden of the policy on innocent third parties. 589 F.Supp.2d 587, *quoting Belk v. Charlotte-Mecklenburg Board of Education*, 269 F.3d 305, 344 (4th Cir. 2001).

The district court held that the legislative scheme in N.C. Gen. Stat. § 136-28.4 is narrowly tailored to remedy private discrimination of minorities and women in the private subcontracting inherent in the letting of road construction contracts. The district court’s analysis focused on narrowly tailoring factors (2) and (4) above, namely the duration of the policy and the flexibility of the policy. With respect to the former, the court held the legislative scheme provides the program be reviewed at least every five years to revisit the issue of utilization of MWBEs in the road construction industry. N.C. Gen. Stat. §136-28.4(b). Further, the legislative scheme includes a sunset provision so that the program will expire on August 31, 2009, unless renewed by an act of the legislature. *Id.* at § 136-28.4(e). The court held these provisions ensured the legislative scheme last no longer than necessary.

The court also found that the legislative scheme enacted by the North Carolina legislature provides flexibility insofar as the participation goals for a given contract or determined on a project by project basis. § 136-28.4(b)(1). Additionally, the court found the legislative scheme in question is not overbroad because the statute applies only to “those racial or ethnicity classifications identified by a study conducted in accordance with this section that had been subjected to discrimination in a relevant marketplace and that had been adversely affected in their ability to obtain contracts with the Department.” § 136-28.4(c)(2). The court found that plaintiff failed to provide any evidence that indicates minorities from non-relevant racial groups had been awarded contracts as a result of the statute.

The court held that the legislative scheme is narrowly tailored to remedy private discrimination of minorities and women in the private subcontracting inherent in the letting of road construction contracts, and therefore found that § 136-28.4 is constitutional.

The decision of the district court was appealed to the United States Court of Appeals for the Fourth Circuit, which affirmed in part and reversed in part the decision of the district court. *See* 615 F3d 233 (4th Cir. 2010), discussed above.

16. *Thomas v. City of Saint Paul*, 526 F. Supp.2d 959 (D. Minn 2007), affirmed, 321 Fed. Appx. 541, 2009 WL 777932 (8th Cir. March 26, 2009) (unpublished opinion), cert. denied, 130 S.Ct. 408 (2009)

In *Thomas v. City of Saint Paul*, the plaintiffs are African American business owners who brought this lawsuit claiming that the City of Saint Paul, Minnesota discriminated against them in awarding publicly-funded contracts. The City moved for summary judgment, which the United States District Court granted and issued an order dismissing the plaintiff’s lawsuit in December 2007.

The background of the case involves the adoption by the City of Saint Paul of a Vendor Outreach Program (“VOP”) that was designed to assist minority and other small business owners in competing for City contracts. Plaintiffs were VOP-certified minority business owners. Plaintiffs contended that the City engaged in racially discriminatory illegal conduct in awarding City contracts for publicly-funded projects. Plaintiff Thomas claimed that the City denied him opportunities to work on projects because of his race arguing that the City failed to invite him to bid on certain projects, the City failed to award him contracts and the fact independent developers had not contracted with his company. 526 F. Supp.2d at 962. The City contended that Thomas was provided opportunities to bid for the City’s work.

Plaintiff Brian Conover owned a trucking firm, and he claimed that none of his bids as a subcontractor on 22 different projects to various independent developers were accepted. 526 F. Supp.2d at 962. The court found that after years of discovery, plaintiff Conover offered no admissible evidence to support his claim, had not identified the subcontractors whose bids were accepted, and did not offer any comparison showing the accepted bid and the bid he submitted. *Id.* Plaintiff Conover also complained that he received bidding invitations only a few days before a bid was due, which did not allow him adequate time to prepare a competitive bid. *Id.* The court found, however, he failed to identify any particular project for which he had only a single day of bid, and did not identify any similarly situated person of any race who was afforded a longer period of time in which to submit a bid. *Id.* at 963. Plaintiff Newell claimed he submitted numerous bids on the City’s

projects all of which were rejected. *Id.* The court found, however, that he provided no specifics about why he did not receive the work. *Id.*

The VOP. Under the VOP, the City sets annual benchmarks or levels of participation for the targeted minorities groups. *Id.* at 963. The VOP prohibits quotas and imposes various “good faith” requirements on prime contractors who bid for City projects. *Id.* at 964. In particular, the VOP requires that when a prime contractor rejects a bid from a VOP-certified business, the contractor must give the City its basis for the rejection, and evidence that the rejection was justified. *Id.* The VOP further imposes obligations on the City with respect to vendor contracts. *Id.* The court found the City must seek where possible and lawful to award a portion of vendor contracts to VOP-certified businesses. *Id.* The City contract manager must solicit these bids by phone, advertisement in a local newspaper or other means. Where applicable, the contract manager may assist interested VOP participants in obtaining bonds, lines of credit or insurance required to perform under the contract. *Id.* The VOP ordinance provides that when the contract manager engages in one or more possible outreach efforts, he or she is in compliance with the ordinance. *Id.*

Analysis and Order of the Court. The district court found that the City is entitled to summary judgment because plaintiffs lack standing to bring these claims and that no genuine issue of material fact remains. *Id.* at 965. The court held that the plaintiffs had no standing to challenge the VOP because they failed to show they were deprived of an opportunity to compete, or that their inability to obtain any contract resulted from an act of discrimination. *Id.* The court found they failed to show any instance in which their race was a determinant in the denial of any contract. *Id.* at 966. As a result, the court held plaintiffs failed to demonstrate the City engaged in discriminatory conduct or policy which prevented plaintiffs from competing. *Id.* at 965-966.

The court held that in the absence of any showing of intentional discrimination based on race, the mere fact the City did not award any contracts to plaintiffs does not furnish that causal nexus necessary to establish standing. *Id.* at 966. The court held the law does not require the City to voluntarily adopt “aggressive race-based affirmative action programs” in order to award specific groups publicly-funded contracts. *Id.* at 966. The court found that plaintiffs had failed to show a violation of the VOP ordinance, or any illegal policy or action on the part of the City. *Id.*

The court stated that the plaintiffs must identify a discriminatory policy in effect. *Id.* at 966. The court noted, for example, even assuming the City failed to give plaintiffs more than one day’s notice to enter a bid, such a failure is not, per se, illegal. *Id.* The court found the plaintiffs offered no evidence that anyone else of any other race received an earlier notice, or that he was given this allegedly tardy notice as a result of his race. *Id.*

The court concluded that even if plaintiffs may not have been hired as a subcontractor to work for prime contractors receiving City contracts, these were independent developers and the City is not required to defend the alleged bad acts of others. *Id.* Therefore, the court held plaintiffs had no standing to challenge the VOP. *Id.* at 966.

Plaintiff’s claims. The court found that even assuming plaintiffs possessed standing, they failed to establish facts which demonstrated a need for a trial, primarily because each theory of recovery is viable only if the City “intentionally” treated plaintiffs unfavorably because of their race. *Id.* at 967. The court held to establish a prima facie violation of the equal protection clause, there must be state

action. *Id.* Plaintiffs must offer facts and evidence that constitute proof of “racially discriminatory intent or purpose.” *Id.* at 967. Here, the court found that plaintiff failed to allege any single instance showing the City “intentionally” rejected VOP bids based on their race. *Id.*

The court also found that plaintiffs offered no evidence of a specific time when any one of them submitted the lowest bid for a contract or a subcontract, or showed any case where their bids were rejected on the basis of race. *Id.* The court held the alleged failure to place minority contractors in a preferred position, without more, is insufficient to support a finding that the City failed to treat them equally based upon their race. *Id.*

The City rejected the plaintiff’s claims of discrimination because the plaintiffs did not establish by evidence that the City “intentionally” rejected their bid due to race or that the City “intentionally” discriminated against these plaintiffs. *Id.* at 967-968. The court held that the plaintiffs did not establish a single instance showing the City deprived them of their rights, and the plaintiffs did not produce evidence of a “discriminatory motive.” *Id.* at 968. The court concluded that plaintiffs had failed to show that the City’s actions were “racially motivated.” *Id.*

The Eighth Circuit Court of Appeals affirmed the ruling of the district court. *Thomas v. City of Saint Paul*, 2009 WL 777932 (8th Cir. 2009)(unpublished opinion). The Eighth Circuit affirmed based on the decision of the district court and finding no reversible error.

17. *Thompson Building Wrecking Co. v. Augusta, Georgia*, No. 1:07CV019, 2007 WL 926153 (S.D. Ga. Mar. 14, 2007)(Slip. Op.)

This case considered the validity of the City of Augusta’s local minority DBE program. The district court enjoined the City from favoring any contract bid on the basis of racial classification and based its decision principally upon the outdated and insufficient data proffered by the City in support of its program. 2007 WL 926153 at *9-10.

The City of Augusta enacted a local DBE program based upon the results of a disparity study completed in 1994. The disparity study examined the disparity in socioeconomic status among races, compared black-owned businesses in Augusta with those in other regions and those owned by other racial groups, examined “Georgia’s racist history” in contracting and procurement, and examined certain data related to Augusta’s contracting and procurement. *Id.* at *1-4. The plaintiff contractors and subcontractors challenged the constitutionality of the DBE program and sought to extend a temporary injunction enjoining the City’s implementation of racial preferences in public bidding and procurement.

The City defended the DBE program arguing that it did not utilize racial classifications because it only required vendors to make a “good faith effort” to ensure DBE participation. *Id.* at *6. The court rejected this argument noting that bidders were required to submit a “Proposed DBE Participation” form and that bids containing DBE participation were treated more favorably than those bids without DBE participation. The court stated: “Because a person’s business can qualify for the favorable treatment based on that person’s race, while a similarly situated person of another race would not qualify, the program contains a racial classification.” *Id.*

The court noted that the DBE program harmed subcontractors in two ways: first, because prime contractors will discriminate between DBE and non-DBE subcontractors and a bid with a DBE subcontractor would be treated more favorably; and second, because the City would favor a bid containing DBE participation over an equal or even superior bid containing no DBE participation. *Id.*

The court applied the strict scrutiny standard set forth in *Croson* and *Engineering Contractors Association* to determine whether the City had a compelling interest for its program and whether the program was narrowly tailored to that end. The court noted that pursuant to *Croson*, the City would have a compelling interest in assuring that tax dollars would not perpetuate private prejudice. But the court found (*citing to Croson*), that a state or local government must identify that discrimination, “public or private, with some specificity before they may use race-conscious relief.” The court cited the Eleventh Circuit’s position that “‘gross statistical disparities’ between the proportion of minorities hired by the public employer and the proportion of minorities willing and able to work” may justify an affirmative action program. *Id.* at *7. The court also stated that anecdotal evidence is relevant to the analysis.

The court determined that while the City’s disparity study showed some statistical disparities buttressed by anecdotal evidence, the study suffered from multiple issues. *Id.* at *7-8. Specifically, the court found that those portions of the study examining discrimination outside the area of subcontracting (e.g., socioeconomic status of racial groups in the Augusta area) were irrelevant for purposes of showing a compelling interest. The court also cited the failure of the study to differentiate between different minority races as well as the improper aggregation of race- and gender-based discrimination referred to as Simpson’s Paradox.

The court assumed for purposes of its analysis that the City could show a compelling interest but concluded that the program was not narrowly tailored and thus could not satisfy strict scrutiny. The court found that it need look no further beyond the fact of the thirteen-year duration of the program absent further investigation, and the absence of a sunset or expiration provision, to conclude that the DBE program was not narrowly tailored. *Id.* at *8. Noting that affirmative action is permitted only sparingly, the court found: “[i]t would be impossible for Augusta to argue that, 13 years after last studying the issue, racial discrimination is so rampant in the Augusta contracting industry that the City must affirmatively act to avoid being complicit.” *Id.* The court held in conclusion, that the plaintiffs were “substantially likely to succeed in proving that, when the City requests bids with minority participation and in fact favors bids with such, the plaintiffs will suffer racial discrimination in violation of the Equal Protection Clause.” *Id.* at *9.

In a subsequent Order dated September 5, 2007, the court denied the City’s motion to continue plaintiff’s Motion for Summary Judgment, denied the City’s Rule 12(b)(6) motion to dismiss, and stayed the action for 30 days pending mediation between the parties. Importantly, in this Order, the court reiterated that the female- and locally-owned business components of the program (challenged in plaintiff’s Motion for Summary Judgment) would be subject to intermediate scrutiny and rational basis scrutiny, respectively. The court also reiterated its rejection of the City’s challenge to the plaintiffs’ standing. The court noted that under *Adarand*, preventing a contractor from competing on an equal footing satisfies the particularized injury prong of standing. And showing that the contractor will sometime in the future bid on a City contract “that offers financial incentives to a prime

contractor for hiring disadvantaged subcontractors” satisfies the second requirement that the particularized injury be actual or imminent. Accordingly, the court concluded that the plaintiffs have standing to pursue this action.

18. *Hershell Gill Consulting Engineers, Inc. v. Miami-Dade County*, 333 F. Supp.2d 1305 (S.D. Fla. 2004)

The decision in *Hershell Gill Consulting Engineers, Inc. v. Miami-Dade County*, is significant to the disparity study because it applied and followed the *Engineering Contractors Association* decision in the context of contracting and procurement for goods and services (including architect and engineer services). Many of the other cases focused on construction, and thus *Hershell Gill* is instructive as to the analysis relating to architect and engineering services. The decision in *Hershell Gill* also involved a district court in the Eleventh Circuit imposing compensatory and punitive damages upon individual County Commissioners due to the district court’s finding of their willful failure to abrogate an unconstitutional MBE/WBE Program. In addition, the case is noteworthy because the district court refused to follow the 2003 Tenth Circuit Court of Appeals decision in *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003). See discussion, *infra*.

Six years after the decision in *Engineering Contractors Association*, two white male-owned engineering firms (the “plaintiffs”) brought suit against Engineering Contractors Association (the “County”), the former County Manager, and various current County Commissioners (the “Commissioners”) in their official and personal capacities (collectively the “defendants”), seeking to enjoin the same “participation goals” in the same MWBE program deemed to violate the Fourteenth Amendment in the earlier case. 333 F. Supp. 1305, 1310 (S.D. Fla. 2004). After the Eleventh Circuit’s decision in *Engineering Contractors Association* striking down the MWBE programs as applied to construction contracts, the County enacted a Community Small Business Enterprise (“CSBE”) program for construction contracts, “but continued to apply racial, ethnic, and gender criteria to its purchases of goods and services in other areas, including its procurement of A&E services.” *Id.* at 1311.

The plaintiffs brought suit challenging the Black Business Enterprise (BBE) program, the Hispanic Business Enterprise (HBE) program, and the Women Business Enterprise (WBE) program (collectively “MBE/WBE”). *Id.* The MBE/WBE programs applied to A&E contracts in excess of \$25,000. *Id.* at 1312. The County established five “contract measures” to reach the participation goals: (1) set asides, (2) subcontractor goals, (3) project goals, (4) bid preferences, and (5) selection factors. *Id.* Once a contract was identified as covered by a participation goal, a review committee would determine whether a contract measure should be utilized. *Id.* The County was required to review the efficacy of the MBE/WBE programs annually, and reevaluated the continuing viability of the MBE/WBE programs every five years. *Id.* at 1313. However, the district court found “the participation goals for the three MBE/WBE programs challenged ... remained unchanged since 1994.” *Id.*

In 1998, counsel for plaintiffs contacted the County Commissioners requesting the discontinuation of contract measures on A&E contracts. *Id.* at 1314. Upon request of the Commissioners, the county manager then made two reports (an original and a follow-up) measuring parity in terms of dollars awarded and dollars paid in the areas of A&E for blacks, Hispanics, and women, and concluded both times that the “County has reached parity for black, Hispanic, and Women-owned firms in the areas of [A&E] services.” The final report further stated, “Based on all the analyses that have been

performed, the County does not have a basis for the establishment of participation goals which would allow staff to apply contract measures.” *Id.* at 1315. The district court also found that the Commissioners were informed that “there was even less evidence to support [the MBE/WBE] programs as applied to architects and engineers 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

info USA, and a list of firms registered for technical certification with the County's Department of Public Works to compile a list of the "universe" of firms competing in the market. *Id.* For the architectural firms only, he also used a list of firms that had been issued an architecture professional license. *Id.*

Dr. Carvajal then conducted a phone survey of the identified firms. Based on his data, Dr. Carvajal concluded that disparities existed between the percentage of A&E firms owned by blacks, Hispanics, and women, and the percentage of annual business they received. *Id.* Dr. Carvajal conducted regression analyses "in order to determine the effect a firm owner's gender or race had on certain dependent variables." *Id.* Dr. Carvajal used the firm's annual volume of business as a dependent variable and determined the disparities were due in each case to the firm's gender and/or ethnic classification. *Id.* at 1320. He also performed variants to the equations including: (1) using certification rather than survey data for the experience / capacity indicators, (2) with the outliers deleted, (3) with publicly-owned firms deleted, (4) with the dummy variables reversed, and (5) using only currently certified firms." *Id.* Dr. Carvajal's results remained substantially unchanged. *Id.*

Based on his analysis of the marketplace data, Dr. Carvajal concluded that the "gross statistical disparities" in the annual business volume for Hispanic- and women-owned firms could be attributed to discrimination; he "did not find sufficient evidence of discrimination against blacks." *Id.*

The court held that Dr. Carvajal's study constituted neither a "strong basis in evidence" of discrimination necessary to justify race- and ethnicity-conscious measures, nor did it constitute "sufficient probative evidence" necessary to justify the gender-conscious measures. *Id.* The court made an initial finding that no disparity existed to indicate underutilization of MBE/WBEs in the award of A&E contracts by the County, nor was there underutilization of MBE/WBEs in the contracts they were awarded. *Id.* The court found that an analysis of the award data indicated, "[i]f anything, the data indicates an overutilization of minority-owned firms by the County in relation to their numbers in the marketplace." *Id.*

With respect to the marketplace data, the County conceded that there was insufficient evidence of discrimination against blacks to support the BBE program. *Id.* at 1321. With respect to the marketplace data for Hispanics and women, the court found it "unreliable and inaccurate" for three reasons: (1) the data failed to properly measure the geographic market, (2) the data failed to properly measure the product market, and (3) the marketplace survey was unreliable. *Id.* at 1321-25.

The court ruled that it would not follow the Tenth Circuit decision of *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003), as the burden of proof enunciated by the Tenth Circuit conflicts with that of the Eleventh Circuit, and the "Tenth Circuit's decision is flawed for the reasons articulated by Justice Scalia in his dissent from the denial of certiorari." *Id.* at 1325 (internal citations omitted).

The defendant intervenors presented anecdotal evidence pertaining only to discrimination against women in the County's A&E industry. *Id.* The anecdotal evidence consisted of the testimony of three A&E professional women, "nearly all" of which was related to discrimination in the award of County contracts. *Id.* at 1326. However, the district court found that the anecdotal evidence contradicted Dr. Carvajal's study indicating that no disparity existed with respect to the award of County A&E contracts. *Id.*

The court quoted the Eleventh Circuit in *Engineering Contractors Association* for the proposition “that only in the rare case will anecdotal evidence suffice standing alone.” *Id.* (internal citations omitted). The court held that “[t]his is not one of those rare cases.” The district court concluded that the statistical evidence was “unreliable and fail[ed] to establish the existence of discrimination,” and the anecdotal evidence was insufficient as it did not even reach the level of anecdotal evidence in *Engineering Contractors Association* where the County employees themselves testified. *Id.*

The court made an initial finding that a number of minority groups provided preferential treatment were in fact majorities in the County in terms of population, voting capacity, and representation on the County Commission. *Id.* at 1326-1329. For purposes only of conducting the strict scrutiny analysis, the court then assumed that Dr. Carvajal’s report demonstrated discrimination against Hispanics (note the County had conceded it had insufficient evidence of discrimination against blacks) and sought to determine whether the HBE program was narrowly tailored to remedying that discrimination. *Id.* at 1330. However, the court found that because the study failed to “identify who is engaging in the discrimination, what form the discrimination might take, at what stage in the process it is taking place, or how the discrimination is accomplished ... it is virtually impossible to narrowly tailor any remedy, and the HBE program fails on this fact alone.” *Id.*

The court found that even after the County Managers informed the Commissioners that the County had reached parity in the A&E industry, the Commissioners declined to enact a CSBE ordinance, a race-neutral measure utilized in the construction industry after *Engineering Contractors Association*. *Id.* Instead, the Commissioners voted to continue the HBE program. *Id.* The court held that the County’s failure to even explore a program similar to the CSBE ordinance indicated that the HBE program was not narrowly tailored. *Id.* at 1331.

The court also found that the County enacted a broad anti-discrimination ordinance imposing harsh penalties for a violation thereof. *Id.* However, “not a single witness at trial knew of any instance of a complaint being brought under this ordinance concerning the A&E industry,” leading the court to conclude that the ordinance was either not being enforced, or no discrimination existed. *Id.* Under either scenario, the HBE program could not be narrowly tailored. *Id.*

The court found the waiver provisions in the HBE program inflexible in practice. *Id.* Additionally, the court found the County had failed to comply with the provisions in the HBE program requiring adjustment of participation goals based on annual studies, because the County had not in fact conducted annual studies for several years. *Id.* The court found this even “more problematic” because the HBE program did not have a built-in durational limit, and thus blatantly violated Supreme Court jurisprudence requiring that racial and ethnic preferences “must be limited in time.” *Id.* at 1332, citing *Grutter*, 123 S. Ct. at 2346. For the foregoing reasons, the court concluded the HBE program was not narrowly tailored. *Id.* at 1332.

With respect to the WBE program, the court found that “the failure of the County to identify who is discriminating and where in the process the discrimination is taking place indicates (though not conclusively) that the WBE program is not substantially related to eliminating that discrimination.” *Id.* at 1333. The court found that the existence of the anti-discrimination ordinance, the refusal to enact a small business enterprise ordinance, and the inflexibility in setting the participation goals rendered the WBE program unable to satisfy the substantial relationship test. *Id.*

The court held that the County was liable for any compensatory damages. *Id.* at 1333-34. The court held that the Commissioners had absolute immunity for their legislative actions; however, they were not entitled to qualified immunity for their actions in voting to apply the race-, ethnicity-, and gender-conscious measures of the MBE/WBE programs if their actions violated “clearly established statutory or constitutional rights of which a reasonable person would have known ... Accordingly, the question is whether the state of the law at the time the Commissioners voted to apply [race-, ethnicity-, and gender-conscious measures] gave them ‘fair warning’ that their actions were unconstitutional. “ *Id.* at 1335-36 (internal citations omitted).

The court held that the Commissioners were not entitled to qualified immunity because they “had before them at least three cases that gave them fair warning that their application of the MBE/WBE programs ... were unconstitutional: *Croson*, *Adarand* and [*Engineering Contractors Association*].” *Id.* at 1137. The court found that the Commissioners voted to apply the contract measures after the Supreme Court decided both *Croson* and *Adarand*. *Id.* Moreover, the Eleventh Circuit had already struck down the construction provisions of the same MBE/WBE programs. *Id.* Thus, the case law was “clearly established” and gave the Commissioners fair warning that the MBE/WBE programs were unconstitutional. *Id.*

The court also found the Commissioners had specific information from the County Manager and other internal studies indicating the problems with the MBE/WBE programs and indicating that parity had been achieved. *Id.* at 1338. Additionally, the Commissioners did not conduct the annual studies mandated by the MBE/WBE ordinance itself. *Id.* For all the foregoing reasons, the court held the Commissioners were subject to individual liability for any compensatory and punitive damages.

The district court enjoined the County, the Commissioners, and the County Manager from using, or requiring the use of, gender, racial, or ethnic criteria in deciding (1) whether a response to an RFP submitted for A&E work is responsive, (2) whether such a response will be considered, and (3) whether a contract will be awarded to a consultant submitting such a response. The court awarded the plaintiffs \$100 each in nominal damages and reasonable attorneys’ fees and costs, for which it held the County and the Commissioners jointly and severally liable.

19. *Florida A.G.C. Council, Inc. v. State of Florida*, 303 F. Supp.2d 1307 (N.D. Fla. 2004)

This case is instructive to the disparity study as to the manner in which district courts within the Eleventh Circuit are interpreting and applying *Engineering Contractors Association*. It is also instructive in terms of the type of legislation to be considered by the local and state governments as to what the courts consider to be a “race-conscious” program and/or legislation, as well as to the significance of the implementation of the legislation to the analysis.

The plaintiffs, A.G.C. Council, Inc. and the South Florida Chapter of the Associated General Contractors brought this case challenging the constitutionality of certain provisions of a Florida statute (Section 287.09451, *et seq.*). The plaintiffs contended that the statute violated the Equal Protection Clause of the Fourteenth Amendment by instituting race- and gender-conscious “preferences” in order to increase the numeric representation of “MBEs” in certain industries.

According to the court, the Florida Statute enacted race-conscious and gender-conscious remedial programs to ensure minority participation in state contracts for the purchase of commodities and in construction contracts. The State created the Office of Supplier Diversity (“OSD”) to assist MBEs to become suppliers of commodities, services and construction to the state government. The OSD had certain responsibilities, including adopting rules meant to assess whether state agencies have made good faith efforts to solicit business from MBEs, and to monitor whether contractors have made good faith efforts to comply with the objective of greater overall MBE participation.

The statute enumerated measures that contractors should undertake, such as minority-centered recruitment in advertising as a means of advancing the statute’s purpose. The statute provided that each State agency is “encouraged” to spend 21 percent of the monies actually expended for construction contracts, 25 percent of the monies actually expended for architectural and engineering contracts, 24 percent of the monies actually expended for commodities and 50.5 percent of the monies actually expended for contractual services during the fiscal year for the purpose of entering into contracts with certified MBEs. The statute also provided that state agencies are allowed to allocate certain percentages for black Americans, Hispanic Americans and for American women, and the goals are broken down by construction contracts, architectural and engineering contracts, commodities and contractual services.

The State took the position that the spending goals were “precatory.” The court found that the plaintiffs had standing to maintain the action and to pursue prospective relief. The court held that the statute was unconstitutional based on the finding that the spending goals were not narrowly tailored to achieve a governmental interest. The court did not specifically address whether the articulated reasons for the goals contained in the statute had sufficient evidence, but instead found that the articulated reason would, “if true,” constitute a compelling governmental interest necessitating race-conscious remedies. Rather than explore the evidence, the court focused on the narrowly tailored requirement and held that it was not satisfied by the State.

The court found that there was no evidence in the record that the State contemplated race-neutral means to accomplish the objectives set forth in Section 287.09451 *et seq.*, such as “simplification of bidding procedures, relaxation of bonding requirements, training or financial aid for disadvantaged entrepreneurs of all races [which] would open the public contracting market to all those who have suffered the effects of past discrimination.” *Florida A.G.C. Council*, 303 F.Supp.2d at 1315, *quoting Eng’g Contractors Ass’n*, 122 F.3d at 928, *quoting Croson*, 488 U.S. at 509-10.

The court noted that defendants did not seem to disagree with the report issued by the State of Florida Senate that concluded there was little evidence to support the spending goals outlined in the statute. Rather, the State of Florida argued that the statute is “permissive.” The court, however, held that “there is no distinction between a statute that is precatory versus one that is compulsory when the challenged statute ‘induces an employer to hire with an eye toward meeting ... [a] numerical target.’ *Florida A.G.C. Council*, 303 F.Supp.2d at 1316.

The court found that the State applies pressure to State agencies to meet the legislative objectives of the statute extending beyond simple outreach efforts. The State agencies, according to the court, were required to coordinate their MBE procurement activities with the OSD, which includes adopting an MBE utilization plan. If the State agency deviated from the utilization plan in two consecutive and three out of five total fiscal years, then the OSD could review any and all

solicitations and contract awards of the agency as deemed necessary until such time as the agency met its utilization plan. The court held that based on these factors, although alleged to be “permissive,” the statute textually was not.

Therefore, the court found that the statute was not narrowly tailored to serve a compelling governmental interest, and consequently violated the Equal Protection Clause of the Fourteenth Amendment.

20. *The Builders Ass’n of Greater Chicago v. The City of Chicago*, 298 F. Supp.2d 725 (N.D. Ill. 2003)

This case is instructive because of the court’s focus and analysis on whether the City of Chicago’s MBE/WBE program was narrowly tailored. The basis of the court’s holding that the program was not narrowly tailored is instructive for any program considered because of the reasons provided as to why the program did not pass muster.

The plaintiff, the Builders Association of Greater Chicago, brought this suit challenging the constitutionality of the City of Chicago’s construction Minority- and Women-Owned Business (“MWBE”) Program. The court held that the City of Chicago’s MWBE program was unconstitutional because it did not satisfy the requirement that it be narrowly tailored to achieve a compelling governmental interest. The court held that it was not narrowly tailored for several reasons, including because there was no “meaningful individualized review” of MBE/WBEs; it had no termination date nor did it have any means for determining a termination; the “graduation” revenue amount for firms to graduate out of the program was very high, \$27,500,000, and in fact very few firms graduated; there was no net worth threshold; and, waivers were rarely or never granted on construction contracts. The court found that the City program was a “rigid numerical quota,” not related to the number of available, willing and able firms. Formulistic percentages, the court held, could not survive the strict scrutiny.

The court held that the goals plan did not address issues raised as to discrimination regarding market access and credit. The court found that a goals program does not directly impact prime contractor’s selection of subcontractors on non-goals private projects. The court found that a set-aside or goals program does not directly impact difficulties in accessing credit, and does not address discriminatory loan denials or higher interest rates. The court found the City has not sought to attack discrimination by primes directly, “but it could.” 298 F.2d 725. “To monitor possible discriminatory conduct it could maintain its certification list and require those contracting with the City to consider unsolicited bids, to maintain bidding records, and to justify rejection of any certified firm submitting the lowest bid. It could also require firms seeking City work to post private jobs above a certain minimum on a website or otherwise provide public notice ...” *Id.*

The court concluded that other race-neutral means were available to impact credit, high interest rates, and other potential marketplace discrimination. The court pointed to race-neutral means including linked deposits, with the City banking at institutions making loans to startup and smaller firms. Other race-neutral programs referenced included quick pay and contract downsizing; restricting self-performance by prime contractors; a direct loan program; waiver of bonds on contracts under \$100,000; a bank participation loan program; a 2 percent local business preference; outreach programs and technical assistance and workshops; and seminars presented to new construction firms.

The court held that race and ethnicity do matter, but that racial and ethnic classifications are highly suspect, can be used only as a last resort, and cannot be made by some mechanical formulation. Therefore, the court concluded the City's MWBE Program could not stand in its present guise. The court held that the present program was not narrowly tailored to remedy past discrimination and the discrimination demonstrated to now exist.

The court entered an injunction, but delayed the effective date for six months from the date of its Order, December 29, 2003. The court held that the City had a "compelling interest in not having its construction projects slip back to near monopoly domination by white male firms." The court ruled a brief continuation of the program for six months was appropriate "as the City rethinks the many tools of redress it has available." Subsequently, the court declared unconstitutional the City's MWBE Program with respect to construction contracts and permanently enjoined the City from enforcing the Program. 2004 WL 757697 (N.D. Ill 2004).

21. *Associated Utility Contractors of Maryland, Inc. v. Mayor and City Council of Baltimore*, 218 F. Supp.2d 749 (D. Md. 2002)

This case is instructive because the court found the Executive Order of the Mayor of the City of Baltimore was precatory in nature (creating no legal obligation or duty) and contained no enforcement mechanism or penalties for noncompliance and imposed no substantial restrictions; the Executive Order announced goals that were found to be aspirational only.

The Associated Utility Contractors of Maryland, Inc. ("AUC") sued the City of Baltimore challenging its ordinance providing for minority and women-owned business enterprise ("MWBE") participation in city contracts. Previously, an earlier City of Baltimore MWBE program was declared unconstitutional. *Associated Utility Contractors of Maryland, Inc. v. Mayor and City Council of Baltimore*, 83 F. Supp.2d 613 (D. Md. 2000). The City adopted a new ordinance that provided for the establishment of MWBE participation goals on a contract-by-contract basis, and made several other changes from the previous MWBE program declared unconstitutional in the earlier case.

In addition, the Mayor of the City of Baltimore issued an Executive Order that announced a goal of awarding 35 percent of all City contracting dollars to MBE/WBEs. The court found this goal of 35 percent participation was aspirational only and the Executive Order contained no enforcement mechanism or penalties for noncompliance. The Executive Order also specified many "noncoercive" outreach measures to be taken by the City agencies relating to increasing participation of MBE/WBEs. These measures were found to be merely aspirational and no enforcement mechanism was provided.

The court addressed in this case only a motion to dismiss filed by the City of Baltimore arguing that the Associated Utility Contractors had no standing. The court denied the motion to dismiss holding that the association had standing to challenge the new MBE/WBE ordinance, although the court noted that it had significant issues with the AUC having representational standing because of the nature of the MBE/WBE plan and the fact the AUC did not have any of its individual members named in the suit. The court also held that the AUC was entitled to bring an as applied challenge to the Executive Order of the Mayor, but rejected it having stood to bring a facial challenge based on a finding that it imposes no requirement, creates no sanctions, and does not inflict an injury upon any member of the AUC in any concrete way. Therefore, the Executive Order did not create a "case or

controversy” in connection with a facial attack. The court found the wording of the Executive Order to be precatory and imposing no substantive restrictions.

After this decision the City of Baltimore and the AUC entered into a settlement agreement and a dismissal with prejudice of the case. An order was issued by the court on October 22, 2003 dismissing the case with prejudice.

22. Kornhass Construction, Inc. v. State of Oklahoma, Department of Central Services, 140 F.Supp.2d 1232 (W.D. OK. 2001)

Plaintiffs, nonminority contractors, brought this action against the State of Oklahoma challenging minority bid preference provisions in the Oklahoma Minority Business Enterprise Assistance Act (“MBE Act”). The Oklahoma MBE Act established a bid preference program by which certified minority business enterprises are given favorable treatment on competitive bids submitted to the state. 140 F.Supp.2d at 1235–36. Under the MBE Act, the bids of nonminority contractors were raised by 5 percent, placing them at a competitive disadvantage according to the district court. *Id.* at 1235–1236.

The named plaintiffs bid on state contracts in which their bids were increased by 5 percent as they were nonminority business enterprises. Although the plaintiffs actually submitted the lowest dollar bids, once the 5 percent factor was applied, minority bidders became the successful bidders on certain contracts. 140 F.Supp. at 1237.

In determining the constitutionality or validity of the Oklahoma MBE Act, the district court was guided in its analysis by the Tenth Circuit Court of Appeals decision in *Adarand Constructors, Inc. v. Slater*, 288 F.3d 1147 (10th Cir. 2000). The district court pointed out that in *Adarand VII*, the Tenth Circuit found compelling evidence of barriers to both minority business formation and existing minority businesses. *Id.* at 1238. In sum, the district court noted that the Tenth Circuit concluded that the Government had met its burden of presenting a strong basis in evidence sufficient to support its articulated, constitutionally valid, compelling interest. 140 F.Supp.2d at 1239, *citing Adarand VII*, 228 F.3d 1147, 1174.

Compelling state interest. The district court, following *Adarand VII*, applied the strict scrutiny analysis, arising out of the Fourteenth Amendment’s Equal Protection Clause, in which a race-based affirmative action program withstands strict scrutiny only if it is narrowly tailored to serve a compelling governmental interest. *Id.* at 1239. The district court pointed out that it is clear from Supreme Court precedent, there may be a compelling interest sufficient to justify race-conscious affirmative action measures. *Id.* The Fourteenth Amendment permits race-conscious programs that seek both to eradicate discrimination by the governmental entity itself and to prevent the governmental entity from becoming a “passive participant” in a system of racial exclusion practiced by private businesses. *Id.* at 1240. Therefore, the district court concluded that both the federal and state governments have a compelling interest assuring that public dollars do not serve to finance the evil of private prejudice. *Id.*

The district court stated that a “mere statistical disparity in the proportion of contracts awarded to a particular group, standing alone, does not demonstrate the evil of private or public racial prejudice.” *Id.* Rather, the court held that the “benchmark for judging the adequacy of a state’s factual predicate for affirmative action legislation is whether there exists a strong basis in the evidence of the state’s conclusion that remedial action was necessary.” *Id.* The district court found that the Supreme Court made it clear that the state bears the burden of demonstrating a strong basis in evidence for its conclusion that remedial action was necessary by proving either that the state itself discriminated in the past or was “a passive participant” in private industry’s discriminatory practices. *Id.* at 1240, *citing to Associated General Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 735 (6th Cir. 2000) and *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 at 486-492 (1989).

With this background, the State of Oklahoma stated that its compelling state interest “is to promote the economy of the State and to ensure that minority business enterprises are given an opportunity to compete for state contracts.” *Id.* at 1240. Thus, the district court found the State admitted that the MBE Act’s bid preference “is not based on past discrimination,” rather, it is based on a desire to “encourag[e] economic development of minority business enterprises which in turn will benefit the State of Oklahoma as a whole.” *Id.* In light of *Adarand VII*, and prevailing Supreme Court case law, the district court found that this articulated interest is not “compelling” in the absence of evidence of past or present racial discrimination. *Id.*

The district court considered testimony presented by Intervenors who participated in the case for the defendants and asserted that the Oklahoma legislature conducted an interim study prior to adoption of the MBE Act, during which testimony and evidence were presented to members of the Oklahoma Legislative Black Caucus and other participating legislators. The study was conducted more than 14 years prior to the case and the Intervenors did not actually offer any of the evidence to the court in this case. The Intervenors submitted an affidavit from the witness who serves as the Title VI Coordinator for the Oklahoma Department of Transportation. The court found that the affidavit from the witness averred in general terms that minority businesses were discriminated against in the awarding of state contracts. The district court found that the Intervenors have not produced — or indeed even described — the evidence of discrimination. *Id.* at 1241. The district court found that it cannot be discerned from the documents which minority businesses were the victims of discrimination, or which racial or ethnic groups were targeted by such alleged discrimination. *Id.*

The court also found that the Intervenors’ evidence did not indicate what discriminatory acts or practices allegedly occurred, or when they occurred. *Id.* The district court stated that the Intervenors did not identify “a single qualified, minority-owned bidder who was excluded from a state contract.” *Id.* The district court, thus, held that broad allegations of “systematic” exclusion of minority businesses were not sufficient to constitute a compelling governmental interest in remedying past or current discrimination. *Id.* at 1242. The district court stated that this was particularly true in light of the “State’s admission here that the State’s governmental interest was not in remedying past discrimination in the state competitive bidding process, but in ‘encouraging economic development of minority business enterprises which in turn will benefit the State of Oklahoma as a whole.’” *Id.* at 1242.

The court found that the State defendants failed to produce any admissible evidence of a single, specific discriminatory act, or any substantial evidence showing a pattern of deliberate exclusion from state contracts of minority-owned businesses. *Id.* at 1241 - 1242, footnote 11.

The district court also noted that the Sixth Circuit Court of Appeals in *Drabik* rejected Ohio's statistical evidence of underutilization of minority contractors because the evidence did not report the actual use of minority firms; rather, they reported only the use of those minority firms that had gone to the trouble of being certified and listed by the state. *Id.* at 1242, footnote 12. The district court stated that, as in *Drabik*, the evidence presented in support of the Oklahoma MBE Act failed to account for the possibility that some minority contractors might not register with the state, and the statistics did not account for any contracts awarded to businesses with minority ownership of less than 51 percent, or for contracts performed in large part by minority-owned subcontractors where the prime contractor was not a certified minority-owned business. *Id.*

The district court found that the MBE Act's minority bidding preference was not predicated upon a finding of discrimination in any particular industry or region of the state, or discrimination against any particular racial or ethnic group. The court stated that there was no evidence offered of actual discrimination, past or present, against the specific racial and ethnic groups to whom the preference was extended, other than an attempt to show a history of discrimination against African Americans. *Id.* at 1242.

Narrow tailoring. The district court found that even if the State's goals could not be considered "compelling," the State did not show that the MBE Act was narrowly tailored to serve those goals. The court pointed out that the Tenth Circuit in *Adarand VII* identified six factors the court must consider in determining whether the MBE Act's minority preference provisions were sufficiently narrowly tailored to satisfy equal protection: (1) the availability of race-neutral alternative remedies; (2) limits on the duration of the challenged preference provisions; (3) flexibility of the preference provisions; (4) numerical proportionality; (5) the burden on third parties; and (6) over- or under-inclusiveness. *Id.* at 1242-1243.

First, in terms of race-neutral alternative remedies, the court found that the evidence offered showed, at most, that nominal efforts were made to assist minority-owned businesses prior to the adoption of the MBE Act's racial preference program. *Id.* at 1243. The court considered evidence regarding the Minority Assistance Program, but found that to be primarily informational services only, and was not designed to actually assist minorities or other disadvantaged contractors to obtain contracts with the State of Oklahoma. *Id.* at 1243. In contrast to this "informational" program, the court noted the Tenth Circuit in *Adarand VII* favorably considered the federal government's use of racially neutral alternatives aimed at disadvantaged businesses, including assistance with obtaining project bonds, assistance with securing capital financing, technical assistance, and other programs designed to assist start-up businesses. *Id.* at 1243 *citing Adarand VII*, 228 F.3d at 1178-1179.

The district court found that it does not appear from the evidence that Oklahoma's Minority Assistance Program provided the type of race-neutral relief required by the Tenth Circuit in *Adarand VII*, in the Supreme Court in the *Croson* decision, nor does it appear that the Program was racially neutral. *Id.* at 1243. The court found that the State of Oklahoma did not show any meaningful form of assistance to new or disadvantaged businesses prior to the adoption of the MBE Act, and thus, the court found that the state defendants had not shown that Oklahoma considered race-neutral

alternative means to achieve the state’s goal prior to adoption of the minority bid preference provisions. *Id.* at 1243.

In a footnote, the district court pointed out that the Tenth Circuit has recognized racially neutral programs designed to assist *all* new or financially disadvantaged businesses in obtaining government contracts tend to benefit minority-owned businesses, and can help alleviate the effects of past and present-day discrimination. *Id.* at 1243, footnote 15 *citing Adarand VII*.

The court considered the evidence offered of post-enactment efforts by the State to increase minority participation in State contracting. The court found that most of these efforts were directed toward encouraging the participation of certified minority business enterprises, “and are thus not racially neutral. This evidence fails to demonstrate that the State employed race-neutral alternative measures prior to or after adopting the Minority Business Enterprise Assistance Act.” *Id.* at 1244. Some of the efforts the court found were directed toward encouraging the participation of certified minority business enterprises and thus not racially neutral, included mailing vendor registration forms to minority vendors, telephoning and mailing letters to minority vendors, providing assistance to vendors in completing registration forms, assuring the vendors received bid information, preparing a minority business directory and distributing it to all state agencies, periodically mailing construction project information to minority vendors, and providing commodity information to minority vendors upon request. *Id.* at 1244, footnote 16.

In terms of durational limits and flexibility, the court found that the “goal” of 10 percent of the state’s contracts being awarded to certified minority business enterprises had never been reached, or even approached, during the thirteen years since the MBE Act was implemented. *Id.* at 1244. The court found the defendants offered no evidence that the bid preference was likely to end at any time in the foreseeable future, or that it is otherwise limited in its duration. *Id.* Unlike the federal programs at issue in *Adarand VII*, the court stated the Oklahoma MBE Act has no inherent time limit, and no provision for disadvantaged minority-owned businesses to “graduate” from preference eligibility. *Id.* The court found the MBE Act was not limited to those minority-owned businesses which are shown to be economically disadvantaged. *Id.*

The court stated that the MBE Act made no attempt to address or remedy any actual, demonstrated past or present racial discrimination, and the MBE Act’s duration was not tied in any way to the eradication of such discrimination. *Id.* Instead, the court found the MBE Act rests on the “questionable assumption that 10 percent of all state contract dollars should be awarded to certified minority-owned and operated businesses, without any showing that this assumption is reasonable.” *Id.* at 1244.

By the terms of the MBE Act, the minority preference provisions would continue in place for five years after the goal of 10 percent minority participation was reached, and thus the district court concluded that the MBE Act’s minority preference provisions lacked reasonable durational limits. *Id.* at 1245.

With regard to the factor of “numerical proportionality” between the MBE Act’s aspirational goal and the number of existing available minority-owned businesses, the court found the MBE Act’s 10 percent goal was not based upon demonstrable evidence of the availability of minority contractors who were either qualified to bid or who were ready, willing and able to become qualified to bid on

state contracts. *Id.* at 1246–1247. The court pointed out that the MBE Act made no attempt to distinguish between the four minority racial groups, so that contracts awarded to members of all of the preferred races were aggregated in determining whether the 10 percent aspirational goal had been reached. *Id.* at 1246. In addition, the court found the MBE Act aggregated all state contracts for goods and services, so that minority participation was determined by the total number of dollars spent on state contracts. *Id.*

The court stated that in *Adarand VII*, the Tenth Circuit rejected the contention that the aspirational goals were required to correspond to an actual finding as to the number of existing minority-owned businesses. *Id.* at 1246. The court noted that the government submitted evidence in *Adarand VII*, that the effects of past discrimination had excluded minorities from entering the construction industry, and that the number of available minority subcontractors reflected that discrimination. *Id.* In light of this evidence, the district court said the Tenth Circuit held that the existing percentage of minority-owned businesses is “not necessarily an absolute cap” on the percentage that a remedial program might legitimately seek to achieve. *Id.* at 1246, *citing Adarand VII*, 228 F.3d at 1181.

Unlike *Adarand VII*, the court found that the Oklahoma State defendants did not offer “substantial evidence” that the minorities given preferential treatment under the MBE Act were prevented, through past discrimination, from entering any particular industry, or that the number of available minority subcontractors in that industry reflects that discrimination. 140 F.Supp.2d at 1246. The court concluded that the Oklahoma State defendants did not offer any evidence of the number of minority-owned businesses doing business in any of the many industries covered by the MBE Act. *Id.* at 1246–1247.

With regard to the impact on third parties factor, the court pointed out the Tenth Circuit in *Adarand VII* stated the mere possibility that innocent parties will share the burden of a remedial program is itself insufficient to warrant the conclusion that the program is not narrowly tailored. *Id.* at 1247. The district court found the MBE Act’s bid preference provisions prevented nonminority businesses from competing on an equal basis with certified minority business enterprises, and that in some instances plaintiffs had been required to lower their intended bids because they knew minority firms were bidding. *Id.* The court pointed out that the 5 percent preference is applicable to *all* contracts awarded under the state’s Central Purchasing Act with no time limitation. *Id.*

In terms of the “under- and over-inclusiveness” factor, the court observed that the MBE Act extended its bidding preference to several racial minority groups without regard to whether each of those groups had suffered from the effects of past or present racial discrimination. *Id.* at 1247. The district court reiterated the Oklahoma State defendants did not offer any evidence at all that the minority racial groups identified in the Act had actually suffered from discrimination. *Id.*

Second, the district court found the MBE Act’s bidding preference extends to all contracts for goods and services awarded under the State’s Central Purchasing Act, without regard to whether members of the preferred minority groups had been the victims of past or present discrimination within that particular industry or trade. *Id.*

Third, the district court noted the preference extends to all businesses certified as minority-owned and controlled, without regard to whether a particular business is economically or socially disadvantaged, or has suffered from the effects of past or present discrimination. *Id.* The court thus

found that the factor of over-inclusiveness weighs against a finding that the MBE Act was narrowly tailored. *Id.*

The district court in conclusion found that the Oklahoma MBE Act violated the Constitution's Fifth Amendment guarantee of equal protection and granted the plaintiffs' Motion for Summary Judgment.

23. *Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore*, 83 F. Supp.2d 613 (D. Md. 2000)

The court held unconstitutional the City of Baltimore's "affirmative action" program, which had construction subcontracting "set-aside" goals of 20 percent for MBEs and 3 percent for WBEs. The court held there was no data or statistical evidence submitted by the City prior to enactment of the Ordinance. There was no evidence showing a disparity between MBE/WBE availability and utilization in the subcontracting construction market in Baltimore. The court enjoined the City Ordinance.

24. *Webster v. Fulton County*, 51 F. Supp.2d 1354 (N.D. Ga. 1999), *a'ff'd per curiam* 218 F.3d 1267 (11th Cir. 2000)

This case is instructive as it is another instance in which a court has considered, analyzed, and ruled upon a race-, ethnicity- and gender-conscious program, holding the local government MBE/WBE-type program failed to satisfy the strict scrutiny constitutional standard. The case also is instructive in its application of the *Engineering Contractors Association* case, including to a disparity analysis, the burdens of proof on the local government, and the narrowly tailored prong of the strict scrutiny test.

In this case, plaintiff Webster brought an action challenging the constitutionality of Fulton County's (the "County") minority and female business enterprise program ("M/FBE") program. 51 F. Supp.2d 1354, 1357 (N.D. Ga. 1999). [The district court first set forth the provisions of the M/FBE program and conducted a standing analysis at 51 F. Supp.2d at 1356-62].

The court, *citing Engineering Contractors Association of S. Florida, Inc. v. Metro. Engineering Contractors Association*, 122 F.3d 895 (11th Cir. 1997), held that "[e]xplicit racial preferences may not be used except as a 'last resort.'" *Id.* at 1362-63. The court then set forth the strict scrutiny standard for evaluating racial and ethnic preferences and the four factors enunciated in *Engineering Contractors Association*, and the intermediate scrutiny standard for evaluating gender preferences. *Id.* at 1363. The court found that under *Engineering Contractors Association*, the government could utilize both post-enactment and pre-enactment evidence to meet its burden of a "strong basis in evidence" for strict scrutiny, and "sufficient probative evidence" for intermediate scrutiny. *Id.*

The court found that the defendant bears the initial burden of satisfying the aforementioned evidentiary standard, and the ultimate burden of proof remains with the challenging party to demonstrate the unconstitutionality of the M/FBE program. *Id.* at 1364. The court found that the plaintiff has at least three methods "to rebut the inference of discrimination with a neutral explanation: (1) demonstrate that the statistics are flawed; (2) demonstrate that the disparities shown by the statistics are not significant; or (3) present conflicting statistical data." *Id.*, *citing Eng'g Contractors Ass'n*, 122 F.3d at 916.

[The district court then set forth the *Engineering Contractors Association* opinion in detail.]

The court first noted that the Eleventh Circuit has recognized that disparity indices greater than 80 percent are generally not considered indications of discrimination. *Id.* at 1368, *citing Eng'g Contractors Assoc.*, 122 F.3d at 914. The court then considered the County's pre-1994 disparity study (the "Brimmer-Marshall Study") and found that it failed to establish a strong basis in evidence necessary to support the M/FBE program. *Id.* at 1368.

First, the court found that the study rested on the inaccurate assumption that a statistical showing of underutilization of minorities in the marketplace as a whole was sufficient evidence of discrimination. *Id.* at 1369. The court cited *City of Richmond v. J.A. Croson Co.*, 488 U.S. 496 (1989) for the proposition that discrimination must be focused on contracting by the entity that is considering the preference program. *Id.* Because the Brimmer-Marshall Study contained no statistical evidence of discrimination by the County in the award of contracts, the court found the County must show that it was a "passive participant" in discrimination by the private sector. *Id.* The court found that the County could take remedial action if it had evidence that prime contractors were systematically excluding minority-owned businesses from subcontracting opportunities, or if it had evidence that its spending practices are "exacerbating a pattern of prior discrimination that can be identified with specificity." *Id.* However, the court found that the Brimmer-Marshall Study contained no such data. *Id.*

Second, the Brimmer-Marshall study contained no regression analysis to account for relevant variables, such as firm size. *Id.* at 1369-70. At trial, Dr. Marshall submitted a follow-up to the earlier disparity study. However, the court found the study had the same flaw in that it did not contain a regression analysis. *Id.* The court thus concluded that the County failed to present a "strong basis in evidence" of discrimination to justify the County's racial and ethnic preferences. *Id.*

The court next considered the County's post-1994 disparity study. *Id.* at 1371. The study first sought to determine the availability and utilization of minority- and female-owned firms. *Id.* The court explained:

Two methods may be used to calculate availability: (1) bid analysis; or (2) bidder analysis. In a bid analysis, the analyst counts the number of bids submitted by minority or female firms over a period of time and divides it by the total number of bids submitted in the same period. In a bidder analysis, the analyst counts the number of minority or female firms submitting bids and divides it by the total number of firms which submitted bids during the same period. Id.

The court found that the information provided in the study was insufficient to establish a firm basis in evidence to support the M/FBE program. *Id.* at 1371-72. The court also found it significant to conduct a regression analysis to show whether the disparities were either due to discrimination or other neutral grounds. *Id.* at 1375-76.

The plaintiff and the County submitted statistical studies of data collected between 1994 and 1997. *Id.* at 1376. The court found that the data were potentially skewed due to the operation of the M/FBE program. *Id.* Additionally, the court found that the County's standard deviation analysis yielded non-statistically significant results (noting the Eleventh Circuit has stated that scientists consider a finding of two standard deviations significant). *Id.* (internal citations omitted).

The court considered the County’s anecdotal evidence, and quoted *Engineering Contractors Association* for the proposition that “[a]necdotal evidence can play an important role in bolstering statistical evidence, but that only in the rare case will anecdotal evidence suffice standing alone.” *Id.*, quoting *Eng’g Contractors Ass’n*, 122 F.3d at 907. The Brimmer-Marshall Study contained anecdotal evidence. *Id.* at 1379. Additionally, the County held hearings but after reviewing the tape recordings of the hearings, the court concluded that only two individuals testified to discrimination by the County; one of them complained that the County used the M/FBE program to only benefit African Americans. *Id.* The court found the most common complaints concerned barriers in bonding, financing, and insurance and slow payment by prime contractors. *Id.* The court concluded that the anecdotal evidence was insufficient in and of itself to establish a firm basis for the M/FBE program. *Id.*

The court also applied a narrow tailoring analysis of the M/FBE program. “The Eleventh Circuit has made it clear that the essence of this inquiry is whether racial preferences were adopted only as a ‘last resort.’” *Id.* at 1380, citing *Eng’g Contractors Assoc.*, 122 F.3d at 926. The court cited the Eleventh Circuit’s four-part test and concluded that the County’s M/FBE program failed on several grounds. First, the court found that a race-based problem does not necessarily require a race-based solution. “If a race-neutral remedy is sufficient to cure a race-based problem, then a race-conscious remedy can never be narrowly tailored to that problem.” *Id.*, quoting *Eng’g Contractors Ass’n*, 122 F.3d at 927. The court found that there was no evidence of discrimination by the County. *Id.* at 1380.

The court found that even though a majority of the Commissioners on the County Board were African American, the County had continued the program for decades. *Id.* The court held that the County had not seriously considered race-neutral measures:

There is no evidence in the record that any Commissioner has offered a resolution during this period substituting a program of race-neutral measures as an alternative to numerical set-asides based upon race and ethnicity. There is no evidence in the record of any proposal by the staff of Fulton County of substituting a program of race-neutral measures as an alternative to numerical set-asides based upon race and ethnicity. There has been no evidence offered of any debate within the Commission about substituting a program of race-neutral measures as an alternative to numerical set-asides based upon race and ethnicity *Id.*

The court found that the random inclusion of ethnic and racial groups who had not suffered discrimination by the County also mitigated against a finding of narrow tailoring. *Id.* The court found that there was no evidence that the County considered race-neutral alternatives as an alternative to race-conscious measures nor that race-neutral measures were initiated and failed. *Id.* at 1381. The court concluded that because the M/FBE program was not adopted as a last resort, it failed the narrow tailoring test. *Id.*

Additionally, the court found that there was no substantial relationship between the numerical goals and the relevant market. *Id.* The court rejected the County’s argument that its program was permissible because it set “goals” as opposed to “quotas,” because the program in *Engineering Contractors Association* also utilized “goals” and was struck down. *Id.*

Per the M/FBE program's gender-based preferences, the court found that the program was sufficiently flexible to satisfy the substantial relationship prong of the intermediate scrutiny standard. *Id.* at 1383. However, the court held that the County failed to present "sufficient probative evidence" of discrimination necessary to sustain the gender-based preferences portion of the M/FBE program. *Id.*

The court found the County's M/FBE program unconstitutional and entered a permanent injunction in favor of the plaintiff. *Id.* On appeal, the Eleventh Circuit affirmed per curiam, stating only that it affirmed on the basis of the district court's opinion. *Webster v. Fulton County, Georgia*, 218 F.3d 1267 (11th Cir. 2000).

25. *Associated Gen. Contractors v. Drabik*, 50 F. Supp.2d 741 (S.D. Ohio 1999)

The district court in this case pointed out that it had struck down Ohio's MBE statute that provided race-based preferences in the award of state construction contracts in 1998. 50 F.Supp.2d at 744. Two weeks earlier, the district court for the Northern District of Ohio, likewise, found the same Ohio law unconstitutional when it was relied upon to support a state mandated set-aside program adopted by the Cuyahoga Community College. See *F. Buddie Contracting, Ltd. v. Cuyaboga Community College District*, 31 F.Supp.2d 571 (N.D. Ohio 1998). *Id.* at 741.

The state defendants appealed this court's decision to the United States court of Appeals for the Sixth Circuit. *Id.* Thereafter, the Supreme Court of Ohio held in the case of *Ritchey Produce, Co., Inc. v. The State of Ohio, Department of Administrative*, 704 N.E. 2d 874 (1999), that the Ohio statute, which provided race-based preferences in the state's purchase of nonconstruction-related goods and services, was constitutional. *Id.* at 744.

While this court's decision related to construction contracts and the Ohio Supreme Court's decision related to other goods and services, the decisions could not be reconciled, according to the district court. *Id.* at 744. Subsequently, the state defendants moved this court to stay its order of November 2, 1998 in light of the Ohio State Supreme Court's decision in *Ritchey Produce*. The district court took the opportunity in this case to reconsider its decision of November 2, 1998, and to the reasons given by the Supreme Court of Ohio for reaching the opposite result in *Ritchey Produce*, and decide in this case that its original decision was correct, and that a stay of its order would only serve to perpetuate a "blatantly unconstitutional program of race-based benefits. *Id.* at 745.

In this decision, the district court reaffirmed its earlier holding that the State of Ohio's MBE program of construction contract awards is unconstitutional. The court cited to *F. Buddie Contracting v. Cuyaboga 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%) 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 *Crosson*, and the failure of the State of Ohio to consider race-neutral means

before adopting the MBE Act in 1980 likewise “dooms Ohio’s program of race-based quotas.” *Id.* at 765.

Second, the court found the Ohio MBE Act was not flexible. The court stated that instead of allowing flexibility to ameliorate harmful effects of the program, the imprecision of the statutory goals has been used to justify bureaucratic decisions which increase its impact on nonminority business.” *Id.* at 765. The court said the waiver system for prime contracts focuses solely on the availability of MBEs. *Id.* at 766. The court noted the awarding agency may remove the contract from the set aside program and open it up for bidding by nonminority contractors if no certified MBE submits a bid, or if all bids submitted by MBEs are considered unacceptably high. *Id.* But, in either event, the court pointed out the agency is then required to set aside additional contracts to satisfy the numerical quota required by the statute. *Id.* The court concluded that there is no consideration given to whether the particular MBE seeking a racial preference has suffered from the effects of past discrimination by the state or prime contractors. *Id.*

Third, the court found the Ohio MBE Act was not appropriately limited such that it will not last longer than the discriminatory effects it was designed to eliminate. *Id.* at 766. The court stated the 1980 MBE Act is unlimited in duration, and there is no evidence the state has ever reconsidered whether a compelling state interest exists that would justify the continuation of a race-based remedy at any time during the two decades the Act has been in effect. *Id.*

Fourth, the court found the goals of the Ohio MBE Act were not related to the relevant market and that the Act failed this element of the “narrowly tailored” requirement of strict scrutiny. *Id.* at 767-768. The court said the goal of 15 percent far exceeds the percentage of available minority firms, and thus bears no relationship to the relevant market. *Id.*

Fifth, the court found the conclusion of the Ohio Supreme Court that the burdens imposed on non-MBEs by virtue of the set-aside requirements were relatively light was incorrect. *Id.* at 768. The court concluded nonminority contractors in various trades were effectively excluded from the opportunity to bid on any work from large state agencies, departments, and institutions solely because of their race. *Id.* at 678.

Sixth, the court found the Ohio MBE Act provided race-based benefits based on a random inclusion of minority groups. *Id.* at 770-771. The court stated there was no evidence about the number of each racial or ethnic group or the respective shares of the total capital improvement expenditures they received. *Id.* at 770. None of the statistical information, the court said, broke down the percentage of all firms that were owned by specific minority groups or the dollar amounts of contracts received by firms in specific minority groups. *Id.* The court, thus, concluded that the Ohio MBE Act included minority groups randomly without any specific evidence that any group suffered from discrimination in the construction industry in Ohio. *Id.* at 771.

Conclusion. The court thus denied the motion of the state defendants to stay the court’s prior order holding unconstitutional the Ohio MBE Act pending the appeal of the court’s order. *Id.* at 771. This opinion underscored that governments must show several factors to demonstrate narrow tailoring: (1) the necessity for the relief and the efficacy of alternative remedies, (2) flexibility and duration of the relief, (3) relationship of numerical goals to the relevant labor market, and (4) impact of the relief on the rights of third parties. The court held the Ohio MBE program failed to satisfy this test.

26. *Phillips & Jordan, Inc. v. Watts*, 13 F. Supp.2d 1308 (N.D. Fla. 1998)

This case is instructive because it addressed a challenge to a state and local government MBE/WBE-type program and considered the requisite evidentiary basis necessary to support the program. In *Phillips & Jordan*, the district court for the Northern District of Florida held that the Florida Department of Transportation's ("FDOT") program of "setting aside" certain highway maintenance contracts for African American- and Hispanic-owned businesses violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The parties stipulated that the plaintiff, a nonminority business, had been excluded in the past and may be excluded in the future from competing for certain highway maintenance contracts "set aside" for business enterprises owned by Hispanic and African American individuals. The court held that the evidence of statistical disparities was insufficient to support the Florida DOT program.

The district court pointed out that Florida DOT did not claim that it had evidence of intentional discrimination in the award of its contracts. The court stated that the essence of FDOT's claim was that the two year disparity study provided evidence of a disparity between the proportion of minorities awarded FDOT road maintenance contracts and a portion of the minorities "supposedly willing and able to do road maintenance work," and that FDOT did not itself engage in any racial or ethnic discrimination, so FDOT must have been a passive participant in "somebody's" discriminatory practices.

Since it was agreed in the case that FDOT did not discriminate against minority contractors bidding on road maintenance contracts, the court found that the record contained insufficient proof of discrimination. The court found the evidence insufficient to establish acts of discrimination against African American- and Hispanic-owned businesses.

The court raised questions concerning the choice and use of the statistical pool of available firms relied upon by the disparity study. The court expressed concern about whether it was appropriate to use Census data to analyze and determine which firms were available (qualified and/or willing and able) to bid on FDOT road maintenance contracts.

G. Recent Decisions and Authorities Involving Federal Procurement That May Impact MBE/WBE/DBE Programs

1. *Rothe Development, Inc. v. U.S. Dept. of Defense, U.S. Small Business Administration, et al.*, 836 F.3d 57, 2016 WL 4719049 (D.C. Cir. 2016), cert. denied, 2017 WL 1375832 (Oct. 16, 2017), affirming on other grounds, *Rothe Development, Inc. v. U.S. Dept. of Defense, U.S. Small Business Administration, et al.*, 107 F.Supp. 3d 183 (D.D.C. 2015)

In a split decision, the majority of a three judge panel of the United States Court of Appeals for the District of Columbia Circuit upheld the constitutionality of section 8(a) of the Small Business Act, which was challenged by Plaintiff-Appellant Rothe Development Inc. (Rothe). Rothe alleged that the statutory basis of the United States Small Business Administration's 8(a) business development program (codified at 15 U.S.C. § 637), violated its right to equal protection under the Due Process Clause of the Fifth Amendment. 836 F.3d 57, 2016 WL 4719049, at *1. Rothe contends the statute contains a racial classification that presumes certain racial minorities are eligible for the program. *Id.* The court held, however, that Congress considered and rejected statutory language that included a

racial presumption. *Id.* Congress, according to the court, chose instead to hinge participation in the program on the facially race-neutral criterion of social disadvantage, which it defined as having suffered racial, ethnic, or cultural bias. *Id.*

The challenged statute authorizes the Small Business Administration (SBA) to enter into contracts with other federal agencies, which the SBA then subcontracts to eligible small businesses that compete for the subcontracts in a sheltered market. *Id.*1.* Businesses owned by “socially and economically disadvantaged” individuals are eligible to participate in the 8(a) program. *Id.* The statute defines socially disadvantaged individuals as persons “who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities.” *Id.*, quoting 15 U.S.C. § 627(a)(5).

The Section 8(a) statute is race-neutral. The court rejected Rothe’s allegations, finding instead that the provisions of the Small Business Act that Rothe challenges do not on their face classify individuals by race. *Id.*1.* The court stated that Section 8(a) uses facially race-neutral terms of eligibility to identify individual victims of discrimination, prejudice, or bias, without presuming that members of certain racial, ethnic, or cultural groups qualify as such. *Id.* The court said that makes this statute different from other statutes, which expressly limit participation in contracting programs to racial or ethnic minorities or specifically direct third parties to presume that members of certain racial or ethnic groups, or minorities generally, are eligible. *Id.*

In contrast to the *statute*, the court found that the SBA’s *regulation* implementing the 8(a) program does contain a racial classification in the form of a presumption that an individual who is a member of one of five designated racial groups is socially disadvantaged. *Id.*2*, citing 13 C.F.R. § 124.103(b). This case, the court held, does not permit it to decide whether the race-based regulatory presumption is constitutionally sound, because Rothe has elected to challenge only the statute. *Id.* Rothe’s definition of the racial classification it attacks in this case, according to the court, does not include the SBA’s regulation. *Id.*

Because the court held the statute, unlike the regulation, lacks a racial classification, and because Rothe has not alleged that the statute is otherwise subject to strict scrutiny, the court applied rational-basis review. *Id.* at *2. The court stated the statute “readily survives” the rational basis scrutiny standards. *Id.*2.* The court, therefore, affirmed the judgment of the district court granting summary judgment to the SBA and the Department of Defense, albeit on different grounds. *Id.*

Thus, the court held the central question on appeal is whether Section 8(a) warrants strict judicial scrutiny, which the court noted the parties and the district court believe that it did. *Id.*2.* Rothe, the court said, advanced only the theory that the statute, on its face, Section 8(a) of the Small Business Act, contains a racial classification. *Id.*2.*

The court found that the definition of the term “socially disadvantaged” does not contain a racial classification because it does not distribute burdens or benefits on the basis of individual classifications, it is race-neutral on its face, and it speaks of individual victims of discrimination. *Id.*3.* On its face, the court stated the term envisions an individual-based approach that focuses on experience rather than on a group characteristic, and the statute recognizes that not all members of a minority group have necessarily been subjected to racial or ethnic prejudice or cultural bias. *Id.* The court said that the statute definition of the term “social disadvantaged” does not provide for

preferential treatment based on an applicant's race, but rather on an individual applicant's experience of discrimination. *Id**3.

The court distinguished cases involving situations in which disadvantaged nonminority applicants could not participate, but the court said the plain terms of the statute permit individuals in any race to be considered "socially disadvantaged." *Id**3. The court noted its key point is that the statute is easily read not to require any group-based racial or ethnic classification, stating the statute defines socially disadvantaged *individuals* as those individuals who have been subjected to racial or ethnic prejudice or cultural bias, not those individuals who are *members or groups* that have been subjected to prejudice or bias. *Id*.

The court pointed out that the SBA's implementation of the statute's definition may be based on a racial classification if the regulations carry it out in a manner that gives preference based on race instead of individual experience. *Id**4. But, the court found, Rothe has expressly disclaimed any challenge to the SBA's implementation of the statute, and as a result, the only question before them is whether the statute itself classifies based on race, which the court held makes no such classification. *Id**4. The court determined the statutory language does not create a presumption that a member of a particular racial or ethnic group is necessarily socially disadvantaged, nor that a white person is not. *Id**5.

The definition of social disadvantage, according to the court, does not amount to a racial classification, for it ultimately turns on a business owner's experience of discrimination. *Id**6. The statute does not instruct the agency to limit the field to certain racial groups, or to racial groups in general, nor does it tell the agency to presume that anyone who is a member of any particular group is, by that membership alone, socially disadvantaged. *Id*.

The court noted that the Supreme Court and this court's discussions of the 8(a) program have identified the regulations, not the statute, as the source of its racial presumption. *Id**8. The court distinguished Section 8(d) of the Small Business Act as containing a race-based presumption, but found in the 8(a) program the Supreme Court has explained that the agency (not Congress) presumes that certain racial groups are socially disadvantaged. *Id*. at *7.

The SBA statute does not trigger strict scrutiny. The court held that the statute does not trigger strict scrutiny because it is race-neutral. *Id**10. The court pointed out that Rothe does not argue that the statute could be subjected to strict scrutiny, even if it is facially neutral, on the basis that Congress enacted it with a discriminatory purpose. *Id**9. In the absence of such a claim by Rothe, the court determined it would not subject a facially race-neutral statute to strict scrutiny. *Id*. The foreseeability of racially disparate impact, without invidious purpose, the court stated, does not trigger strict constitutional scrutiny. *Id*.

Because the statute does not trigger strict scrutiny, the court found that it need not and does not decide whether the district court correctly concluded that the statute is narrowly tailored to meet a compelling interest. *Id**10. Instead, the court considered whether the statute is supported by a rational basis. *Id*. The court held that it plainly is supported by a rational basis, because it bears a rational relation to some legitimate end. *Id**10.

The statute, the court stated, aims to remedy the effects of prejudice and bias that impede business formation and development and suppress fair competition for government contracts. *Id.* Counteracting discrimination, the court found, is a legitimate interest, and in certain circumstances qualifies as compelling. *Id.*11.* The statutory scheme, the court said, is rationally related to that end. *Id.*

The court declined to review the district court's admissibility determinations as to the expert witnesses because it stated that it would affirm the district court's grant of summary judgment even if the district court abused its discretion in making those determinations. *Id.*11.* The court noted the expert witness testimony is not necessary to, nor in conflict with, its conclusion that Section 8(a) is subject to and survives rational-basis review. *Id.*

Other issues. The court declined to review the district court's admissibility determinations as to the expert witnesses because it stated that it would affirm the district court's grant of summary judgment even if the district court abused its discretion in making those determinations. *Id.*11.* The court noted the expert witness testimony is not necessary to, nor in conflict with, its conclusion that Section 8(a) is subject to and survives rational-basis review. *Id.*

In addition, the court rejected Rothe's contention that Section 8(a) is an unconstitutional delegation of legislative power. *Id.*11.* Because the argument is premised on the idea that Congress created a racial classification, which the court has held it did not, Rothe's alternative argument on delegation also fails. *Id.*

Dissenting Opinion. There was a dissenting opinion by one of the three members of the court. The dissenting judge stated in her view that the provisions of the Small Business Act at issue are not facially race-neutral, but contain a racial classification. *Id.*12.* The dissenting judge said that the act provides members of certain racial groups an advantage in qualifying for Section 8(a)'s contract preference by virtue of their race. *Id.*13.*

The dissenting opinion pointed out that all the parties and the district court found that strict scrutiny should be applied in determining whether the Section 8(a) program violates Rothe's right to equal protection of the laws. *Id.*16.* In the view of the dissenting opinion the statutory language includes a racial classification, and therefore, the statute should be subject to strict scrutiny. *Id.*22.*

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

Although this case does not involve the Federal DBE Program (49 CFR Part 26), it is an analogous case that may impact the legal analysis and law related to the validity of programs implemented by recipients of federal funds, including the Federal DBE Program. Additionally, it underscores the requirement that race-, ethnic- and gender-based programs of any nature must be supported by substantial evidence. In *Rothe*, an unsuccessful bidder on a federal defense contract brought suit alleging that the application of an evaluation preference, pursuant to a federal statute, to a small disadvantaged bidder (SDB) to whom a contract was awarded, violated the Equal Protection clause of the U.S. Constitution. The federal statute challenged is Section 1207 of the National Defense Authorization Act of 1987 and as reauthorized in 2003. The statute provides a goal that 5 percent of the total dollar amount of defense contracts for each fiscal year would be awarded to small

businesses owned and controlled by socially and economically disadvantaged individuals. 10 U.S.C. § 2323. Congress authorized the Department of Defense (“DOD”) to adjust bids submitted by non-socially and economically disadvantaged firms upwards by 10 percent (the “Price Evaluation Adjustment Program” or “PEA”).

The district court held the federal statute, as reauthorized in 2003, was constitutional on its face. The court held the 5 percent goal and the PEA program as reauthorized in 1992 and applied in 1998 was unconstitutional. The basis of the decision was that Congress considered statistical evidence of discrimination that established a compelling governmental interest in the reauthorization of the statute and PEA program in 2003. Congress had not documented or considered substantial statistical evidence that the DOD discriminated against minority small businesses when it enacted the statute in 1992 and reauthorized it in 1998. The plaintiff appealed the decision.

The Federal Circuit found that the “analysis of the facial constitutionality of an act is limited to evidence before Congress prior to the date of reauthorization.” 413 F.3d 1327 (Fed. Cir. 2005)(affirming in part, vacating in part, and remanding 324 F. Supp.2d 840 (W.D. Tex. 2004). The court limited its review to whether Congress had sufficient evidence in 1992 to reauthorize the provisions in 1207. The court held that for evidence to be relevant to a strict scrutiny analysis, “the evidence must be proven to have been before Congress prior to enactment of the racial classification.” The Federal Circuit held that the district court erred in relying on the statistical studies without first determining whether the studies were before Congress when it reauthorized section 1207. The Federal Circuit remanded the case and directed the district court to consider whether the data presented was so outdated that it did not provide the requisite strong basis in evidence to support the reauthorization of section 1207.

On August 10, 2007 the Federal District Court for the Western District of Texas in *Rothe Development Corp. v. U.S. Dept. of Defense*, 499 F.Supp.2d 775 (W.D.Tex. Aug 10, 2007) issued its Order on remand from the Federal Circuit Court of Appeals decision in *Rothe*, 413 F.3d 1327 (Fed Cir. 2005). The district court upheld the constitutionality of the 2006 Reauthorization of Section 1207 of the National Defense Authorization Act of 1987 (10 USC § 2323), which permits the U.S. Department of Defense to provide preferences in selecting bids submitted by small businesses owned by socially and economically disadvantaged individuals (“SDBs”). The district court found the 2006 Reauthorization of the 1207 Program satisfied strict scrutiny, holding that Congress had a compelling interest when it reauthorized the 1207 Program in 2006, that there was sufficient statistical and anecdotal evidence before Congress to establish a compelling interest, and that the reauthorization in 2006 was narrowly tailored.

The district court, among its many findings, found certain evidence before Congress was “stale,” that the plaintiff (Rothe) failed to rebut other evidence which was not stale, and that the decisions by the Eighth, Ninth and Tenth Circuits in the decisions in *Concrete Works*, *Adarand Constructors*, *Sherbrooke Turf* and *Western States Paving* (discussed above and below) were relevant to the evaluation of the facial constitutionality of the 2006 Reauthorization.

2007 Order of the District Court (499 F.Supp.2d 775). In the Section 1207 Act, Congress set a goal that 5 percent of the total dollar amount of defense contracts for each fiscal year would be awarded to small businesses owned and controlled by socially and economically disadvantaged individuals. In order to achieve that goal, Congress authorized the DOD to adjust bids submitted by non-socially

and economically disadvantaged firms up to 10 percent. 10 U.S.C. § 2323(e)(3). *Rothe*, 499 F.Supp.2d. at 782. Plaintiff *Rothe* did not qualify as an SDB because it was owned by a Caucasian female. Although *Rothe* was technically the lowest bidder on a DOD contract, its bid was adjusted upward by 10 percent, and a third party, who qualified as an SDB, became the “lowest” bidder and was awarded the contract. *Id.* *Rothe* claims that the 1207 Program is facially unconstitutional because it takes race into consideration in violation of the Equal Protection component of the Due Process Clause of the Fifth Amendment. *Id.* at 782-83. The district court’s decision only reviewed the facial constitutionality of the 2006 Reauthorization of the 2007 Program.

The district court initially rejected six legal arguments made by *Rothe* regarding strict scrutiny review based on the rejection of the same arguments by the Eighth, Ninth, and Tenth Circuit Courts of Appeal in the *Sherbrooke Turf*, *Western States Paving*, *Concrete Works*, *Adarand VII* cases, and the Federal Circuit Court of Appeal in *Rothe*. *Rothe* at 825-833.

The district court discussed and cited the decisions in *Adarand VII* (2000), *Sherbrooke Turf* (2003), and *Western States Paving* (2005), as holding that Congress had a compelling interest in eradicating the economic roots of racial discrimination in highway transportation programs funded by federal monies, and concluding that the evidence cited by the government, particularly that contained in *The Compelling Interest* (a.k.a. the Appendix), more than satisfied the government’s burden of production regarding the compelling interest for a race-conscious remedy. *Rothe* at 827. Because the Urban Institute Report, which presented its analysis of 39 state and local disparity studies, was cross-referenced in the Appendix, the district court found the courts in *Adarand VII*, *Sherbrooke Turf*, and *Western States Paving*, also relied on it in support of their compelling interest holding. *Id.* at 827.

The district court also found that the Tenth Circuit decision in *Concrete Works IV*, 321 F.3d 950 (10th Cir. 2003), established legal principles that are relevant to the court’s strict scrutiny analysis. First, *Rothe*’s claims for declaratory judgment on the racial constitutionality of the earlier 1999 and 2002 Reauthorizations were moot. Second, the government can meet its burden of production without conclusively proving the existence of past or present racial discrimination. Third, the government may establish its own compelling interest by presenting evidence of its own direct participation in racial discrimination or its passive participation in private discrimination. Fourth, once the government meets its burden of production, *Rothe* must introduce “credible, particularized” evidence to rebut the government’s initial showing of the existence of a compelling interest. Fifth, *Rothe* may rebut the government’s statistical evidence by giving a race-neutral explanation for the statistical disparities, showing that the statistics are flawed, demonstrating that the disparities shown are not significant or actionable, or presenting contrasting statistical data. Sixth, the government may rely on disparity studies to support its compelling interest, and those studies may control for the effect that pre-existing affirmative action programs have on the statistical analysis. *Id.* at 829-32.

Based on *Concrete Works IV*, the district court did not require the government to conclusively prove that there is pervasive discrimination in the relevant market, that each presumptively disadvantaged group suffered equally from discrimination, or that private firms intentionally and purposefully discriminated against minorities. The court found that the inference of discriminatory exclusion can arise from statistical disparities. *Id.* at 830-31.

The district court held that Congress had a compelling interest in the 2006 Reauthorization of the 1207 Program, which was supported by a strong basis in the evidence. The court relied in significant part upon six state and local disparity studies that were before Congress prior to the 2006 Reauthorization of the 1207 Program. The court based this evidence on its finding that Senator Kennedy had referenced these disparity studies, discussed and summarized findings of the disparity studies, and Representative Cynthia McKinney also cited the same six disparity studies that Senator Kennedy referenced. The court stated that based on the content of the floor debate, it found that these studies were put before Congress prior to the date of the Reauthorization of Section 1207. *Id.* at 838.

The district court found that these six state and local disparity studies analyzed evidence of discrimination from a diverse cross-section of jurisdictions across the United States, and “they constitute prima facie evidence of a nation-wide pattern or practice of discrimination in public and private contracting.” *Id.* at 838-39. The court found that the data used in these six disparity studies is not “stale” for purposes of strict scrutiny review. *Id.* at 839. The court disagreed with Rothe’s argument that all the data were stale (data in the studies from 1997 through 2002), “because this data was the most current data available at the time that these studies were performed.” *Id.* The court found that the governmental entities should be able to rely on the most recently available data so long as those data are reasonably up-to-date. *Id.* The court declined to adopt a “bright-line rule for determining staleness.” *Id.*

The court referred to the reliance by the Ninth Circuit and the Eighth Circuit on the *Appendix* to affirm the constitutionality of the USDOT MBE [now DBE] Program, and rejected five years as a bright-line rule for considering whether data are “stale.” *Id.* at n.86. The court also stated that it “accepts the reasoning of the *Appendix*, which the court found stated that for the most part “the federal government does business in the same contracting markets as state and local governments. Therefore, the evidence in state and local studies of the impact of discriminatory barriers to minority opportunity in contracting markets throughout the country is relevant to the question of whether the federal government has a compelling interest to take remedial action in its own procurement activities.” *Id.* at 839, quoting 61 *Fed.Reg.* 26042-01, 26061 (1996).

The district court also discussed additional evidence before Congress that it found in Congressional Committee Reports and Hearing Records. *Id.* at 865-71. The court noted SBA Reports that were before Congress prior to the 2006 Reauthorization. *Id.* at 871.

The district court found that the data contained in the *Appendix*, the Benchmark Study, and the Urban Institute Report were “stale,” and the court did not consider those reports as evidence of a compelling interest for the 2006 Reauthorization. *Id.* at 872-75. The court stated that the Eighth, Ninth and Tenth Circuits relied on the *Appendix* to uphold the constitutionality of the Federal DBE Program, citing to the decisions in *Sherbrooke Turf*, *Adarand VII*, and *Western States Paving*. *Id.* at 872. The court pointed out that although it does not rely on the data contained in the *Appendix* to support the 2006 Reauthorization, the fact the Eighth, Ninth, and Tenth Circuits relied on these data to uphold the constitutionality of the Federal DBE Program as recently as 2005, convinced the court that a bright-line staleness rule is inappropriate. *Id.* at 874.

Although the court found that the data contained in the Appendix, the Urban Institute Report, and the Benchmark Study were stale for purposes of strict scrutiny review regarding the 2006 Reauthorization, the court found that Rothe introduced no concrete, particularized evidence challenging the reliability of the methodology or the data contained in the six state and local disparity studies, and other evidence before Congress. The court found that Rothe failed to rebut the data, methodology or anecdotal evidence with “concrete, particularized” evidence to the contrary. *Id.* at 875. The district court held that based on the studies, the government had satisfied its burden of producing evidence of discrimination against African Americans, Asian Americans, Hispanic Americans, and Native Americans in the relevant industry sectors. *Id.* at 876.

The district court found that Congress had a compelling interest in reauthorizing the 1207 Program in 2006, which was supported by a strong basis of evidence for remedial action. *Id.* at 877. The court held that the evidence constituted prima facie proof of a nationwide pattern or practice of discrimination in both public and private contracting, that Congress had sufficient evidence of discrimination throughout the United States to justify a nationwide program, and the evidence of discrimination was sufficiently pervasive across racial lines to justify granting a preference to all five purportedly disadvantaged racial groups. *Id.*

The district court also found that the 2006 Reauthorization of the 1207 Program was narrowly tailored and designed to correct present discrimination and to counter the lingering effects of past discrimination. The court held that the government’s involvement in both present discrimination and the lingering effects of past discrimination was so pervasive that the DOD and the Department of Air Force had become passive participants in perpetuating it. *Id.* The court stated it was law of the case and could not be disturbed on remand that the Federal Circuit in *Rothe III* had held that the 1207 Program was flexible in application, limited in duration and it did not unduly impact on the rights of third parties. *Id.*, quoting *Rothe III*, 262 F.3d at 1331.

The district court thus conducted a narrowly tailored analysis that reviewed three factors:

1. The efficacy of race-neutral alternatives;
2. Evidence detailing the relationship between the stated numerical goal of 5 percent and the relevant market; and
3. Over- and under-inclusiveness.

Id. The court found that Congress examined the efficacy of race-neutral alternatives prior to the enactment of the 1207 Program in 1986 and that these programs were unsuccessful in remedying the effects of past and present discrimination in federal procurement. *Id.* The court concluded that Congress had attempted to address the issues through race-neutral measures, discussed those measures, and found that Congress’ adoption of race-conscious provisions were justified by the ineffectiveness of such race-neutral measures in helping minority-owned firms overcome barriers. *Id.* The court found that the government seriously considered and enacted race-neutral alternatives, but these race-neutral programs did not remedy the widespread discrimination that affected the federal procurement sector, and that Congress was not required to implement or exhaust every conceivable race-neutral alternative. *Id.* at 880. Rather, the court found that narrow tailoring requires only “serious, good faith consideration of workable race-neutral alternatives.” *Id.*

The district court also found that the 5 percent goal was related to the minority business availability identified in the six state and local disparity studies. *Id.* at 881. The court concluded that the 5 percent goal was aspirational, not mandatory. *Id.* at 882. The court then examined and found that the regulations implementing the 1207 Program were not over-inclusive for several reasons.

November 4, 2008 decision by the Federal Circuit Court of Appeals. On November 4, 2008, the Federal Circuit Court of Appeals reversed the judgment of the district court in part, and remanded with instructions to enter a judgment (1) denying Rothe any relief regarding the facial constitutionality of Section 1207 as enacted in 1999 or 2002, (2) declaring that Section 1207 as enacted in 2006 (10 U.S.C. § 2323) is facially unconstitutional, and (3) enjoining application of Section 1207 (10 U.S.C. § 2323).

The Federal Circuit Court of Appeals held that Section 1207, on its face, as reenacted in 2006, violated the Equal Protection component of the Fifth Amendment right to due process. The court found that because the statute authorized the DOD to afford preferential treatment on the basis of race, the court applied strict scrutiny, and because Congress did not have a “strong basis in evidence” upon which to conclude that the DOD was a passive participant in pervasive, nationwide racial discrimination — at least not on the evidence produced by the DOD and relied on by the district court in this case — Section 1207 failed to meet this strict scrutiny test. 545 F.3d at 1050.

Strict scrutiny framework. The Federal Circuit Court of Appeals recognized that the Supreme Court has held a government may have a compelling interest in remedying the effects of past or present racial discrimination. 545 F.3d at 1036. The court cited the decision in *Croson*, 488 U.S. at 492, that it is “beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.” 545 F.3d. at 1036, *quoting Croson*, 488 U.S. at 492.

The court held that before resorting to race-conscious measures, the government must identify the discrimination to be remedied, public or private, with some specificity, and must have a strong basis of evidence upon which to conclude that remedial action is necessary. 545 F.3d at 1036, *quoting Croson*, 488 U.S. at 500, 504. Although the party challenging the statute bears the ultimate burden of persuading the court that it is unconstitutional, the Federal Circuit stated that the government first bears a burden to produce strong evidence supporting the legislature’s decision to employ race-conscious action. 545 F.3d at 1036.

Even where there is a compelling interest supported by strong basis in evidence, the court held the statute must be narrowly tailored to further that interest. *Id.* The court noted that a narrow tailoring analysis commonly involves six factors: (1) the necessity of relief; (2) the efficacy of alternative, race-neutral remedies; (3) the flexibility of relief, including the availability of waiver provisions; (4) the relationship with the stated numerical goal to the relevant labor market; (5) the impact of relief on the rights of third parties; and (6) the overinclusiveness or underinclusiveness of the racial classification. *Id.*

Compelling interest — strong basis in evidence. The Federal Circuit pointed out that the statistical and anecdotal evidence relief upon by the district court in its ruling below included six disparity studies of state or local contracting. The Federal Circuit also pointed out that the district court found that the data contained in the Appendix, the Urban Institute Report, and the Benchmark Study were

stale for purposes of strict scrutiny review of the 2006 Authorization, and therefore, the district court concluded that it would not rely on those three reports as evidence of a compelling interest for the 2006 reauthorization of the 1207 Program. 545 F.3d 1023, citing to *Rothe VI*, 499 F.Supp.2d at 875. Since the DOD did not challenge this finding on appeal, the Federal Circuit stated that it would not consider the Appendix, the Urban Institute Report, or the Department of Commerce Benchmark Study, and instead determined whether the evidence relied on by the district court was sufficient to demonstrate a compelling interest. *Id.*

Six state and local disparity studies. The Federal Circuit found that disparity studies can be relevant to the compelling interest analysis because, as explained by the Supreme Court in *Croson*, “[w]here there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by [a] locality or the locality’s prime contractors, an inference of discriminatory exclusion could arise.” 545 F.3d at 1037-1038, quoting *Croson*, 488 U.S.C. at 509. The Federal Circuit also cited to the decision by the Fifth Circuit Court of Appeals in *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206 (5th Cir. 1999) that given *Croson’s* emphasis on statistical evidence, other courts considering equal protection challenges to minority-participation programs have looked to disparity indices, or to computations of disparity percentages, in determining whether *Croson’s* evidentiary burden is satisfied. 545 F.3d at 1038, quoting *W.H. Scott*, 199 F.3d at 218.

The Federal Circuit noted that a disparity study is a study attempting to measure the difference- or disparity- between the number of contracts or contract dollars actually awarded minority-owned businesses in a particular contract market, on the one hand, and the number of contracts or contract dollars that one would expect to be awarded to minority-owned businesses given their presence in that particular contract market, on the other hand. 545 F.3d at 1037.

Staleness. The Federal Circuit declined to adopt a per se rule that data more than five years old are stale per se, which rejected the argument put forth by *Rothe*. 545 F.3d at 1038. The court pointed out that the district court noted other circuit courts have relied on studies containing data more than five years old when conducting compelling interest analyses, citing to *Western States Paving v. Washington State Department of Transportation*, 407 F.3d 983, 992 (9th Cir. 2005) and *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964, 970 (8th Cir. 2003)(relying on the Appendix, published in 1996).

The Federal Circuit agreed with the district court that Congress “should be able to rely on the most recently available data so long as that data is reasonably up-to-date.” 545 F.3d at 1039. The Federal Circuit affirmed the district court’s conclusion that the data analyzed in the six disparity studies were not stale at the relevant time because the disparity studies analyzed data 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 no evidence presented of a single instance of alleged discrimination by the DOD in the course of awarding a prime contract, or to a single instance of alleged discrimination by a private contractor identified as the recipient of a prime defense contract. 545 F.3d at 1049. The court noted this lack of evidence in the context of the opinion in *Croson* that if a government has become a passive participant in a system of racial exclusion practiced by elements of the local construction industry, then that government may take affirmative steps to dismantle the exclusionary system. 545 F.3d at 1048, citing *Croson*, 488 U.S. at 492.

The Federal Circuit pointed out that the Tenth Circuit in *Concrete Works* noted the City of Denver offered more than dollar amounts to link its spending to private discrimination, but instead provided testimony from minority business owners that general contractors who use them in city construction projects refuse to use them on private projects, with the result that Denver had paid tax dollars to support firms that discriminated against other firms because of their race, ethnicity and gender. 545 F.3d at 1049, quoting *Concrete Works*, 321 F.3d at 976-977.

In concluding, the court stated that it stressed its holding was grounded in the particular items of evidence offered by the DOD, and “should not be construed as stating blanket rules, for example about the reliability of disparity studies. As the Fifth Circuit has explained, there is no ‘precise mathematical formula’ to assess the quantum of evidence that rises to the *Croson* ‘strong basis in evidence’ benchmark.” 545 F.3d at 1049, quoting *W.H. Scott Constr. Co.*, 199 F.3d at 218 n. 11.

Narrowly tailoring. The Federal Circuit only made two observations about narrowly tailoring, because it held that Congress lacked the evidentiary predicate for a compelling interest. First, it noted that the 1207 Program was flexible in application, limited in duration, and that it did not unduly impact on the rights of third parties. 545 F.3d at 1049. Second, the court held that the absence of strongly probative statistical evidence makes it impossible to evaluate at least one of the other narrowly tailoring factors. Without solid benchmarks for the minority groups covered by the Section 1207, the court said it could not determine whether the 5 percent goal is reasonably related to the capacity of firms owned by members of those minority groups — i.e., whether that goal is comparable to the share of contracts minorities would receive in the absence of discrimination.” 545 F.3d at 1049-1050.

3. *Rothe Development, Inc. v. U.S. Department of Defense and Small Business Administration*, 107 F. Supp. 3d 183, 2015 WL 3536271 (D.D.C. June 5, 2015), affirmed on other grounds, 2016 WL 471909 (D.C. Cir. September 9, 2016).

Plaintiff Rothe Development, Inc. is a small business that filed this action against the U.S. Department of Defense (“DOD”) and the U.S. Small Business Administration (“SBA”) (collectively, “Defendants”) challenging the constitutionality of the Section 8(a) Program on its face.

The constitutional challenge that Rothe brings in this case is nearly identical to the challenge brought in the case of *DynaLantic Corp. v. United States Department of Defense*, 885 F.Supp.2d 237 (D.D.C. 2012). The plaintiff in *DynaLantic* sued the DOD, the SBA, and the Department of Navy alleging that Section 8(a) was unconstitutional both on its face and as applied to the military simulation and training industry. See *DynaLantic*, 885 F.Supp.2d at 242. *DynaLantic’s* court disagreed with the plaintiff’s facial attack and held the Section 8(a) Program as facially constitutional. See *DynaLantic*, 885 F.Supp.2d at 248-280, 283-291. (See also discussion of *DynaLantic* in this Appendix below.)

The court in *Rothe* states that the plaintiff Rothe relies on substantially the same record evidence and nearly identical legal arguments as in the *DynaLantic* case, and urges the court to strike down the race-conscious provisions of Section 8(a) on their face, and thus to depart from *DynaLantic’s* holding in the context of this case. 2015 WL 3536271 at *1. Both the plaintiff Rothe and the Defendants filed cross-motions for summary judgment as well as motions to limit or exclude testimony of each other’s expert witnesses. The court concludes that Defendants’ experts meet the relevant qualification standards under the Federal Rules, and therefore denies plaintiff Rothe’s motion to exclude Defendants’ expert testimony. *Id.* By contrast, the court found sufficient reason to doubt the qualifications of one of plaintiff’s experts and to question the reliability of the testimony of the other; consequently, the court grants the Defendants’ motions to exclude plaintiff’s expert testimony.

In addition, the court in *Rothe* agrees with the court’s reasoning in *DynaLantic*, and thus the court in *Rothe* also concludes that Section 8(a) is constitutional on its face. Accordingly, the court denies plaintiff’s motion for summary judgment and grants Defendants’ cross-motion for summary judgment.

DynaLantic Corp. v. Department of Defense. The court in *Rothe* analyzed the *DynaLantic* case, and agreed with the findings, holding and conclusions of the court in *DynaLantic*. See 2015 WL 3536271 at *4-5. The court in *Rothe* noted that the court in *DynaLantic* engaged in a detailed examination of Section 8(a) and the extensive record evidence, including disparity studies on racial discrimination in federal contracting across various industries. *Id.* at *5. The court in *DynaLantic* concluded that Congress had a compelling interest in eliminating the roots of racial discrimination in federal contracting, funded by federal money, and also that the government had established a strong basis in evidence to support its conclusion that remedial action was necessary to remedy that discrimination. *Id.* at *5. This conclusion was based on the finding the government provided extensive evidence of discriminatory barriers to minority business formation and minority business development, as well as significant evidence that, even when minority businesses are qualified and eligible to perform contracts in both public and private sectors, they are awarded these contracts far less often than their similarly situated nonminority counterparts. *Id.* at *5, citing *DynaLantic*, 885 F.Supp.2d at 279.

The court in *DynaLantic* also found that DynaLantic had failed to present credible, particularized evidence that undermined the government’s compelling interest or that demonstrated that the government’s evidence did not support an inference of prior discrimination and thus a remedial purpose. 2015 WL 3536271 at *5, *citing DynaLantic*, at 279.

With respect to narrow tailoring, the court in *DynaLantic* concluded that the Section 8(a) Program is narrowly tailored on its face, and that since Section 8(a) race-conscious provisions were narrowly tailored to further a compelling state interest, strict scrutiny was satisfied in the context of the construction industry and in other industries such as architecture and engineering, and professional services as well. *Id.* The court in *Rothe* also noted that the court in *DynaLantic* found that DynaLantic had thus failed to meet its burden to show that the challenge provisions were unconstitutional in all circumstances and held that Section 8(a) was constitutional on its face. *Id.*

Defendants’ expert evidence. One of Defendants’ experts used regression analysis, claiming to have isolated the effect in minority ownership on the likelihood of a small business receiving government contracts, specifically using a “logit model” to examine government contracting data in order to determine whether the data show any difference in the odds of contracts being won by minority-owned small businesses relative to other small businesses. 2015 WL 3536271 at *9. The expert controlled for other variables that could influence the odds of whether or not a given firm wins a contract, such as business size, age, and level of security clearance, and concluded that the odds of minority-owned small firms and non-8(a) SDB firms winning contracts were lower than small nonminority and non-SDB firms. *Id.* In addition, the Defendants’ expert found that non-8(a) minority-owned SDBs are statistically significantly less likely to win a contract in industries accounting for 94.0 percent of contract actions, 93.0 percent of dollars awarded, and in which 92.2 percent of non-8(a) minority-owned SDBs are registered. *Id.* Also, the expert found that there is no industry where non-8(a) minority-owned SDBs have a statistically significant advantage in terms of winning a contract from the federal government. *Id.*

The court rejected Rothe’s contention that the expert opinion is based on insufficient data, and that its analysis of data related to a subset of the relevant industry codes is too narrow to support its scientific conclusions. *Id.* at *10. The court found convincing the expert’s response to Rothe’s critique about his dataset, explaining that, from a mathematical perspective, excluding certain NAICS codes and analyzing data at the three-digit level actually increases the reliability of his results. The expert opted to use codes at the three-digit level as a compromise, balancing the need to have sufficient data in each industry grouping and the recognition that many firms can switch production within the broader three-digit category. *Id.* The expert also excluded certain NAICS industry groups from his regression analyses because of incomplete data, irrelevance, or because data issues in a given NAICS group prevented the regression model from producing reliable estimates. *Id.* The court found that the expert’s reasoning with respect to the exclusions and assumptions he makes in the analysis are fully explained and scientifically sound. *Id.*

In addition, the court found that post-enactment evidence was properly considered by the expert and the court. *Id.* The court found that nearly every circuit to consider the question of the relevance of post-enactment evidence has held that reviewing courts need not limit themselves to the particular evidence that Congress relied upon when it enacted the statute at issue. *Id.*, *citing DynaLantic*, 885 F.Supp.2d at 257.

Thus, the court held that post-enactment evidence is relevant to constitutional review, in particular, following the court in *DynaLantic*, when the statute is over 30 years old and the evidence used to justify Section 8(a) is stale for purposes of determining a compelling interest in the present. *Id.*, citing *DynaLantic* at 885 F.Supp.2d at 258. The court also points out that the statute itself contemplates that Congress will review the 8(a) Program on a continuing basis, which renders the use of post-enactment evidence proper. *Id.*

The court also found Defendants' additional expert's testimony as admissible in connection with that expert's review of the results of the 107 disparity studies conducted throughout the United States since the year 2000, all but 32 of which were submitted to Congress. *Id.* at *11. This expert testified that the disparity studies submitted to Congress, taken as a whole, provide strong evidence of large, adverse, and often statistically significant disparities between minority participation in business enterprise activity and the availability of those businesses; the disparities are not explained solely by differences in factors other than race and sex that are untainted by discrimination; and the disparities are consistent with the presence of discrimination in the business market. *Id.* at *12.

The court rejects Rothe's contentions to exclude this expert testimony merely based on the argument by Rothe that the factual basis for the expert's opinion is unreliable based on alleged flaws in the disparity studies or that the factual basis for the expert's opinions are weak. *Id.* The court states that even if Rothe's contentions are correct, an attack on the underlying disparity studies does not necessitate the remedy of exclusion. *Id.*

Plaintiff's expert's testimony rejected. The court found that one of plaintiff's experts was not qualified based on his own admissions regarding his lack of training, education, knowledge, skill and experience in any statistical or econometric methodology. *Id.* at *13. Plaintiff's other expert the court determined provided testimony that was unreliable and inadmissible as his preferred methodology for conducting disparity studies "appears to be well outside of the mainstream in this particular field." *Id.* at *14. The expert's methodology included his assertion that the only proper way to determine the availability of minority-owned businesses is to count those contractors and subcontractors that actually perform or bid on contracts, which the court rejected as not reliable. *Id.*

The Section 8(a) Program is constitutional on its face. The court found persuasive the court decision in *DynaLantic*, and held that inasmuch as Rothe seeks to re-litigate the legal issues presented in that case, this court declines Rothe's invitation to depart from the *DynaLantic* court's conclusion that Section 8(a) is constitutional on its face. *Id.* at *15.

The court reiterated its agreement with the *DynaLantic* court that racial classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interest. *Id.* at *17. To demonstrate a compelling interest, the government defendants must make two showings: first the government must articulate a legislative goal that is properly considered a compelling governmental interest, and second the government must demonstrate a strong basis in evidence supporting its conclusion that race-based remedial action was necessary to further that interest. *Id.* at *17. In so doing, the government need not conclusively prove the existence of racial discrimination in the past or present. *Id.* The government may rely on both statistical and anecdotal evidence, although anecdotal evidence alone cannot establish a strong basis in evidence for the purposes of strict scrutiny. *Id.*

If the government makes both showings, the burden shifts to the plaintiff to present credible, particularized evidence to rebut the government's initial showing of a compelling interest. *Id.* Once a compelling interest is established, the government must further show that the means chosen to accomplish the government's asserted purpose are specifically and narrowly framed to accomplish that purpose. *Id.*

The court held that the government articulated and established compelling interest for the Section 8(a) Program, namely, remedying race-based discrimination and its effects. *Id.* The court held the government also established a strong basis in evidence that furthering this interest requires race-based remedial action — specifically, evidence regarding discrimination in government contracting, which consisted of extensive evidence of discriminatory barriers to minority business formation and forceful evidence of discriminatory barriers to minority business development. *Id.* at *17, *citing DynaLantic*, 885 F.Supp.2d at 279.

The government defendants in this case relied upon the same evidence as in the *DynaLantic* case and the court found that the government provided significant evidence that even when minority businesses are qualified and eligible to perform contracts in both the private and public sectors, they are awarded these contracts far less often than their similarly situated nonminority counterparts. *Id.* at *17. The court held that Rothe has failed to rebut the evidence of the government with credible and particularized evidence of its own. *Id.* at *17. Furthermore, the court found that the government defendants established that the Section 8(a) Program is narrowly tailored to achieve the established compelling interest. *Id.* at *18.

The court found, citing agreement with the *DynaLantic* court, that the Section 8(a) Program satisfies all six factors of narrow tailoring. *Id.* First, alternative race-neutral remedies have proved unsuccessful in addressing the discrimination targeted with the Program. *Id.* Second, the Section 8(a) Program is appropriately flexible. *Id.* Third, Section 8(a) is neither over nor under-inclusive. *Id.* Fourth, the Section 8(a) Program imposes temporal limits on every individual's participation that fulfilled the durational aspect of narrow tailoring. *Id.* Fifth, the relevant aspirational goals for SDB contracting participation are numerically proportionate, in part because the evidence presented established that minority firms are ready, willing and able to perform work equal to 2 to 5 percent of government contracts in industries including but not limited to construction. *Id.* And six, the fact that the Section 8(a) Program reserves certain contracts for program participants does not, on its face, create an impermissible burden on non-participating firms. *Id.*; *citing DynaLantic*, 885 F.Supp.2d at 283-289.

Accordingly, the court concurred completely with the *DynaLantic* court's conclusion that the strict scrutiny standard has been met, and that the Section 8(a) Program is facially constitutional despite its reliance on race-conscious criteria. *Id.* at *18. The court found that on balance the disparity studies on which the government defendants rely reveal large, statistically significant barriers to business formation among minority groups that cannot be explained by factors other than race, and demonstrate that discrimination by prime contractors, private sector customers, suppliers and bonding companies continues to limit minority business development. *Id.* at *18, *citing DynaLantic*, 885 F.Supp.2d at 261, 263.

Moreover, the court found that the evidence clearly shows that qualified, eligible minority-owned firms are excluded from contracting markets, and accordingly provides powerful evidence from which an inference of discriminatory exclusion could arise. *Id.* at *18. The court concurred with the *DynaLantic* court’s conclusion that based on the evidence before Congress, it had a strong basis in evidence to conclude the use of race-conscious measures was necessary in, at least, some circumstances. *Id.* at *18, *citing DynaLantic*, 885 F.Supp.2d at 274.

In addition, in connection with the narrow tailoring analysis, the court rejected Rothe’s argument that Section 8(a) race-conscious provisions cannot be narrowly tailored because they apply across the board in equal measures, for all preferred races, in all markets and sectors. *Id.* at *19. The court stated the presumption that a minority applicant is socially disadvantaged may be rebutted if the SBA is presented with credible evidence to the contrary. *Id.* at *19. The court pointed out that any person may present credible evidence challenging an individual’s status as socially or economically disadvantaged. *Id.* The court said that Rothe’s argument is incorrect because it is based on the misconception that narrow tailoring necessarily means a remedy that is laser-focused on a single segment of a particular industry or area, rather than the common understanding that the “narrowness” of the narrow-tailoring mandate relates to the relationship between the government’s interest and the remedy it prescribes. *Id.*

Conclusion. The court concluded that plaintiff’s facial constitutional challenge to the Section 8(a) Program failed, that the government defendants demonstrated a compelling interest for the government’s racial classification, the purported need for remedial action is supported by strong and un rebutted evidence, and that the Section 8(a) program is narrowly tailored to further its compelling interest. *Id.* at *20.

Plaintiff Rothe appealed the decision of the district court to the United States Court of Appeals for the District of Columbia Circuit. The Court of Appeals affirmed the decision of the district court on other grounds. See 836 F.3d. 57, 2016 WL 4719049 (D.C. Cir. September 9, 2016).

4. *DynaLantic Corp. v. United States Dept. of Defense, et al.*, 885 F.Supp.2d 237, 2012 WL 3356813 (D.D.C. Aug. 15, 2012), appeals voluntarily dismissed, United States Court of Appeals, District of Columbia, Docket Numbers 12-5329 and 12-5330 (2014)

Plaintiff, the DynaLantic Corporation (“DynaLantic”), is a small business that designs and manufactures aircraft, submarine, ship, and other simulators and training equipment. DynaLantic sued the United States Department of Defense (“DoD”), the Department of the Navy, and the Small Business Administration (“SBA”) challenging the constitutionality of Section 8(a) of the Small Business Act (the “Section 8(a) program”), on its face and as applied: namely, the SBA’s determination that it is necessary or appropriate to set aside contracts in the military simulation and training industry. 2012 WL 3356813, at *1, *37.

The Section 8(a) program authorizes the federal government to limit the issuance of certain contracts to socially and economically disadvantaged businesses. *Id.* at *1. DynaLantic claimed that the Section 8(a) is unconstitutional on its face because the DoD’s use of the program, which is reserved for “socially and economically disadvantaged individuals,” constitutes an illegal racial preference in violation of the equal protection in violating its right to equal protection under the Due Process Clause of the Fifth Amendment to the Constitution and other rights. *Id.* at *1. DynaLantic also

claimed the Section 8(a) program is unconstitutional as applied by the federal defendants in DynaLantic's specific industry, defined as the military simulation and training industry. *Id.*

As described in *DynaLantic Corp. v. United States Department of Defense*, 503 F.Supp. 2d 262 (D.D.C. 2007) (*see below*), the court previously had denied Motions for Summary Judgment by the parties and directed them to propose future proceedings in order to supplement the record with additional evidence subsequent to 2007 before Congress. 503 F.Supp. 2d at 267.

The Section 8(a) Program. The Section 8(a) program is a business development program for small businesses owned by individuals who are both socially and economically disadvantaged as defined by the specific criteria set forth in the congressional statute and federal regulations at 15 U.S.C. §§ 632, 636 and 637; *see* 13 CFR § 124. “Socially disadvantaged” individuals are persons who have been “subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups without regard to their individual qualities.” 13 CFR § 124.103(a); *see also* 15 U.S.C. § 637(a)(5). “Economically disadvantaged” individuals are those socially disadvantaged individuals “whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged.” 13 CFR § 124.104(a); *see also* 15 U.S.C. § 637(a)(6)(A). *DynaLantic Corp.*, 2012WL 3356813 at *2.

Individuals who are members of certain racial and ethnic groups are presumptively socially disadvantaged; such groups include, but are not limited to, Black Americans, Hispanic Americans, Native Americans, Indian tribes, Asian Pacific Americans, Native Hawaiian Organizations, and other minorities. *Id.* at *2 *quoting* 15 U.S.C. § 631(f)(1)(B)-(c); *see also* 13 CFR § 124.103(b)(1). All prospective program participants must show that they are economically disadvantaged, which requires an individual to show a net worth of less than \$250,000 upon entering the program, and a showing that the individual's income for three years prior to the application and the fair market value of all assets do not exceed a certain threshold. 2012 WL 3356813 at *3; *see* 13 CFR § 124.104(c)(2).

Congress has established an “aspirational goal” for procurement from socially and economically disadvantaged individuals, which includes but is not limited to the Section 8(a) program, of 5 percent of procurements dollars government wide. *See* 15 U.S.C. § 644(g)(1). *DynaLantic*, at *3. Congress has not, however, established a numerical goal for procurement from the Section 8(a) program specifically. *See Id.* Each federal agency establishes its own goal by agreement between the agency head and the SBA. *Id.* DoD has established a goal of awarding approximately 2 percent of prime contract dollars through the Section 8(a) program. *DynaLantic*, at *3. The Section 8(a) program allows the SBA, “whenever it determines such action is necessary and appropriate,” to enter into contracts with other government agencies and then subcontract with qualified program participants. 15 U.S.C. § 637(a)(1). Section 8(a) contracts can be awarded on a “sole source” basis (i.e., reserved to one firm) or on a “competitive” basis (i.e., between two or more Section 8(a) firms). *DynaLantic*, at *3-4; 13 CFR 124.501(b).

Plaintiff's business and the simulation and training industry. DynaLantic performs contracts and subcontracts in the simulation and training industry. The simulation and training industry is composed of those organizations that develop, manufacture, and acquire equipment used to train personnel in any activity where there is a human-machine interface. *DynaLantic* at *5.

Compelling interest. The Court rules that the government must make two showings to articulate a compelling interest served by the legislative enactment to satisfy the strict scrutiny standard that racial classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.” *DynaLantic*, at *9. First, the government must “articulate a legislative goal that is properly considered a compelling government interest.” *Id.* quoting *Sherbrooke Turf v. Minn. DOT.*, 345 F.3d 964, 969 (8th Cir.2003). Second, in addition to identifying a compelling government interest, “the government must demonstrate ‘a strong basis in evidence’ supporting its conclusion that race-based remedial action was necessary to further that interest.” *DynaLantic*, at *9, quoting *Sherbrooke*, 345 F.3d 969.

After the government makes an initial showing, the burden shifts to *DynaLantic* to present “credible, particularized evidence” to rebut the government’s “initial showing of a compelling interest.” *DynaLantic*, at *10 quoting *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950, 959 (10th Cir. 2003). The court points out that although Congress is entitled to no deference in its ultimate conclusion that race-conscious action is warranted, its fact-finding process is generally entitled to a presumption of regularity and deferential review. *DynaLantic*, at *10, citing *Rothe Dev. Corp. v. U.S. Dep’t of Def.* (“*Rothe III*”), 262 F.3d 1306, 1321 n. 14 (Fed. Cir. 2001).

The court held that the federal Defendants state a compelling purpose in seeking to remediate either public discrimination or private discrimination in which the government has been a “passive participant.” *DynaLantic*, at *11. The Court rejected *DynaLantic*’s argument that the federal Defendants could only seek to remedy discrimination by a governmental entity, or discrimination by private individuals directly using government funds to discriminate. *DynaLantic*, at *11. The Court held that it is well established that the federal government has a compelling interest in ensuring that its funding is not distributed in a manner that perpetuates the effect of either public or private discrimination within an industry in which it provides funding. *DynaLantic*, at *11, citing *Western States Paving v. Washington State DOT*, 407 F.3d 983, 991 (9th Cir. 2005).

The Court noted that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax dollars of all citizens, do not serve to finance the evils of private prejudice, and such private prejudice may take the form of discriminatory barriers to the formation of qualified minority businesses, precluding from the outset competition for public contracts by minority enterprises. *DynaLantic* at *11 quoting *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 492 (1995), and *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1167-68 (10th Cir. 2000). In addition, private prejudice may also take the form of “discriminatory barriers” to “fair competition between minority and nonminority enterprises ... precluding existing minority firms from effectively competing for public construction contracts.” *DynaLantic*, at *11, quoting *Adarand VII*, 228 F.3d at 1168.

Thus, the Court concluded that the government may implement race-conscious programs not only for the purpose of correcting its own discrimination, but also to prevent itself from acting as a “passive participant” in private discrimination in the relevant industries or markets. *DynaLantic*, at *11, citing *Concrete Works IV*, 321 F.3d at 958.

Evidence before Congress. The Court analyzed the legislative history of the Section 8(a) program, and then addressed the issue as to whether the Court is limited to the evidence before Congress when it enacted Section 8(a) in 1978 and revised it in 1988, or whether it could consider post-enactment evidence. *DynaLantic*, at *16-17. The Court found that nearly every circuit court to consider the question has held that reviewing courts may consider post-enactment evidence in addition to evidence that was before Congress when it embarked on the program. *DynaLantic*, at *17. The Court noted that post-enactment evidence is particularly relevant when the statute is over thirty years old, and evidence used to justify Section 8(a) is stale for purposes of determining a compelling interest in the present. *Id.* The Court then followed the 10th Circuit Court of Appeals' approach in *Adarand VII*, and reviewed the post-enactment evidence in three broad categories: (1) evidence of barriers to the formation of qualified minority contractors due to discrimination, (2) evidence of discriminatory barriers to fair competition between minority and nonminority contractors, and (3) evidence of discrimination in state and local disparity studies. *DynaLantic*, at *17.

The Court found that the government presented sufficient evidence of barriers to minority business formation, including evidence on race-based denial of access to capital and credit, lending discrimination, routine exclusion of minorities from critical business relationships, particularly through closed or "old boy" business networks that make it especially difficult for minority-owned businesses to obtain work, and that minorities continue to experience barriers to business networks. *DynaLantic*, at *17-21. The Court considered as part of the evidentiary basis before Congress multiple disparity studies conducted throughout the United States and submitted to Congress, and qualitative and quantitative testimony submitted at Congressional hearings. *Id.*

The Court also found that the government submitted substantial evidence of barriers to minority business development, including evidence of discrimination by prime contractors, private sector customers, suppliers, and bonding companies. *DynaLantic*, at *21-23. The Court again based this finding on recent evidence submitted before Congress in the form of disparity studies, reports and Congressional hearings. *Id.*

State and local disparity studies. Although the Court noted there have been hundreds of disparity studies placed before Congress, the Court considers in particular studies submitted by the federal Defendants of 50 disparity studies, encompassing evidence from 28 states and the District of Columbia, which have been before Congress since 2006. *DynaLantic*, at *25-29. The Court stated it reviewed the studies with a focus on two indicators that other courts have found relevant in analyzing disparity studies. First, the Court considered the disparity indices calculated, which was a disparity index, calculated by dividing the percentage of MBE, WBE, and/or DBE firms *utilized* in the contracting market by the percentage of M/W/DBE firms *available* in the same market. *DynaLantic*, at *26. The Court said that normally, a disparity index of 100 demonstrates full M/W/DBE participation; the closer the index is to zero, the greater the M/W/DBE disparity due to underutilization. *DynaLantic*, at *26.

Second, the Court reviewed the method by which studies calculated the *availability* and *capacity* of minority firms. *DynaLantic*, at *26. The Court noted that some courts have looked closely at these factors to evaluate the reliability of the disparity indices, reasoning that the indices are not probative unless they are restricted to firms of significant size and with significant government contracting experience. *DynaLantic*, at *26. The Court pointed out that although discriminatory barriers to

formation and development would impact capacity, the Supreme Court decision in *Croson* and the Court of Appeals decision in *O'Donnell Construction Co. v. District of Columbia, et al.*, 963 F.2d 420 (D.C. Cir. 1992) “require the additional showing that eligible minority firms experience disparities, notwithstanding their abilities, in order to give rise to an inference of discrimination.” *DynaLantic*, at *26, n. 10.

Analysis: Strong basis in evidence. Based on an analysis of the disparity studies and other evidence, the Court concluded that the government articulated a compelling interest for the Section 8(a) program and satisfied its initial burden establishing that Congress had a strong basis in evidence permitting race-conscious measures to be used under the Section 8(a) program. *DynaLantic*, at *29-37. The Court held that DynaLantic did not meet its burden to establish that the Section 8(a) program is unconstitutional on its face, finding that DynaLantic could not show that Congress did not have a strong basis in evidence for permitting race-conscious measures to be used under any circumstances, in any sector or industry in the economy. *DynaLantic*, at *29.

The Court discussed and analyzed the evidence before Congress, which included extensive statistical analysis, qualitative and quantitative consideration of the unique challenges facing minorities from all businesses, and an examination of their race-neutral measures that have been enacted by previous Congresses, but had failed to reach the minority owned firms. *DynaLantic*, at *31. The Court said Congress had spent decades compiling evidence of race discrimination in a variety of industries, including but not limited to construction. *DynaLantic*, at *31. The Court also found that the federal government produced significant evidence related to professional services, architecture and engineering, and other industries. *DynaLantic*, at *31. The Court stated that the government has therefore “established that there are at least some circumstances where it would be ‘necessary or appropriate’ for the SBA to award contracts to businesses under the Section 8(a) program. *DynaLantic*, at *31, citing 15 U.S.C. § 637(a)(1).

Therefore, the Court concluded that in response to plaintiff’s facial challenge, the government met its initial burden to present a strong basis in evidence sufficient to support its articulated, constitutionally valid, compelling interest. *DynaLantic*, at *31. The Court also found that the evidence from around the country is sufficient for Congress to authorize a nationwide remedy. *DynaLantic*, at *31, n. 13.

Rejection of DynaLantic’s rebuttal arguments. The Court held that since the federal Defendants made the initial showing of a compelling interest, the burden shifted to the plaintiff to show why the evidence relied on by Defendants fails to demonstrate a compelling governmental interest. *DynaLantic*, at *32. The Court rejected each of the challenges by DynaLantic, including holding that: the legislative history is sufficient; the government compiled substantial evidence that identified private racial discrimination which affected minority utilization in specific industries of government contracting, both before and after the enactment of the Section 8(a) program; any flaws in the evidence, including the disparity studies, DynaLantic has identified in the data do not rise to the level of credible, particularized evidence necessary to rebut the government’s initial showing of a compelling interest; DynaLantic cited no authority in support of its claim that fraud in the administration of race-conscious programs is sufficient to invalidate Section 8(a) program on its face; and Congress had strong evidence that the discrimination is sufficiently pervasive across racial lines to justify granting a preference for all five groups included in Section 8(a). *DynaLantic*, at *32-36.

In this connection, the Court stated it agreed with *Croson* and its progeny that the government may properly be deemed a “passive participant” when it fails to adjust its procurement practices to account for the effects of identified private discrimination on the availability and utilization of minority-owned businesses in government contracting. *DynaLantic*, at *34. In terms of flaws in the evidence, the Court pointed out that the proponent of the race-conscious remedial program is not required to unequivocally establish the existence of discrimination, nor is it required to negate all evidence of non-discrimination. *DynaLantic*, at *35, citing *Concrete Work IV*, 321 F.3d at 991. Rather, a strong basis in evidence exists, the Court stated, when there is evidence approaching a *prima facie* case of a constitutional or statutory violation, not irrefutable or definitive proof of discrimination. *Id.*, citing *Croson*, 488 U.S. 500. Accordingly, the Court stated that DynaLantic’s claim that the government must independently verify the evidence presented to it is unavailing. *Id.* *DynaLantic*, at *35.

Also, in terms of DynaLantic’s arguments about flaws in the evidence, the Court noted that Defendants placed in the record approximately 50 disparity studies which had been introduced or discussed in Congressional Hearings since 2006, which DynaLantic did not rebut or even discuss any of the studies individually. *DynaLantic*, at *35. DynaLantic asserted generally that the studies did not control for the capacity of the firms at issue, and were therefore unreliable. *Id.* The Court pointed out that Congress need not have evidence of discrimination in all 50 states to demonstrate a compelling interest, and that in this case, the federal Defendants presented recent evidence of discrimination in a significant number of states and localities which, taken together, represents a broad cross-section of the nation. *DynaLantic*, at *35, n. 15. The Court stated that while not all of the disparity studies accounted for the capacity of the firms, many of them did control for capacity and still found significant disparities between minority and nonminority-owned firms. *DynaLantic*, at *35. In short, the Court found that DynaLantic’s “general criticism” of the multitude of disparity studies does not constitute particular evidence undermining the reliability of the particular disparity studies and therefore is of little persuasive value. *DynaLantic*, at *35.

In terms of the argument by DynaLantic as to requiring proof of evidence of discrimination against each minority group, the Court stated that Congress has a strong basis in evidence if it finds evidence of discrimination is sufficiently pervasive across racial lines to justify granting a preference to all five disadvantaged groups included in Section 8(a). The Court found Congress had strong evidence that the discrimination is sufficiently pervasive across racial lines to justify a preference to all five groups. *DynaLantic*, at *36. The fact that specific evidence varies, to some extent, within and between minority groups, was not a basis to declare this statute facially invalid. *DynaLantic*, at *36.

Facial challenge: Conclusion. The Court concluded Congress had a compelling interest in eliminating the roots of racial discrimination in federal contracting and had established a strong basis of evidence to support its conclusion that remedial action was necessary to remedy that discrimination by providing significant evidence in three different areas. First, it provided extensive evidence of discriminatory barriers to minority business formation. *DynaLantic*, at *37. Second, it provided “forceful” evidence of discriminatory barriers to minority business development. *Id.* Third, it provided significant evidence that, even when minority businesses are qualified and eligible to perform contracts in both the public and private sectors, they are awarded these contracts far less often than their similarly situated nonminority counterparts. *Id.* The Court found the evidence was particularly strong, nationwide, in the construction industry, and that there was substantial evidence

of widespread disparities in other industries such as architecture and engineering, and professional services. *Id.*

As-applied challenge. *DynaLantic* also challenged the SBA and DoD’s use of the Section 8(a) program as applied: namely, the agencies’ determination that it is necessary or appropriate to set aside contracts in the military simulation and training industry. *DynaLantic*, at *37. Significantly, the Court points out that the federal Defendants “concede that they do not have evidence of discrimination in this industry.” *Id.* Moreover, the Court points out that the federal Defendants admitted that there “is no Congressional report, hearing or finding that references, discusses or mentions the simulation and training industry.” *DynaLantic*, at *38. The federal Defendants also admit that they are “unaware of any discrimination in the simulation and training industry.” *Id.* In addition, the federal Defendants admit that none of the documents they have submitted as justification for the Section 8(a) program mentions or identifies instances of past or present discrimination in the simulation and training industry. *DynaLantic*, at *38.

The federal Defendants maintain that the government need not tie evidence of discriminatory barriers to minority business formation and development to evidence of discrimination in any particular industry. *DynaLantic*, at *38. The Court concludes that the federal Defendants’ position is irreconcilable with binding authority upon the Court, specifically, the United States Supreme Court’s decision in *Croson*, as well as the Federal Circuit’s decision in *O’Donnell Construction Company*, which adopted *Croson*’s reasoning. *DynaLantic*, at *38. The Court holds that *Croson* made clear the government must provide evidence demonstrating there were eligible minorities in the relevant market. *DynaLantic*, at *38. The Court held that absent an evidentiary showing that, in a highly skilled industry such as the military simulation and training industry, there are eligible minorities who are qualified to undertake particular tasks and are nevertheless denied the opportunity to thrive there, the government cannot comply with *Croson*’s evidentiary requirement to show an inference of discrimination. *DynaLantic*, at *39, citing *Croson*, 488 U.S. 501. The Court rejects the federal government’s position that it does not have to make an industry-based showing in order to show strong evidence of discrimination. *DynaLantic*, at *40.

The Court notes that the Department of Justice has recognized that the federal government must take an industry-based approach to demonstrating compelling interest. *DynaLantic*, at *40, citing *Cortez III Service Corp. v. National Aeronautics & Space Administration*, 950 F.Supp. 357 (D.D.C. 1996). In *Cortez*, the Court found the Section 8(a) program constitutional on its face, but found the program unconstitutional as applied to the NASA contract at issue because the government had provided no evidence of discrimination in the industry in which the NASA contract would be performed. *DynaLantic*, at *40. The Court pointed out that the Department of Justice had advised federal agencies to make industry-specific determinations before offering set-aside contracts and specifically cautioned them that without such particularized evidence, set-aside programs may not survive *Croson* and *Adarand*. *DynaLantic*, at *40.

The Court recognized that legislation considered in *Croson*, *Adarand* and *O’Donnell* were all restricted to one industry, whereas this case presents a different factual scenario, because Section 8(a) is not industry-specific. *DynaLantic*, at *40, n. 17. The Court noted that the government did not propose an alternative framework to *Croson* within which the Court can analyze the evidence, and that in fact, the evidence the government presented in the case is industry specific. *Id.*

The Court concluded that agencies have a responsibility to decide if there has been a history of discrimination in the particular industry at issue. *DynaLantic*, at *40. According to the Court, it need not take a party's definition of "industry" at face value, and may determine the appropriate industry to consider is broader or narrower than that proposed by the parties. *Id.* However, the Court stated, in this case the government did not argue with plaintiff's industry definition, and more significantly, it provided no evidence whatsoever from which an inference of discrimination in that industry could be made. *DynaLantic*, at *40.

Narrowly tailoring. In addition to showing strong evidence that a race-conscious program serves a compelling interest, the government is required to show that the means chosen to accomplish the government's asserted purpose are specifically and narrowly framed to accomplish that purpose. *DynaLantic*, at *41. The Court considered several factors in the narrowly tailoring analysis: the efficacy of alternative, race-neutral remedies, flexibility, over- or under-inclusiveness of the program, duration, the relationship between numerical goals and the relevant labor market, and the impact of the remedy on third parties. *Id.*

The Court analyzed each of these factors and found that the federal government satisfied all six factors. *DynaLantic*, at *41-48. The Court found that the federal government presented sufficient evidence that Congress attempted to use race-neutral measures to foster and assist minority owned businesses relating to the race-conscious component in Section 8(a), and that these race-neutral measures failed to remedy the effects of discrimination on minority small business owners. *DynaLantic*, at *42. The Court found that the Section 8(a) program is sufficiently flexible in granting race-conscious relief because race is made relevant in the program, but it is not a determinative factor or a rigid racial quota system. *DynaLantic*, at *43. The Court noted that the Section 8(a) program contains a waiver provision and that the SBA will not accept a procurement for award as an 8(a) contract if it determines that acceptance of the procurement would have an adverse impact on small businesses operating outside the Section 8(a) program. *DynaLantic*, at *44.

The Court found that the Section 8(a) program was not over- and under-inclusive because the government had strong evidence of discrimination which is sufficiently pervasive across racial lines to all five disadvantaged groups, and Section 8(a) does not provide that every member of a minority group is disadvantaged. *DynaLantic*, at *44. In addition, the program is narrowly tailored because it is based not only on social disadvantage, but also on an individualized inquiry into economic disadvantage, and that a firm owned by a nonminority may qualify as socially and economically disadvantaged. *DynaLantic*, at *44.

The Court also found that the Section 8(a) program places a number of strict durational limits on a particular firm's participation in the program, places temporal limits on every individual's participation in the program, and that a participant's eligibility is continually reassessed and must be maintained throughout its program term. *DynaLantic*, at *45. Section 8(a)'s inherent time limit and graduation provisions ensure that it is carefully designed to endure only until the discriminatory impact has been eliminated, and thus it is narrowly tailored. *DynaLantic*, at *46.

In light of the government's evidence, the Court concluded that the aspirational goals at issue, all of which were less than 5 percent of contract dollars, are facially constitutional. *DynaLantic*, at *46-47. The evidence, the Court noted, established that minority firms are ready, willing, and able to perform work equal to 2 to 5 percent of government contracts in industries including but not limited to

construction. *Id.* The Court found the effects of past discrimination have excluded minorities from forming and growing businesses, and the number of available minority contractors reflects that discrimination. *DynaLantic*, at *47.

Finally, the Court found that the Section 8(a) program takes appropriate steps to minimize the burden on third parties, and that the Section 8(a) program is narrowly tailored on its face. *DynaLantic*, at *48. The Court concluded that the government is not required to eliminate the burden on nonminorities in order to survive strict scrutiny, but a limited and properly tailored remedy to cure the effects of prior discrimination is permissible even when it burdens third parties. *Id.* The Court points to a number of provisions designed to minimize the burden on nonminority firms, including the presumption that a minority applicant is socially disadvantaged may be rebutted, an individual who is not presumptively disadvantaged may qualify for such status, the 8(a) program requires an individualized determination of economic disadvantage, and it is not open to individuals whose net worth exceeds \$250,000 regardless of race. *Id.*

Conclusion. The Court concluded that the Section 8(a) program is constitutional on its face. The Court also held that it is unable to conclude that the federal Defendants have produced evidence of discrimination in the military simulation and training industry sufficient to demonstrate a compelling interest. Therefore, *DynaLantic* prevailed on its as-applied challenge. *DynaLantic*, at *51. Accordingly, the Court granted the federal Defendants' Motion for Summary Judgment in part (holding the Section 8(a) program is valid on its face) and denied it in part, and granted the plaintiff's Motion for Summary Judgment in part (holding the program is invalid as applied to the military simulation and training industry) and denied it in part. The Court held that the SBA and the DoD are enjoined from awarding procurements for military simulators under the Section 8(a) program without first articulating a strong basis in evidence for doing so.

Appeals voluntarily dismissed, and Stipulation and Agreement of Settlement Approved and Ordered by District Court. A Notice of Appeal and Notice of Cross Appeal were filed in this case to the United States Court of Appeals for the District of Columbia by the United States and DynaLantic: Docket Numbers 12-5329 and 12-5330. Subsequently, the appeals were voluntarily dismissed, and the parties entered into a Stipulation and Agreement of Settlement, which was approved by the District Court (Jan. 30, 2014). The parties stipulated and agreed *inter alia*, as follows: (1) the Federal Defendants were enjoined from awarding prime contracts under the Section 8(a) program for the purchase of military simulation and military simulation training contracts without first articulating a strong basis in evidence for doing so; (2) the Federal Defendants agreed to pay plaintiff the sum of \$1,000,000.00; and (3) the Federal Defendants agreed they shall refrain from seeking to vacate the injunction entered by the Court for at least two years.

The District Court on January 30, 2014 approved the Stipulation and Agreement of Settlement, and So Ordered the terms of the original 2012 injunction modified as provided in the Stipulation and Agreement of Settlement.

5. *DynaLantic Corp. v. United States Dept. of Defense, et al.*, 503 F. Supp.2d 262 (D.D.C. 2007)

DynaLantic Corp. involved a challenge to the DOD’s utilization of the Small Business Administration’s (“SBA”) 8(a) Business Development Program (“8(a) Program”). In its Order of August 23, 2007, the district court denied both parties’ Motions for Summary Judgment because there was no information in the record regarding the evidence before Congress supporting its 2006 reauthorization of the program in question; the court directed the parties to propose future proceedings to supplement the record. 503 F. Supp.2d 262, 263 (D.D.C. 2007).

The court first explained that the 8(a) Program sets a goal that no less than 5 percent of total prime federal contract and subcontract awards for each fiscal year be awarded to socially and economically disadvantaged individuals. *Id.* Each federal government agency is required to establish its own goal for contracting but the goals are not mandatory and there is no sanction for failing to meet the goal. Upon application and admission into the 8(a) Program, small businesses owned and controlled by disadvantaged individuals are eligible to receive technological, financial, and practical assistance, and support through preferential award of government contracts. For the past few years, the 8(a) Program was the primary preferential treatment program the DOD used to meet its 5 percent goal. *Id.* at 264.

This case arose from a Navy contract that the DOD decided to award exclusively through the 8(a) Program. The plaintiff owned a small company that would have bid on the contract but for the fact it was not a participant in the 8(a) Program. After multiple judicial proceedings the D.C. Circuit dismissed the plaintiff’s action for lack of standing but granted the plaintiff’s motion to enjoin the contract procurement pending the appeal of the dismissal order. The Navy cancelled the proposed procurement, but the D.C. Circuit allowed the plaintiff to circumvent the mootness argument by amending its pleadings to raise a facial challenge to the 8(a) program as administered by the SBA and utilized by the DOD. The D.C. Circuit held the plaintiff had standing because of the plaintiff’s inability to compete for DOD contracts reserved to 8(a) firms, the injury was traceable to the race-conscious component of the 8(a) Program, and the plaintiff’s injury was imminent due to the likelihood the government would in the future try to procure another contract under the 8(a) Program for which the plaintiff was ready, willing, and able to bid. *Id.* at 264-65.

On remand, the plaintiff amended its complaint to challenge the constitutionality of the 8(a) Program and sought an injunction to prevent the military from awarding any contract for military simulators based upon the race of the contractors. *Id.* at 265. The district court first held that the plaintiff’s complaint could be read only as a challenge to the DOD’s implementation of the 8(a) Program [pursuant to 10 U.S.C. § 2323] as opposed to a challenge to the program as a whole. *Id.* at 266. The parties agreed that the 8(a) Program uses race-conscious criteria so the district court concluded it must be analyzed under the strict scrutiny constitutional standard. The court found that in order to evaluate the government’s proffered “compelling government interest,” the court must consider the evidence that Congress considered at the point of authorization or reauthorization to ensure that it had a strong basis in evidence of discrimination requiring remedial action. The court cited to *Western States Paving* in support of this proposition. *Id.* The court concluded that because the DOD program was reauthorized in 2006, the court must consider the evidence before Congress in 2006.

The court cited to the recent *Rotbe* decision as demonstrating that Congress considered significant evidentiary materials in its reauthorization of the DOD program in 2006, including six recently published disparity studies. The court held that because the record before it in the present case did not contain information regarding this 2006 evidence before Congress, it could not rule on the parties' Motions for Summary Judgment. The court denied both motions and directed the parties to propose future proceedings in order to supplement the record. *Id.* at 267.

APPENDIX C.

Contract Data Collection

Keen Independent compiled data about HDOT contracts and the firms used as prime contractors and subcontractors on those contracts. Keen Independent sought sources of data that consistently included information about prime contractors and subcontractors on FHWA-, FTA- and FAA- funded contracts and airport concessions gross receipts, regardless of firm ownership or DBE status. Appendix C describes the study team’s utilization data collection processes in six parts:

- A. Highway contract data;
- B. Transit contract data;
- C. Aviation contract data;
- D. Airports concessions contract data;
- E. Exclusions; and
- F. Data limitations.

A. Highway Contract Data

Keen Independent collected data on FHWA-funded, highway-related construction and engineering contracts that HDOT and counties awarded during the July 2011 to June 2016 study period. The study team examined 1,291 contracts and subcontracts that totaled \$815 million.

HDOT Office of Civil Rights contract PDFs were the primary source of prime and subcontract information for FHWA-funded construction and engineering services contracts awarded by HDOT and counties. HDOT Office of Civil Rights collected award, selected and concurrence letters for each awarded contract. The Keen Independent Study team used these letters (about 500 PDFs) to identify the following information, when available:

- Awarded agency (HDOT or county);
- Project number;
- Contract title;
- Project location (county);
- Prime name;
- Awarded amount;
- Project goal;
- Awarded date;
- Subcontractor name;
- Subcontractor amount;
- Subcontractor DBE status;
- Subcontractor type of work; and
- Subcontractor amount.

B. Transit Contract Data

Keen Independent also collected data on FTA-funded construction and engineering contracts that HDOT awarded during the July 2011 to June 2016 study period. The study team examined 47 contracts that totaled \$32 million.

HDOT Statewide Transportation Planning Office contract PDFs and internal reports were the primary sources of prime and subcontract information for FTA-funded construction and engineering services. These sources identified dollars going to prime contractors and subcontractors for each project. The study team were able to identify the following information, when available:

- Contract title;
- Contract type;
- Prime contractor;
- Contract award date;
- Contract location;
- Contract complete date;
- Total contract amount;
- Subcontractor name;
- Subcontractor amount;
- Subcontractor DBE status; and
- Subcontractor type of work.

C. Aviation Contract Data

Keen Independent also collected data on FAA-funded contracts that HDOT awarded during the July 2011 to June 2016 study period. The study team examined 342 contracts that totaled \$258 million.

HDOT Airports Division's Overall DBE Percentage reports were the primary source of prime and subcontract information for FAA-funded construction and engineering services. These reports identified dollars going to prime contractors and subcontractors for each project. Fields in the DBE Percentage Report include:

- Contract title;
- Contractor name;
- Project number;
- Bid award date;
- Proposed goal;
- Bid amount;
- Adjustment bid amount;
- Subcontractor name;
- Item of work;
- Contract type; and
- Subcontractor amount.

D. Airport Concessions

Keen Independent collected data on airport concessions gross revenues for the July 2011 to June 2016 study period. The study team examined 741 concessions contracts that totaled \$4.9 billion.

HDOT Airports Division's ACDBE Accomplishment Reports were the primary source of prime and subcontract information for airport concessions gross receipts. These reports identified gross receipts going to concessionaires and disadvantaged business enterprises. Fields in the ACDBE Accomplishment Report include:

- Concessionaire name;
- Disadvantaged Business Enterprise name;
- Contract number;
- Business type;
- Estimated gross receipts;
- DBE goals;
- Fiscal year;
- Date lease begins; and
- Date lease ends.

E. Exclusions

Some types of purchases are typically outside the scope of an availability and disparity study. The study team made certain exclusions related to payments to:

- Colleges and universities;
- Non for profits;
- Government agencies; and
- Insurance companies.

F. Ownership Determination

Firms were identified as minority- and women-owned based on firms' responses to availability and utilization surveys, analysis of DBE and other directories, and other research. HDOT reviewed preliminary study team coding of firm ownership before Keen Independent finalized the utilization analyses.

The study team also identified MBE/WBEs utilized in HDOT contracts that were "potential DBEs." Potential DBEs were defined as MBE/WBE that are not currently DBE-certified and:

- Were in the availability survey database and identified as "potential DBEs" (see Chapter 4);
- If not in the availability survey database, appeared to be below the revenue limits for certification based on Dun & Bradstreet data for the firm and had not graduated from the DBE program or applied for and been denied DBE certification.

G. Data Limitations

HDOT and Keen Independent were able to collect subcontract data for 90 percent of FHWA and FTA contracts and 85 percent of FAA contracts based on dollars awarded.

Although this does not represent all subcontracts, it is close to the complete population of subcontracts. There is no indication that the subcontracts not received were different from those for which the study team had data.

APPENDIX D.

General Approach to Availability Analysis

The study team used an approach similar to a “custom census” to compile data on MBEs, WBEs and majority-owned firms available for HDOT contracts and developed dollar-weighted estimates of MBE/WBE availability based on analysis of individual HDOT transportation-related construction and engineering prime contracts and subcontracts as well as airport concessions-related work. Appendix D further explains the availability methodology and results in six parts:

- A. General approach to collecting availability information;
- B. Development of the survey instruments;
- C. Execution of transportation-related construction and engineering contracts surveys;
- D. Execution of concessions surveys;
- E. Additional considerations related to measuring availability; and
- F. Availability survey instruments.

A. General Approach to Collecting Availability Information

Keen Independent collected information from firms about their availability for HDOT and local government contracts through telephone surveys.

Separate listings for transportation- and airport concessions-related businesses. The study team analyzed transportation-related construction and engineering contracts, and airport-related concessions opportunities separately. As such, distinct surveys were developed for concessions and transportation businesses, and businesses were only surveyed using questions about their respective industries (e.g., restaurant owners were not asked about their availability for construction work and paving contractors were not asked about their availability for concessions work).

Listings. The firms contacted in the transportation-related availability surveys came from two sources:

- Company representatives who had previously identified themselves to HDOT as interested in learning about future work by being prequalified for certain types of work or being on bidding lists.
- Businesses that Dun & Bradstreet (D&B) identified in certain study-related subindustries in Hawaii (D&B’s Hoover’s business establishment database).

The firms contacted in the airport concessions-related opportunities availability surveys came from Dun & Bradstreet (D&B) only.

The availability analysis focused on companies in Hawaii performing types of work most relevant to (1) transportation-related construction and engineering contracts, or (2) airport concessions work. As such, Keen Independent did not include all of the listings in the bidder/vendor lists or D&B database in the availability surveys, as described below.

- A&E Annual Consultants Selection List — This is a list of professional services consultants that have been approved to bid on HDOT contracts. Contractors must apply to be prequalified.
- CIP — The Capital Improvement Plan (CIP) list includes all firms who are expressed interest in or bid on CIP projects during the study period.
- Bidders registration list — This list includes that bid on prime contracts or quoting subcontracts on federally-assisted projects. This list is maintained by HDOT Office of Civil Rights.

Keen Independent attempted to exclude any listings for government agencies or not-for-profit organizations. (Not all were excluded on the list, but after survey respondents indicated that the organization was not a business those organizations were then excluded.)

Dun & Bradstreet Hoover’s database. There might be other firms available for HDOT work that do not appear on HDOT lists. Therefore, Keen Independent supplemented the firms on the HDOT lists by acquiring Dun & Bradstreet data for firms in Hawaii doing business in relevant subindustries.

Dun & Bradstreet’s Hoover’s affiliate maintains the largest commercially available database of U.S. businesses. The study team used D&B listings to supplement the companies identified in HDOT’s databases of bidders, vendors and prequalified firms.

- For transportation-related businesses, Keen Independent determined the types of work involved in HDOT contract elements by reviewing prime contract and subcontract dollars that went to different types of businesses during the study period. D&B classifies types of work by 8-digit work specialization codes.¹ Figure D-1 identifies the work specialization codes the study team determined were the most related to the study transportation-related contract dollars.
- For concessions-related businesses, the study team used specialization codes related to restaurants, gift shops and other businesses typically found in airports. Figure D-2 provides work codes used in identifying firms specializing in concessionaire-related industries.

Keen Independent obtained a list of firms from the D&B Hoover’s database within relevant work codes that had locations within Hawaii. D&B provided phone numbers for these businesses.

¹ D&B has developed 8-digit industry codes to provide more precise definitions of firm specializations than the 4-digit SIC codes or the NAICS codes that the federal government has prepared.

Total listings. Keen Independent attempted to consolidate information when a firm had multiple listings across these data sources. After consolidation, the data sources provided the following business lists:

- 3,494 unique listings for transportation-related firms; and
- 2,821 listings for concessions-related firms.

Keen Independent did not draw a sample of those firms for the availability analysis; rather, the study team attempted to contact each business identified through telephone surveys and other methods. Some courts have referred to similar approaches to gathering availability data as a “custom census.”

Telephone surveys. Keen Independent retained Customer Research International (CRI) to conduct telephone surveys with listed businesses. After receiving the list described above, CRI used the following steps to complete telephone surveys with business establishments:

- Firms were contacted by telephone. Up to five phone calls were made at different times of day and different days of the week to attempt to reach each company.
- Interviewers indicated that the calls to transportation-related firms were made on behalf of the Hawaii Department of Transportation providing construction, engineering, planning and other services related to highways, airports, ferry terminals and public transportation.
- For concessions-related firms, interviewers explained that the calls were made to assist HDOT with compiling a list of companies interested in operating businesses within an airport when concessions opportunities become available in the future.
- Some firms indicated in the phone calls that they did not work in the transportation contracting industry (or concessions industry) or had no interest in HDOT work, so no further survey was necessary. (Such surveys were treated as complete at that point.)

Other avenues to complete a survey. Even if a company was not able to complete a survey on the telephone, business owners could request a fax or fillable PDF version of the survey.

Figure D-1.
D&B 8-digit codes for transportation-related availability list source

Code	Description	Code	Description
07820200	Lawn services	17319904	Lighting contractor
07820203	Lawn care services	17610000	Roofing, siding, and sheetmetal work
07820204	Mowing services, lawn	17610100	Roofing and gutter work
07820207	Sodding contractor	17610101	Gutter and downspout contractor
07820210	Turf installation services, except artificial	17610102	Roof repair
15420000	Nonresidential construction, nec	17610103	Roofing contractor
15420100	Commercial and office building contractors	17610104	Skylight installation
15420101	Commercial and office building, new construction	17619901	Architectural sheet metal work
15420102	Commercial and office buildings, prefabricated erection	17619903	Sheet metal work, nec
15420103	Commercial and office buildings, renovation and repair	17619904	Siding contractor
16110000	Highway and street construction	17710201	Curb construction
16110101	Guardrail construction, highways	17719901	Concrete pumping
16110200	Surfacing and paving	17719902	Concrete repair
16110202	Concrete construction: roads, highways, sidewalks, etc.	17719903	Flooring contractor
16110203	Grading	17719904	Foundation and footing contractor
16110204	Highway and street paving contractor	17719905	Patio construction, concrete
16119901	General contractor, highway and street construction	17910000	Structural steel erection
16119902	Highway and street maintenance	17919902	Concrete reinforcement, placing of
16220000	Bridge, tunnel, and elevated highway construction	17919905	Iron work, structural
16290106	Dredging contractor	17919909	Storage tanks, metal: erection
17110000	Plumbing, heating, air-conditioning	17940000	Excavation work
17110103	Heating systems repair and maintenance	17949901	Excavation and grading, building construction
17110104	Hydronics heating contractor	17950000	Wrecking and demolition work
17110200	Plumbing contractors	17959902	Demolition, buildings and other structures
17110201	Septic system construction	41110000	Local and suburban transit
17110300	Sprinkler contractors	41110100	Bus transportation
17110301	Fire sprinkler system installation	41110101	Bus line operations
17110302	Irrigation sprinkler system installation	41110300	Airport transportation
17110400	Heating and air conditioning contractors	41110301	Airport limousine, scheduled service
17110401	Mechanical contractor	41110302	Airport transportation services, regular route
17110403	Solar energy contractor	41119901	Cable cars, except aerial, amusement, and scenic
17110404	Ventilation and duct work contractor	42120000	Local trucking, without storage
17110405	Warm air heating and air conditioning contractor	42120400	Moving services
17119901	Refrigeration contractor	42120401	Furniture moving, local: without storage
17210303	Pavement marking contractor	42129905	Dump truck haulage
17310000	Electrical work	42129908	Heavy machinery transport, local
17310100	Electric power systems contractors	42129909	Light haulage and cartage, local
17310102	Computer power conditioning	42129913	Truck rental with drivers
17310104	Switchgear and related devices installation	50329901	Aggregate
17310200	Electronic controls installation	50510216	Steel
17310202	Energy management controls	51720203	Gasoline
17310300	Communications specialization	87110000	Engineering services
17310302	Fiber optic cable installation	87110100	Sanitary engineers
17310303	Sound equipment specialization	87110101	Pollution control engineering
17310304	Telephone and telephone equipment installation	87110202	Mechanical engineering
17310305	Voice, data, and video wiring contractor	87110400	Construction and civil engineering
17310400	Safety and security specialization	87110401	Building construction consultant
17310402	Closed circuit television installation	87110402	Civil engineering
17310403	Fire detection and burglar alarm systems specialization	87110404	Structural engineering
17319903	General electrical contractor	87119901	Acoustical engineering

Figure D-1.

D&B 8-digit codes for transportation-related availability list source (cont.)

Code	Description	Code	Description
87119902	Aviation and/or aeronautical engineering	87139902	Surveying technicians
87119903	Consulting engineer	87340000	Testing laboratories
87119904	Designing: ship, boat, machine, and product	87340104	X-ray inspection service, industrial
87119905	Electrical or electronic engineering	87349902	Calibration and certification
87119906	Energy conservation engineering	87419902	Construction management
87119907	Fire protection engineering	87420410	Transportation consultant
87119908	Marine engineering	87489905	Environmental consultant
87119909	Professional engineer		
87130000	Surveying services		
87139901	Photogrammetric engineering		

Figure D-2.

D&B 8-digit codes for concessions-related availability list source

Code	Description	Code	Description
58120000	Eating places	58120403	Luncheonette
58120100	Ethnic food restaurants	58120405	Restaurant, lunch counter
58120101	American restaurant	58120500	Family restaurants
58120102	Cajun restaurant	58120501	Restaurant, family: chain
58120103	Chinese restaurant	58120502	Restaurant, family: independent
58120104	French restaurant	58120600	Pizza restaurants
58120105	German restaurant	58120601	Pizzeria, chain
58120106	Greek restaurant	58120602	Pizzeria, independent
58120107	Indian/Pakistan restaurant	58120700	Seafood restaurants
58120108	Italian restaurant	58120701	Oyster bar
58120109	Japanese restaurant	58120702	Seafood shack
58120110	Korean restaurant	58120800	Steak and barbecue restaurants
58120111	Lebanese restaurant	58120801	Barbecue restaurant
58120112	Mexican restaurant	58120802	Steak restaurant
58120114	Sushi bar	58129901	Buffet (eating places)
58120115	Thai restaurant	58129902	Cafe
58120116	Vietnamese restaurant	58129903	Caterers
58120200	Ice cream, soft drink and soda fountain stands	58129904	Chicken restaurant
58120201	Concessionaire	58129905	Commissary restaurant
58120202	Frozen yogurt stand	58129906	Contract food services
58120203	Ice cream stands or dairy bars	58129907	Diner
58120204	Snow cone stand	58129909	Health food restaurant
58120206	Soft drink stand	59470000	Gift, novelty, and souvenir shop
58120300	Fast food restaurants and stands	59470100	Gifts and novelties
58120301	Box lunch stand	59470101	Artcraft and carvings
58120302	Carry-Out only (except pizza) restaurant	59470102	Balloon shops
58120303	Chili stand	59470103	Gift baskets
58120304	Coffee shop	59470104	Gift shop
58120305	Delicatessen (eating places)	59470105	Novelties
58120307	Fast-Food restaurant, chain	59479901	Greeting cards
58120308	Fast-Food restaurant, independent	59479902	Souvenirs
58120309	Food bars	59479903	Trading cards: baseball or other sports, entertainment, etc.
58120310	Grills (eating places)	59929901	Flowers, fresh
58120311	Hamburger stand	59949902	Newsstand
58120312	Hot dog stand	60999906	Foreign currency exchange
58120313	Sandwiches and submarines shop	75210000	Automobile parking
58120314	Snack bar	75210100	Outdoor parking services
58120315	Snack shop	75210101	Parking lots
58120400	Lunchrooms and cafeterias	75210202	Parking garage
58120402	Cafeteria	51720203	Gasoline
17310202	Energy management controls	87110000	Engineering services
17310300	Communications specialization	87110100	Sanitary engineers
17310302	Fiber optic cable installation	87110101	Pollution control engineering
17310303	Sound equipment specialization	87110202	Mechanical engineering
17310304	Telephone and telephone equipment installation	87110400	Construction and civil engineering
17310305	Voice, data, and video wiring contractor	87110401	Building construction consultant
17310400	Safety and security specialization	87110402	Civil engineering
17310402	Closed circuit television installation	87110404	Structural engineering
17310403	Fire detection and burglar alarm systems specialization	87119901	Acoustical engineering
17319903	General electrical contractor		

B. Development of the Survey Instruments

Keen Independent developed the survey instruments and obtained HDOT staff review before performing the surveys. The final telephone survey instrument is presented at the end of this appendix.

The construction-related availability survey included eleven sections, and the concessions-related survey included eight sections. The study team did not know the race, ethnicity or gender of the business owner when calling a business establishment. Obtaining that information was a key component of the survey. Areas of survey questions included:

- **Identification of purpose.** The surveys began by identifying HDOT as the survey sponsor and describing the purpose of the study (i.e., “compiling a list of companies interested in working on road, highway and bridge projects”).
- **Verification of correct business name.** CRI confirmed that the business reached was in fact the business sought out.
- **Contact information.** CRI collected complete contact information for the establishment and the individual who completed the survey.
- **Verification of work related to transportation or airport concessions.** The interviewer asked whether the organization does work or provides materials related to construction, maintenance or design on transportation-related projects (or, in the concessions survey version, whether the business is in a line of work that might be found in an airport).
- **Verification of for-profit business status.** The survey then asked whether the organization was a for-profit business as opposed to a government or not-for-profit entity. Interviewers continued the survey with businesses that responded “yes” to that question.
- **Identification of main lines of business.** Businesses then chose from a list of work types that their firm performed in categories of construction-related work, engineering-related work and supply activities. In addition to choosing all areas that the firms did work, the study team asked businesses to briefly describe their main line of business as an open-ended question. (In the concessions survey, businesses were only asked to identify their firm’s primary type of work.)
- **Sole location or multiple locations.** The interviewer asked business owners or managers if their businesses had other locations and whether their establishments were affiliates or subsidiaries of other firms. (Keen Independent combined responses from multiple locations into a single record for multi-establishment firms.)
- **Past bids or work with government agencies and private sector organizations.** The survey then asked about bids and work on past government and private sector contracts. The questions were asked in connection with both prime contracts and subcontracts. (This section was skipped for concessions businesses.)

- **Qualifications and interest in future transportation work.** The interviewer asked about businesses’ qualifications and interest in future work with HDOT and other government agencies in connection with both prime contracts and subcontracts. (This section was skipped for concessions businesses.)
- **Geographic areas.** Interviewees were asked whether they could do work in several geographic areas (islands) in Hawaii: Oahu, Kauai, Maui, Hawaii Island, Lanai and Molokai.
- **Largest contracts.** The study team asked businesses to identify the value of the largest transportation-related contract or subcontract on which they had bid on or had been awarded in Hawaii during the past seven years. (This section was skipped for concessions businesses.)
- **Ownership.** Businesses were asked if at least 51 percent of the firm was owned and controlled by women and/or minorities. If businesses indicated that they were minority-owned, they were also asked about the race and ethnicity of owners. The study team reviewed reported ownership against other available data sources such as DBE directories.
- **Business background.** The study team asked businesses to identify the approximate year in which they were established. The interviewer asked several questions about the size of businesses in terms of their revenues and number of employees. For businesses with multiple locations, this section also asked about their revenues and number of employees across all locations.
- **Potential barriers in the marketplace.** Establishments were asked a series of questions concerning general insights about the marketplace and HDOT contracting practices including obtaining loans, bonding and insurance. The survey also included an open-ended question which asked for respondents’ thoughts about barriers to starting a business or achieving success in Hawaii. In addition, the survey included a question asking whether interviewees would be willing to participate in a follow-up survey about marketplace conditions.

C. Execution of Transportation-Related Work Surveys

Keen Independent held planning and training sessions with CRI as part of the launch of the availability surveys. CRI began conducting full availability surveys for transportation construction and engineering-related firms in September of 2018 and completed the surveys in early December. (Note that concessions results are presented separately in this appendix.)

To minimize non-response, CRI made at least five attempts at different times of day and on different days of the week to reach each business establishment. CRI identified and attempted to interview an available company representative such as the owner, manager or other key official who could provide accurate and detailed responses to the questions included in the survey.

Establishments that the study team successfully contacted. Figures D-3 presents the dispositions of the businesses the study team attempted to contact for availability surveys.

Note that the following analysis is based on business counts after Keen Independent removed duplicate listings (beginning with a list of 3,494 unique businesses).

Non-working or wrong phone numbers. Some of the business listings that the study team attempted to contact were:

- Non-working phone numbers (582); or
- Wrong numbers for the desired businesses (20).

Some non-working phone and wrong numbers reflected business establishments that closed, were sold or changed their names. Those phone numbers could also have changed between the time that a source listed them and the time that the study team attempted to contact them.

Figure D-3.
Disposition of attempts to survey business establishments

Note:

Study team made at least five attempts to complete an interview with each establishment.

Source:

Keen Independent from 2018 Availability Surveys.

	Number of firms	Percent of business listings
Beginning list (unique businesses)	3,494	
Less non-working phone numbers	582	
Less wrong number	20	
Firms with working phone numbers	2,892	100.0 %
Less no answer	1,468	
Less could not reach responsible staff member	186	
Less could not continue in English or Spanish	7	
Less unreturned fax/email	118	
Less said they already completed the survey but didn't	12	
Firms successfully contacted	1,101	38.1 %

Working phone numbers. As shown in Figure D-3, there were 2,892 businesses with working phone numbers that the study team attempted to contact. For various reasons, the study team was unable to contact some of those businesses:

- **No answer.** Some businesses could not be reached after at least five attempts at different times of the day and on different days of the week (1,468 establishments).
- **Could not reach responsible staff member.** For a small number of businesses (186), a responsible staff person could not be reached to complete the survey after repeated attempts.

- **Could not complete the survey in English or Spanish.** Businesses with language barriers during an initial call were re-contacted by a Spanish-speaking CRI interviewer, as appropriate. The interviewee was asked if there was anyone available to perform the survey in English. If not, Questions 1 and 2 of the instrument were asked in Spanish. If it appeared that the firm performed transportation related work, the interviewer asked if the company would like to complete an email or faxed questionnaire (in English), which was then sent. This approach appeared to nearly eliminate any language barriers to participating in the availability surveys. Language barriers presented a difficulty in conducting the survey for only seven companies.
- **Unreturned fax or email surveys.** The study team sent email invitations to those who requested a link to the online survey or requested to do the survey via fax. There were 118 businesses that requested such surveys, but did not return them.
- **Respondent indicated that they had already completed an online survey.** There were 12 respondents who said that they had already completed an online survey that were not found within the online survey responses.

After taking those unsuccessful attempts into account, the study team was able to successfully contact 1,101 businesses, or 38 percent of those with working phone numbers.

Establishments included in the availability database. Figure D-4 presents the disposition of the 1,101 businesses the study team successfully contacted and how that number resulted in the 304 businesses the study team included in the availability database.

Figure D-4.
Disposition of
successfully contacted
businesses

Source:
Keen Independent from
2018 Availability Surveys.

	Number of firms
Firms successfully contacted	1,101
Less businesses not interested	672
Less no longer in business	35
Firms that completed interviews about business	394
Less not a for-profit business	86
Less duplicate responses	4
Firms included in availability database	304

Establishments not interested in discussing availability for HDOT work. Of the 1,101 businesses that the study team successfully contacted, 672 were not interested in discussing their availability for HDOT work. In Keen Independent’s experience, those types of responses are often firms that do not perform relevant types of work. Another 35 respondents indicated that their companies were no longer in business.

Businesses included in the availability database. Many firms completing availability surveys were not included in the final availability database because they indicated that they were not a for-profit business.

- Of the completed surveys, 86 indicated that they were not a for-profit business (including non-profits or government agencies). Surveys ended when respondents reported that their establishments were not for-profit businesses.
- There were four duplicate responses excluded at this point of the analysis (answers were consolidated).

After those final screening steps, the survey effort produced a database of 304 businesses potentially available for HDOT transportation contracting work.

Coding responses from multi-location businesses. As described above, there were multiple responses from some firms. Responses from different locations of the same business were combined into a single, summary data record after reviewing the multiple responses.

D. Execution of Concessions Surveys

CRI also conducted concessions availability surveys in fall 2018, using the same protocols as for the surveys with firms in the transportation contracting industry.

Establishments that the study team successfully contacted. Figure D-5 presents the dispositions of the businesses the study team attempted to contact for availability surveys.

Note that the following analysis is based on business counts after Keen Independent removed duplicate listings (beginning with a list of 2,821 unique businesses).

Non-working or wrong phone numbers. Some of the business listings that the study team attempted to contact were:

- Non-working phone numbers (289); or
- Wrong numbers for the desired businesses (46).

As with the surveys with transportation contracting firms, some of the non-working phones and wrong numbers reflected business establishments that closed, were sold or changed their names and phone numbers.

Figure D-5.
Disposition of attempts
to survey concessions-
related business
establishments

Note:

Study team made at least five attempts to complete an interview with each establishment.

Source:

Keen Independent from 2018 Availability Surveys.

	Number of firms	Percent of business listings
Beginning list (unique businesses)	2,821	
Less non-working phone numbers	289	
Less wrong number	46	
Firms with working phone numbers	2,486	100.0 %
Less no answer	948	
Less could not reach responsible staff member	317	
Less could not continue in English or Spanish	69	
Less unreturned fax/email	186	
Less said they already completed the survey but didn't	5	
Firms successfully contacted	961	38.7 %

Working phone numbers. As shown in Figure D-5, there were 2,486 concessions-related businesses with working phone numbers that the study team attempted to contact. For various reasons, the study team was unable to contact some of those businesses:

- **No answer.** Some businesses could not be reached after at least five attempts at different times of the day and on different days of the week (948 establishments).
- **Could not reach responsible staff member.** For a small number of businesses (317), a responsible staff person could not be reached to complete the survey after repeated attempts.
- **Could not complete the survey in English or Spanish.** Businesses with language barriers during an initial call were re-contacted by a Spanish-speaking CRI interviewer, as appropriate. The interviewee was asked if there was anyone available to perform the survey in English. If not, Questions 1 and 2 of the instrument were asked in Spanish. If it appeared that the firm performed concessions related work, the interviewer asked if the company would like to complete an email or faxed questionnaire (in English), which was then sent. Language barriers presented a difficulty in conducting the survey for 69 companies.
- **Unreturned fax or email surveys.** The study team sent email invitations to those who requested a link to the online survey or requested to do the survey via fax. There were 186 businesses that requested such surveys but did not return them.
- **Respondent indicated that they had already completed an online survey.** There were five respondents who said that they had already completed an online survey that were not found within the online survey responses.

After taking those unsuccessful attempts into account, the study team was able to successfully contact 961 businesses, or 39 percent of those with working phone numbers.

Establishments included in the availability database. Figure D-6 presents the disposition of the 961 businesses the study team successfully contacted and how that number resulted in the 160 businesses the study team included in the availability database.

Figure D-6.
Disposition of
successfully contacted
concessions-related
businesses

Source:
Keen Independent from
2018 Availability Surveys.

	Number of firms
Firms successfully contacted	961
Less businesses not interested	671
Less no longer in business	24
Less don't perform related work	60
Firms that completed interviews about business	206
Less not a for-profit business	46
Firms included in availability database	160

Establishments not interested in discussing availability for HDOT work. Of the 961 businesses that the study team successfully contacted, 671 were not interested in discussing their availability for airport concessions. Another 24 respondents indicated that their companies were no longer in business, and 60 respondents indicated that they don't perform concessions-related work.

Businesses included in the availability database. Many firms completing availability surveys were not included in the final availability database because they indicated that they were not a for-profit business.

Of the completed surveys, 46 indicated that they were not a for-profit business (including non-profits or government agencies). Surveys ended when respondents reported that their establishments were not for-profit businesses.

After those final screening steps, the survey effort produced a database of 160 businesses potentially available for HDOT work.

Coding responses from multi-location businesses. As described above, there were multiple responses from some firms. Responses from different locations of the same business were combined into a single, summary data record after reviewing the multiple responses.

E. Additional Considerations Related to Measuring Availability

The study team made several additional considerations related to its approach to measuring availability, particularly as they related to HDOT's implementation of the Federal DBE program.

Not providing a count of all businesses available for HDOT work. The purpose of the availability surveys was to provide precise, unbiased estimates of the percentage of MBE/WBEs potentially available for HDOT work. The research appropriately focused on firms in subindustries related to transportation contracting or concessions and the relevant geographic area for HDOT contracts. Subindustries that comprised a very small portion of HDOT highway-related work were not included.

Keen Independent did not purchase Dun & Bradstreet data for firms outside Hawaii. And, not all firms on the list of businesses completed surveys, even after repeated attempts to contact them. Therefore, the availability analysis did not provide a comprehensive listing of every business that could be available for all types of HDOT contracts and should not be used in that way.

There were some firms receiving HDOT work that did not complete an availability survey. Further research indicated that some were out of business by the time that the survey was conducted or might have been no longer interested in HDOT work. And, Keen Independent's analysis of MBE/WBE and majority-owned firms receiving HDOT work found that MBE/WBEs were as or more likely to have completed an availability survey as majority-owned firms.

Federal courts have approved similar approaches to measuring availability that Keen Independent used in this study. The United States Department of Transportation's (USDOT's) "Tips for Goals Setting in the Disadvantaged Business Enterprise (DBE) Program" also recommends a similar approach to measuring availability for agencies implementing the Federal DBE Program.²

Not using a "headcount" based solely on HDOT lists. USDOT guidance for determining MBE/WBE availability recommends dividing the number of businesses in an agency's DBE directory by the total number of businesses in the marketplace, as reported in U.S. Census data. As another option, USDOT suggests using a list of prequalified businesses or a bidders list to estimate the availability of MBE/WBEs for an agency's prime contracts and subcontracts.

Keen Independent used HDOT lists that included firms that expressed interest in HDOT work, but included other firms potentially available for HDOT contracts as well. This helps capture firms that might have been discouraged from pursuing HDOT work and would not appear on HDOT lists.

Keen Independent's approach to measuring availability used in this study also incorporates several layers of refinement to a simple head count approach. For example, the surveys provide data on businesses' qualifications, size of contracts they bid on and interest in HDOT work, which allowed the study team to take a more refined approach to measuring availability.

² Tips for Goal-Setting in the Disadvantaged Business Enterprise (DBE) Program. Retrieved from <http://www.osdbu.dot.gov/dbeprogram/tips.cfm>

Using D&B lists. Keen Independent supplemented business lists obtained from HDOT with Dun & Bradstreet business listings for Hawaii. Note that D&B does not require firms to pay a fee to be included in its listings — it is completely free to listed firms. D&B provides the most comprehensive private database of business listings in the United States. Even so, the database does not include all establishments operating in Hawaii due to the following reasons:

- There can be a lag between formation of a new business and inclusion in D&B listings, meaning that the newest businesses may be underrepresented in the sample frame.
- Although D&B includes home-based businesses, those businesses are more difficult to identify and are thus somewhat less likely than other businesses to be included in D&B listings. Small, home-based businesses are more likely than large businesses to be minority- or women-owned, which again suggests that MBE/WBEs might be underrepresented in the final availability database.³
- Some businesses providing transportation construction or engineering-related work might not be classified as such in the D&B data.

Because Keen Independent used several HDOT data sources of business listings for the availability analysis as well as D&B lists, the final survey list captures some firms not included in the D&B data. (The study team estimates that about one-quarter of the completed surveys were firms not on the D&B list.)

Selection of specific subindustries. Keen Independent identified specific subindustries when compiling business listings from Dun & Bradstreet. D&B provides highly specialized, 8-digit codes to assist in selecting firms within specific specializations. There are limitations when choosing specific D&B work specialization codes to define sets of establishments to be surveyed, which leave some businesses off the contact list. However, Keen Independent’s use of additional HDOT data (A&E Consultants Selection list, bidders’ list, etc.) for Hawaii mitigates this potential concern.

Large number of companies reporting that they do not perform highway-related work or were not interested in discussing HDOT work. Many firms contacted in the availability surveys indicated that they did not perform related work or were otherwise not interested in HDOT work. The number of responses fitting these categories reflects the fact that Keen Independent was necessarily broad when developing its initial lists.

For example, Dun & Bradstreet does not have a subindustry code that identifies the subset of electrical firms or trucking firms that perform highway-related work. Therefore, Keen Independent acquired a general list of electrical firms (code 17310000) and local trucking firms (code 42120000), and through surveys identified which firms would perform highway or other transportation work. Most did not. Most of the construction and engineering contracting firms indicating that they were not interested in discussing HDOT work were in electrical, plumbing, trucking, nonresidential construction and engineering services.

³ Michael McManus. 2016. Minority Business Ownership: Data from the 2012 Survey of Business Owners. U.S. Small Business Administration. <https://www.sba.gov/sites/default/files/advocacy/Minority-Owned-Businesses-in-the-US.pdf> (accessed June 16, 2019).

There were some companies that had actually performed HDOT contracts that responded in the availability survey that they were not interested in discussing their availability for HDOT work or did not perform relevant work. These firms accounted less than 10 percent of the total of such responses for transportation work, and less than 1 percent of the total of such responses for concessions work. There was no indication that MBE/WBEs were underrepresented in the final availability database due to these types of responses.

Non-response bias. An analysis of non-response bias considers whether businesses that were not successfully surveyed are systematically different from those that were successfully surveyed and included in the final data set. There are opportunities for non-response bias in any survey effort. The study team considered the potential for non-response bias due to:

- Research sponsorship;
- Differences in success reaching potential interviewees;
- Calling from outside Hawaii; and
- Language barriers.

Research sponsorship. Interviewers introduced themselves by identifying HDOT as the survey sponsor because businesses may be less likely to answer somewhat sensitive business questions if the interviewer was unable to identify the sponsor.

Differences in success reaching potential interviewees. There might be differences in the success reaching firms in different types of work. However, Keen Independent concludes that any such differences did not lead to lower estimates of MBE/WBE availability than if the study team had been able to successfully reach all firms.

Businesses in highly mobile fields, such as trucking, are more difficult to reach for availability surveys than businesses more likely to work out of fixed offices (e.g., engineering firms). That assertion suggests that response rates may differ by work specialization. Simply counting all surveyed businesses across work specializations to determine overall MBE/WBE availability would lead to estimates that were biased in favor of businesses that could be easily contacted by email or telephone.

However, work specialization as a potential source of non-response bias in the availability analysis is minimized because the availability analysis examines businesses within particular work fields before determining an MBE/WBE availability figure. In other words, the potential for trucking firms to be less likely to complete a survey is less important because the number of MBE/WBE trucking firms is compared with the number of total trucking firms when calculating availability for trucking work.

Keen Independent examined whether minority- and women-owned firms were more difficult to reach in the telephone survey and found no indication that interviewers were less likely to complete telephone surveys with MBE/WBEs than majority-owned firms. The study team examined response rates based on MBE/WBE versus non-MBE/WBE business ownership data that Dun & Bradstreet had for firms in the list purchased from this source. Comparing MBE/WBE representation on the initial list from Dun & Bradstreet with MBE/WBE representation on the list of firms (from the D&B source) that were successfully contacted, MBE/WBE firms were just slightly more likely to be successfully contacted than majority-owned firms.

- This was true for concessions-related businesses (based on D&B identification of ownership, MBE/WBE firms were 13.7% of the initial list and 15.6% of successfully contacted concessions firms).
- Keen Independent also found this to be true for firms in the transportation contracting industry (MBE/WBE firms were 27.8% of the initial list and 31.2% of successfully surveyed firms).

Therefore, there is no indication that there were differences in response rates that materially affected the estimates of MBE/WBE availability in this study.

Calling from outside Hawaii. It might have been obvious to people in Hawaii that the phone calls were placed from outside the state and the interviewers were not from Hawaii. This might have reduced the overall response rate. However, there was no indication that minority- and women-owned firms were less likely to respond to the calls than white male-owned businesses.

Potential language barriers. Because of the methods explained previously in this appendix, any language barriers were minimal, especially for firms in the transportation contracting industry. Study results do not appear to have been affected by conducting the principal portions of the availability survey in English. CRI made callbacks to firms in Spanish when an initial call identified an individual who only spoke Spanish appeared to be effective. In the concessions industry, a higher proportion of firms could not complete the survey in English, which might somewhat understate the overall estimate of MBEs as a share of all firms available for airport concessions.

Response reliability. Business owners and managers were asked questions that may be difficult to answer, including questions about revenues and employment. Keen Independent explored the reliability of survey responses in a number of ways. For example:

- Keen Independent reviewed data from the availability surveys in light of information from other sources. This includes data on the race/ethnicity and gender of the owners of DBE-certified businesses which was compared with survey responses concerning business ownership.
- Keen Independent compared survey responses about the largest contracts that businesses won during the past seven years with actual HDOT contract data.

A copy of the survey instrument for construction follows. Keen Independent then provides a copy of the airport concession survey.

F. Availability Survey Instruments

HAWAII DEPARTMENT OF TRANSPORTATION FAX/EMAIL SURVEY

The information developed in this survey will add to Hawaii DOT's data on companies interested in working with the Department.

If you have any questions, please contact: **Melanie Martin**
Hawaii Department of Transportation (HDOT)
Civil Rights Coordinator
808-831-7912

You may also visit the study website at www.keenindependent.com/hdotdisparitystudy2019 to learn more.

Z5. What is the name of your business?

Z8. Address of business (if multiple offices, choose a Hawaii location if possible):

Street Address: _____

City (Required): _____

State (Required): _____

ZIP: _____

A1. Does your firm do any work related to transportation-related projects, such as highways, airports, ferry terminals, or providing transportation services?

- 01=Yes
- 02=No
- 98=Don't know

A2. Is your firm a business, as opposed to a non-profit organization, a foundation or a government office?

- 01=Yes
- 02=No
- 98=Don't know

A4. What would you say is the main line of business of your company?

A5. Is the address of your business, as provided earlier, the sole location for your business, or do you have offices in other locations?

- 01=Sole location
- 02=Have other locations
- 98=Don't know

A6. Is your company a subsidiary or affiliate of another firm?

- 01=Independent **[SKIP TO B1]**
- 02=Subsidiary or affiliate of another firm
- 98=Don't know **[SKIP TO B1]**

A7. What is the name of your parent company?

B1. What types of work does your firm perform? Select all that apply.

- 01=Office and public building construction
- 02=General road construction and widening
- 03=Bridge and elevated highway construction
- 04=Electrical work including lighting and signals
- 05=Roofing
- 06=Plumbing, heating and air conditioning
- 07=Steel work
- 08=Excavation, site prep, grading and drainage
- 09=Wrecking and demolition
- 10=Landscaping and related work including erosion control
- 11=Installation of guardrails, fencing or signs
- 12=Airport runway construction and paving
- 13=Asphalt, concrete or other paving
- 14=Pavement surface treatment (such as sealing)
- 15=Striping or pavement marking
- 16=Concrete flatwork (including sidewalk, curb and gutter)
- 17=Other concrete work
- 18=Temporary traffic control
- 19=Harbor dredging
- 20=Pier construction
- 21=Trucking and hauling
- 43=Inspection and testing
- 44=Construction management
- 88=Other (Please specify) _____
- _____
- 98=Don't know

C1. Thinking about work in the past seven years, has your company bid on or been awarded work for any part of a contract for a government agency in Hawaii?

- 01=Yes
- 02=No **[SKIP TO C3]**
- 98=Don't know **[SKIP TO C3]**

C2. Were those bids or awards to work as a prime contractor, a subcontractor or a supplier?

- 01=Prime contractor
- 02=Subcontractor
- 03=Supplier (or manufacturer)
- 04=Prime and sub
- 05=Sub and supplier
- 06=Prime and supplier
- 07=Prime, sub and supplier
- 98=Don't know

C3. Is your company qualified and interested in working with the Hawaii Department of Transportation or other state or county agencies as a prime contractor?

- 01=Yes
- 02=No
- 98=Don't know

C4. Is your company qualified and interested in working with the Hawaii Department of Transportation or other state or county agencies as a subcontractor?

- 01=Yes
- 02=No
- 98=Don't know

The next questions pertain to the islands where your company can perform work or serve customers.

D1. Can your company do work on Oahu?

- 01=Yes
- 02=No
- 98=Don't know

D2. Can your company do work on Kauai?

- 01=Yes
- 02=No
- 98=Don't know

D3. Can your company do work on Maui?

- 01=Yes
- 02=No
- 98=Don't know

D4. Can your company do work on Hawaii Island (also known as the Big Island)?

- 01=Yes
- 02=No
- 98=Don't know

D5. Can your company do work on Lanai?

- 01=Yes
- 02=No
- 98=Don't know

D6. Can your company do work on Molokai?

- 01=Yes
- 02=No
- 98=Don't know

The next question is about the firm's contract history.

E1. In rough dollar terms, in the past seven years what was the largest contract or subcontract your company was awarded or bid on in Hawaii? Includes contracts not yet completed.

- 01=\$100,000 or less
- 02=More than \$100,000 up to \$500,000
- 03=More than \$500,000 to \$1 million
- 04=More than \$1 million to \$2 million
- 05=More than \$2 million to \$5 million
- 06=More than \$5 million to \$10 million
- 07=More than \$10 million to \$20 million
- 08=More than \$20 million to \$100 million
- 09=More than \$100 million or more
- 97=None
- 98=Don't know

The next questions are about the ownership of the business.

F1. A business is defined as woman-owned if more than half — that is, 51 percent or more — of the ownership and control is by women. By this definition, is your firm a woman-owned business?

- 01=Yes
- 02=No
- 98=Don't know

F2. A business is defined as minority-owned if more than half — that is, 51 percent or more — of the ownership and control is by one or more persons who are Asian-Pacific American, Native Hawaiian or Pacific Islander; African American; Hispanic or Portuguese American; American Indian or Alaska Native; or Subcontinent Asian American. By this definition, is your firm a minority-owned business?

- 01=Yes
- 02=No **[SKIP TO G1]**
- 98=Don't know **[SKIP TO G1]**

F3. Would you say that the minority group ownership is mostly Asian-Pacific American, Native Hawaiian or Pacific Islander; African American; Hispanic or Portuguese American; American Indian or Alaska Native; or Subcontinent Asian American?

- 01=African American **[SKIP TO G1]**
- 02= Hispanic American including Portuguese American (persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race) **[SKIP TO G1]**
- 03= American Indian or Alaska Native **[SKIP TO G1]**
- 04= Subcontinent Asian American **[SKIP TO G1]**
- 05= Asian Pacific American, Native Hawaiian or Pacific Islander **[SPECIFY which group in question F5]**
- 88=Other (Please specify) _____
- 98=Don't know

F5. If the answer to question F3 was Asian Pacific American, Native Hawaiian or Pacific Islander, what racial or ethnic group would the owner(s) most closely identify with?

- 1=Chinese American
- 2=Filipino American
- 3=Japanese American
- 4=Korean American
- 5=Native Hawaiian
- 6=Pacific Islander
- 88=Other Asian Pacific American (Please specify) _____
- 98=Don't know

The next questions are about the background of the business.

G1. About what year was your firm established?

The next set of questions pertains to annual averages for your company for the past three years (or just years in business if formed after 2015).

G3. On average, about how many employees did you have working out of just your location, identified earlier, for the past three years? (Includes employees who work at that location and those who work from that location.)

G5. Roughly, what was the average annual gross revenue of your company, just considering your location, for the past three years?

- 01=Less than \$1 million
- 02=\$1 million to \$5 million
- 03=\$5.1 million to \$7.5 million
- 04=\$7.6 million to \$11 million
- 05=\$11.1 million to \$15 million
- 06=\$15.1 million to \$20.5 million
- 07=\$20.6 million to 24 million
- 08=\$24.1 million to \$27.5 million
- 09=\$27.6 million to \$36.5 million
- 10=\$36.6 million to \$38.5 million
- 11=More than \$38.5 million
- 98=Don't know

G6. **[SKIP IF YOUR FIRM DOES NOT HAVE OTHER LOCATIONS]**

About how many employees did you have, on average, for all of your Hawaii locations in the past three years?

(Number of employees at all locations should not be fewer than at "just your location.")

G7. **[SKIP IF YOUR FIRM DOES NOT HAVE OTHER LOCATIONS]**

Roughly, what was the average annual gross revenue of your company, for all of your locations in the past three years (or for the years your company was in business if started after 2015)?

(Revenue at all locations should not be less than at "just your location.")

- 01=Less than \$1 million
- 02=\$1 million to \$5 million
- 03=\$5.1 million to \$7.5 million
- 04=\$7.6 million to \$11 million
- 05=\$11.1 million to \$15 million
- 06=\$15.1 million to \$20.5 million
- 07=\$20.6 million to 24 million
- 08=\$24.1 million to \$27.5 million
- 09=\$27.6 million to \$36.5 million
- 10=\$36.6 million to \$38.5 million
- 11=More than \$38.5 million
- 98=Don't know

Finally, we're interested in whether your company has experienced barriers or difficulties associated with business start-up or expansion in your industry, or with obtaining work. Think about your experiences in the past seven years as you answer these questions.

H1A. Has your company experienced any difficulties in obtaining lines of credit or loans?

- 01=Yes
- 02=No
- 97=Does not apply
- 98=Don't know

H1B. Has your company obtained or tried to obtain a bond for a project?

- 01=Yes
- 02=No [SKIP TO H1D]
- 97=Does not apply [SKIP TO H1D]
- 98=Don't know [SKIP TO H1D]

H1C. Has your company had any difficulties obtaining bonds needed for a project?

- 01=Yes
- 02=No
- 97=Does not apply
- 98=Don't know

H1D. Have you had any difficulty in being prequalified for work?

- 01=Yes
- 02=No
- 97=Does not apply
- 98=Don't know

H1E. Have any insurance requirements on projects presented a barrier to bidding?

- 01=Yes
- 02=No
- 97=Does not apply
- 98=Don't know

H1F. Has the large size of projects presented a barrier to bidding?

- 01=Yes
- 02=No
- 97=Does not apply
- 98=Don't know

H1G. Has your company experienced any difficulties learning about bid opportunities directly with Hawaii DOT?

- 01=Yes
- 02=No
- 97=Does not apply
- 98=Don't know

H1H. Has your company experienced any difficulties learning about bid opportunities in the private sector in general in Hawaii?

- 01=Yes
- 02=No
- 97=Does not apply
- 98=Don't know

H1I. Has your company experienced any difficulties learning about subcontracting opportunities with prime contractors in Hawaii?

- 01=Yes
- 02=No
- 97=Does not apply
- 98=Don't know

H1J. Has your company experienced any difficulties receiving payment from Hawaii DOT in a timely manner?

- 01=Yes
- 02=No
- 97=Does not apply
- 98=Don't know

H1K. Has your company experienced any difficulties receiving payment from prime contractors in a timely manner?

- 01=Yes
- 02=No
- 97=Does not apply
- 98=Don't know

H1L. Has your company experienced any difficulties receiving payment from other customers in a timely manner?

- 01=Yes
- 02=No
- 97=Does not apply
- 98=Don't know

H1M. Has your company experienced any difficulties obtaining final approval on your work from inspectors or prime contractors?

- 01=Yes
- 02=No
- 97=Does not apply
- 98=Don't know

H2. Do any other barriers come to mind about starting and expanding a business or achieving success in your industry in Hawaii?

- 97=Nothing/None/No comments
- 98=Don't know

H3. Would you be willing to participate in a follow-up interview about any of these issues?

- 01=Yes
- 02=No
- 97=(Does not apply)
- 98=(Don't know)

Just a few last questions:

I1. What is your name?

I2. What is your position at the firm?

- 01=Owner
 - 02=Principal
 - 03=CEO
 - 04=President
 - 05=Manager
 - 06=CFO
 - 07=Vice President
 - 08=Sales manager
 - 09=Office manager
 - 10=Assistant to Owner/CEO
 - 88=Other (Please specify)
- _____

I4. If you would like to receive information from the Hawaii Department of Transportation, what mailing address should they use?

Street Address: _____

City: _____

State: _____

ZIP: _____

I5. What fax number should they use to fax any materials to you?

I5_PHONE. What phone number should they use to contact you?

I6. What e-mail address should they use to get any materials to you?

Thank you for your time. This is very helpful for the Hawaii Department of Transportation.

If you have any questions, please contact:

Melanie Martin
Hawaii Department of Transportation (HDOT)
Civil Rights Coordinator
808-831-7912

KEEN INDEPENDENT SURVEY OF HAWAII POTENTIAL AIRPORT CONCESSIONS BUSINESSES

[NOTE TO INTERVIEWER – PURPOSE OF THE SURVEY – INTERVIEW STARTS HERE:]

Hello. My name is [interviewer name]. We are calling on behalf of the Hawaii Department of Transportation Airports Division, which operates all major airports in the state. This is not a sales call. The Department of Transportation is compiling a list of companies that might be interested in operating different types of food and beverage, retail, services or other types of businesses at an airport when concessions opportunities become available in the future.

Who can I speak with to get the information we need from your firm?

[NOTE TO INTERVIEWER – AFTER REACHING THE OWNER OR AN APPROPRIATELY SENIOR STAFF MEMBER, THE INTERVIEWER SHOULD RE-INTRODUCE THE PURPOSE OF THE INTERVIEW OUTLINED ABOVE AND BEGIN WITH QUESTIONS.]

[NOTE TO INTERVIEWER – IF NEEDED, INTERVIEWER CAN ADD THIS:

We are contacting thousands of companies statewide.]

[NOTE TO INTERVIEWER – IF INTERVIEWEE REQUESTS ADDITIONAL INFORMATION:

You may visit the study website at www.keenindependent.com/hdotdisparitystudy2019 to learn more. And, you may call Melanie Martin, Civil Rights Coordinator at HDOT at 808-831-7912.]

[NOTE TO INTERVIEWER – IF ASKED:

The information developed in these interviews will add to Hawaii DOT's existing data on companies interested in future airport concessions opportunities.]

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

3=Refused to give information – TERMINATE

X2. Can you give me any information about [firm name]?

[NOTE TO INTERVIEWER – READ LIST.]

1=Yes, same owner doing business under a different name – SKIP TO X5

2=Yes, can give information about [firm name]

3=Company bought/sold/changed ownership – SKIP TO X5

4=No, does not have information – TERMINATE

5=Refused to give information – TERMINATE

X3. Can you give me the phone number of [firm name]?

[NOTE TO INTERVIEWER – ENTER UPDATED PHONE OF NAMED COMPANY.]

1=VERBATIM

X4. Can you give me the complete address for [firm name]?

[NOTE TO INTERVIEWER – RECORD IN THE FOLLOWING FORMAT:]

. STREET ADDRESS

. CITY

. STATE

. ZIP]

1=VERBATIM

X5. And what is the new name of the business that used to be [firm name]?

[NOTE TO INTERVIEWER – ENTER UPDATED NAME.]

1=VERBATIM

X6. Can you give me the name of the owner or manager of [Business from X5]? [NOTE TO INTERVIEWER – THIS IS THE BUSINESS FROM X5.]

[NOTE TO INTERVIEWER – ENTER UPDATED NAME.]

1=VERBATIM

X7. Can I have a telephone number for them?

[NOTE TO INTERVIEWER – ENTER UPDATED PHONE NUMBER.]

1=VERBATIM

X8. 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

2=SAME AS X4

X9. Do you work for this new company?

1=Yes – CONTINUE

2=No – TERMINATE

A. Confirmation of work.

A1. Is your firm in a line of business that you might find at an airport?

1=Yes

2=No - [END – INTERVIEW COMPLETE.]

98=(Don't know)

A2. Is your firm a business, as opposed to a non-profit organization, a foundation or a government office?

1=Yes

2=No [END – INTERVIEW COMPLETE.]

98=(Don't know)

A3. 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 this correct?

[NOTE TO INTERVIEWER – IF ASKED, DUN & BRADSTREET OR D&B, IS A COMPANY THAT COMPILES BUSINESS INFORMATION THROUGHOUT THE COUNTRY.]

1=Yes – SKIP TO A5

2=No

98=(Don't know)

99=(Refused)

A4. What would you say is the main line of business of your company?

[NOTE TO INTERVIEWER – ENTER VERBATIM RESPONSE.]

1=VERBATIM

A5. Is this the sole location for your business, or do you have offices in other locations?

1=Sole location

2=Have other locations

98=(Don't know)

99=(Refused)

A6. Is your company a subsidiary or affiliate of another firm?

1=Independent – SKIP TO B1

2=Subsidiary or affiliate of another firm

98=(Don't know) – SKIP TO B1

99=(Refused) – SKIP TO B1

A7. What is the name of your parent company?

1=ENTER NAME

98=(Don't know) – SKIP TO B1

99=(Refused) – SKIP TO B1

D. Geographic areas.

D1. Is your company interested in learning about airport concessions opportunities on Oahu [oh-wah-who]?

1=Yes

2=No

98=(Don't know)

D2. Is your company interested in learning about airport concessions opportunities on Kauai [kah-why]?

1=Yes

2=No

98=(Don't know)

D3. Is your company interested in learning about airport concessions opportunities on Maui [mah-wee]?

1=Yes

2=No

98=(Don't know)

D4. Is your company interested in learning about airport concessions opportunities on Hawaii [ha-wah-ee] Island?

[NOTE TO INTERVIEWER: HAWAII ISLAND IS ALSO KNOWN AS THE BIG ISLAND.]

1=Yes

2=No

98=(Don't know)

D5. Is your company interested in learning about airport concessions opportunities at Lanai Airport [luh-nye]?

1=Yes

2=No

98=(Don't know)

D6. Is your company interested in learning about airport concessions opportunities at Molokai Airport [MO-lo-kye]?

1=Yes

2=No

98=(Don't know)

F. Ownership.

F1. A business is defined as woman-owned if more than half — that is, 51 percent or more — of the ownership and control is by women. By this definition, is your firm a woman-owned business?

1=Yes

2=No

98=(Don't know)

99=(Refused)

F2. A business is defined as minority-owned if more than half — that is, 51 percent or more — of the ownership and control is by one or more persons who are Asian-Pacific American, Native Hawaiian or Pacific Islander; African American; Hispanic or Portuguese American; American Indian or Alaska Native; or Subcontinent Asian American. By this definition, is your firm a minority-owned business?

1=Yes

2=No – SKIP TO G1

98=(Don't know) – SKIP TO G1

99=(Refused) – SKIP TO G1

F3. Would you say that the minority group ownership is mostly Asian-Pacific American, Native Hawaiian or Pacific Islander; African American; Hispanic or Portuguese American; American Indian or Alaska Native; or Subcontinent Asian American?

1=African American

2=Hispanic American including Portuguese American (persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race)

3=American Indian or Alaska Native

4 = Subcontinent Asian American

5=Asian Pacific American, Native Hawaiian or Pacific Islander [SPECIFY which group]

88=Other [specify]

98=(Don't know)

99=(Refused)

F3_OTH. [NOTE TO INTERVIEWER – OTHER GROUP – SPECIFY.]

1=VERBATIM

F5. What racial or ethnic group would the owner(s) most closely identify with?" READ THE FOLLOWING OPTIONS, SELECT ONE.]

5A=Chinese American

5B=Filipino American

5C=Japanese American

5D=Korean American

5E=Native Hawaiian

5F=Pacific Islander

5G=Other Asian Pacific American (SPECIFY IN F5_OTH)

98=(Don't know)

99=(Refused)

F5_OTH. [NOTE TO INTERVIEWER – OTHER ASIAN PACIFIC AMERICAN GROUP – SPECIFY.]

1=VERBATIM

G. Business background.

G1. My next questions are about the background of the business. About what year was your firm established?

[NOTE TO INTERVIEWER – RECORD FOUR-DIGIT YEAR, e.g., '1977'.]

9998=(Don't know)

9999=(Refused)

1=NUMERIC (1600-2018)

G2. My next set of questions pertain to annual averages for your company for the past three years [NOTE TO INTERVIEWER – OR JUST YEARS IN BUSINESS IF FORMED AFTER 2015]. Dun & Bradstreet indicates that your company has about [number] employees working out of just your location. Is that an accurate estimate of your company's average employees in the past three years?

[NOTE TO INTERVIEWER – INCLUDES EMPLOYEES WHO WORK AT THAT LOCATION AND THOSE WHO WORK FROM THAT LOCATION.]

1=Yes – SKIP TO G4

2=No

98=(Don't know) – SKIP TO G4

99=(Refused) – SKIP TO G4

G3. About how many employees did you have working out of just your location, on average, for the past three years?

[NOTE TO INTERVIEWER – Includes employees who work at that location and those who work from that location.)

[NOTE TO INTERVIEWER – RECORD NUMBER OF EMPLOYEES:]

1=NUMERIC (1-999999999)

G4. Dun & Bradstreet lists the annual gross revenue of your company, just considering your location, to be approximately [dollar amount]. Is that an accurate estimate for your company's average annual gross revenue in the past three years (or for the years your company was in business if started after 2015)?

1=Yes – SKIP TO G6

2=No

98=(Don't know) – SKIP TO G6

99=(Refused) – SKIP TO G6

G5. Roughly, what was the average annual gross revenue of your company, just considering your location, for the past three years? [NOTE TO INTERVIEWER – READ LIST IF NEEDED; STOP IF THE RESPONDENT MAKES A SELECTION. “Would you say ...”]

1=Less than \$1 million

2=\$1 million to \$5 million

3=\$5.1 million to \$7.5 million

4= \$7.6 million to \$11 million

5= \$11.1 million to \$15 million

6=\$15.1 million to \$20.5 million

7=\$20.6 million to \$24 million

8=\$24.1 million to \$27.5 million

9=\$27.6 million to \$36.5 million

10=\$36.6 million to \$38.5 million

11= \$38.6 million to \$56.4 million

12=\$56.5 million or more

98=(Don't know)

99=(Refused)

G6. [NOTE TO INTERVIEWER – IF MULTI-LOCATION FIRM NOTED IN A5, OTHERWISE GO TO H1a] About how many employees did you have, on average, for all of your Hawaii locations in the past three years?

[NOTE TO INTERVIEWER – RECORD NUMBER OF EMPLOYEES:]

NUMERIC (1-999999999)

98=(Don't know)

99=(Refused)

G7. Roughly, what was the average annual gross revenue of your company, for all of your Hawaii locations in the past three years (or for the years your company was in business if started after 2015)? Would you say . . .
[NOTE TO INTERVIEWER – READ LIST IF NEEDED; STOP IF THE RESPONDENT MAKES A SELECTION. “Would you say . . .”] NOTE: CANNOT BE LOWER THAN ANSWER IN G5.

1=Less than \$1 million

2=\$1 million to \$5 million

3=\$5.1 million to \$7.5 million

4= \$7.6 million to \$11 million

5= \$11.1 million to \$15 million

6=\$15.1 million to \$20.5 million

7=\$20.6 million to \$24 million

8=\$24.1 million to \$27.5 million

9=\$27.6 million to \$36.5 million

10=\$36.6 million to \$38.5 million

11= \$38.6 million to \$56.4 million

12=\$56.5 million or more

98=(Don't know)

99=(Refused)

H. Market barriers or difficulties.

Finally, we're interested in whether the company has experienced barriers or difficulties associated with business start-up or expansion in the industry. This helps the Hawaii Department of Transportation identify any assistance that businesses might need if they operated concessions at an airport.

H1a. Has your company experienced any difficulties in obtaining lines of credit or loans?

1=Yes

2=No

97=(Does not apply)

98=(Don't know)

99=(Refused)

H1g(1). Has your company ever tried to get information about concessions opportunities at Hawaii airports?

1=Yes

2=No – SKIP TO H2

97=(Does not apply) – SKIP TO H2

98=(Don't know) – SKIP TO H2

99=(Refused) – SKIP TO H2

H1g(2). Has your company experienced any difficulties learning about concessions opportunities at Hawaii airports?

1=Yes

2=No

97=(Does not apply)

98=(Don't know)

99=(Refused)

H2. Do any other barriers come to mind about starting and expanding a business or achieving success in your industry in Hawaii?

1=VERBATIM [NOTE TO INTERVIEWER – PROBE FOR COMPLETE THOUGHTS.]

97=(Nothing/None/No comments)

98=(Don't know)

99=(Refused)

H3. Would you be willing to participate in a follow-up interview about any of these issues?

1=Yes

2=No

97=(Does not apply)

98=(Don't know)

99=(Refused)

I. Additional questions.

I1. Just a few last questions. What is your name?

[NOTE TO INTERVIEWER – RECORD FULL NAME:]

1=VERBATIM

I2. What is your position at [firm name / new firm name]?

1=Receptionist

2=Owner

3=Manager

4=CFO

5=CEO

6=Assistant to Owner/CEO

7=Sales manager

8=Office manager

9=President

10=Other [SPECIFY]

99=(Refused)

I2. [NOTE TO INTERVIEWER – ENTER OTHER – SPECIFY:]

1=VERBATIM

I3. For purposes of receiving procurement information from HDOT, is your mailing address [firm address]?

1=Yes – SKIP TO I5

2=No

98=(Don't know) – SKIP TO I5

99=(Refused) – SKIP TO I5

I4. What mailing address should HDOT use to get any materials to you? [Should have X4 and X8 as options]

1=VERBATIM [on following screen(s)]

I5. What fax number could they use to fax any materials to you?

1=NUMERIC (1000000000-9999999999)

I5_PHONE. What phone number should they use to contact you?

1=NUMERIC (1000000000-9999999999)

I6. What e-mail address could they use to get any materials to you?

1=ENTER E-MAIL

97=(No email address)

98=(Don't know)

99=(Refused)

I6. [NOTE TO INTERVIEWER – RECORD EMAIL ADDRESS. VERIFY ADDRESS LETTER BY LETTER. EXAMPLE: 'John@CRI-RESEARCH.COM' SHOULD BE VERIFIED AS: J-O-H-N-at-C-R-I-hyphen-R-E-S-E-A-R-C-H-dot-com]

1=VERBATIM

[NOTE TO INTERVIEWER – END OF SURVEY MESSAGE:]

Thank you for your time. This is very helpful for the Hawaii Department of Transportation.

APPENDIX E.

Entry and Advancement in the Hawaii Construction, Engineering and Concessions Industries

Federal courts have found that Congress “spent decades compiling evidence of race discrimination in government highway contracting, of barriers to the formation of minority-owned construction businesses, and of barriers to entry.”¹ Congress found that discrimination had impeded the formation of qualified minority-owned businesses. In the marketplace appendices (Appendix E through Appendix I), Keen Independent examines whether some of the barriers to business formation that Congress found for minority- and women-owned businesses also appear to occur in Hawaii.

Potential barriers to business formation include barriers associated with entry and advancement in the study industries. Appendix E examines recent data on education, employment and workplace advancement that may ultimately influence business formation in the Hawaii study industries.^{2, 3}

Introduction

Keen Independent examined whether there were barriers to the formation of minority- and women-owned businesses in Hawaii. Business ownership often results from an individual entering an industry as an employee and then advancing within that industry. Within the entry and advancement process, there may be some barriers that limit opportunities for minorities and women. Figure E-1 presents a model of entry and advancement in the study industries.

Appendix E uses 2012–2016 American Community Survey (ACS) data to analyze education, employment and workplace advancement — all factors that may influence whether individuals start construction, architecture and engineering, and concessions-related businesses. The “concessions” industry consists of sectors most likely to be represented in airport concessions including restaurants, bars and selected retail, as described in detail in Appendix I.

Keen Independent studied barriers to entry into the study industries separately, because entrance requirements and opportunities for advancement differ for those industries.

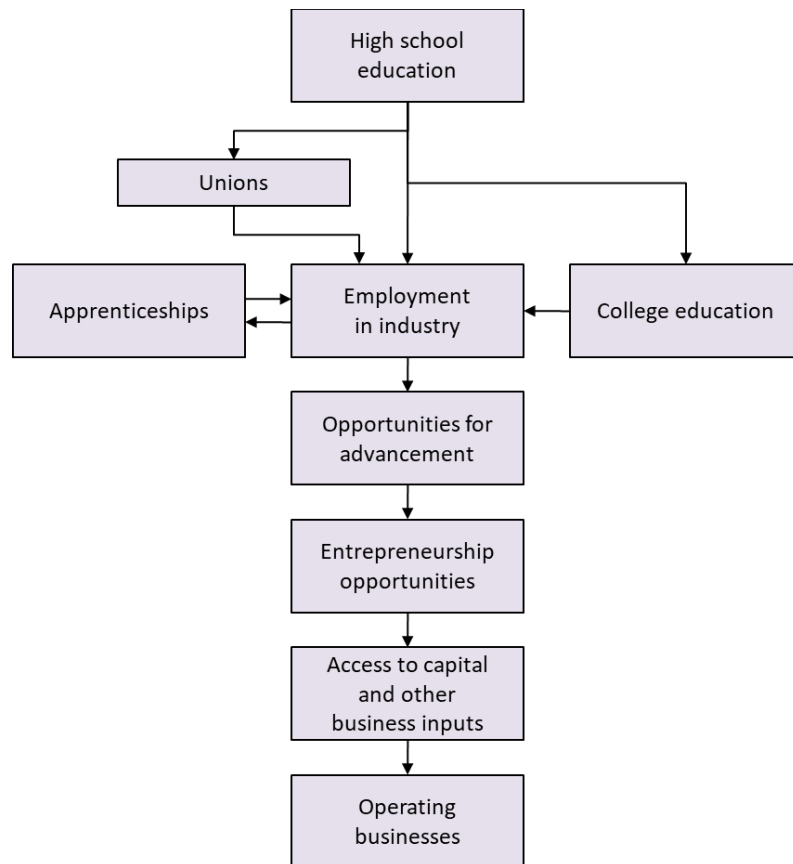
¹ *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d 964 (8th Cir. 2003), citing *Adarand Constructors, Inc. v. Slater*, 228 F.3d (10th Cir. 2000); *Western States Paving Co., Inc. v. Washington State DOT*, 345 F.3d 964 (8th Cir. 2003).

² In Appendix E and other appendices that present information about local marketplace conditions, information for “A&E” refers to architectural, engineering and related services. “Concessions” refers to retail florists; gift, novelty and souvenir shops; automotive equipment rental and leasing; restaurants and other food services; and other personal services. The concessions industry may also be referred to as the food, beverage and selected retail industry.

³ Several other report appendices analyze other quantitative aspects of conditions in the Hawaii marketplace. Appendix F explores business ownership. Appendix G presents an examination of access to capital. Appendix H considers the success of businesses. Appendix I presents the data sources that Keen Independent used in those appendices.

Figure E-1.
Model for studying entry
into the study industries
in Hawaii

Source:
Keen Independent.



Analysis of the race and ethnicity of workers in Hawaii. Keen Independent began the analysis by examining the representation of people of color among workers in Hawaii.

There are several characteristics of the workforce in Hawaii that required unique analyses. First, Keen Independent created a database from ACS data for the civilian labor force by removing active members of the military. Such individuals typically have a short residence in Hawaii (two to four years) and are not potential business owners.⁴ The race and ethnic distribution of people in the military is also quite different from the non-military workforce of Hawaii. Most active-duty members of the military in 2016 reported themselves as being white (69%),⁵ while the majority of the Hawaiian civilian workforce is of Asian Pacific or Native Hawaiian race/ethnicity (71%) (see Figure E-2).

⁴ U.S. Department of Labor, Bureau of Labor Statistics. (2018, April 13). Military Careers. Occupational Outlook Handbook. Retrieved July 6, 2018, from <https://www.bls.gov/ooh/military/military-careers.htm>

⁵ U.S. Department of Defense, Office of the Deputy Assistant Secretary of Defense for Military Community and Family Policy. (2018, June). 2016 Demographics: Profile of the military community (Rep.). Retrieved July 6, 2018, from <http://download.militaryonesource.mil/12038/MOS/Reports/2016-Demographics-Report.pdf>

The racial composition of Hawaii residents differs from other parts of the United States. Many individuals in Hawaii report more than one race in survey data such as the American Community Survey. Of the states in the U.S., Hawaii has by far the highest percentage of residents who report themselves to be of multiple races (24%); Alaska and Oklahoma have the next-highest percentages of multi-racial residents (8% and 7%, respectively).⁶ Researchers examining demographic characteristics of people living in Hawaii often adapt their analysis of race and ethnicity to the unique multi-racial and ethnic background of local residents.⁷ Consistent with other researchers, Keen Independent applied two ways of grouping people based on race and ethnicity:

1. A mutually exclusive analysis that includes anyone with Asian Pacific or Native Hawaiian background in a broad Asian Pacific/Native Hawaiian group. Anyone who reported in the ACS that they had Asian Pacific or Native Hawaiian background were in that group. Results reported for African Americans, American Indians and Alaskan Natives, Subcontinent Asian Americans, Hispanic Americans and whites only pertain to those people who reported those races or ethnicities and not also indicate that they were Asian Pacific or Native Hawaiian.
2. A non-mutually exclusive analysis in which results for a racial or ethnic group includes all individuals who report that group, including those who report multiple racial or ethnic categories. In this analysis, Keen Independent was also able to examine subgroups within the broad population of people of indicating that they were Asian Pacific or Native Hawaiian. The study team disaggregated results for the five largest subgroups among people who are Asian Pacific and/or Native Hawaiian. In order of size of the civilian labor force, these groups are Filipino Americans, Japanese Americans, Native Hawaiians, people of other Asian Pacific and Pacific Islander backgrounds, and Chinese Americans.

Analysis of the civilian workforce in Hawaii in 2012–2016, using mutually exclusive categories, indicates the following:

- People who described their race, at least in part, as Asian Pacific American or Native Hawaiian were 71 percent of the workforce;
- Other people of color were about 7 percent of the workforce; and
- Non-Hispanic whites were about 22 percent of the workforce.

The latter two groups include only those individuals who did not list an Asian Pacific or Native Hawaiian background when asked their race in the ACS.

⁶ Krogstad, J. M. (2015, June 17). Hawaii is home to the nation's largest share of multiracial Americans. *Pew Research Center*. Retrieved July 6, 2018, from <http://www.pewresearch.org/fact-tank/2015/06/17/hawaii-is-home-to-the-nations-largest-share-of-multiracial-americans/>

⁷ Kaneshiro, B., Geling, O., Gellert, K., & Millar, L. (2011). The challenges of collecting data on race and ethnicity in a diverse, multiethnic state. *Hawaii Medical Journal*, 70(8), 168-171.

The second column of Figure E-2 examines the ACS data using non-mutually exclusive groupings. A person who said they were Asian Pacific American and white, for example, is counted in the results for both groups. Keen Independent could also break out subgroups among those who had Asian Pacific background. Because of the number of people choosing more than one racial category to describe themselves, the percentages in the second column of Figure E-2 are not additive (i.e., do not add to 100%). Viewing race and ethnicity of the civilian workforce through this lens, the percentage of people reporting the following background increases:

- African Americans (to 2.8%);
- Hispanic Americans (to 9.1%);
- American Indian or Alaska Native (to 2.1%); and
- Whites (to nearly 40%).

There was little change in the percentage of people indicating they were, at least in part, Subcontinent Asian Americans or other minority (still only 0.2% and 0.3% of the civilian workforce, respectively). Note that Hispanic Americans include people reporting Portuguese background.

Figure E-2.
Demographic distribution of the civilian workforce in Hawaii, 2012–2016

State of Hawaii	Mutually exclusive race definitions	Non-mutually exclusive race definitions
Race/ethnicity		
African American	2.1 %	2.8 %
Asian Pacific or Native Hawaiian	70.8	70.8
Native Hawaiian		16.0
Chinese American		10.6
Filipino American		23.3
Japanese American		18.2
Other Asian and Pacific Islanders		13.1
Subcontinent Asian American	0.2	0.3
Hispanic American	3.2	9.1
American Indian or Alaska Native	0.9	2.1
Other minority	1.1	1.1
White	<u>21.6</u>	39.7
Total	100.0 %	
Gender		
Female	47.9 %	
Male	<u>52.1</u>	
Total	100.0 %	

Note: Only the civilian workforce is included in workforce calculations.
Because individuals can identify as multiple races, demographic calculations using non-mutually exclusive race definitions may total more than 100 percent.
White was defined as non-Hispanic whites using the mutually exclusive race definition.

Source: Keen Independent Research from 2012–2016 ACS Public Use Microdata Sample (PUMS). The 2012–2016 raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Representation of women and people of color among business owners and workers in Hawaii.

As shown in Figure E-2, women comprised 48 percent of the Hawaii civilian workforce in 2012–2016. However, Figure E-3 demonstrates that women comprised a much smaller percentage of the construction and engineering workforce (11%), while women comprised 51 percent of the workforce in both the food, beverage and selected retail industries (which is representative of the “concessions industry”) as well as non-study industries. Further, Figure E-4 indicates that in Hawaii, from 2012 through 2016, women represented an even smaller percentage of business owners in the construction and engineering industries (6%), though they were well-represented as business owners in the food beverage and selected retail industry (51%) and in non-study industries (47%).

Analysis of business ownership for minority groups showed similar results. See Figures E-3 and E-4 on the following page for tables of results using mutually exclusive race/ethnicity definitions. In the Hawaiian workforce, in the ACS 2012–2016 survey:

- Those who identified as Asian Pacific American were roughly 71 percent of the Hawaiian civilian workforce and represented approximately 71 percent of business owners in the food, beverage and selected retail industry; however, they represented a much smaller percentage of business owners in the construction and engineering industries (42%).
- African Americans comprised approximately 2 percent of the civilian workforce; however, they comprised a smaller percentage of the construction workforce (1%) and a smaller percentage of business owners in the food, beverage and selected retail industry.
- In contrast, non-Hispanic whites made up roughly 22 percent of the Hawaiian civilian workforce, but they were 48 percent of construction and engineering business owners.

Figure E-3.

Demographic distribution of Hawaii workforce using mutually exclusive race definitions, 2012–2016

State of Hawaii	Workforce in construction and engineering industries	Workforce in food, beverage and selected retail industry	Workforce in all non-study industries
Race/ethnicity			
African American	1.2 % **	1.8 %	2.3 %
Asian Pacific or Native Hawaiian	68.3 **	75.6 **	70.6
Subcontinent Asian American	0.2	0.2	0.2
Hispanic American	3.3	3.1	3.2
American Indian, Alaska Native or other minority	3.0 **	2.1	1.8
White	23.9 **	17.2 **	21.9
Total	100.0 %	100.0 %	100.0 %
Gender			
Female	11.4 % **	50.9 %	51.3 %
Male	88.6 **	49.1	48.7
Total	100.0 %	100.0 %	100.0 %

Note: ** Denotes that the difference in proportions between the workforce in the specified industries and the workforce in non-study industries for a given race/ethnicity/gender group is statistically significant at the 95% confidence level.

Only the civilian workforce is included in workforce calculations. White was defined as non-Hispanic whites.

Source: Keen Independent Research from 2012–2016 ACS Public Use Microdata samples. The 2012–2016 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Figure E-4.

Demographic distribution of Hawaii business owners using mutually exclusive race definitions, 2012–2016

State of Hawaii	Business owners in construction and engineering industries	Business owners in food, beverage and selected retail industry	Business owners in all non-study industries
Race/ethnicity			
African American	1.4 %	0.8 %	1.9 %
Asian Pacific or Native Hawaiian	41.5 **	71.3 **	54.0
Subcontinent Asian American	0.0 **	0.4	0.3
Hispanic American	5.1	2.7	3.7
American Indian, Alaska Native or other minority	3.5	1.5 **	2.8
White	48.4 **	23.3 **	37.3
Total	100.0 %	100.0 %	100.0 %
Gender			
Female	5.8 % **	51.1 %	47.1 %
Male	94.2 **	48.9	52.9
Total	100.0 %	100.0 %	100.0 %

Note: ** Denotes that the difference in proportions between business owners in the specified industries and business owners in non-study industries for a given race/ethnicity/gender group is statistically significant at the 95% confidence level.

Only the civilian workforce is included in workforce calculations. White was defined as non-Hispanic whites.

Source: Keen Independent Research from 2012–2016 ACS Public Use Microdata samples. The 2012–2016 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Construction Industry

Keen Independent examined how education, training, employment and advancement may affect the number of businesses that individuals of different races/ethnicities and genders owned in the Hawaii construction industry in 2012–2016.

Education. Formal education beyond high school is not a prerequisite for most construction jobs,⁸ and the construction industry often attracts individuals who have relatively less formal education than in other industries.^{9, 10} Based on 2012–2016 ACS data, 42 percent of construction workers in Hawaii were high school graduates without post-secondary education and 8 percent had not graduated high school. Only 14 percent of construction workers had a four-year college degree or more, less than the 34 percent found for other industries combined.

Due to the educational requirements of entry-level jobs and the limited education beyond high school for many minority groups, one would expect a relatively high representation of those groups in the Hawaii construction industry, especially in entry-level positions.

Mutually exclusive race definitions. The ACS data indicate that almost 50 percent of non-Hispanic white workers in Hawaii held a four-year college degree in 2012–2016. In contrast, almost all other groups had a smaller percentage of four-year college degree-holders; this included those who were Asian Pacific American or Native Hawaiian (31%), African American (33%), Hispanic American (24%), and of other minority groups (29%). Subcontinent Asian Americans were the only minority group with a higher percentage of college degree-holders (71%) than non-Hispanic whites. Given these disparate levels of education, one might expect the level of minority participation in the construction industry to be higher than in other industries.

Non-mutually exclusive race definitions. Only 20 percent of Native Hawaiian workers age 25 and older had at least a four-year college degree, and only 23 percent of Filipino American workers had a four-year degree. Other Asian Pacific American groups had higher percentages of workers with a four-year degree. Notably, much higher percentages of Chinese American and Japanese American workers age 25 and older held at least a four-year college degree (38% and 47%, respectively.) Figure E-5 presents these results.

⁸ U.S. Department of Labor, Bureau of Labor Statistics. (2018, January 30). Construction and extraction occupations. *Occupational Outlook Handbook*. Retrieved February 27, 2018, from <https://www.bls.gov/ooh/construction-and-extraction/home.htm>

⁹ CPWR - The Center for Construction Research and Training. (2013). Educational attainment and internet usage in construction and other industries. In *The construction chart book: The U.S. construction industry and its workers* (5th ed.). Retrieved February 27, 2018, from <https://www.cpwr.com/sites/default/files/publications/5th%20Edition%20Chart%20Book%20Final.pdf>;

¹⁰ CPWR - The Center for Construction Research and Training. (2007). Educational attainment and internet usage in construction and other industries. In *The construction chart book: The U.S. construction industry and its workers* (3rd ed.). Retrieved February 27, 2018, from https://www.cpwr.com/sites/default/files/research/CB3_FINAL.pdf

Figure E-5.

Percentage of all workers 25 and older in Hawaii with at least a four-year degree, 2012–2016

State of Hawaii	Mutually exclusive race definitions	Non-mutually exclusive race definitions
Race/ethnicity		
African American	33.4 % **	31.2 % **
Asian Pacific or Native Hawaiian	31.1 **	31.1 **
Native Hawaiian		20.3 **
Chinese American		38.3 *
Filipino American		22.7 **
Japanese American		47.0 **
Other Asian and Pacific Islanders		26.3 **
Subcontinent Asian American	70.6 **	67.1 **
Hispanic American	23.9 **	23.7 **
American Indian, Alaska Native or other minority	29.3 **	29.2 **
White	49.6	40.4
Gender		
Female	38.9 % **	
Male	31.7	
All workers	35.1 %	

Note: *,** Denote that the difference in proportions between the minority and white groups (or female and male gender groups) for the race/ethnicity/gender is statistically significant at the 90% or 95% confidence level, respectively. Only the civilian workforce is included in workforce calculations.

Because individuals can identify as multiple races, demographic calculations using non-mutually exclusive race definitions may total more than 100 percent.

White was defined as non-Hispanic whites using the mutually exclusive race definition.

Source: Keen Independent Research from 2012–2016 ACS Public Use Microdata samples. The 2012–2016 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Gender. Based on 2012–2016 data, 39 percent of female workers and 32 percent of male workers age 25 and older had at least a four-year college degree.

Though a higher percentage of female workers have a college degree, female college students may be less likely to enroll in construction-related degree programs. For example, women have low levels of enrollment in Construction Management programs, and this may be due to (1) the prevailing notion that construction is an industry dominated by males and is unkind to females and families, and (2) secondary school career counselors’ lack of discussion of women’s career opportunities in the construction fields, and female students’ consequent lack of knowledge of these professions.¹¹

¹¹ Sewalk, S., & Nietfeld, K. (2013). Barriers preventing women from enrolling in construction management programs. *International Journal of Construction Education and Research*, 9(4), 239-255. doi:10.1080/15578771.2013.764362

Apprenticeship and training. Training in the construction industry is largely on-the-job and through trade schools and apprenticeship programs. Entry-level jobs for workers out of high school are often for laborers, helpers or apprentices. More skilled positions in the construction industry may require additional training through a technical or trade school, or through an apprenticeship or other training program. Apprenticeship programs can be developed by employers, trade associations, trade unions or other groups. In Hawaii, approximately 83 percent of apprenticeship programs are run by unions.¹²

Workers can enter apprenticeship programs from high school or trade school. Apprenticeships have traditionally been three- to five-year programs that combine on-the-job training with classroom instruction.¹³ In response to limited construction employment opportunities during the Great Recession, apprenticeship programs limited the number of new apprenticeships¹⁴ as well as access to knowing when and where apprenticeships are occurring.¹⁵ Apprenticeship programs often refer to an “out-of-work list” when contacting apprentices; those who have been on the list the longest are given preference.

Furthermore, some research indicates that apprentices are often hired and laid off several times throughout the duration of their apprenticeship program. Apprentices were more successful if they were able to maintain steady employment, either by remaining with one company and moving to various work sites, or by finding work quickly after being laid off. Apprentices identified mentoring from senior coworkers, such as journey workers, foremen or supervisors, and being assigned tasks that furthered their training as important to their success.¹⁶

Employment. With educational attainment for minorities and women as context, Keen Independent examined employment in the Hawaii construction industry. Figure E-6 presents data from 2012–2016 to compare the demographic composition of the construction industry with all the other workforce industries in the state.

Mutually exclusive race definitions. Based on 2012–2016 ACS data, people of color were 78 percent of those working in the Hawaii construction industry. Examination of the Hawaii construction industry workforce in 2012–2016 shows that Hispanic Americans (3.4%) and American Indians, Alaska Natives and other minorities (3.2%) were a slightly larger percentage of workers in construction than in all other industries (3.1% and 1.9%, respectively). In contrast African Americans (1.2%) accounted for a slightly smaller percentage of workers in the construction industry than in other industries (2.2%). Representation of those identifying as Asian Pacific Americans or Native Hawaiians as a percentage of workers in the construction industry (70%) was

¹² State of Hawaii, Department of Labor and Industrial Relations. (2017, November 9). *List of Construction Trades in Registered Apprenticeship Programs*. Retrieved July 6, 2018, from <https://labor.hawaii.gov/wdd/files/2012/12/Revised-Construction-Apprenticeships-11.9.17.pdf>

¹³ U.S. Department of Labor, Bureau of Labor Statistics. (2013). Apprenticeship: Earn while you learn. Retrieved February 27, 2018, from <https://www.bls.gov/careeroutlook/2013/summer/art01.pdf>

¹⁴ Kelly, M., Pisciotta, M., Wilkinson, L., & Williams, L. S. (2015). When working hard is not enough for female and racial/ethnic minority apprentices in the highway trades. *Sociological Forum*, 30(2), 415-438. doi:10.1111/socf.12169

¹⁵ Graves, F. G., Chaudhry, N., Khouri, L., Frohlich, L., Lane, A., Rao, D., & Hogan, V. (n.d.). *Women in construction: Still breaking ground* (Rep.). Retrieved February 27, 2018, from National Women's Law Center website: https://www.nwlc.org/sites/default/files/pdfs/final_nwlc_womeninconstruction_report.pdf

¹⁶ *Ibid.*

roughly comparable to their representation in the all other industries (71%). Non-Hispanic whites' representation in the construction industry (23% of all construction workers) was also similar to their representation in all other industries (22%). Figure E-6 provides these results.

Non-mutually exclusive race definitions. Native Hawaiians composed a significantly larger percentage of the construction workforce (24%) than the non-construction workforce (15%). This was not the case for any group of Asian Pacific Americans: Chinese Americans, Filipino Americans, Japanese Americans, and other Asian and Pacific Islanders all composed a smaller portion of the Hawaiian construction industry workforce (10%, 21%, 16% and 11%, respectively) than the Hawaiian workforce in all other industries (11%, 23%, 18% and 13%, respectively).

Figure E-6.
Demographics of workers in construction and all other industries in Hawaii, 2012–2016

State of Hawaii	Construction industry with mutually exclusive race definitions	All other industries with mutually exclusive race definitions	Construction industry with non-mutually exclusive race definitions	All other industries with non-mutually exclusive race definitions
Race/ethnicity				
African American	1.2 % **	2.2 %	1.5 % **	2.9 %
Asian Pacific or Native Hawaiian	69.5	70.9	69.5	70.9
Native Hawaiian			23.5 **	15.4
Chinese American			9.8	10.6
Filipino American			21.4 *	23.4
Japanese American			16.3 **	18.3
Other Asian and Pacific Islanders			11.4 **	13.2
Subcontinent Asian American	0.2	0.2	0.3	0.3
Hispanic American	3.4	3.1	10.7 **	9.0
American Indian, Alaska Native or other minority	3.2 **	1.9	4.6 **	3.0
Total minority	77.5 %	78.4 %		
White	22.5	21.6	43.0 **	39.4
Total	100.0 %	100.0 %		
Gender				
Female	9.6 % **	51.1 %		
Male	90.4 **	48.9		
Total	100.0 %	100.0 %		

Note: *,** Denote that the difference in proportions between workers in the construction industry and all other industries for the given race/ethnicity/gender definition is statistically significant at the 90% or 95% confidence level, respectively.

Only the civilian workforce is included in workforce calculations.

Because individuals can identify as multiple races, demographic calculations using non-mutually exclusive race definitions may total more than 100 percent.

"All other industries" includes all industries other than the construction industry.

White was defined as non-Hispanic whites using the mutually exclusive race definition.

Source: Keen Independent Research from 2012–2016 ACS Public Use Microdata samples. The 2012–2016 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Gender. There are large differences in the representation of women in construction compared with women in all industries. For 2012–2016, women represented less than 10 percent of all construction workers and about 51 percent of workers in all other industries in Hawaii.

Academic research concerning any effect of race- and gender-based discrimination in construction labor markets.

There is substantial academic literature that has examined whether race- or gender-based discrimination affects opportunities for minorities and women to enter construction trades in the United States. Many studies indicate that race- and gender-based discrimination affects opportunities for minorities and women in the construction industry. For example, literature concerning women in construction trades has identified substantial barriers to entry and advancement due to gender discrimination and sexual harassment.¹⁷

One recent study found that when African American women in construction advance into leadership roles, they often find others unduly challenge their authority. Study participants also reported incidents of harassment, bullying, and the assumption that they are inferior to their male peers; these instances are believed to hinder African American females' career development and overall success in the construction industry.¹⁸

In another study, white men were found to be the least likely to report challenges related to being assigned low-skill or repetitive tasks that did not enable them to learn new skills. Women and people of color felt that they were disproportionately performing low-skill tasks that negatively impacted the quality of their training experience.¹⁹ Additionally, women encounter practical issues such as difficulty in accessing personal protective equipment that fits them properly (they frequently find such employer-provided equipment to be too large). This sometimes poses a safety hazard, and even more often hinders female workers' productivity, which can impact their relationships with supervisors as well as their opportunities for growth in the industry.²⁰

Research suggests that race and gender inequalities are visible in a workplace often evidenced through the acceptance of the “good old boys’ club” culture.²¹ There may also be an attachment to the idea that “working hard” will bring success. However, the quantitative and qualitative evidence indicates that “hard work” alone does not ensure success for women and people of color.²² In 2014, the National Women’s Law Center found low representation of women, and especially women of color, in construction jobs and apprenticeships. Women experience many barriers to success in this career path, including experiencing outright gender discrimination and harassment.²³

¹⁷ Denissen, A. M., & Saguy, A. C. (2013). Gendered homophobia and the contradictions of workplace discrimination for women in the building trades. *Gender & Society*, 28(3), 381-403. doi:10.1177/0891243213510781; Ericksen, J. A., & Schulteiss, D. E. (2009). Women pursuing careers in trades and construction. *Journal of Career Development*, 36(1), 68-89. doi:10.1177/0894845309340797

¹⁸ Hunte, R. (2016). Black women and race and gender tensions in the trades. *Peace Review*, 28(4), 436-443. doi:10.1080/10402659.2016.1237087

¹⁹ Kelly, M., et al. (2015). When working hard is not enough for female and racial/ethnic minority apprentices in the highway trades. *Sociological Forum*, 30(2), 415-438. doi:10.1111/socf.12169

²⁰ Onyebeke, L. C., Papazaharias, D. M., Freund, A., Dropkin, J., McCann, M., Sanchez, S. H., . . . Zuckerman, N. C. (2016). Access to properly fitting personal protective equipment for female construction workers. *American Journal of Industrial Medicine*, 59(11), 1032-1040. doi:10.1002/ajim.22624

²¹ Kelly, Maura, et al. (2015). When working hard is not enough for female and racial/ethnic minority apprentices in highway trades. *Eastern Sociological Society*, 30(2): 415–438.

²² *Ibid.*

²³ Graves, F. G., Chaudhry, N., Khouri, L., Fröhlich, L., Lane, A., Rao, D., & Hogan, V. (n.d.). *Women in construction: Still breaking ground* (Rep.). Retrieved February 27, 2018, from National Women's Law Center website: https://www.nwlc.org/sites/default/files/pdfs/final_nwlc_womeninconstruction_report.pdf

Importance of unions to entry in the construction industry. Labor researchers characterize construction as a historically volatile industry that is sensitive to business cycles, making the presence of labor unions important for stability and job security within the industry.²⁴ Unions in Hawaii are exceptionally strong compared with much of the rest of the nation. Union participation rates are nearly double the national average and are second only to rates in New York. In 2017, Hawaii union membership accounted for 21.3 percent of all wage and salary employees, an increase from 19.9 percent in 2016.²⁵ Additionally, a 2012 administrative directive by then-governor Neil Abercrombie encouraged the use of project labor agreements in construction contracts over \$25 million.²⁶

The temporary nature of construction work results in uncertain job prospects, and the relatively high turnover of laborers presents a disincentive for construction firms to invest in training. Some researchers have concluded that constant turnover has lent itself to informal recruitment practices and nepotism, compelling laborers to tap social networks for training and work. They credit the importance of social networks with the high degree of ethnic segmentation in the construction industry.²⁷ Unable to integrate themselves into traditionally white social networks, minorities faced long-standing historical barriers to entering into the industry.²⁸

Construction unions aim to provide a reliable source of labor for employers and preserve job opportunities for workers by formalizing the recruitment process, coordinating training and apprenticeships, enforcing standards of work and mitigating wage competition. The unionized sector of construction would seemingly be the best road for underrepresented groups into the industry.

²⁴ Applebaum, H. A. (1999). *Construction workers, U.S.A.* Westport, CT: Greenwood Press.

²⁵ U.S. Department of Labor, Bureau of Labor Statistics. (2018, January). *Union members - 2017* [Press release]. Retrieved February 27, 2018, from <https://www.bls.gov/news.release/pdf/union2.pdf>

²⁶ Abercrombie, N. (2012, May 22). *Administrative Directive No. 12-05: Use of Project Labor Agreements for State Construction Projects* (State of Hawaii, Executive Chambers). Retrieved July 6, 2018, from <https://budget.hawaii.gov/wp-content/uploads/2012/11/AD-12-05-Use-of-Project-Labor-Agreements-for-State-Construction-Projects.pdf>

²⁷ Waldinger, R., & Bailey, T. (1991). The continuing significance of race: Racial conflict and racial discrimination in construction. *Politics & Society*, 19(3), 291-323. doi:10.1177/003232929101900302

²⁸ Feagin, J. R., & Imani, N. (1994). Racial barriers to African American entrepreneurship: An exploratory study. *Social Problems*, 41(4), 562-584. doi:10.1525/sp.1994.41.4.03x02721

However, some researchers examining U.S. labor unions have identified racial discrimination by trade unions that has historically prevented minorities from obtaining employment in skilled trades.²⁹ Some researchers have historically argued that union discrimination has taken place in a variety of forms, including the following examples:

- Unions have used admissions criteria that adversely affect minorities. In the 1970s, federal courts ruled that standardized testing requirements for unions unfairly disadvantaged minority applicants who had less exposure to testing. In addition, the policies that required new union members to have relatives who were already in the union perpetuated the effects of past discrimination.³⁰
- Of those minority individuals who are admitted to unions, a disproportionately low number are admitted into union-coordinated apprenticeship programs. Apprenticeship programs are an important means of producing skilled construction laborers, and the reported exclusion of African Americans from those programs has severely limited their access to skilled occupations in the construction industry.³¹
- Although formal training and apprenticeship programs exist within unions, most training of union members takes place informally through social networking. Nepotism characterizes the unionized sector of construction as it does the non-unionized sector, and that practice favors a white-dominated status quo.³²
- Traditionally, unions have been successful in resisting policies designed to increase African American participation in training programs. The political strength of unions in resisting affirmative action in construction has hindered the advancement of African Americans in the industry.³³
- Discriminatory practices in employee referral procedures, including apportioning work based on seniority, have precluded minority union members from having the same access to construction work as their white counterparts.³⁴

²⁹ U.S. Department of Justice. (1996). Proposed reforms to affirmative action in federal procurement (61 FR 26042). *Federal register*, 101(61), 26042-63. Office of the Federal Register, National Archives and Records Administration.

³⁰ *Ibid.* See U.S. v. Iron Workers Local 86, 443 F.2d 544 (9th Cir. 1971); Sims v. Sheet Metal Workers International Association, 489 F. 2d 1023 (6th Cir. 1973); U.S. v. International Association of Bridge, Structural and Ornamental Iron Workers, 438 F.2d 679 (7th Cir. 1971).

³¹ Applebaum, H. A. (1999). *Construction workers, U.S.A.* Westport, CT: Greenwood Press.

³² *Ibid.* A high percentage of skilled workers reported having a father or relative in the same trade. However, the author suggests this may not be indicative of current trends.

³³ Waldinger, R., & Bailey, T. (1991). The continuing significance of race: Racial conflict and racial discrimination in construction. *Politics & Society*, 19(3), 291-323. doi:10.1177/003232929101900302

³⁴ U.S. Department of Justice. (1996). Proposed reforms to affirmative action in federal procurement (61 FR 26042). *Federal register*, 101(61), 26042-63. Office of the Federal Register, National Archives and Records Administration.

- According to testimony from African American union members, even when unions implement meritocratic mechanisms of apportioning employment to laborers, white workers are often allowed to circumvent procedures and receive preference for construction jobs.³⁵

More recent national research suggests that the relationship between minorities and unions has been changing. As a result, historical observations may not be indicative of current dynamics in construction unions. Recent studies focusing on the role of unions in apprenticeship programs have compared minority and female participation and graduation rates for apprenticeships in joint programs (that unions and employers organize together) with rates in employer-only programs. Many of those studies conclude that the impact of union involvement is generally positive or neutral for minorities and women, compared to non-Hispanic white males, as summarized below.

- Glover and Bilginsoy analyzed apprenticeship programs in the U.S. construction industry during 1996 through 2003. Their dataset covered about 65 percent of apprenticeships during that time. The authors found that joint programs had “much higher enrollments and participation of women and ethnic/racial minorities” and exhibited “markedly better performance for all groups on rates of attrition and completion” compared to employer-run programs.³⁶
- In a similar analysis focusing on female apprentices, Bilginsoy and Berik found that women were most likely to work in highly-skilled construction professions as a result of enrollment in joint programs as opposed to employer-run programs. Moreover, the effect of union involvement in apprenticeship training was higher for African American women than for white women.³⁷
- Additional research on the presence of African Americans and Hispanic Americans in apprenticeship programs found that African Americans were 8 percent more likely to be enrolled in a joint program than in an employer-run program. However, Hispanic Americans were less likely to be in a joint program than in an employer-run program.³⁸ Those data suggest that Hispanic Americans may be more likely than African Americans to enter the construction industry without the support of a union.

³⁵ Feagin, J. R., & Imani, N. (1994). Racial barriers to African American entrepreneurship: An exploratory study. *Social Problems*, 41(4), 562-584. doi:10.1525/sp.1994.41.4.03x0272l

³⁶ Glover, R. W., & Bilginsoy, C. (2005). Registered apprenticeship training in the U.S. construction industry. *Education + Training*, 47(4/5), 337-349. doi:10.1108/00400910510601913

³⁷ Berik, G., & Bilginsoy, C. (2006). Still a wedge in the door: Women training for the construction trades in the USA. *International Journal of Manpower*, 27(4), 321-341. doi:10.1108/01437720610679197

³⁸ Bilginsoy, C. (2005). How unions affect minority representation in building trades apprenticeship programs. *Journal of Labor Research*, 26(3), 451-463. doi:10.1007/s12122-005-1014-4

Recent union membership data support those findings as well. For example, 2017 Current Population Survey (CPS) data showed national union membership to be 9 percent for Asian American workers, 13 percent for African American workers, 9 percent for Hispanic American workers and 11 percent for non-Hispanic white workers.³⁹ The Bureau of Labor Statistics (BLS) found that the U.S. construction industry is relatively more unionized than other industries, with union membership within the construction industry (13%) higher than membership rates across all industries (11%). Using CPS data, the Bureau of Labor Statistics (BLS) also found that, among all states in 2018, Hawaii had the highest union membership rate across all industries (23%).⁴⁰

According to some research, union apprenticeships appear to have drawn more minority workers into the construction trades in some markets,⁴¹ and studies have found a high percentage of minority construction apprentices. In 2010 in New York City, for example, approximately 69 percent of first-year local construction apprentices were African American, Hispanic American, Asian American or members of other minority groups. In addition, 11 percent of local New York City construction apprentices were women. It should be noted that, though the Building and Construction Trades Council of Greater New York set a goal that women represent 10 percent of local apprentices, the City did not establish a goal for minority participation.⁴²

However, this increase in apprenticeships may not necessarily be indicative of improved future prospects for minority workers. A study in Oregon found that, though minority men's participation in construction apprenticeships was roughly proportional to their representation in the state's workforce, their representation in skilled trade apprenticeships was lower than might be expected.⁴³

Although union membership and union program participation vary based on race and ethnicity, there is no clear picture from the research about the causes of those differences and their effects on construction industry employment. Research is especially limited concerning the impact of unions on Asian American employment. It is unclear from past studies whether unions presently help or hinder equal opportunity in construction and whether effects in Hawaii are different from other parts of the country. The history of unions in Hawaii differs from other states.

³⁹ U.S. Department of Labor, Bureau of Labor Statistics. (2018). Union affiliation of employed wage and salary workers by selected characteristics. *Current Population Survey*. Retrieved March 6, 2018, from <https://www.bls.gov/cps/cpsaat40.pdf>

⁴⁰ U.S. Department of Labor, Bureau of Labor Statistics. (2019). Union Membership (Annual) News Release [Press release]. Retrieved from <https://www.bls.gov/news.release/union2.htm>

⁴¹ Mishel, L. (2017). *Diversity in the New York City union and nonunion construction sectors* (Rep.). Retrieved February 27, 2018, from Economic Policy Institute website: <http://www.epi.org/publication/diversity-in-the-nyc-construction-union-and-nonunion-sectors/>

⁴² Figueroa, M., Grabelsky, J., & Lamare, J. R. (2013). Community workforce agreements: A tool to grow the union market and to expand access to lifetime careers in the unionized building trades. *Labor Studies Journal*, 38(1), 7-31. doi:10.1177/0160449x13490408

⁴³ Berik, G., Bilginsoy, C., & Williams, L. S. (2011). Gender and racial training gaps in Oregon apprenticeship programs. *Labor Studies Journal*, 36(2), 221-244. doi:10.1177/0160449x10396377

In addition, the current research indicates that the effects of unions on entry into the construction industry may be different for different minority groups. Some unions are actively trying to provide a more inclusive environment for racial minorities and women.⁴⁴

Advancement. To research opportunities for advancement in the Hawaii construction industry, Keen Independent examined the representation of minorities and women in construction occupations defined by the U.S. Bureau of Labor Statistics.⁴⁵ Appendix I provides full descriptions of construction trades with large enough sample sizes in the 2000 Census and 2012–2016 ACS for analysis.

Mutually exclusive race definitions. Figure E-7 presents the race/ethnicity of workers in select construction-related occupations in Hawaii, including lower-skill occupations (e.g., construction laborers), higher-skill construction trades (e.g., electricians) and supervisory roles. The trades correspond to types of construction labor often involved in transportation contracting. Figure E-7 presents those data for 2012–2016.

Based on 2012–2016 ACS data, there are large differences in the racial/ethnic makeup of workers in various trades related to construction in Hawaii.

- Overall, people of color comprised 77 percent of construction workers in 2012–2016, as shown in Figure E-7. Most minorities working in the Hawaii construction industry in 2012–2016 were Asian Pacific Americans and Native Hawaiians.
- Representation of people of color varied by construction trade. For example, among those included in the ACS sample, Asian Pacific Americans and Native Hawaiians represented nearly all the drivers in the Hawaiian construction industry (97%), a much higher percentage than their representation among all construction workers (70%).

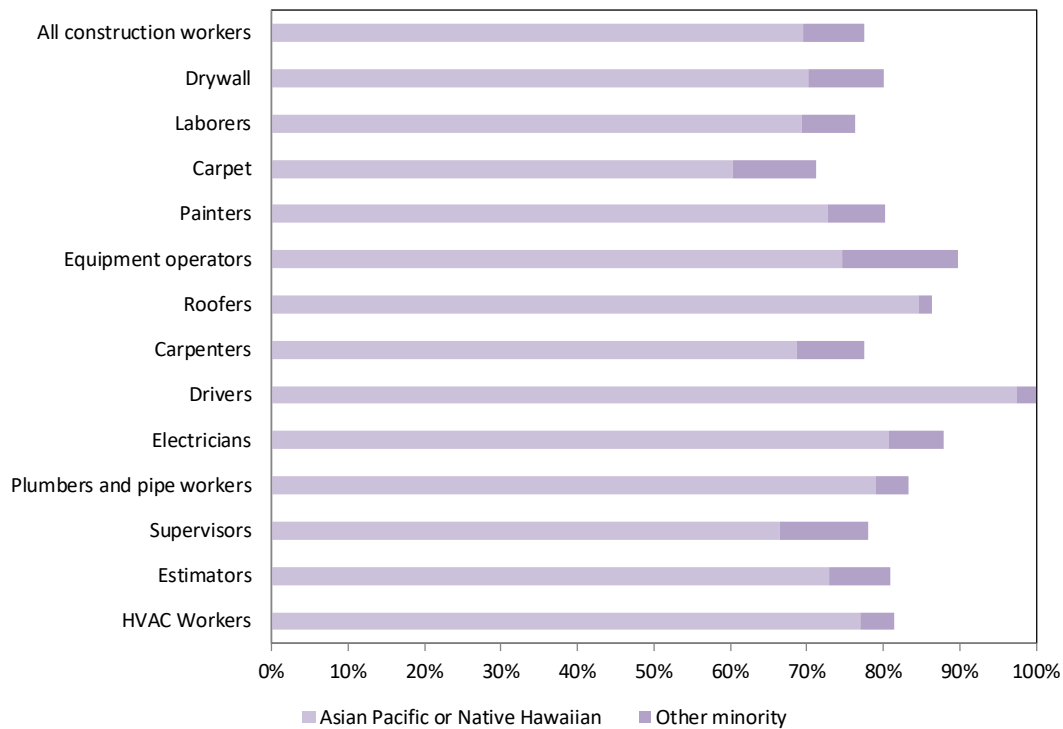
Asian Pacific Americans and Native Hawaiians were only 69 percent of construction laborers, which might be a lower-skill occupation, but they were also not highly represented among carpenters (69%) and estimators (73%), which might be higher-skill occupations.

⁴⁴ Judd, R. (2016, November 30). Seattle's building boom is good news for a new generation of workers. *The Seattle Times, Pacific NW Magazine*. Retrieved from <https://www.seattletimes.com/pacific-nw-magazine/seattles-building-boom-is-good-news-for-a-new-generation-of-workers/>

⁴⁵ U.S. Department of Labor, Bureau of Labor Statistics. (2001). Standard occupational classification major groups. Retrieved February 15, 2007, from http://www.bls.gov/soc/major_groups.htm

Figure E-7.

Minorities as a percentage of selected construction occupations in Hawaii using mutually exclusive race definitions, 2012–2016



Note: 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 a single category of equipment operators.

Only the civilian workforce is included in workforce calculations.

White was defined as non-Hispanic whites.

Source: Keen Independent Research from 2012–2016 ACS Public Use Microdata samples. The 2012–2016 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Other minority groups comprised a high percentage of some trades (e.g., 15% of equipment operators and 11% of carpet-layers). However, in some trades they were not as well-represented as might be expected (e.g., about 4% each of HVAC workers and plumbers).

Among first-line supervisors in construction in Hawaii, only 66 percent were Asian Pacific American or Native Hawaiian and only 12 percent were from other minority groups.

Non-mutually exclusive race definitions. Figure E-8 on the following page presents the representation of workers’ race/ethnicity in select construction-related occupations in Hawaii using non-mutually exclusive definitions of race. The trades correspond to types of construction labor often involved in transportation contracting. Figure E-8 presents those data for 2012–2016.

Based on 2012–2016 ACS data, there are large differences in the racial/ethnic makeup of workers in various construction-related trades in Hawaii. Filipino Americans comprised over one-fifth of all construction workers but represented a much smaller percentage of construction supervisors (15%). Both Native Hawaiians and other minority groups (those that are not Asian Pacific or Native Hawaiian) were employed as equipment operators at higher rates than might be expected (45% and 25%, respectively), while Chinese Americans and Filipino Americans represented a lower percentage of equipment operators than might be expected (6% and 10%, respectively).

For construction laborers (which might be a relatively low-skill profession), Japanese Americans had the lowest representation of any non-mutually exclusive race category (8%). This was lower than Japanese Americans’ representation among all construction workers (16%) and was substantially lower than the percentage of electricians who were Japanese Americans (26%), which is a higher-skill profession.

Non-Hispanic whites comprised 43 percent of the construction workforce but comprised 47 percent of construction supervisors. This percentage is higher than non-Hispanic whites’ representation in any other work category studied, including laborers (42%), painters (33%) and equipment operators (40%).

Figure E-8.

Demographic distribution of selected construction occupations in the state of Hawaii using non-mutually exclusive race definitions, 2012–2016

State of Hawaii	All construction workers	Laborers	Painters	Equipment operators	Carpenters	Electricians	Plumbers and pipe workers	Supervisors
Race/ethnicity								
Asian Pacific or Native Hawaiian	69.5 %	69.4 %	72.8 %	74.5 %	68.7 %	80.7 %	79.0 %	66.4 %
Native Hawaiian	23.5	25.2	26.9	44.6	21.9	30.0	18.1	20.5
Chinese American	9.8	9.1	10.5	6.3	8.0	10.0	4.6	5.5
Filipino American	21.4	23.2	28.7	10.4	20.6	19.7	26.9	15.0
Japanese American	16.3	7.9	14.1	12.9	17.9	26.2	19.6	20.8
Other Asian and Pacific Islanders	11.4	16.3	13.6	12.5	13.6	12.1	20.5	14.2
Other minority	13.9	11.9	11.6	24.5	14.7	9.5	6.1	20.1
White	43.0	41.6	32.6	40.1	44.8	34.2	40.9	46.9

Note: Only the civilian workforce is included in workforce calculations.

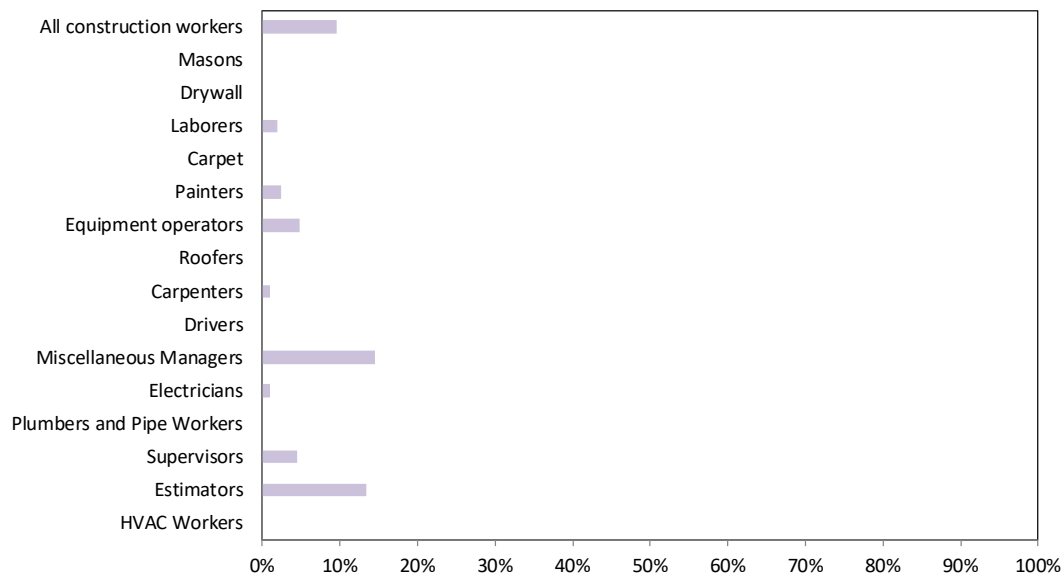
Because individuals can identify as multiple races, demographic calculations using non-mutually exclusive race definitions may total more than 100 percent.

Source: Keen Independent Research from 2012–2016 ACS Public Use Microdata samples. The 2012–2016 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Gender composition of construction occupations. Keen Independent also analyzed the proportion of women in construction-related occupations. Figure E-9 summarizes the representation of women in select construction-related occupations for 2012–2016. Overall, women made up less than 10 percent of workers in the industry in 2012–2016, and women accounted for less than 5 percent of the workers in most of the largest construction trades. There were no women among the 289 workers in the ACS sample data for people working in drywall, carpeting, roofing, driving, plumbing and HVAC.

As shown in Figure E-9, women comprised only 5 percent of first-line supervisors in 2012–2016.

Figure E-9.
 Women as a percentage of construction workers in selected occupations in
 the state of Hawaii, 2012–2016



Note: 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 a single category of equipment operators.

Only the civilian workforce is included in workforce calculations.

Source: Keen Independent Research from 2012–2016 ACS Public Use Microdata samples. data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Percentage of minorities and women who are managers. To further assess advancement opportunities for minorities and women in the Hawaii construction industry, Keen Independent examined the proportion of construction workers who reported being managers. Figure E-10 presents the percentage of construction employees who reported working as managers in 2012–2016 for Hawaii, by racial, ethnic and gender group using both mutually exclusive and non-mutually exclusive race definitions.

Mutually exclusive race definitions. In 2012–2016, 13 percent of non-Hispanic whites in the Hawaii construction industry were managers. Using mutually exclusive race definitions, only 5 percent of workers identifying as Asian Pacific American or Native Hawaiian were managers, a statistically significant difference from non-Hispanic whites. Only 2 percent of other minority construction workers worked as managers. This difference was also statistically significant.

Non-mutually exclusive race definitions. Additionally, using non-mutually exclusive definitions of race, non-Hispanic whites led all groups in terms of percentage of workers who reported being managers (9%), and Chinese Americans were not far behind (7%). In contrast, less than 3 percent of Native Hawaiian, Hispanic American and other minority construction workers were managers. About 3 percent of other Asian and Pacific Islanders worked as managers and only 5 percent of Filipino American construction workers were managers.

Figure E-10.
 Percentage of construction workers in Hawaii who worked as a manager with
 different race definitions, 2012–2016

State of Hawaii	Percentage of managers using mutually exclusive race definitions	Percentage of managers using non-mutually exclusive race definitions
Race/ethnicity		
Asian Pacific or Native Hawaiian	4.5 % **	4.5 % **
Native Hawaiian		2.6 **
Chinese American		7.2
Filipino American		5.4 *
Japanese American		6.4
Other Asian and Pacific Islanders		3.0 **
Hispanic American	3.7	2.8 **
Other minority	1.9 **	2.5 **
White	13.2	8.8
Gender		
Female	5.0 %	
Male	6.5	
All individuals	6.3 %	

Note: *,** Denote that the difference in proportions between the minority group and whites (or between females and males) for the given race/ethnicity/gender definition is statistically significant at the 90% or 95% confidence level, respectively.
 Only the civilian workforce is included in workforce calculations.
 Because individuals can identify as multiple races, demographic calculations using non-mutually exclusive race definitions may total more than 100 percent.
 White was defined as non-Hispanic whites using the mutually exclusive race definition.

Source: Keen Independent Research from 2012–2016 ACS Public Use Microdata samples.
 The 2012–2016 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Gender. In the Hawaii construction industry in 2012–2016, fewer women than men worked as managers (see Figure E-10). About 7 percent of male construction workers were managers in 2012–2016 and only 5 percent of female construction workers were managers during the same time period.

National research suggests these disparities are not due to differences in managerial competency between males and females. One study found that female construction managers are rated similarly to their male counterparts in terms of various managerial capabilities; female managers actually performed better than men in terms of sensitivity, customer focus, and authority and presence.⁴⁶

⁴⁶ Arditi, D., & Balci, G. (2009). Managerial competencies of female and male construction managers. *Journal of Construction Engineering and Management*, 135(11), 1275-1278. doi:10.1061/(asce)co.1943-7862.0000100

Architecture and Engineering Industry

Keen Independent also examined how education and employment may influence the number of potential minority and female entrepreneurs working in the Hawaii professional services industry, specifically in architecture and engineering (A&E).

Education. In contrast to the construction industry, lack of educational attainment may preclude workers' entry into the architecture and engineering industry. Many occupations require at least a four-year college degree and some require licensure. According to the 2012–2016 ACS, 69 percent of individuals working in the Hawaii architecture and engineering industry had at least a four-year college degree. Approximately 11 percent had an associate's degree.

Therefore, any barriers to college education can restrict employment opportunities, advancement opportunities, and, consequently, business ownership in the architecture and engineering industry. Any disparities in business ownership rates for A&E may in part reflect the lack of higher education for particular racial, ethnic and gender groups.⁴⁷ Keen Independent explores this issue below.

Mutually exclusive race definitions. As previously shown in Figure E-5, about 50 percent of all non-Hispanic white workers age 25 and older had at least a four-year degree in 2012–2016. For other racial/ethnic groups using mutually exclusive definitions of race, the data for Hawaii indicated the following percentages of workers age 25 and older with at least a four-year college degree:

- 31 percent for Asian Pacific Americans and Native Hawaiians;
- 33 percent for African Americans;
- 24 percent for Hispanic Americans; and
- 29 percent for other minorities.

Non-mutually exclusive race definitions. Using non-mutually exclusive definitions of race, the data indicated that different racial and ethnic groups in the category “Asian Pacific or Native Hawaiian” had highly varied results: Only 20 percent of Native Hawaiians held a college degree, a substantially smaller percentage than Japanese Americans (47%) and Chinese Americans (38%), for example. Similarly, only 23 percent of Filipino Americans held at least a four-year college degree.

The level of education necessary to work in the A&E industry may affect employment opportunities for groups for which college education lags that of non-Hispanic whites.

⁴⁷ Dickson, P. H., Solomon, G. T., & Weaver, K. M. (2008). Entrepreneurial selection and success: Does education matter? *Journal of Small Business and Enterprise Development*, 15(2), 239-258. doi:10.1108/14626000810871655; Feagin, J. R., & Imani, N. (1994). Racial barriers to African American entrepreneurship: An exploratory study. *Social Problems*, 41(4), 562-584. doi:10.1525/sp.1994.41.4.03x0272; Macionis, J. J. (2018). *Sociology* (16th ed.). Harlow, England: Pearson.

Employment. Figure E-11 compares the demographic composition of workers in the Hawaii architecture and engineering (A&E) industry to that of all workers in Hawaii who are 25 years or older and have a college degree.

Mutually exclusive race definitions. In 2012–2016, using mutually exclusive race definitions, about 65 percent of workers in the Hawaii architecture and engineering industry were people of color:

- 59 percent were Asian Pacific Americans or Native Hawaiians;
- About 1 percent were African Americans;
- About 2 percent were Hispanic Americans; and
- About 2 percent were American Indians, Alaska Natives or other minorities.

In 2012–2016, all minorities considered together comprised a smaller percentage of workers in A&E industry (65%) than minority workers 25 and older with a four-year college degree in other industries (69%).

Non-mutually exclusive race definitions. Hispanic Americans comprised a larger percentage of workers in the A&E industry (9%) than workers 25 and older with a college degree in all other industries (6%). Similarly, Chinese Americans were found to be a larger percentage of workers in the A&E industry (14%) than workers 25 and older with a college degree in other industries (12%). Japanese Americans, however, made up a smaller percentage of A&E workers (23%) than all other industry workers with a college degree (25%).

Gender. Compared to their representation among workers 25 and older with a college degree in all industries, women represented a relatively smaller percentage of those in the A&E industry. In 2012–2016, women represented about 26 percent of A&E workers in Hawaii, and 54 percent of workers with a four-year college degree.

Academic research concerning female and minority participation in science, technology, engineering and mathematics (STEM) fields. Many studies have examined the factors that contribute to low minority and female participation in the STEM fields.⁴⁸ Some factors that may play a role include isolation within work environments,⁴⁹ negative bias toward females in the engineering

⁴⁸ See, for example, Rice, D. (2017). Diversity in STEM? Challenges influencing the experiences of African American female engineers. In J. Ballenger, B. Polnick, & B. J. Irby (Eds.), *Women of color in STEM: Navigating the workforce* (pp. 157-180). Charlotte, NC: Information Age Publishing; Moss-Racusin, C. A., Dovidio, J. F., Brescoll, V. L., & Graham, M. J. (2012). Science faculty's subtle gender biases favor male students. *Proceedings of the National Academy of Sciences*, 109(41), 16474-16479. doi:10.1073/pnas.1211286109

⁴⁹ Rice, D. (2017). Diversity in STEM? Challenges influencing the experiences of African American female engineers. In J. Ballenger, B. Polnick, & B. J. Irby (Eds.), *Women of color in STEM: Navigating the workforce* (pp. 157-180). Charlotte, NC: Information Age Publishing; Strayhorn, T. L. (2015). Factors influencing black males' preparation for college and success in STEM majors: A mixed methods study. *Western Journal of Black Studies*, 39(1), 45-63. Retrieved from http://link.galegroup.com.ezp3.lib.umn.edu/apps/doc/A419267248/EAIM?u=umn_wilson&sid=EAIM&xid=dd369039; Wagner, S. H. (2017). Perceptions of support for diversity and turnover intentions of managers with solo-minority status. *Journal of Organizational Psychology*, 17(5), 28-36. Retrieved from http://www.na-businesspress.com/JOP/WagnerSH_17_5_.pdf

fields,⁵⁰ the perception that STEM fields are non-communal,⁵¹ low anticipated power in male-dominated domains such as the STEM fields,⁵² and inadequate secondary-school preparation for college-level STEM courses.⁵³

Figure E-11.
Demographic distribution of workers age 25 and older with a four-year college degree in architecture and engineering and all other industries in Hawaii, 2012–2016

State of Hawaii	Architecture and engineering industries with mutually exclusive race definitions	All other industries with mutually exclusive race definitions	Architecture and engineering industries with non-mutually exclusive race definitions	All other industries with non-mutually exclusive race definitions
Race/ethnicity				
African American	1.2 %	1.9 %	1.8 %	2.3 %
Asian Pacific or Native Hawaiian	58.8	62.2	58.8	62.2
Native Hawaiian			9.2	8.9
Chinese American			13.6	11.5
Filipino American			12.2	14.9
Japanese American			23.4	25.3
Other Asian and Pacific Islanders			9.9	9.2
Subcontinent Asian American	0.4	0.5	0.4	0.6
Hispanic American	2.4	2.2	9.2	5.7
American Indian, Alaska Native or other minority	2.1	1.6	2.8	2.5
Total minority	64.9 %	68.5 %		
White	35.1	31.5	47.4	45.0
Total	100.0 %	100.0 %		
Gender				
Female	26.4 % **	53.7 %		
Male	73.6 % **	46.3		
Total	100.0 %	100.0 %		

Note: ** Denotes that the difference in proportions between workers in A&E and all other industries for the given race/ethnicity/gender definition is statistically significant at the 95% confidence level.
Only the civilian workforce is included in workforce calculations.
Because individuals can identify as multiple races, demographic calculations using non-mutually exclusive race definitions may total more than 100 percent.
"All other industries" includes all industries other than the A&E industry.
White was defined as non-Hispanic whites using the mutually exclusive race definition.

Source: Keen Independent Research from 2012–2016 ACS Public Use Microdata samples. The 2012–2016 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

⁵⁰ Banchevsky, S., Westfall, J., Park, B., & Judd, C. M. (2016). But you don't look like a scientist!: Women scientists with feminine appearance are deemed less likely to be scientists. *Sex Roles*, 75(3/4), 95-109. doi:10.1007/s11199-016-0586-1; Moss-Racusin, C. A., Dovidio, J. F., Brescoll, V. L., & Graham, M. J. (2012). Science faculty's subtle gender biases favor male students. *Proceedings of the National Academy of Sciences*, 109(41), 16474-16479. doi:10.1073/pnas.1211286109; Reuben, E., Sapienza, P., & Zingales, L. (2014). How stereotypes impair women's careers in science. *Proceedings of the National Academy of Sciences*, 111(12), 4403-4408. doi:10.1073/pnas.1314788111

⁵¹ Stout, J. G., Grunberg, V. A., & Ito, T. A. (2016). Gender roles and stereotypes about science careers help explain women and men's science pursuits. *Sex Roles*, 75(9/10), 490-499. doi:10.1007/s11199-016-0647-5

⁵² Chen, J. M., & Moons, W. G. (2014). They won't listen to me: Anticipated power and women's disinterest in male-dominated domains. *Group Processes & Intergroup Relations*, 18(1), 116-128. doi:10.1177/1368430214550340

⁵³ Strayhorn, T. L. (2015). Factors influencing black males' preparation for college and success in STEM majors: A mixed methods study. *Western Journal of Black Studies*, 39(1), 45-63. Retrieved from http://link.galegroup.com.ezp3.lib.umn.edu/apps/doc/A419267248/EAIM?u=umn_wilson&sid=EAIM&xid=dd369039

Concessions Industry

Keen Independent also examined how workforce composition may affect the number of potential minority and female entrepreneurs in the food, beverage and selected retail industry (also referred to as the “concessions industry” in this study as it is the industry that most closely corresponds to airport concessions) This industry includes retail florists, gift, novelty and souvenir shops, automotive equipment rental and leasing, restaurants and other food services, and other personal services.

Employment. Figure E-12 compares the demographic composition of workers in the Hawaii concessions industry to that of workers in all other industries, using different race definitions.

Mutually exclusive race definitions. In 2012–2016, people of color represented about 83 percent of the workforce in the Hawaii concessions industry. This was a larger percentage than what might be expected given that people of color were 78 percent of workers in other industries. This difference was primarily due to a relatively high representation of Asian Pacific Americans and Native Hawaiians in the concessions industry.

Non-mutually exclusive race definitions. When compared with the percentage of Native Hawaiians employed in all other industries (16%), a slightly smaller percentage were employed in the concessions industry (13%). A similar comparison can be made for Japanese Americans, who were represented more heavily in all other industries (19%) than in the concessions industry (14%).

In contrast, Filipino Americans as well as other Asian and Pacific Islanders were a higher percentage of the concessions industry (28% and 19%, respectively) than of all other industries (23% and 13%, respectively).

Gender. Compared to representation of women among workers in all other industries, a slightly higher percentage of women worked in the concessions industry. In 2012–2016, women represented about 51 percent of concessions-related workers in Hawaii, and 48 percent of workers in other industries.

Figure E-12.

Demographics of workforce in food, beverage and selected retail and in all other industries with different race definitions, 2012–2016

State of Hawaii	Food, beverage and selected retail with mutually exclusive race definitions	All other industries with mutually exclusive race definitions	Food, beverage and selected retail with non-mutually exclusive race definitions	All other industries with non-mutually exclusive race definitions
Race/ethnicity				
African American	1.8 %	2.2 %	2.7 %	2.8 %
Asian Pacific or Native Hawaiian	75.6 **	70.3	75.6 **	70.3
Native Hawaiian			12.9 **	16.3
Chinese American			10.7	10.5
Filipino American			27.8 **	22.8
Japanese American			13.9 **	18.6
Other Asian and Pacific Islanders			19.1 **	12.5
Subcontinent Asian American	0.2	0.2	0.3	0.3
Hispanic American	3.1	3.2	10.1	9.0
American Indian, Alaska Native or other minority	2.1	2.0	3.8	3.1
Total minority	82.8 %	77.9 %		
White	17.2 **	22.1	37.0 **	40.0
Total	100.0 %	100.0 %		
Gender				
Female	50.9 % **	47.6 %		
Male	49.1 **	52.4		
Total	100.0 %	100.0 %		

Note: ** Denotes that the difference in proportions between workers in the concessions industry and workers in all other industries for the given race/ethnicity/gender definition is statistically significant at the 95% confidence level. Only the civilian workforce is included in workforce calculations. Because individuals can identify as multiple races, demographic calculations using non-mutually exclusive race definitions may total more than 100 percent. "All other industries" includes all industries other than the food, beverage and selected retail industry. White was defined as non-Hispanic whites using the mutually exclusive race definition.

Source: Keen Independent Research from 2012–2016 ACS Public Use Microdata samples. The 2012–2016 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Advancement. Figure E-13 examines the percentage of workers in Hawaii concessions industry that are managers, using different race definitions.

Mutually exclusive race definitions. In Hawaii in 2012–2016, about 12 percent of those identifying as Asian Pacific or Native Hawaiian in the concessions industry were managers, and only 4 percent of African Americans workers were managers. This was lower than the 19 percent of non-Hispanic whites in the concessions industry that worked as managers, and the difference between non-Hispanic whites and the other two groups of workers was statistically significant at the 95 percent level.

Non-mutually exclusive race definitions. Of all groups identifying as Asian Pacific American or Native Hawaiian, the group with the smallest percentage of concessions workers in management roles was Chinese Americans (less than 11%), and the group with the highest percentage of concessions workers in management roles was Japanese Americans (13%).

Gender. The percentage of concessions workers holding management positions were similar across gender groups. In 2012–2016, about 13 percent of both female and male food, beverage and selected retail workers were managers.

Figure E-13.

Percentage of food, beverage and selected retail workers who worked as a manager with different race definitions, 2012–2016

State of Hawaii	Percentage of managers using mutually exclusive race definitions	Percentage of managers using non-mutually exclusive race definitions
Race/ethnicity		
African American	3.9 % **	4.4 % **
Asian Pacific or Native Hawaiian	11.9 **	11.9 *
Native Hawaiian		12.0
Chinese American		10.6 *
Filipino American		11.6
Japanese American		13.0
Other Asian and Pacific Islanders		11.9
Hispanic American	10.3	11.2
Other minority	12.0	13.5
White	18.5	14.5
Gender		
Female	12.9 %	
Male	12.7	
All individuals	12.8 %	

Note: *,** Denote that the difference in proportions between the minority group whites (or between females and males) for the given race definition is statistically significant at the 90% or 95% confidence level, respectively.

Only the civilian workforce is included in workforce calculations.

Because individuals can identify as multiple races, demographic calculations using non-mutually exclusive race definitions may total more than 100 percent.

White was defined as non-Hispanic whites using the mutually exclusive race definition.

Source: Keen Independent Research from 2012–2016 ACS Public Use Microdata samples. The 2012–2016 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Summary

Keen Independent’s analyses suggest that there are barriers to entry and advancement for certain minority groups and for women in the construction, architecture and engineering, and concessions industries in Hawaii, as summarized below.

Although racial and ethnic minorities comprised 78 percent of the Hawaiian workforce in 2012–2016, people of color were less than 50 percent of business owners in the construction and engineering industries. Women were 48 percent of the Hawaiian workforce and only 6 percent of business owners in the construction and engineering industries. Keen Independent explored whether barriers to entry and advancement might partly explain these overall differences.

- Women composed a much smaller percentage of the construction and architecture and engineering workforce than the workforce in other industries.
- Fewer minorities and women worked in the Hawaii architecture and engineering industry than what might be expected based on analyses of workers 25 and older with a four-year college degree.
- Representation of Filipino Americans, other Asian and Pacific Islanders, Hispanic Americans and female employees in the Hawaii concessions industry was above what might be expected.

Any barriers to entry in the study industries might affect the relative number of minority and female business owners in these industries in Hawaii.

Keen Independent also examined advancement in the Hawaii construction industry.

- Representation of people of color was lower in certain construction trades than others.
- Most construction trades were nearly all male workers.
- Compared to non-Hispanic whites working in the construction industry, all groupings of Asian Pacific Americans and Native Hawaiians were less likely to be first line supervisors and less likely to be managers. Relatively fewer women than men working in the construction industry were first line supervisors or managers.

There were similar disparities in representation of people of color and women among managers in the A&E industry and for people of color in the concessions industry in Hawaii.

Any barriers to advancement may also affect the number of business owners among those groups.

Appendix F, which follows, examines rates of business ownership among individuals working in the Hawaii study industries.

APPENDIX F.

Business Ownership in the Hawaii Construction, Engineering and Concessions Industries

More than 17 percent of construction workers in the Hawaii marketplace were self-employed business owners in 2012–2016. Similarly, 17 percent of workers in the architecture and engineering (A&E) industry in Hawaii during the study period were self-employed business owners. In the food, beverage and selected retail industry, only 6.6 percent of workers were self-employed. (The food, beverage and selected retail industry is also referred to as the “concessions industry” in this appendix.) Focusing on these study industries, Keen Independent examined business ownership rates for different racial, ethnic and gender groups in Hawaii using Public Use Microdata Samples (PUMS) from the 2012–2016 American Community Survey (ACS). (Appendix F uses “self-employment” and “business ownership” interchangeably.)

As discussed in Appendix E, Keen Independent tailored its research approach to accurately reflect the unique multi-racial and ethnic background of Hawaii’s population. To appropriately study business ownership rates in Hawaii, Keen Independent examined business ownership data in two ways: (a) based on mutually exclusive race definitions and (b), using non-mutually exclusive race definitions. The non-mutually exclusive category permits people to choose multiple races or ethnicities that represent their background. Looking at race and ethnicity in this way allows the study team to compare demographic groups within the broader population that has Asian Pacific and Native Hawaiian backgrounds.

Note that, in general, rates of business ownership for whites are lower when considering the larger, non-mutually exclusive definition of “white.”

Keen Independent considers the entire state of Hawaii to represent the Hawaii marketplace. Any discussion of the Hawaii marketplace or Hawaii construction, A&E or concessions industries in the following analysis also includes firms and individuals located across the state.

Business Ownership Rates

Many studies have explored differences between minority and nonminority business ownership at the national level.¹ Although self-employment rates have increased for minorities and women over time, several studies indicate that race, ethnicity and gender continue to affect opportunities for business

¹ See, for example, Bates, T., & Robb, A.M. (2016). Impacts of Owner Race and Geographic Context on Access to Small-Business Financing. *Economic Development Quarterly*, 30(2), 159-170.; Blanchflower, D. (2008). Minority Self Employment in the United States and the Impact of Affirmative Action Programs. *NBER Working Paper Series*, (13972).; Fairlie, R. W. & Robb, A.M. (2007). Why are Black-Owned Businesses Less Successful than White-Owned Businesses? The Role of Families, Inheritances and Business Human Capital. *Journal of Labor Economics*, 25(2), 289-323.; Fairlie, R. W. & Robb, A.M. (2006). Race, Families and Business Success: A Comparison of African-American-, Asian-, and White-Owned Businesses. *Russell Sage Foundation*.; Chatterji, A. K., Chay, K.Y., & Fairlie, R.W. (2013). The Impact of City Contracting Set-Asides on Black Self-Employment and Employment.

ownership. The extent to which such individual characteristics may limit business ownership opportunities differs across industries and regions.²

Construction industry. Keen Independent classified workers as self-employed if they reported that they worked in their own unincorporated or incorporated business. In 2012–2016, 17.2 percent of workers in the Hawaii construction industry were self-employed compared with 10.3 percent of workers across all industries. Figure F-1 shows the percentage of workers who were self-employed in the construction industry by group from 2012–2016 in Hawaii. During the study period, disparities in business ownership rates were present between whites and people of color in Hawaii’s construction industry.

Figure F-1.
Percentage of workers in the Hawaii construction industry who were self-employed, 2012–2016

State of Hawaii	Mutually exclusive race definitions	Non-mutually exclusive race definitions
Race/ethnicity		
Asian Pacific or Native Hawaiian	10.7 % **	10.7 % **
Native Hawaiian		8.2 **
Chinese American		9.7 **
Filipino American		7.4 **
Japanese American		13.6 **
Other Asian and Pacific Islanders		13.2 **
Other minority	21.5 **	15.4 **
White	36.0	25.5
Gender		
Female	8.0 % **	
Male	18.2	
All individuals	17.2 %	

Note: **Denotes that the difference in proportions between the minority and non-Hispanic white groups (or female and male groups) for the given Census/ACS year is statistically significant at the 95% confidence level. Because of small sample size, “other minority” includes African Americans, Subcontinent Asian American, Hispanic American, American Indian or Alaska Natives, and other minorities. White was defined as non-Hispanic whites using the mutually exclusive race definition.

Source: Keen Independent Research from 2012–2016 ACS Public Use Microdata sample. The 2012–2016 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

² Lofstrom, M., Bates, T., & Parker, S. C. (2014). Why are Some People More Likely to Become Small-Businesses Owners than Others: Entrepreneurship Entry and Industry-Specific Barriers. *Journal of Business Venturing*, (29), 232-251.

Mutually exclusive race definitions. About 11 percent of Asian Pacific or Native Hawaiian workers in the construction industry were self-employed, as shown in Figure F-1. This rate was less than one-third the rate of non-Hispanic white workers. Other minorities and women working in construction also had rates of business ownership that were lower than non-Hispanic whites and men (differences were statistically significant).

Non-mutually exclusive race definitions. The right-hand column of Figure F-1 presents business ownership rates for groups based on non-mutually exclusive race definitions. Each Asian Pacific and Native Hawaiian subgroup had a business ownership rate that was lower than the 26 percent found for whites. Among the groups examined, Filipino Americans and Native Hawaiians had the lowest rates of business ownership.

The “other minority” category includes African Americans, Subcontinent Asian Americans, Hispanic Americans, American Indian or Alaska Natives, and other minority groups. The rate of self-employment in the construction industry for this group was 15 percent using the non-mutually exclusive race definition.

Women business owners. The business ownership rate was 8 percent for women working in the construction industry, less than one-half the rate for men (a statistically significant difference).

Architecture and engineering industry. Figure F-2 presents the percentage of workers in Hawaii’s architecture and engineering industry who were self-employed based on ACS data for 2012–2016. There were large differences in business ownership rates for minority groups compared with whites.

Mutually exclusive race definitions. Asian Pacific or Native Hawaiian workers in the A&E industry had a self-employment rate of 9 percent. Using mutually exclusive race definitions, this was roughly one-third the rate of non-Hispanic whites and a statistically significant difference.

Non-mutually exclusive race definitions. When considering non-mutually exclusive race definitions for workers in the A&E industry, each group within the broader set of Asian Pacific and Native Hawaiian employees had lower self-employment rates compared with whites. Each of these differences was statistically significant except for Native Hawaiians, which was due to a small number of Native Hawaiian workers in the sample data for the Hawaii A&E industry.

Results for “other minority” A&E business owners in Figure F-2 include African Americans, Subcontinent Asian Americans, Hispanic Americans, American Indian or Alaska Natives, and other minority groups. The rate of self-employment in the A&E industry for these individuals was 30 percent in the mutually exclusive category and 19 percent in the non-mutually exclusive category, and were not statistically significant different than self-employment rates for whites.

Figure F-2.
 Percentage of workers in the Hawaii architecture and engineering industry
 who were self-employed, 2012–2016

State of Hawaii	Mutually exclusive race definitions	Non-mutually exclusive race definitions
Race/ethnicity		
Asian Pacific or Native Hawaiian	8.7 % **	8.7 % **
Native Hawaiian		0.0
Chinese American		2.9 **
Filipino American		7.9 **
Japanese American		14.7 *
Other Asian and Pacific Islanders		5.6 **
Other minority	29.9	19.1
White	29.5	25.6
Gender		
Female	10.9 %	
Male	19.6	
All individuals	17.3 %	

Note: *,** Denote that the difference in proportions between the minority and non-Hispanic white groups (or female and male groups) for the given Census/ACS year is statistically significant at the 90% or 95% confidence level, respectively.

Because of small sample size, “other minority” includes African Americans, Subcontinent Asian American, Hispanic American, American Indian or Alaska Natives, and other minorities. White was defined as non-Hispanic whites using the mutually exclusive race definition.

Source: Keen Independent Research from 2012–2016 ACS Public Use Microdata sample. The 2012–2016 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Women business owners. From 2012 to 2016, about 11 percent of women in the A&E industry were self-employed, roughly one-half the rate for men working in the industry. The sample had too few observations of women working in this industry for this difference to be statistically significant.

Food, beverage and selected retail industry. Keen Independent also examined business ownership rates for people working in the Hawaii food, beverage and selected retail (“concessions”) industry in 2012–2016, as shown in Figure F-3.

Figure F-3.
Percentage of workers in the Hawaii food, beverage and selected retail industry who were self-employed, 2012–2016

State of Hawaii	Mutually exclusive race definitions	Non-mutually exclusive race definitions
Race/ethnicity		
African American	3.0 % **	1.9 % **
Asian Pacific or Native Hawaiian	6.2	6.2
Native Hawaiian		1.1 **
Chinese American		7.4
Filipino American		2.9 **
Japanese American		9.4
Other Asian and Pacific Islanders		8.9
Hispanic American	5.7	3.9
Other minority	5.4	7.4
White	9.0	6.4
Gender		
Female	6.6 %	
Male	6.5	
All individuals	6.6 %	

Note: **Denotes that the difference in proportions between the minority and non-Hispanic white groups (or female and male groups) for the given Census/ACS year is statistically significant at the 95% confidence level. Because of small sample size, “other minority” includes Subcontinent Asian American, American Indian or Alaska Natives, and other minorities. White was defined as non-Hispanic whites using the mutually exclusive race definition.

Source: Keen Independent Research from 2012–2016 ACS Public Use Microdata sample. The 2012–2016 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Mutually exclusive race definitions. Three percent of African American workers were self-employed in the concessions industry, far less than the rate for non-Hispanic whites (9%) and a statistically significant difference. Although the overall rates of business ownership were lower than whites for workers who were Asian Pacific and Native Hawaiian, Hispanic American and other minority, the differences were not statistically significant.

Non-mutually exclusive race definitions. African Americans, Native Hawaiians and Filipino Americans working in the concessions industry had large differences in business ownership rates comparison to whites, and these differences were statistically significant. Native Hawaiians had the largest disparity in rates of business ownership in the concessions industry, only owning businesses at a rate close to one-sixth the rate for whites.

In Figure F-3, “other minority” includes Subcontinent Asian Americans, American Indians or Alaska Natives, and other minorities. This group had a higher rate of self-employment in Hawaii’s concessions industry than whites when considering non-mutually exclusive race definitions.

Women business owners. About 7 percent of women working in Hawaii’s concessions industry were self-employed in the study period, similar to the business ownership rate for men.

Potential causes of differences in business ownership rates. Nationally, researchers have examined whether there are disparities in business ownership rates after considering personal characteristics such as education and age. Several studies have found that disparities in business ownership still exist even after accounting for such factors.

- **Financial capital.** Some studies have concluded that access to financial capital is a strong determinant of business ownership. Researchers have consistently found correlations between start-up capital and business formation, expansion and survival.³ In addition, studies suggest that housing appreciation has a positive effect on small business formation and employment.⁴ However, unexplained differences in financial capital still exist when statistically controlling for those factors.⁵ Access to capital is discussed in more detail in Appendix G.
- **Education.** Education has a positive effect on the probability of business ownership in most industries. However, results of multiple studies indicate that minorities are still less likely to own a business than nonminorities with similar levels of education.⁶ Recent research confirms a significant relationship between education and ability to obtain start-up capital.⁷

³ See Lofstrom, M. & Chunbei, W. (2006). Hispanic Self-Employment: A Dynamic Analysis of Business Ownership, *Forschungsinstitut zur Zukunft der Arbeit (Institute for the Study of Labor)*; Fairlie, R.W., & Robb, A.M. (2006). Race, Families and Business Success: A Comparison of African-American-, Asian-, and White-Owned Businesses. *Russell Sage Foundation*; Chatterji, A.K., et al. (2013). The Impact of City Contracting Set-Asides on Black Self-Employment and Employment.

⁴ Fairlie, R. W., & Krashinsky, H. A. (2012). Liquidity Constraints, Household Wealth, and Entrepreneurship Revisited.

⁵ Lofstrom, M., & Chunbei, W. (2006). Hispanic Self-Employment: A Dynamic Analysis of Business Ownership. *Forschungsinstitut zur Zukunft der Arbeit (Institute for the Study of Labor)*; Fairlie, R.W., Robb, A.M., & United States Minority Business Development Agency. (2010). Disparities in Capital Access between Minority and Non-minority-owned Businesses: The Troubling Reality of Capital Limitations Faced by MBEs.

⁶ See Fairlie, R.W. and Meyer, B.D. (1996). Ethnic and Racial Self-Employment Differences and Possible Explanations. *The Journal of Human Resources*, 31(4), 757-793; Butler, J.S. and Herring, C. (1991). Ethnicity and Entrepreneurship in America: Toward an Explanation of Racial and Ethnic Group Variations in Self-Employment. *Sociological Perspectives*. 79-94.

⁷ Robb, A.M., Fairlie, R.W. and Robinson, D.T. (2009). “Capital Injections among New Black and White Business Ventures: Evidence from the Kauffman Firm Survey.” *Federal Reserve Bank of Cleveland*.

- **Experience.** Both prior self-employment and managerial experience are important indicators of re-entering or entering business ownership, respectively.⁸ However, unexplained differences in self-employment between minorities and nonminorities still exist when accounting for business experience.⁹
- **Intergenerational links.** Intergenerational links affect one's likelihood of self-employment.¹⁰ In fact, having an entrepreneurial parent can increase the likelihood of their offspring choosing to be self-employed by up to 200 percent.¹¹ One study found that experience working for a self-employed family member increases the likelihood of business ownership for minorities.¹²

There is relatively little research on business ownership rates for Hawaii, except for noting that small business makes up a larger portion of the overall Hawaii economy compared with the nation as a whole.¹³

Business Ownership Regression Analysis

Race, ethnicity and gender can affect opportunities for business ownership, even when accounting for personal characteristics such as education, age and familial status. Research published at the beginning of the study period indicates that minorities face greater credit constraints at business startup and throughout business ownership than non-Hispanic whites, even after controlling for other factors including credit score.¹⁴

To further examine business ownership, Keen Independent developed multivariate regression models to explore patterns of business ownership in the Hawaii marketplace. These models estimate the effect of race, ethnicity and gender on the probability of business ownership while statistically controlling for other personal and family characteristics. Keen Independent analyzed these variables using mutually exclusive race definitions and non-mutually exclusive race definitions.

⁸ Kim, P., Aldrich, H., & Keister, H. (2006). Access (Not) Denied: The Impact of Financial, Human, and Cultural Capital on Entrepreneurial Entry in the United States. *Small Business Economics*, 27(1), 5-22; Georgellis, Y., Sessions, J. G., & Tsitsianis, N. (2005). Windfalls, wealth, and the transition to self-employment. *Small Business Economics*, 25(5), 407.

⁹ Fairlie, R., & Meyer, B. (2000). Trends in Self-Employment among White and Black Men during the Twentieth Century. *The Journal of Human Resources*, 35(4), 643-669. doi:10.2307/146366

¹⁰ Andersson, L., & Hammarstedt, M. (2010). Intergenerational transmissions in immigrant self-employment: Evidence from three generations. *Small Business Economics*, 34(3), 261-276.

¹¹ Lindquist, M. J., Sol, J., & Van Praag, M. (2016). Why Do Entrepreneurial Parents Have Entrepreneurial Children? *Journal of labor economics*, (2). 269.

¹² See Fairlie, R.W., & Robb, A.M. (2006). Race, Families and Business Success: A Comparison of African-American-, Asian-, and White-Owned Businesses. *Russell Sage Foundation*; Fairlie, R.W., & Robb, A.M. (2007). Why are Black-Owned Businesses Less Successful than White-Owned Businesses? The Role of Families, Inheritances and Business Human Capital. *Journal of Labor Economics*, 25(2), 289-323.

¹³ State of Hawaii - Department of Business, Economic Development & Tourism, Research & Economic Analysis Division. (2014). *Hawaii New Business Formation: An analysis of business birth, deaths, and survival rates*. Retrieved from State of Hawaii website: http://files.hawaii.gov/dbedt/economic/reports/new_bus.pdf.

¹⁴ Robb, A.M. (2012). Access to Capital among Young Firms, Minority-owned Firms, Women-owned Firms and High-Tech Firms. *Small Business Administration*; Chatterji, A.K., et al. (2013). The Impact of City Contracting Set-Asides on Black Self-Employment and Employment.

An extensive body of literature examines whether race- and gender-neutral personal factors such as access to financial capital, education, age and family characteristics (e.g., marital status) help explain differences in business ownership. This subject has also been examined in other disparity studies that have been used to defend DBE and MBE programs in court.¹⁵ For example, prior studies in Minnesota and Illinois have used econometric analyses to investigate whether disparities in business ownership for minorities and women working in the construction and professional services industry persist after statistically controlling for race- and gender-neutral personal characteristics.^{16, 17} Those studies have incorporated probit econometric models using PUMS data from the 2000 Census, and have been among the materials that agencies have submitted to courts in subsequent litigation concerning the implementation of the Federal DBE Program.

Keen Independent used similar probit regression models to predict business ownership from multiple independent or “explanatory” variables, such as:¹⁸

- Personal characteristics that are potentially linked to the likelihood of business ownership — age, age-squared, disability, marital status, number of children in the household, number of elderly people in the household and English-speaking ability;
- Educational attainment;
- Measures and indicators related to personal financial resources and constraints — home ownership, home value, monthly mortgage payment, dividend and interest income, and additional household income from a spouse or unmarried partner; and
- Race, ethnicity and gender.

Keen Independent developed probit regression models using PUMS data from 2012–2016 ACS data:

- A model for the Hawaii construction industry that included 2,139 observations;
- A model for the Hawaii A&E industry that included 326 observations; and
- A model for the Hawaii concessions industry that included 2,415 observations.

¹⁵ National Economic Research Associates, Inc. (2012). *The State of Minority- and Women-Owned Business Enterprise in Construction: Evidence from Houston*. Prepared for the City of Houston.; Mason Tillman Associates (2012) *Illinois Department of Transportation/Illinois Tollway Disadvantaged Business Enterprises Disparity Study (Vols. 1-2)*. Prepared for the Illinois Department of Transportation.; Mason Tillman Associates (2012); National Economic Research Associates, Inc. (1997) *Disadvantaged Business Enterprise Availability Study*. Prepared for the City of Denver.

¹⁶ National Economic Research Associates, Inc. (2000). *Disadvantaged Business Enterprise Availability Study*. Prepared for the Minnesota Department of Transportation.

¹⁷ National Economic Research Associates, Inc. (2004). *Disadvantaged Business Enterprise Availability Study*. Prepared for the Illinois Department of Transportation.

¹⁸ Probit models estimate the effects of multiple independent or “predictor” variables in terms of a single, dichotomous dependent or “outcome” variable — in this case, business ownership. The dependent variable is binary, coded as “1” for individuals in a particular industry who are self-employed and “0” for individuals who are not self-employed. The model enables estimation of the probability that workers in a given sample are self-employed, based on their individual characteristics. Keen Independent excluded observations where the Census Bureau had imputed values for the dependent variable (business ownership).

Hawaii construction industry in 2012–2016. Keen Independent created business ownership models for the Hawaii construction industry using 2012–2016 ACS data and considered both mutually exclusive and non-mutually exclusive race definitions.

Probit modeling allows for further analysis of the disparities identified in business ownership rates for African Americans, Hispanic Americans and women. Keen Independent modeled business ownership rates for these groups as if they had the same probability of business ownership as similarly-situated non-Hispanic white males.

1. Keen Independent performed a probit regression analysis predicting business ownership using only non-Hispanic white male construction workers in the dataset.¹⁹
2. After obtaining the results from the non-Hispanic white male regression model, the study team used coefficients from that model along with the mean personal, financial and educational characteristics of Asian Pacific or Native Hawaiian, other minority and women working in the Hawaii construction industry (i.e., indicators of educational attainment as well as indicators of personal financial resources and constraints) to estimate the probability of business ownership of each group. Similar simulation approaches have been used in other disparity studies that courts have reviewed.

Mutually exclusive race definitions. Figure F-4 presents the coefficients for the probit model for individuals working in the Hawaii construction industry in 2012–2016 using mutually exclusive race definitions. Several factors were important and statistically significant in predicting the probability of business ownership:

- Older workers were associated with a higher probability of business ownership.
- Workers whose households contained more children were associated with a lower probability of business ownership.
- Higher home values were associated with a higher probability of business ownership.
- Individuals who spoke English well were associated with a lower probability of business ownership.
- Persons with an advanced degree were associated with a lower probability of business ownership.

After statistically controlling for factors other than race, ethnicity and gender, there were statistically significant disparities in business ownership rates for Asian Pacific or Native Hawaiians, other minorities and women working in the Hawaii construction industry. People of color and women working in the construction industry were less likely to own businesses than similarly-situated non-Hispanic whites and men.

¹⁹ That version of the model excluded the race, ethnicity and gender indicator variables, because the value of all those variables would be the same (i.e., 0).

Figure F-4.
Hawaii construction industry business ownership model with mutually exclusive race definitions, 2012–2016

Note:

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

Because of small sample size, “other minority” includes African Americans, Subcontinent Asian American, Hispanic American, American Indian or Alaska Natives, and other minorities.

Source:

Keen Independent Research from 2012–2016 ACS Public Use Microdata sample. The 2012–2016 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Variable	Coefficient
Constant	-1.4250 **
Age	0.0486 *
Age-squared	-0.0002
Married	-0.0151
Disabled	-0.2670
Number of children in household	-0.0780 **
Number of people over 65 in household	-0.0825
Owens home	-0.1640
Home value (\$0,000s)	0.0002 **
Monthly mortgage payment (\$0,000s)	-0.0221
Interest and dividend income (\$0,000s)	-0.0020
Income of spouse or partner (\$0,000s)	0.0010
Speaks English well	-0.6560 **
Less than high school education	-0.2020
Some college	0.0324
Four-year degree	-0.0430
Advanced degree	-0.5390 *
Asian Pacific or Native Hawaiian	-0.8460 **
Other minority	-0.3670 **
Female	-0.5390 **

Non-mutually exclusive race definitions. Figure F-5 presents the race/ethnicity and gender coefficients for a similar probit model for individuals working in the Hawaii construction industry in 2012–2016 that uses non-mutually exclusive race definitions. This regression model compares individuals in specific race and ethnicity categories against all other races and ethnicities for workers in the Hawaii construction industry from 2012–2016. (As with the model results shown in Figure F-4, factors such as age and education were still important in predicting self-employment in this industry.)

When compared to all other groups, Native Hawaiians, Chinese Americans, Filipino Americans and Japanese Americans were all associated with *lower* probabilities of business ownership for people working in the construction industry. These results suggest that the disparities in business ownership rates are found across the largest subgroups of Asian Pacific Americans/Native Hawaiians in Hawaii.

Figure F-5.
Hawaii construction industry business ownership model with
non-mutually exclusive race definitions, 2012–2016

Variable	Coefficient
Native Hawaiian	-0.5010 **
Chinese American	-0.3730 **
Filipino American	-0.5730 **
Japanese American	-0.3590 **
Other Asian and Pacific Islanders	-0.0100
Other minority	0.0410

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

Because of small sample size, “other minority” includes African Americans, Subcontinent Asian American, Hispanic American, American Indian or Alaska Natives, and other minorities.

Source: Keen Independent Research from 2012–2016 ACS Public Use Microdata sample. The 2012–2016 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Figure F-6 presents the simulated business ownership rates (i.e., “benchmark” rate) for Asian Pacific Americans/Native Hawaiians, other minorities and non-Hispanic white women, and compares them to the actual, observed mean probabilities of business ownership for each group. The disparity index was calculated by taking the actual business ownership rate for each group, dividing it by that group’s benchmark rate, and then multiplying the result by 100. The disparity index expresses the presence of an ownership disparity, or lack thereof, in terms of what would be expected based on the simulated business ownership rates of similarly-situated non-Hispanic white male construction workers. Note that the “actual” self-employment rates are for the dataset used for these regression analyses and do not always exactly match results from the entire 2012–2016 data.

Figure F-6.
Comparison of actual business ownership rates to simulated rates for
Hawaii construction workers, 2012–2016

Group	Self-employment rate		Disparity index (100 = parity)
	Actual	Benchmark	
Asian Pacific or Native Hawaiian	10.2 %	34.5 %	30
Other minority	22.2	34.3	65
Non-Hispanic white female	12.4	39.4	31

Note: As the benchmark figure can only be estimated for records with an observed (rather than imputed) dependent variable, comparison is made with only these subsets of the sample. For this reason, actual self-employment rates may differ from those in Figure F-1.

Source: Keen Independent Research from 2012–2016 ACS Public Use Microdata sample. The 2012–2016 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Results from these analyses show lower actual self-employment rates for Asian Pacific/ Native Hawaiians, other minorities and non-Hispanic white women than the simulated ownership rates for these groups:

- **Asian Pacific or Native Hawaiians.** The actual business ownership rate for Asian Pacific or Native Hawaiians was 10.2 percent, which is less than the benchmark rate of 34.5 percent. Dividing 10.2 percent by 34.5 percent (and then multiplying by 100) gives a disparity index of 30, indicating that Asian Pacific Americans and Native Hawaiians owned construction businesses at less than one-third of the rate that would be expected based on simulated ownership rates. Because the disparity index is less than 80, it indicates a “substantial” disparity (Appendix B has a discussion of the use of substantial disparity in court cases).
- **Other minority.** In the construction industry, other minorities had actual business ownership rates of 22.2 percent, which is less than the benchmark rate of 34.3 percent. The disparity index for this group is 65 and indicates a substantial disparity.
- **Women.** The benchmark ownership rate for non-Hispanic white women was 39.4 percent while the actual rate was only 12.4 percent. The corresponding disparity index was 31, indicating a substantial disparity in the rate of business ownership for non-Hispanic white women working in the construction industry.

Keen Independent ran a sensitivity analysis for all Asian Pacific subgroups and found consistent results across all groups.

A&E industry in 2012 through 2016. Keen Independent developed separate business ownership models for the Hawaii A&E industry using the same data source (2012–2016 ACS data). Keen Independent created models using mutually exclusive race definitions and non-mutually exclusive race definitions. Due to small sample size, in the following regression analyses “other minority” refers to African Americans, Subcontinent Asian Americans, Hispanic Americans, American Indians or Alaska Natives, and other minorities.

Mutually exclusive race definitions. Figure F-7 presents the coefficients for the probit model for individuals working in the Hawaii A&E industry in 2012–2016 using mutually exclusive race definitions. This regression model compares each group against non-Hispanic whites and males. Several factors were important and statistically significant in predicting the probability of business ownership among workers in the A&E industry:

- Speaking English well was associated with a higher probability of business ownership; and
- Having less than a high school degree was associated with a lower probability of business ownership.

After controlling for personal and family characteristics, there were statistically significant disparities in business ownership rates for Asian Pacific/Native Hawaiians working in the Hawaii A&E industry. Asian Pacific Americans and Native Hawaiians working in the industry were less likely to own A&E businesses than similarly-situated non-Hispanic white males.

Although the probability of business ownership was somewhat lower for women working in the industry than for men, this difference was not statistically significant.

Figure F-7.
Hawaii architecture and engineering industry business ownership model with mutually exclusive race definitions, 2012–2016

Note:

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

Because of small sample size, “other minority” includes African Americans, Subcontinent Asian American, Hispanic American, American Indian or Alaska Natives, and other minorities.

Source:

Keen Independent Research from 2012–2016 ACS Public Use Microdata sample. The 2012–2016 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Variable	Coefficient
Constant	-6.1560 **
Age	0.0143
Age-squared	0.0002
Married	0.2400
Disabled	-0.3750
Number of children in household	-0.1320
Number of people over 65 in household	-0.0465
Owns home	0.0291
Home value (\$0,000s)	0.0000
Monthly mortgage payment (\$0,000s)	0.0454
Interest and dividend income (\$0,000s)	0.0038
Income of spouse or partner (\$0,000s)	-0.0018
Speaks English well	4.1380 **
Less than high school education	-4.2590 **
Some college	-0.1070
Four-year degree	0.1310
Advanced degree	0.2540
Asian Pacific or Native Hawaiian	-0.6160 **
Other minority	0.1810
Female	-0.1360

Non-mutually exclusive race definitions. Figure F-8 presents the coefficients for the probit model for persons working in the Hawaii A&E industry in 2012–2016 with non-mutually exclusive race definitions.

When compared to all other groups, Native Hawaiians, Chinese Americans, Filipino Americans and other Asian Pacific Islanders working in the A&E industry were associated with *lower* probabilities of business ownership (statistically significant differences for Native Hawaiians and Chinese Americans).

Figure F-8.
Hawaii architecture and engineering industry business ownership
model with non-mutually exclusive race definitions, 2012–2016

Variable	Coefficient
Native Hawaiian	-6.3910 **
Chinese American	-0.8890 *
Filipino American	-0.4650
Japanese American	0.1400
Other Asian and Pacific Islanders	-0.5730
Other minority	0.1360

Note: *,** Denote statistical significance at the 90% and 95% confidence levels, respectively. Because of small sample size, "other minority" includes African Americans, Subcontinent Asian American, Hispanic American, American Indian or Alaska Natives, and other minorities.

Source: Keen Independent Research from 2012–2016 ACS Public Use Microdata sample. The 2012–2016 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Using the same approach as for the construction industry, Keen Independent simulated business ownership rates in the A&E industry and compared them to actual rates from 2012 to 2016. (See Figure F-9). The study team performed this analysis for groups showing statistically significant differences in business ownership rates in Figure F-7 (Asian Pacific or Native Hawaiians).

The benchmark ownership rate for Asian Pacific or Native Hawaiian workers in the A&E industry was 23.3 percent, compared with an actual ownership rate of 8.8 percent. The disparity index was 38, which indicates a substantial disparity.

Figure F-9.
Comparison of actual business ownership rates to simulated rates
for Hawaii architecture and engineering workers, 2012–2016

Group	Self-employment rate		Disparity index (100 = parity)
	Actual	Benchmark	
Asian Pacific or Native Hawaiian	8.8 %	23.3 %	38

Note: As the benchmark figure can only be estimated for records with an observed (rather than imputed) dependent variable, comparison is made with only these subsets of the sample. For this reason, actual self-employment rates may differ from those in Figure F-2.

Source: Keen Independent Research from 2012–2016 ACS Public Use Microdata sample. The 2012–2016 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Hawaii food, beverage and selected retail industry in 2012 through 2016. Keen Independent also created business ownership models for the Hawaii food, beverage and selected retail (“concessions”) industry using 2012–2016 ACS data and considered both mutually exclusive and non-mutually exclusive race definitions.

Mutually exclusive race definitions. Figure F-10 presents the coefficients for the probit model for individuals working in the Hawaii concessions industry in 2012–2016 with mutually exclusive race definitions. This regression model compares all ethnic demographics against non-Hispanic white males to determine the probability of self-employment in Hawaii’s concessions industry from 2012–2016. Several factors were important and statistically significant in predicting the probability of business ownership:

- Individuals with an advanced degree were associated with higher rates of business ownership.
- Married persons were associated with higher rates of business ownership.
- Older workers were associated with a higher probability of business ownership, with this effect reversing for the oldest workers.

As shown in Figure F-10, there were no statistically significant differences in ownership rates based for African Americans, Hispanic Americans, Asian Pacific Americans/Native Hawaiians (as a broad group) or other minorities after controlling for other personal and family characteristics. There were also no differences in ownership rates between women and men.

Figure F-10.
Hawaii food, beverage and selected retail industry business ownership model with mutually exclusive race definitions, 2012–2016

Note:
*,** Denote statistical significance at the 90% and 95% confidence levels, respectively.
Because of small sample size, “other minority” includes African Americans, Subcontinent Asian American, Hispanic American, American Indian or Alaska Natives, and other minorities.

Source:
Keen Independent Research from 2012–2016 ACS Public Use Microdata sample. The 2012–2016 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center:
<http://usa.ipums.org/usa/>.

Variable	Coefficient
Constant	-3.9850 **
Age	0.0808 **
Age-squared	-0.0006 **
Married	0.2810 **
Disabled	-0.2390
Number of children in household	-0.0905
Number of people over 65 in household	-0.0730
Owns home	0.1090
Home value (\$0,000s)	0.0002
Monthly mortgage payment (\$0,000s)	0.0216
Interest and dividend income (\$0,000s)	0.0044
Income of spouse or partner (\$0,000s)	0.0011
Speaks English well	0.0401
Less than high school education	-0.1890
Some college	0.0940
Four-year degree	0.1600
Advanced degree	0.9750 **
African American	-0.2200
Asian Pacific or Native Hawaiian	-0.0571
Hispanic American	0.1600
Other minority	0.0701
Female	-0.0314

Non-mutually exclusive race definitions. Figure F-11 presents the coefficients for the probit model for persons working in the Hawaii concessions industry in 2012–2016 with non-mutually exclusive race definitions. This regression model compares individuals in specific race and ethnicity categories against all other races and ethnicities in the Hawaii concessions marketplace from 2012–2016.

When compared to all groups, Native Hawaiians and Filipino Americans working in the industry were associated with lower rates of business ownership. Conversely, other Asian and Pacific Islanders and other minorities were both associated with higher rates of business ownership.

Figure F-11.

Hawaii food, beverage and selected retail industry business ownership model with non-mutually exclusive race definitions, 2012–2016

Variable	Coefficient
African American	-0.3090
Native Hawaiian	-0.8940 **
Chinese American	0.0066
Filipino American	-0.6300 **
Japanese American	0.0983
Other Asian and Pacific Islanders	0.4720 **
Hispanic American	-0.0093
Other minority	0.3970 *

Note: *,** Denote statistical significance at the 90% and 95% confidence levels, respectively. Because of small sample size, "other minority" includes Subcontinent Asian American, American Indian or Alaska Natives, and other minorities.

Source: Keen Independent Research from 2012–2016 ACS Public Use Microdata sample. The 2012–2016 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Summary of Business Ownership in Hawaii

This study examined business ownership using both mutually exclusive and non-mutually exclusive race definitions. The regression models using mutually exclusive race definitions include anyone with an Asian Pacific or Native Hawaiian background in a broad Asian Pacific or Native Hawaiian group. The models that explored business ownership using non-mutually exclusive race definitions allowed the study team to examine subgroups within the broad population of people indicating that they were Asian Pacific or Native Hawaiian. There would be more minority- and women-owned firms in the Hawaii marketplace but for disparities in business ownership rates.

- There were statistically significant disparities in business ownership rates for Asian Pacific Americans and Native Hawaiians (combined), members of other minority groups and women working in the construction industry in 2012–2016. Disparities for Asian Pacific Americans and Native Hawaiians were evident by subgroup when examining non-mutually exclusive race/ethnicity definitions.

After statistically controlling for factors including education, age, family status and homeownership, statistically significant disparities in business ownership rates persisted for Asian Pacific/Native Hawaiian and other minority groups as well as for women working in the industry. These disparities were substantial.

- Fewer Asian Pacific Americans and Native Hawaiians in the A&E industry owned businesses compared with non-Hispanic whites (statistically significant differences). The rate of business ownership for women working in this industry was about one-half that of men, although this difference was not statistically significant.

After controlling for education, age and other personal characteristics, a substantial disparity in firm ownership persisted for Asian Pacific Americans and Native Hawaiians working in the industry.

- African Americans, Native Hawaiians and Filipino Americans working in the food, beverage and selected retail industry were less likely to own businesses than other groups (statistically significant differences). Disparities in business ownership rates persisted for Native Hawaiian and Filipino workers in this industry after considering other personal and family characteristics.

The results of these analyses indicate that, but for disparities in the rates of business ownership, there would be more minority-owned firms in the Hawaii construction, A&E and concessions industries than found in Hawaii today. There would also be more women-owned companies in the Hawaii construction industry.

APPENDIX G.

Access to Capital for Business Formation and Success in Hawaii

Access to capital is one factor that researchers have examined when studying business formation and success. If race- or gender-based discrimination exists in capital markets, minorities and women may have difficulty acquiring the capital necessary to start, operate or expand businesses.^{1, 2} Researchers have also found that the amount of start-up capital can affect long-term business success and, on average, minority- and women-owned businesses appear to have less start-up capital than non-Hispanic white-owned businesses and male-owned businesses.³ For example:

- In 2012, 25 percent of white-owned businesses that responded to a national U.S. Census Bureau survey indicated that they had start-up capital of \$25,000 or more.⁴
- Only 12 percent of African American-owned businesses indicated a comparable amount of start-up capital, and disparities in start-up capital were identified for every other minority group except Asian Americans.
- Fifteen percent of female-owned businesses reported start-up capital of \$25,000 or more compared with 27 percent of male-owned businesses (not including businesses that were equally owned by men and women).

Race- or gender-based discrimination affecting availability of start-up capital can have long-term consequences, as can discrimination in access to business loans after businesses have already been formed.⁵ Therefore, any discrimination in the traditional means of obtaining start-up capital (e.g., access to credit markets, the ability to obtain a business loan, and having equity in a home and the ability to borrow against that equity) could also have long-term impacts on business ownership and success. Lack of access to credit, housing discrimination markets and discrimination in mortgage lending that occurred decades ago could all have lasting effects today for current or potential business owners.

¹ Fairlie, R. W., & Robb, A. (2010). *Disparities in Capital Access between Minority and Non-Minority-Owned Businesses: The Troubling Reality of Capital Limitations Faced by MBEs*. U.S. Department of Commerce.

² Fairlie, R. W., & Robb, A. (2010). *Race and Entrepreneurial Success: Black-, Asian-, and White-Owned Businesses in the United States*. Cambridge, MA: MIT Press.

³ Ibid.

⁴ United States Census Bureau. (2012). *2012 Survey of Business Owners*. [Data file]. Retrieved from https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=SBO_2007_00CSCB16&prodType=table.

⁵ Fairlie, R. W., & Robb, A. (2010). *Race and Entrepreneurial Success: Black-, Asian-, and White-Owned Businesses in the United States*. Cambridge, MA: MIT Press.

Appendix G presents information about start-up capital and business credit markets. It also provides information on homeownership and mortgage lending, because home equity is often an important source of capital to start and expand businesses. The results begin with national data and then provide Hawaii-specific information, when possible.

Start-Up Capital

The study team analyzed sources of start-up capital and recent trends in wealth to explore differences across race/ethnicity and gender.

Sources of start-up capital. The most common sources of capital used to start or acquire a business according to the U.S. Census Bureau's 2015 Annual Survey of Entrepreneurs (ASE) include:

- Personal/family savings of owner(s);
- Personal/family assets other than savings of owner(s);
- Personal/family home equity loan;
- Personal credit card(s) carrying balances;
- Business credit card(s) carrying balances;
- Business loan from federal, state or local government;
- Government-guaranteed business loan from a bank or financial institution;
- Business loan from a bank or financial institution;
- Business loan/investment from family/friends;
- Investment by venture capitalist(s); and
- Grants.

Personal and/or family savings of the owner are the main sources of capital used to start or acquire a business among all groups surveyed according to the 2015 ASE.⁶ The following trends were also identified by the Survey:

- Female-owned employer businesses were more likely than male-owned employer businesses to report using personal and/or family savings for start-up capital.
- Asian American-owned employer businesses were most likely to use personal/family savings as a source of start-up capital (74%), followed by Hispanic American-owned employer businesses (73%) and African American-owned employer businesses (70%).
- Native Hawaiian and other Pacific Islander-owned employer businesses were least likely to use personal/family savings of the owners for start-up capital (65%) followed by white-owned employer businesses (66%).

⁶ The Annual Survey of Entrepreneurs provides economic and demographic data of all businesses with employees with receipts of \$1,000 or more by ethnicity, race and gender. This differs from the U.S. Census Bureau's Survey of Business Owners which collects data on employer businesses and nonemployer businesses with receipts of \$1,000 or more.

Some noteworthy trends regarding the use of credit cards as a source of start-up capital were also identified by the 2015 ASE:

- More female-owned employer businesses used personal credit cards as a source of start-up capital⁷ compared with male-owned employer businesses.
- About 18 percent of African American-, American Indian- and Alaska Native-owned employer businesses used personal credit cards as a source of start-up capital, followed by Native Hawaiian and other Pacific Islander- (17%) and Hispanic American-owned employer businesses (14%).
- Less than 11 percent of Asian American- and white-owned employer businesses reported using personal credit cards as a source of start-up capital.

Because credit card financing for debt is a more expensive source of debt-financing compared with business loans through financial institutions,⁸ women- and minority-owned employer businesses are adversely affected by their higher use of personal credit cards as a source of start-up capital.

Trends in wealth-holding. Given that personal and/or family savings was the most common source of start-up capital used to start or acquire a business, one must examine recent trends in wealth-holding to gain a more comprehensive picture of the impact on women and minorities of using personal and/or family savings for start-up capital.

Recent trends in wealth-holding indicate that in 2016, white households maintained the highest income and net worth levels, far surpassing the income and net worth levels of black and Hispanic households.⁹ White households were less likely to have zero or negative net worth and had more assets than black and Hispanic households.¹⁰ White households also had greater mean net housing wealth than black and Hispanic households.¹¹ Figure G-1 below provides household financial data by race/ethnicity for 2016.

⁷ United States Census Bureau. (2015). *2015 Annual Survey of Entrepreneurs*. [Data file]. Retrieved from <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk>

⁸ Robb, A. (2018). *Financing Patterns and Credit Market Experiences: A Comparison by Race and Ethnicity for U.S. Employer Firms* (Report No. SBAHQ-16-M-0175). Retrieved from U.S. Small Business Administration, Office of Advocacy website: https://www.sba.gov/sites/default/files/Financing_Patterns_and_Credit_Market_Experiences_report.pdf

⁹ Dettling, L. J., Hsu, J. W., Jacobs, L., Moore, K. B., Thompson, J. P., & Llanes, E. (2017). *Recent Trends in Wealth-Holding by Race and Ethnicity: Evidence from the Survey of Consumer Finances*. Retrieved from Board of Governors of the Federal Reserve System website: <https://doi.org/10.17016/2380-7172.2083>

¹⁰ Ibid.

¹¹ Ibid.

Figure G-1.

U.S. household financial data by race/ethnicity for 2016 (thousands of dollars or percent)

	White	African American	Hispanic American
Income			
Median	\$ 61,200	\$ 35,400	\$ 38,500
Mean	123,400	54,000	57,300
Net worth			
Median	\$ 171,000	\$ 17,600	\$ 20,700
Mean	933,700	138,200	191,200
Percent of families with zero or negative net worth	9.0 %	19.0 %	13.0 %
Assets (percent of families with ...)			
Primary residence	73.0 %	45.0 %	46.0 %
Retirement accounts	60.0	34.0	30.0
Business equity	15.0	7.0	6.0
Wealth from housing (for homeowners)			
Percent of assets in housing	32.0 %	37.0 %	39.0 %
Mean net housing wealth	215.8	94.4	129.8

Source: Dettling, L. J., Hsu, J. W., Jacobs, L., Moore, K. B., Thompson, J. P., & Llanes, E. (2017). *Recent Trends in Wealth-Holding by Race and Ethnicity: Evidence from the Survey of Consumer Finances*. Retrieved from Board of Governors of the Federal Reserve System website: <https://doi.org/10.17016/2380-7172.2083>.

All minority groups except for Asian Americans had relatively lower levels of household wealth compared to whites. Given the heavy dependence upon personal and/or family savings of the owner as the main source of start-up capital, clearly, lower levels of wealth among minorities may result in difficulty acquiring the capital necessary to start, operate or expand businesses.

Business Credit

In addition to a heavy dependence upon personal and/or family savings as a source of start-up capital, businesses also rely on banks for start-up capital.¹² The study team analyzed credit-market trends in the business loan industry to explore differences across race/ethnicity and gender that may lead to disparities in access to capital.

Credit market trends in the business loan industry. Data for employer businesses that secured business loans from a bank or financial institution are included in the 2015 ASE.¹³ The data show that white- and male-owned employer businesses were more likely than women-, African American- or Hispanic-owned employer businesses to secure business loans from a bank or financial institution.

¹² Robb, A. & Robinson, D. T. (2017). Testing for Racial Bias in Business Credit Scores. *Small Business Economics*, 50(3),429-443.

¹³ United States Census Bureau. (2015). *2015 Annual Survey of Entrepreneurs*. [Data file]. Retrieved from <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk>

Figure G-2.
 U.S. employer businesses that secured business loans from a bank or financial institution in 2015 by race, ethnicity and gender

	Percent of respondents
Race/ethnicity	
African American	14.0 %
Hispanic American	12.0
White	18.0
Gender	
Female	15.0 %
Male	18.0

Source: U.S. Census Bureau Annual Survey of Entrepreneurs, 2015.

Data on whether a business needed additional financing and why the owner chose not to apply are also presented in the 2015 ASE.¹⁴ One of the top reasons why an owner chose not to apply was because the firm owner(s) believed that they would not be approved by a lender. The data show that white-, Asian- and male-owned firms were less likely to believe that they would not be approved by a lender when compared with African American- and Hispanic-owned firms.

Figure G-3.
 U.S. employer businesses that avoided additional financing in 2015 because they did not think the business would be approved by lender

	Percent of respondents
Race/ethnicity	
African American	14.0 %
Asian American	4.0
Hispanic American	7.0
White	4.0
Gender	
Female	5.4 %
Male	3.8

Source: U.S. Census Bureau Annual Survey of Entrepreneurs, 2015.

¹⁴ Ibid.

The 2015 ASE examines explanations given by employer firm owner(s) for negative impacts on profitability.¹⁵ The survey showed that female- and minority-owned employer business owners were more likely to believe that access to financial capital had a negative impact on profitability.

Figure G-4.
U.S. employer businesses that cited access to financial capital as negatively impacting the profitability of their business in 2015

	Percent of respondents
Race/ethnicity	
African American	26.0 %
Asian American	13.0
Hispanic American	16.0
White	9.0
Gender	
Female	11.0 %
Male	10.0

Source: U.S. Census Bureau Annual Survey of Entrepreneurs, 2015.

Apart from Asian American-owned employer businesses, minority-owned employer businesses were less likely to secure business loans from a bank or financial institution, more likely to not apply for additional financing because firm owner(s) believed that they would not be approved by a lender, and more likely to cite access to financial capital as having a negative impact on profitability. These less than favorable credit-market trends in the business loan industry may result in difficulty acquiring the capital necessary to start, operate or expand businesses for minorities and women who are often categorized as small-business owners.

Small business loan growth rates must also be considered when addressing credit-market trends in the business loan industry. Following the financial crisis years of 2009–2011, small business lending remained relatively weak and the small-business loan market has shown little recovery.¹⁶ In fact, at large banks, post financial-crisis lending disproportionately went to large businesses, and bank lending to small businesses decreased by nearly \$100 billion from 2008 to 2016.¹⁷ This decrease in small business lending coupled with unfavorable financing patterns and credit market trends in the business loan industry can create an environment where minorities and women may have difficulty acquiring the capital necessary to start, operate or expand businesses.

¹⁵ Ibid.

¹⁶ Cole, R. (2018). *How Did Bank Lending to Small Business in the United States Fare After the Financial Crisis?* (Report No. SBAHQ-15-M-0144). Retrieved from U.S. Small Business Administration, Office of Advocacy website: <https://www.sba.gov/sites/default/files/439-How-Did-Bank-Lending-to-Small-Business-Fare.pdf>

¹⁷ Ibid.

2003 Survey of Small Business Finances (SSBF). Conducted by the U.S. Federal Reserve Board of Governors, the 2003 SSBF collected information on business owners including:

- Information on firm and owner characteristics;
- An inventory of small businesses' use of financial services and of their financial service suppliers;
- Income and balance sheet information;
- Demographic characteristics for up to three individual owners;
- Information on the use of nonstandard work arrangements; and
- Details on the use of credit and debit card processing.

Unlike previous surveys, the 2003 SSBF is unique in that it provides data on firm-level measurement of characteristics such as race, ethnicity, gender and ownership concentration. In addition, the 2003 SSBF is the most comprehensive national source of credit characteristics of small businesses (those with fewer than 500 employees). Unfortunately, the 2003 SSBF was the last effort by the U.S. Federal Reserve Board of Governors to collect such a detailed and comprehensive level of business owner data. Although no new data have been released, researchers have used SSBF data to analyze capital markets for small businesses in the U.S. and in the Pacific region.^{18, 19}

The 2003 SSBF surveyed 4,072 representative firms that were operating at the end of 2003. Conclusions drawn from the 2003 SSBF were compared to the results of similar surveys conducted in 1993 and 1998.²⁰ Results from the SSBF indicated:

- Minority business owners were more likely to not apply for a loan over the three preceding years due to fears the loan would be denied. These national trends were also reflected in the Pacific region. This is consistent with the results of the 2016 Annual Survey of Entrepreneurs (see Figure G-3).
- Twice as many minority- and women-owned small businesses were denied loans than non-Hispanic male-owned small businesses.
- Regression analysis found that minority-owned firms (African American-owned firms in particular) were far more likely to have their loan application denied when compared with firms owned by non-Hispanic whites, even after accounting for other factors including firm size and credit history. These trends persisted in the U.S. as a whole as well as the Pacific region.
- The mean value of approved loans for minority- and female-owned businesses in the Pacific region was substantially lower than for non-Hispanic white male-owned firms.

¹⁸ The Pacific region includes Hawaii, Alaska, California, Oregon and Washington state.

¹⁹ NERA Economic Consulting. (2010). *The State of Minority- and Women-Owned Business Enterprise: Evidence from Hawai'i* (Rep.). Austin, TX: NERA Economic Consulting.

²⁰ The National Survey of Small Business Finances (NSSBF) was conducted in 1993, and the Survey of Small Business Finances (SSBF) was first conducted in 1998. Although each survey asked slightly different questions both the NSSBF and SSBF collected data on the same topics.

- There is some evidence that nationally, after controlling for certain factors, minority-owned firms had higher interest rates on their loans when compared with non-Hispanic white-owned firms. This trend persisted in the Pacific region. However, these results were not statistically significant.²¹

Note that results of the 2003 SSBF were strongly consistent with conclusions from similar data collected in 1993 and in 1998. This consistency over time also indicates little change in discrimination trends in the small business credit market.²²

Results from the Keen Independent 2018 availability interviews with firms in the Hawaii study industries. At the close of the 2018 availability interviews conducted as part of the study, the study team asked questions regarding potential barriers or difficulties firms might have experienced in the Hawaii marketplace. The series of questions was introduced with the following statement: “Finally, we’re interested in whether your company has experienced barriers or difficulties associated with starting or expanding a business in your industry or with obtaining work. Think about your experiences within the past seven years as you answer these questions.” Respondents were then asked about specific potential barriers or difficulties.

For each potential barrier, the study team examined whether responses differed between minority-, women- and majority-owned firms. Figure G-5 presents results for questions related to access to capital and bonding, combining respondents from all study industries.

The first question was, “Has your company experienced any difficulties in obtaining lines of credit or loans?” As shown in figure G-5, 15 percent of MBEs and 9 percent of WBEs reported difficulties obtaining lines of credit or loans. Only 7 percent of majority-owned firms reported similar difficulties (“majority-owned business” are firms not owned by people of color or women).

Appendix H provides results for this availability survey question by industry.

To research whether bonding represented a barrier for Hawaii businesses, Keen Independent asked firms completing availability interviews:

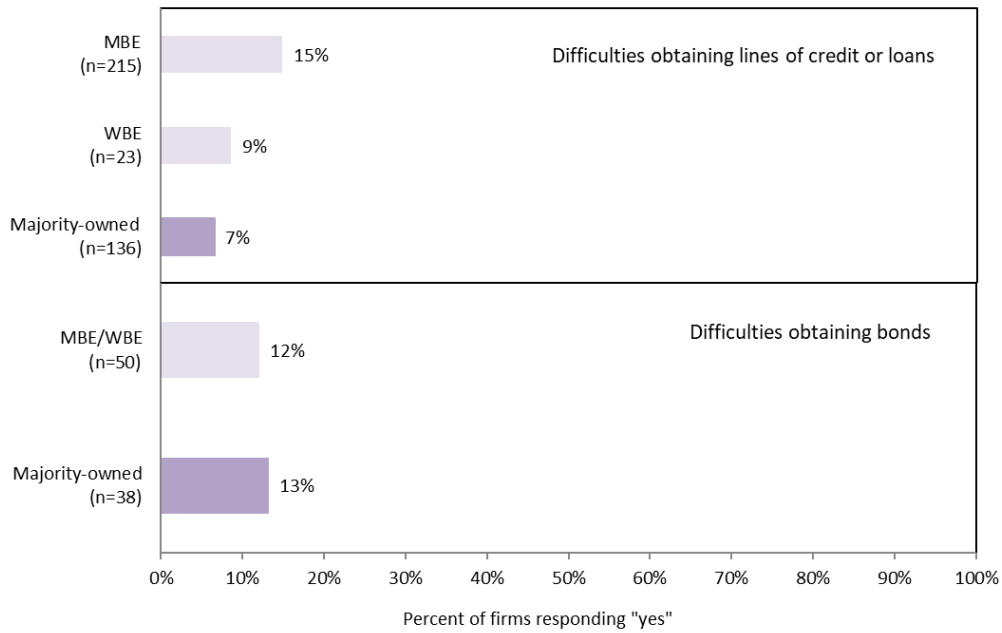
- “Has your company obtained or tried to obtain a bond for a project?”
- [and if so] “Has your company had any difficulties obtaining bonds needed for a project?”

²¹ NERA Economic Consulting. (2010). *The State of Minority- and Women-Owned Business Enterprise: Evidence from Hawai'i* (Rep.). Austin, TX: NERA Economic Consulting.

²² Ibid.

Among firms receiving or attempting to receive a bond, there was little difference in the percentage of MBE/WBEs and majority-owned firms reporting difficulties receiving a bond. (Responses for white women-owned firms were combined with minority-owned businesses because the small number of WBE respondents who had attempted to obtain a bond.)

Figure G-5.
Responses to availability interview questions concerning loans and bonding,
Hawaii MBE, WBE and majority-owned firms



Source: Keen Independent Research from 2018 availability survey.

Homeownership and Mortgage Lending

The study team also analyzed homeownership and the mortgage lending industry to explore differences across race/ethnicity and gender that may lead to disparities in access to capital.

Homeownership. There is a strong positive correlation between the likelihood of starting a new business and home equity value.²³ Wealth created through homeownership can be an important source of capital to start or expand a business.²⁴ In sum:

- Homeownership is a tool for building wealth;²⁵
- More personal wealth provides additional options for financing because higher wealth enables both self-financing and wealth leveraging via borrowing from the equity in one's home;²⁶
- Business owners tend to use home equity to finance business investments, confirming that home equity is an efficient means of business financing;²⁷ and
- Wealth inequality results in a decreased rate of homeownership among women and minorities.

Therefore, barriers to homeownership and creation of home equity for minorities and women can affect business opportunities. Similarly, barriers to accessing home equity through home mortgages can also affect available capital for new or expanding businesses. The study team analyzed homeownership rates, home values and the home mortgage market.

Homeownership rates. Many studies have documented past discrimination in the national housing market. The United States has a history of restrictive real estate covenants and property laws that affect the ownership rights of minorities and women.²⁸ For example, in the past, white southerners refused to sell land to African Americans.²⁹ The study team used 2012–2016 American Community Survey (ACS) data to examine homeownership rates in Hawaii. Figure G-6 presents Hawaii homeownership rates with non-mutually exclusive race definitions for households in which at least one person is in the labor force.

²³ Corradin, S., & Popov, A. (2015). House Prices, Home Equity Borrowing, and Entrepreneurship. *The Review of Financial Studies*, 28(8), 2399-2428.

²⁴ The housing and mortgage crisis beginning in late 2006 has substantially impacted the ability of small businesses to secure loans through home equity. Later in Appendix G, Keen Independent discusses the consequences of the housing and mortgage crisis on small businesses and MBE/WBEs.

²⁵ McCabe, B. J. (2018). Why Buy a Home? Race, Ethnicity, and Homeownership Preferences in the United States. *Sociology of Race and Ethnicity*, 4(4), 452-472.

²⁶ Bates, T., Bradford, W., & Jackson, W. E. (2018). Are Minority-Owned Businesses Underserved by Financial Markets? Evidence from the private-equity industry. *Small Business Economics*, (50)3, 445-461.

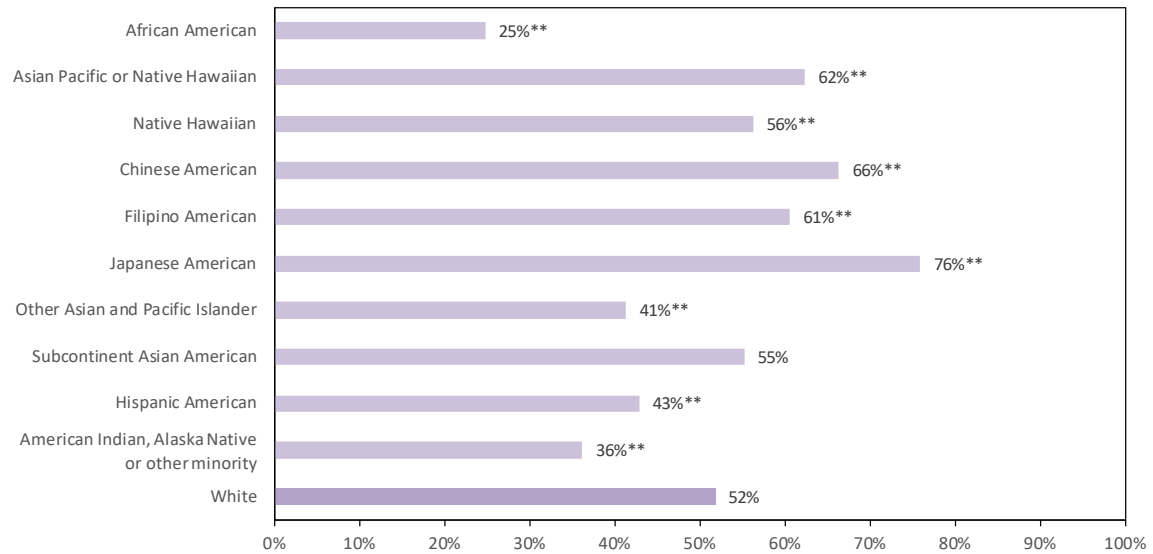
²⁷ Corradin, S., & Popov, A. (2015). House Prices, Home Equity Borrowing, and Entrepreneurship. *The Review of Financial Studies*, 28(8), 2399-2428.

²⁸ Baradaran, M. (2017). *The Color of Money: Black banks and the racial wealth gap*. London: The Belknap Press of Harvard University Press.

²⁹ Ibid.

Figure G-6.

Hawaii homeownership rates with non-mutually exclusive race definitions, 2012–2016



Note: The sample universe is all households in which at least one person is in the civilian labor force. This is done because of the large military population in Hawaii.

** Denotes that the difference in proportions between the minority group and non-Hispanic whites for the given Census/ACS year is statistically significant at the 95% confidence level.

Source: Keen Independent Research from 2012–2016 ACS Public Use Microdata sample. The 2012–2016 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Disparities in homeownership rates between certain racial/ethnic minority groups and nonminorities were apparent in 2012 through 2016.

- One-fourth (25%) of African American households were homeowners, compared to 52 percent of non-Hispanic white households;
- About 36 percent of American Indian, Alaska Native or other minority households were homeowners;
- 41 percent of other Asian and Pacific Islander households were homeowners; and
- About 43 percent of Hispanic American households were homeowners.

Rates of homeownership for most Asian Pacific American groups were higher than for non-Hispanic whites, however.

Lower rates of homeownership may reflect lower incomes for certain groups. That relationship may be self-reinforcing, as low wealth puts individuals at a disadvantage in becoming homeowners, which has historically been a path to building wealth. For example, the probability of homeownership is considerably lower for African Americans than it is for comparable non-Hispanic whites throughout

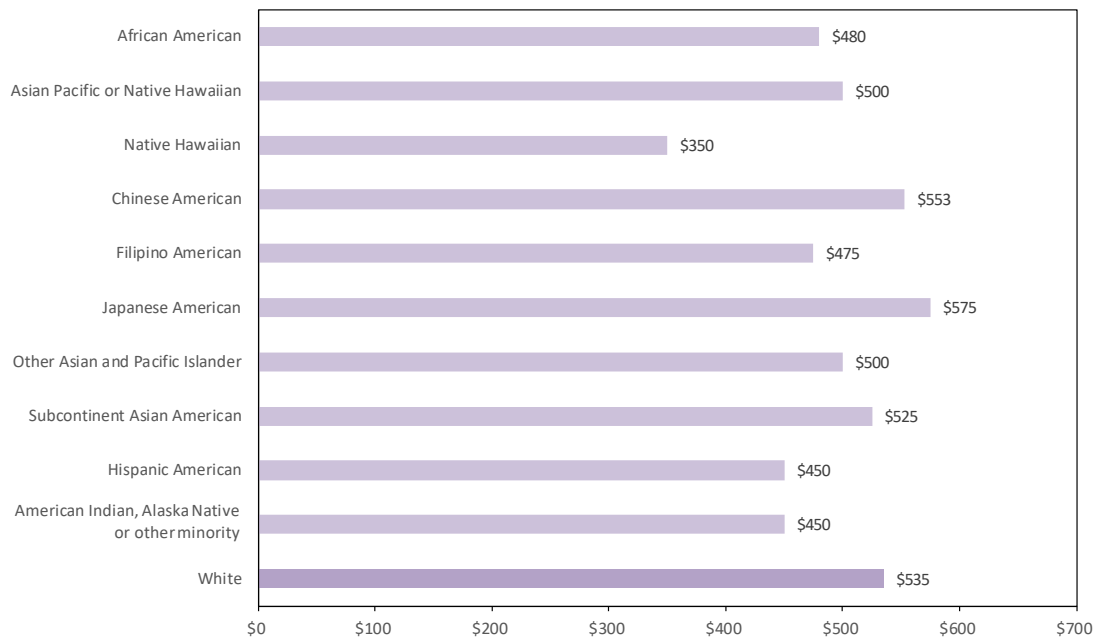
the United States.³⁰ In Hawaii, Asian Pacific Americans and Native Hawaiians had higher homeownership rates (by about 10 percentage points) compared to non-Hispanic whites for 2012–2016.

Home values. Research has shown that housing capital gains encourage transitions into self-employment.³¹ Using 2012 through 2016 ACS data, the study team compared median home values by group. Figure G-7 presents median home values by racial/ethnic groups in Hawaii from 2012 through 2016.

People in the following groups had lower median home values than the \$535,000 found for whites in Hawaii: African Americans; Native Hawaiians; Filipino Americans; other Asian and Pacific Islanders; Hispanic Americans; and American Indians, Alaska Natives or other minorities.

On average, Chinese Americans (\$553,000) and Japanese Americans (\$575,000) owned homes of greater value than non-Hispanic whites.

Figure G-7.
Median home values in Hawaii with non-mutually exclusive race definitions, 2012–2016, thousands



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

Source: Keen Independent Research from 2012–2016 ACS Public Use Microdata sample. The 2012–2016 ACS raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

³⁰ Board of Governors of the Federal Reserve System. (2017). Residential Mortgage Lending in 2016: Evidence from the Home Mortgage Disclosure Act. *Federal Reserve Bulletin*, 103(6).

³¹ Harding, J., & Rosenthal, S.S. (2017). Homeownership, Housing Capital Gains and Self-Employment. *Journal of Urban Economics*, 99, 120-135.

Mortgage lending. Minorities may be denied opportunities to own homes, to purchase more expensive homes, or to access equity in their homes if they are discriminated against when applying for home mortgages. For example, Bank of America paid \$335 million to settle allegations that its Countrywide Financial unit discriminated against African American and Hispanic American borrowers between 2004 and 2008. The case was brought by the Securities and Exchange Commission after finding evidence of “statistically significant disparities by race and ethnicity” among Countrywide Financial customers.³²

The study team explored market conditions for mortgage lending in Hawaii. The best available source of information concerning mortgage lending is Home Mortgage Disclosure Act (HMDA) data, which contain information on mortgage loan applications that financial institutions, savings banks, credit unions and some mortgage companies receive.³³ Those data include information about the location, dollar amount and types of loans made, as well as race/ethnicity, income and credit characteristics of all loan applicants. The data are available for home purchases, loan refinances and home improvement loans.

The study team examined HMDA statistics provided by the Federal Financial Institutions Examination Council (FFIEC) for 2017 and 2012.

Mortgage denials. The study team examined mortgage denial rates of conventional purchase loans to high-income households with mutually exclusive race definitions and non-mutually exclusive race definitions for 2017 and 2012. Conventional loans are loans that are not insured by a government program. High-income applicants are those households with 120 percent or more of the U.S. Department of Housing and Urban Development (HUD) area median family income.³⁴ Loan denial rates are calculated as the percentage of mortgage loan applications that were denied, excluding applications that the potential borrowers terminated and applications that were closed due to incompleteness.³⁵

³² Savage, C. (2011, December 21). \$335 Million Settlement on Countrywide Lending Bias. *The New York Times*. Retrieved March 1, 2018, from <http://www.nytimes.com/2011/12/22/business/us-settlement-reported-on-countrywide-lending.html>

³³ Depository institutions were required to report 2017 HMDA data if they had assets of more than \$44 million on the preceding December 31 (\$36 million for 2007 and \$41 million for 2012), had a home or branch office in a metropolitan area, and originated at least one home purchase or refinance loan in the reporting calendar year. In 2017 only depository institutions that met the requirements described above and also originated at least 25 home purchase loans (including refinancing of home purchase loans) in each of the two preceding calendar years had to report. Non-depository mortgage companies were required to report HMDA if they are for-profit institutions, had home purchase loan originations (including refinancing) either a.) exceeding 10 percent of all loan obligations originations in the past year or b.) exceeding \$25 million, had a home or branch office located in an MSA (or receive applications for, purchase or originated five or more home purchase loans mortgages in an MSA), and either had more than \$10 million in assets or made at least 100 home purchase or refinance loans in the preceding calendar year.

³⁴ Median family income for the Honolulu MSA was about \$86,600 in 2017 and \$82,700 in 2012. Likewise, median family income for the non-metro portion of Hawaii was about \$67,000 in 2017 and \$73,400 in 2012. Source: FFIEC Census and FFIEC estimated MSA/MD median family income for the 2017 and 2012 CRA/HMDA reports.

³⁵ For this analysis, loan applications are considered to be applications for which a specific property was identified, thus excluding preapproval requests.

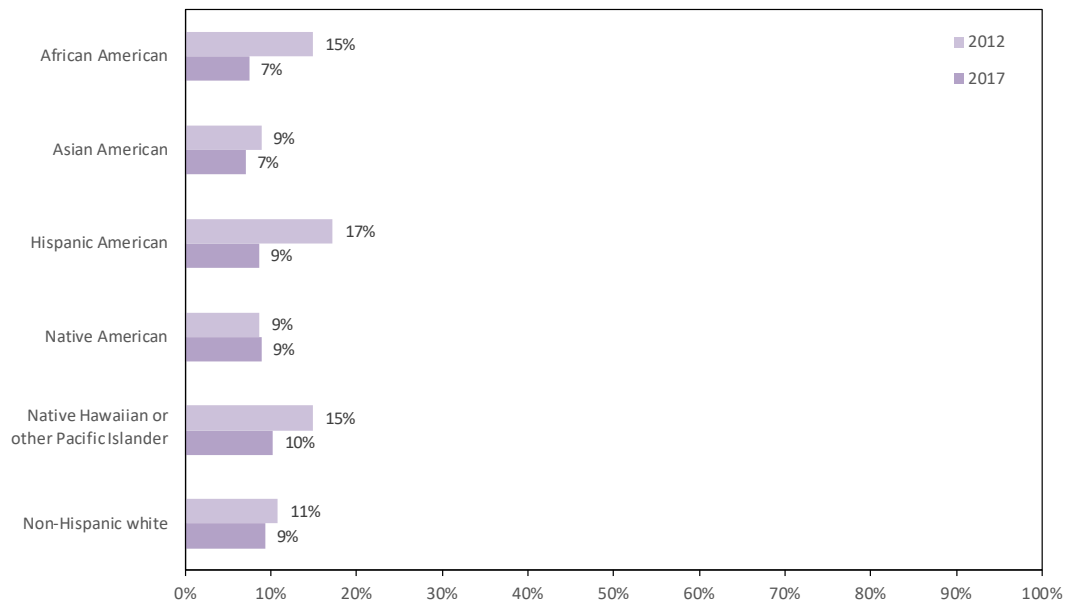
Figure G-8 presents loan denial results for high-income households with mutually exclusive race definitions in Hawaii in 2017 and 2012. Data for 2012 show higher denial rates for all groups compared with 2017 except for Native Americans, who experienced an equal rate of denial in both 2017 and 2012.

When using mutually exclusive race definitions, African American, Hispanic American, and Native Hawaiian or other Pacific Islander high-income applicants faced higher loan denial rates compared with non-Hispanic white applicants in 2012. Native Hawaiian or other Pacific Islander high-income applicants faced higher loan denial rates compared with non-Hispanic white applicants in 2017.

Loan denial rates were somewhat lower for Asian American high-income applicants compared with white applicants in Hawaii in these two years.

Figure G-8.

Denial rates of conventional purchase loans to high-income households with mutually exclusive race definitions in Hawaii, 2012 and 2017



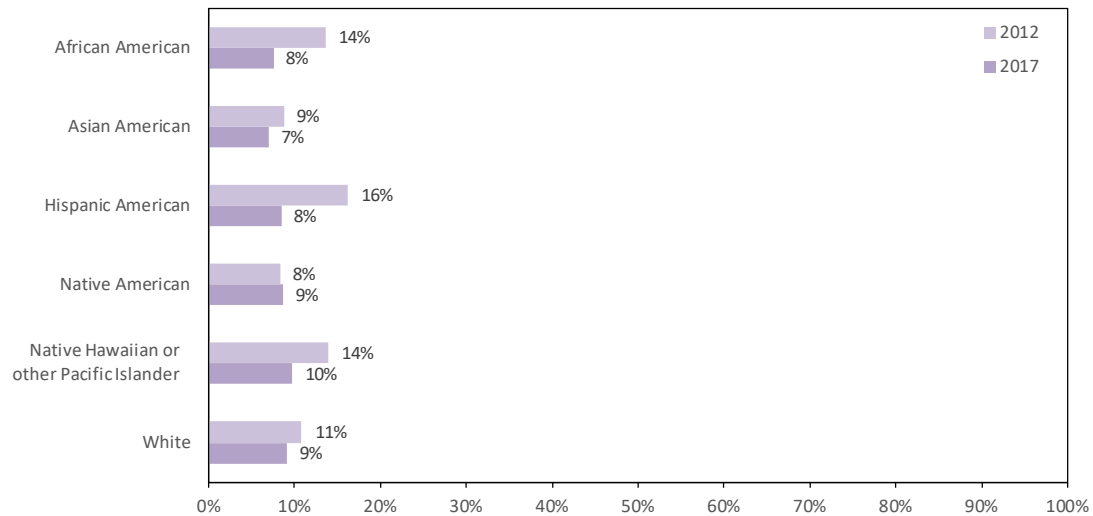
Note: High-income borrowers are those households with 120% or more than the HUD area median family income (MFI). Loan denial rates are calculated as the percentage of mortgage loan applications that were denied, excluding applications that the potential borrowers terminated and applications that were closed due to incompleteness.

Source: Keen Independent Research from FFIEC HMDA data, 2017 and 2012.

Figure G-9 presents loan denial results for high-income households with non-mutually exclusive race definitions in Hawaii in 2017 and 2012.

When using non-mutually exclusive race definitions, African American, Hispanic American, and Native Hawaiian or other Pacific Islander high-income applicants faced higher loan denial rates when compared with non-Hispanic white applicants in 2012. Most of the disparities lessened or disappeared in the data for 2017. However, Native Hawaiian or other Pacific Islander high-income applicants still faced higher loan denial rates in 2017.

Figure G-9.
Denial rates of conventional purchase loans to high-income households with non-mutually exclusive race definitions in Hawaii, 2012 and 2017



Note: High-income borrowers are those households with 120% or more than the HUD area median family income (MFI). Loan denial rates are calculated as the percentage of mortgage loan applications that were denied, excluding applications that the potential borrowers terminated and applications that were closed due to incompleteness.

Source: Keen Independent Research from FFIEC HMDA data, 2017 and 2012.

Subprime lending. Loan denial is only one of several ways minorities might be discriminated against in the home mortgage market. Mortgage lending discrimination can also occur through higher fees and interest rates. Subprime lending provides a unique example of such types of discrimination through fees associated with various loan types.

Until recent years, one of the fastest growing segments of the home mortgage industry was subprime lending. From 1994 through 2003, subprime mortgage activity grew by 25 percent per year and accounted for \$330 billion of U.S. mortgages in 2003, up from \$35 billion a decade earlier. In 2006, subprime loans represented about one-fifth of all mortgages in the United States.³⁶ With higher interest rates than prime loans, subprime loans were historically marketed to customers with blemished or limited credit histories who would not typically qualify for prime loans. Over time, subprime loans also became available to homeowners who did not want to make a down payment, did not want to provide proof of income and assets, or wanted to purchase a home with a cost above that for which they would qualify from a prime lender.³⁷ Because of higher interest rates and additional costs, subprime loans affected homeowners' ability to grow home equity and increased their risks of foreclosure. Fair-lending enforcement mechanisms have historically tended to overlook

³⁶ Avery, B., Brevoort, K. P., & Canner, G. B. (2007). The 2006 HMDA Data. *Federal Reserve Bulletin*, A73-A109.

³⁷ Gerardi, S., & Willen, P. (2008). *Subprime Outcomes: Risky Mortgages, Homeownership Experiences, and Foreclosure* (Working Paper No. 07-15). Boston, MA: Federal Reserve Bank of Boston. Retrieved from Federal Reserve Bank of Boston website: <https://www.bostonfed.org/publications/research-department-working-paper/2007/subprime-outcomes-risky-mortgages-homeownership-experiences-and-foreclosures.aspx>

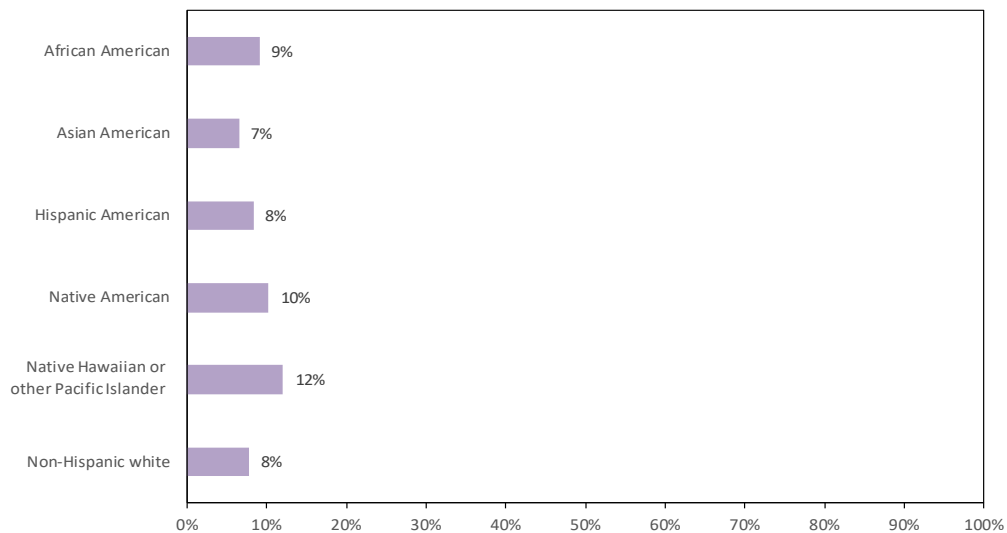
disparate impact and treatment, and shielded some lenders with discriminating practices from investigations.³⁸

Keen Independent examined trends in subprime lending with HMDA data. Note that information regarding loan rates are not reported for all HMDA data. Instead, loan rates that meet certain criteria must be reported and are then included in the HMDA data. In 2008, the FFIEC adjusted the requirements outlining which HMDA data were required to report loan rates. The result of this change was that fewer loan rate data had to be reported. As such, Keen Independent’s analysis regarding loan rates utilized more complete HMDA data from 2007. (Appendix I includes more information on data sources and limitations.)

Because lending patterns and borrower motivations differ depending on the type of loan being sought, the study team separately considered home purchase loans and refinance loans. Patterns in subprime lending did not differ substantially between the different types of loans.

Figure G-10 shows the percent of conventional home purchase loans that were subprime with mutually exclusive race definitions in 2007. Native Hawaiian or other Pacific Islander, and Native American borrowers were more likely to receive subprime home purchase loans than non-Hispanic whites in 2007.

Figure G-10.
Percent of conventional home purchase loans that were subprime with mutually exclusive race definitions in Hawaii, 2007



Note: Subprime rates are calculated as the percentage of originated loans that were subprime. Because of a change in reporting requirements for loan rates in 2008, there are few data available for subsequent years. Due to the low collection rate, Keen Independent analyzed lending rates for 2007.

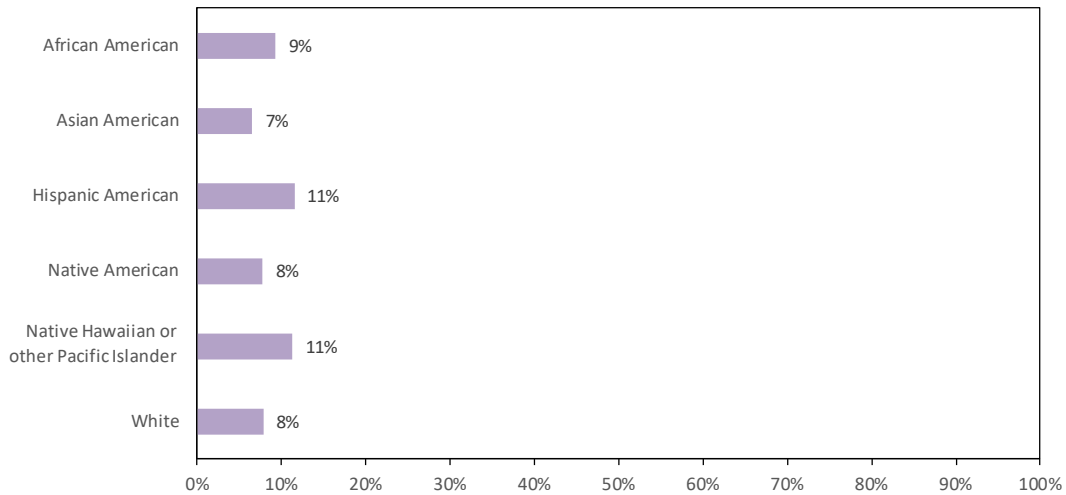
Source: Keen Independent Research from FFIEC HMDA data, 2007.

³⁸ Ross, S. L., & Yinger, J. (2002). *The Color of Credit: Mortgage Discrimination, Research Methodology, and Fair-Lending Enforcement*. Cambridge, MA: MIT Press

Figure G-11 shows the percent of conventional home purchase loans that were subprime with non-mutually exclusive race definitions in 2007.

When using non-mutually exclusive race definitions, Native Hawaiian or other Pacific Islander, Hispanic American and African American borrowers were more likely to receive subprime home purchase loans than non-Hispanic whites in 2007. Asian American borrowers were least likely to use subprime home purchase loans out of all groups surveyed.

Figure G-11.
Percent of conventional home purchase loans that were subprime with non-mutually exclusive race definitions in Hawaii, 2007

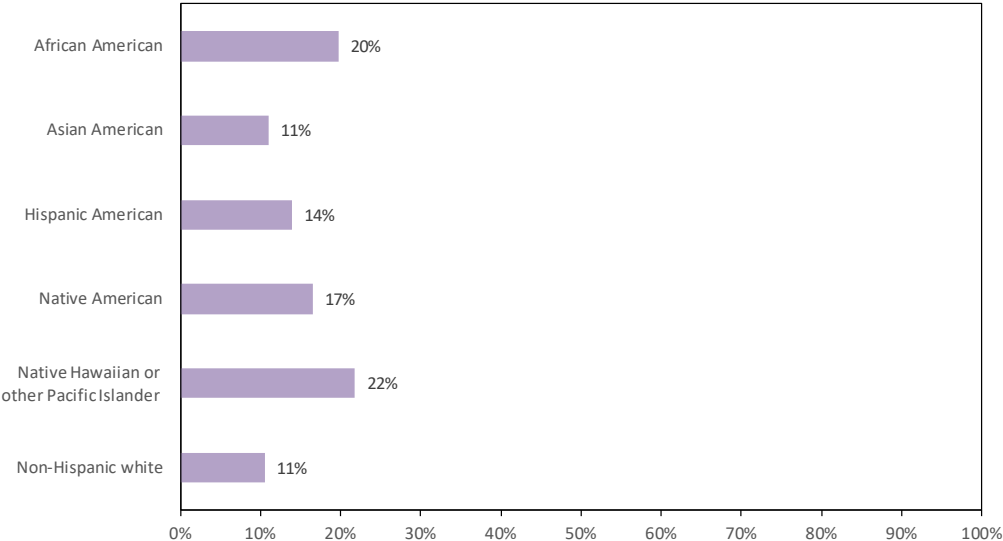


Note: Subprime rates are calculated as the percentage of originated loans that were subprime. Because of a change in reporting requirements for loan rates in 2008, there are little data available for subsequent years. Due to the low collection rate, Keen Independent analyzed lending rates for 2007.

Source: Keen Independent Research from FFIEC HMDA data, 2007.

In Hawaii, patterns in the use of subprime loans for home refinance were different from those for home purchase loans, as shown in Figure G-12. When using mutually exclusive race definitions, nearly all minority groups receiving refinance loans in 2007 were more likely than non-Hispanic white borrowers to obtain subprime refinance loans.

Figure G-12.
Percent of conventional refinance loans that were subprime with mutually exclusive race definitions in Hawaii, 2007



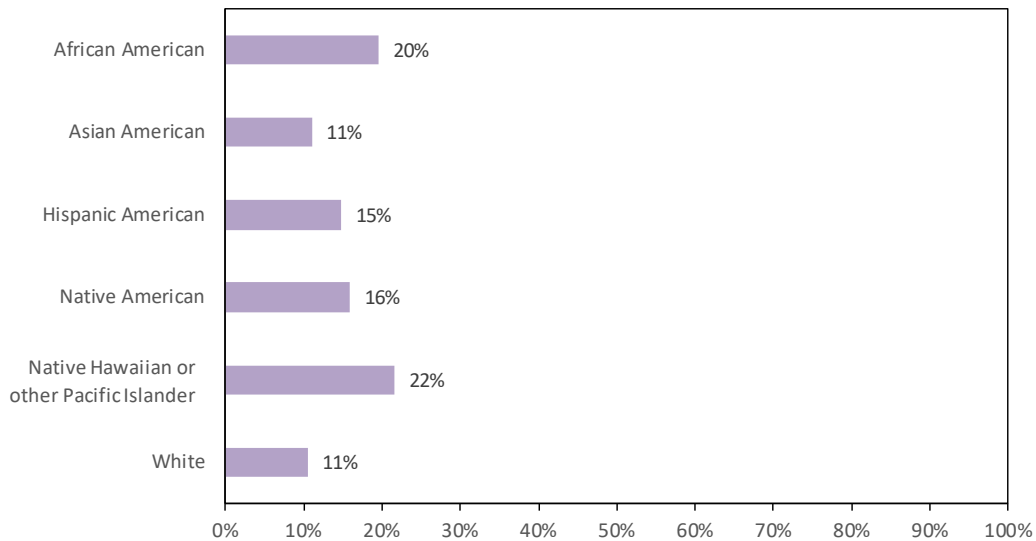
Note: Subprime rates are calculated as the percentage of originated loans that were subprime. Because of a change in reporting requirements for loan rates in 2008, there are little data available for subsequent years. Due to the low collection rate, Keen Independent analyzed lending rates for 2007.

Source: Keen Independent Research from FFIEC HMDA data, 2007.

Figure G-13 examines the percentage of conventional refinance loans that were subprime with non-mutually exclusive race definitions in Hawaii in 2007.

Results when considering non-mutually exclusive race definitions were similar to those found using mutually exclusive race definitions. All minority groups receiving refinance loans in 2007, except for Asian American borrowers, were more likely than non-Hispanic white borrowers to obtain subprime refinance loans.

Figure G-13.
Percent of conventional refinance loans that were subprime with non-mutually exclusive race definitions in Hawaii, 2007



Note: Subprime rates are calculated as the percentage of originated loans that were subprime. Because of a change in reporting requirements for loan rates in 2008, there are little data available for subsequent years. Due to the low collection rate, Keen Independent analyzed lending rates for 2007.

Source: Keen Independent Research from FFIEC HMDA data, 2007.

Additional research. Several studies have examined disparities in the path to homeownership for minorities in the presence of other influences. For example:

- A study that analyzed more than two million home sale transactions over the course of 18 years in four major metropolitan areas — Chicago, Baltimore/Maryland, Los Angeles and San Francisco — showed that African American and Hispanic American buyers pay more for the price of their house than their white counterparts in almost every purchase scenario.³⁹

³⁹ Bayer, C., Casey, M., Ferreira, F., & McMillan F. (2017). Racial and Ethnic Price Differentials in the Housing Market. *Journal of Urban Economics*, 102, 91-105.

- Researchers found that between 1999 and 2011, socioeconomic and demographic factors could only partially explain the gap in homeownership that existed between white and African Americans homeowners, and that discrimination in the mortgage process was a likely explanation.⁴⁰
- Results of a mystery-shopping field study conducted at several national banks in a major metropolitan U.S. city showed that minority loan applicants were provided less comprehensive information about financing options, required to provide more information to apply for a loan and received less encouragement and assistance compared to white potential loan applicants.⁴¹
- An analysis of U.S. Survey of Consumer Finance data shows that African American borrowers on average pay about 29 basis points more in interest on mortgage loans than comparable white borrowers.⁴²

Some evidence suggests that lenders sought out and offered subprime loans to individuals who often would not be able to pay off the loan, a form of “predatory lending.”⁴³ Furthermore, some research has found that many recipients of subprime loans could have qualified for prime loans.⁴⁴ Previous studies of subprime lending suggest that predatory lenders have disproportionately targeted minorities.⁴⁵ A 2018 study, for example, examined subprime mortgage loans in seven metropolitan areas across the country. The study found that African American borrowers were 103 percent more likely and Hispanic American borrowers were 78 percent more likely than white borrowers to receive a high-cost loan for home purchases, for both low- and high-risk borrowers and regardless of age.⁴⁶

A 2007 study released from the Federal Reserve Bank of Boston found that “homeownerships that begin with a subprime purchase mortgage end up in foreclosure almost 20 percent of the time, or more than six times as often as experiences that begin with prime purchase mortgages.”⁴⁷

⁴⁰ Fuller, C. (2015). *Race and Homeownership: How Much of the Differences are Explainable by Economics Alone?* Retrieved from Zillow Research website: <https://www.zillow.com/research/racial-homeownership-differences-10155/>

⁴¹ Bone, S. A., Christensen, G. L., & Williams, J. D. (2014). Rejected, Shackled, and Alone: The Impact of Systemic Restricted Choice on Minority Consumers' Construction of Self. *Journal of Consumer Research*, 41(2), 451–474.

⁴² Cheng, P., Lin, Z., & Liu, Y. (2015). Racial Discrepancy in Mortgage Interest Rates. *Journal of Real Estate Finance and Economics*, 51(1), 101-120.

⁴³ For example Hull, N.R. (2017). Crossing the Line: Prime, subprime, and predatory lending. *Maine Law Review*, 61(1); Morgan, D. P. (2007). *Defining and Detecting Predatory Lending* (No. 273). Staff report, Federal Reserve Bank of New York.

⁴⁴ Faber, J. W. (2013). Racial Dynamics of Subprime Mortgage Lending at the Peak. *Housing Policy Debate*, 23(2), 328-349.

⁴⁵ Ibid; Been, V., Ellen, I., & Madar, J. (2009). The High Cost of Segregation: Exploring racial disparities in high-cost lending. *Fordham Urb. LJ*, 36, 361.

⁴⁶ Bayer, P., Ferreira, F., & Ross, S. (2018). What Drives Racial and Ethnic Differences in High-Cost Mortgages? The Role of High-Risk Lenders. *Review of Financial Studies*, 31(1), 175-205.

⁴⁷ Gerardi, K., Shapiro, A. H., & Willen, P. (2007). Subprime Outcomes: Risky mortgages, homeownership experiences, and foreclosures. Federal Reserve Bank of Boston Working Paper 07-15.

Implications of the mortgage lending crisis. The ramifications of the mortgage lending crisis not only continue to substantially impact the ability of homeowners to secure capital through home mortgages to start or expand small businesses but have also created a nationwide retreat in dynamism in nearly every measurable respect.⁴⁸ (Dynamism consists of the rate and scale at which the process of reallocating the economy's resources across firms and industries according to their most productive use occurs.)

- On July 19, 2017, Karen Kerrigan, President and CEO of the Small Business and Entrepreneurship (SBE) Council, testified before the U.S. House of Representatives Committee on Small Business that there has been a continuing dearth of entrepreneurial activity and substantial decline over the past ten years due to the financial crises, Great Recession and a weak economic recovery that continues to negatively influence the American psyche.⁴⁹
- According to research conducted by economists for the U.S. Federal Reserve System, loan origination activity remains well below pre-crisis levels.⁵⁰
- Startup rates have dropped for decades, but the effects of the Great Recession were so detrimental that firm deaths exceeded firm births for the first time in more than 40 years.⁵¹
- Despite a progressive decline in new business formation, 117,300 more firms opened than closed on average each year from 1977 to 2007; however, firm deaths have outpaced firm births on average since 2008.⁵²
- Small firms suffer more during financial crises due to dependence on bank capital to fund growth.⁵³
- Every major survey identifies access to credit as a problem and top growth concern for small firms during the recovery, including surveys conducted by the National Federation of Independent Businesses (NFIB) and the Federal Reserve.⁵⁴

⁴⁸ Economic Innovation Group. (2017). *Dynamism in Retreat: Consequences for Regions, Markets, and Workers*. Retrieved from the Economic Innovation Group website: <http://eig.org/wp-content/uploads/2017/07/Dynamism-in-Retreat-A.pdf>

⁴⁹ *Reversing the Entrepreneurship Decline: Hearing before the Committee on Small Business*, House of Representatives, 115th Cong. Page 3 (2017) (testimony of Ms. Karen Kerrigan).

⁵⁰ Dore, T., & Mach, T. (2018). *Recent Trends in Small Business Lending and the Community Reinvestment Act*. Retrieved from the Board of Governors of the Federal Reserve System website: <https://www.federalreserve.gov/econres/notes/feds-notes/recent-trends-in-small-business-lending-and-the-community-reinvestment-act-20180102.htm>

⁵¹ Economic Innovation Group. (2017). *Dynamism in Retreat: Consequences for Regions, Markets, and Workers*. Retrieved from the Economic Innovation Group website: <http://eig.org/wp-content/uploads/2017/07/Dynamism-in-Retreat-A.pdf>

⁵² Ibid.

⁵³ Mills, K.G., & McCarthy, B. (2016). *The State of Small Business Lending: Innovation and Technology and the Implications for Regulation* (Working Paper 17-042). Cambridge, MA. Retrieved from Harvard Business School website: http://www.hbs.edu/faculty/Publication%20Files/17-042_30393d52-3c61-41cb-a78a-ebbe3e040e55.pdf

⁵⁴ Ibid.

- Commercial and residential real estate — which represent two-thirds of the assets of small business owners and are frequently used as collateral for loans — were hit hard during the financial crisis, making small business borrowers less creditworthy today.⁵⁵

The repercussions of the mortgage-lending crisis coupled with the subsequent Great Recession have limited opportunities for homeowners with little home equity to obtain business capital through home mortgages. Furthermore, the increasing rates of default and foreclosure, especially for homeowners with subprime loans, reflect shrinking access to capital available through such loans. Those consequences are likely to have a disproportionate impact on minorities in terms of both homeownership and the ability to secure capital for business start-up and growth.

Redlining. Historically, redlining referred to mortgage lending discrimination against geographic areas based on racial or ethnic characteristics of a neighborhood.⁵⁶ Presently, the concept of redlining includes an examination of the availability of and access to credit in predominantly minority neighborhoods, and the credit terms offered within a lender’s assessment area.⁵⁷

The practice of reverse redlining consists of extending high-cost credit. This discriminatory practice involves charging minority borrowers higher mortgage fee costs compared to white borrowers and was the subject of multiple lawsuits brought by the U.S. Department of Justice from the late 1990s through the early 2000s.⁵⁸ As a result of reverse redlining, some researchers argue that mortgage discrimination has shifted from being an access to credit issue to being a discretionary pricing issue.⁵⁹

As evidenced by settlements in recent court cases, the practice of redlining continues to minority mortgage applicants. For example:

- In 2015, New York Attorney General Eric Schneiderman settled with Evans Bank for \$825,000 after learning that Evans Bank erased African American neighborhoods from maps used to determine mortgage lending.⁶⁰
- In 2015, the U.S. Department of Housing and Urban Development reached a \$200 million settlement with Associated Bank for denying mortgage loans to African American and Hispanic American applicants in Chicago and Milwaukee.⁶¹

⁵⁵ Ibid.

⁵⁶ Burnison, T. R., & Boccia, B. (2017). Redlining Everything Old Is New Again. *ABA Banking Journal*, 109(2).

⁵⁷ Ibid.

⁵⁸ Brescia, R. H. (2009). Subprime Communities: Reverse Redlining, the Fair Housing Act and Emerging Issues in Litigation Regarding the Subprime Mortgage Crisis. *Albany Government Law Review*, 2 (1), 164-216.

⁵⁹ Ibid.

⁶⁰ Mock, B. (2015, September 28). Redlining is Alive and Well-and Evolving. *City Lab*. Retrieved February 28, 2018, from <https://www.citylab.com/equity/2015/09/redlining-is-alive-and-welland-evolving/407497/>

⁶¹ Ibid.

- In November 2016, Hudson City Savings Bank was subject to a record redlining settlement due to disparities suffered by African American and Hispanic American loan applicants.⁶² According to the Consumer Financial Protection Bureau (CFPB) and the Department of Justice (DOJ), Hudson City Savings Bank avoided locating branches and loan officers, and using mortgage brokers in majority African American and Hispanic communities.⁶³ Hudson City Savings Bank also excluded majority African American and Hispanic communities from its marketing strategy and credit assessment areas.⁶⁴
- In a different 2016 redlining legal action, the CFPB and DOJ ordered BancorpSouth Bank to pay millions to harmed minorities for illegally denying them access to credit in minority neighborhoods and denying African American applicants certain mortgage loans and over charging them, among other things.⁶⁵
- In a reverse redlining case tried in federal court in 2016, a federal jury found that Emigrant Savings Bank and Emigrant Mortgage Company violated the Fair Housing Act, Equal Credit Opportunity Act and New York City Human Rights Law by aggressively promoting toxic mortgages to African American and Hispanic American applicants with poor credit.⁶⁶

⁶² Burnison, T. R., & Boccia, B. (2017). Redlining Everything Old Is New Again. *ABA Banking Journal*, 109(2).

⁶³ Consumer Financial Protection Bureau. (2015, September 24). *CFPB and DOJ Order Hudson City Savings Bank to Pay \$27 Million to Increase Mortgage Credit Access in Communities Illegally Redlined* [Press release]. Retrieved February 28, 2018, from <https://www.consumerfinance.gov/about-us/newsroom/cfpb-and-doj-order-hudson-city-savings-bank-to-pay-27-million-to-increase-mortgage-credit-access-in-communities-illegally-redlined/>

⁶⁴ Ibid.

⁶⁵ Dodd-Ramirez, D., & Ficklin, P. (2016, June 29). Redlining: CFPB and DOJ action requires BancorpSouth Bank to pay millions to harmed consumers [Web log post]. Retrieved February 28, 2018, from <https://www.consumerfinance.gov/about-us/blog/redlining-cfpb-and-doj-action-requires-bancorpsouth-bank-pay-millions-harmed-consumers/>

⁶⁶ Lane, B. (2016, June 30). Groundbreaking ruling? Federal jury finds Emigrant Bank liable for predatory lending. *Housingwire*. Retrieved February 28, 2018, from <https://www.housingwire.com/articles/37419-groundbreaking-ruling-federal-jury-finds-emigrant-bank-liable-for-predatory-lending>

Steering by real estate agents. The illegal act of steering can be defined as actions by real estate agents that differentially direct customers to certain neighborhoods and away from others based on race or ethnicity.⁶⁷ Mortgage loan originators can also engage in steering. Prior to the mortgage loan crisis, mortgage loan originators engaged in steering to generate higher profits for themselves⁶⁸ by directing minority loan applicants to less desirable and toxic loan instruments. Such steering can affect the perception of minority borrowers about the availability of mortgage loans. Additionally, explicit steering can drive racially/ethnically housing prices and result in segregation.⁶⁹

Challenges persist when attempting to prosecute cases involving steering; however, several steering cases have been prosecuted by federal and state agencies over the past decade:

- In 2011, the U.S. Department of Justice (DOJ) reached a \$335 million settlement with Countrywide Financial Corporation for steering thousands of African American and Hispanic American borrowers into subprime mortgages when white borrowers with comparable credit received prime loans.⁷⁰
- In 2012, the DOJ reached a \$184 million settlement with Wells Fargo for steering African American and Hispanic American borrowers into subprime mortgages and charging higher fees and rates than white borrowers with comparable credit profiles.⁷¹

⁶⁷ Galster, G., & Godfrey, E. (2005) By Words and Deeds: Racial Steering by Real Estate Agents in the U.S. in 2000. *Journal of the American Planning Association*, 71(3), 251-268.

⁶⁸ Consumer Financial Protection Bureau. (2013, January 18). *CFPB Issuing Rules to Prevent Loan Originators from Steering Consumers into Risky Mortgages* [Press release]. Retrieved February 28, 2018, from <https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-rules-to-prevent-loan-originators-from-steering-consumers-into-risky-mortgages/>

⁶⁹ Besbris, M., & Faber, J.W. (2017). Investigating the Relationship Between Real Estate Agents, Segregation, and House Prices: Steering and Upselling in New York State. *Sociological Forum*, 32(4).

⁷⁰ Department of Justice, Office of Public Affairs. (2011, December 21). *Justice Department Reaches \$335 Million Settlement to Resolve Allegations of Lending Discrimination by Countrywide Financial Corporation* [Press release]. Retrieved February 28, 2018, from <https://www.justice.gov/opa/pr/justice-department-reaches-335-million-settlement-resolve-allegations-lending-discrimination>

⁷¹ Department of Justice, Office of Public Affairs. (2012, July 12). *Justice Department Reaches Settlement with Wells Fargo Resulting in More Than \$175 Million in Relief for Homeowners to Resolve Fair Lending Claims* [Press release]. Retrieved March 1, 2018, from <https://www.justice.gov/opa/pr/justice-department-reaches-settlement-wells-fargo-resulting-more-175-million-relief>

- In 2015, M&T Bank agreed to pay \$485,000 to plaintiffs in a settlement for a case involving racial discrimination and steering.⁷²
- In 2015, the City of Oakland, California sued Wells Fargo & Co for steering minorities into costly mortgage loans that supposedly led to foreclosures, abandoned properties and blight.⁷³ The City of Philadelphia filed a lawsuit with similar allegations against Wells Fargo & Co in 2017.⁷⁴
- In 2017, the U.S. Attorney settled a federal civil rights lawsuit against JP Morgan Chase Bank for \$53 million for steering and discrimination based on race and national origin after it was discovered that African Americans and Hispanic Americans paid higher mortgage loan rates compared with whites with comparable credit profiles.⁷⁵

Gender discrimination in mortgage lending. Relatively little information is available on gender-based discrimination in mortgage lending markets. Historically, lending practices overtly discriminated against women by requiring information on marital and childbearing status. The Equal Credit Opportunity Act in 1973 suspended such discriminatory lending practices. However, certain barriers affecting women have persisted after 1973 in mortgage lending markets.

⁷² Stempel, J. (2015, August 31). M&T Bank settles lawsuit claiming New York City lending bias. *Reuters*. Retrieved March 1, 2018, from <https://www.reuters.com/article/us-usa-guns-dicks-sporting/walmart-joins-dicks-sporting-goods-in-raising-age-to-buy-guns-idUSKCN1GC1R1>

⁷³ Aubin, D. (2015, September 22). Oakland lawsuit accuses Wells Fargo of mortgage discrimination. *Reuters*. Retrieved March 1, 2018, from <https://www.reuters.com/article/us-wellsfargo-discrimination/oakland-lawsuit-accuses-wells-fargo-of-mortgage-discrimination-idUSKCN0RM28L20150922>

⁷⁴ City of Philadelphia, Office of the Mayor. (2015, May 15). *City Files Lawsuit Against Wells Fargo* [Press release]. Retrieved March 1, 2018, from <https://beta.phila.gov/press-releases/mayor/city-files-lawsuit-against-wells-fargo/>

⁷⁵ Department of Justice, U.S. Attorney's Office, Southern District of New York. (2017, January 20). *Manhattan U.S. Attorney Settles Lending Discrimination Suit Against JPMorgan Chase For \$53 Million* [Press release]. Retrieved February 28, 2018, from <https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-settles-lending-discrimination-suit-against-jpmorgan-chase-53>

Research has confirmed that on average, women are better than men at paying their mortgages; however, women on average pay more for mortgages relative to their risk, and minority women pay the most.⁷⁶ Although disparity in mortgage rates is prevalent between African American and white borrowers, African American women are the most likely to experience mortgage loan discrimination.⁷⁷ Recent lawsuits expose the reality that gender-based discrimination against women continues to prevail in the United States:

- In 2017, Bellco Credit Union settled a lawsuit for alleged discrimination against women on maternity leave.⁷⁸
- In 2014 the U.S. Department of Housing & Urban Development (HUD) settled a lawsuit against Mountain America Credit Union over allegations of discrimination against prospective borrowers on maternity leave.⁷⁹
- A 2013 study by the Woodstock Institute found that within the six-county Chicago area, women were far less likely to be approved for mortgage loans than men, and even male-female joint applications were less likely to be originated if the female applicant was listed first. This disparity persisted for mortgage refinancing.⁸⁰
- In 2011, HUD engaged in litigation against a company that revoked a pregnant woman's mortgage insurance once the company learned that the woman was on leave from work.⁸¹
- In 2010, Dr. Budde, an oncologist from Washington State, was initially granted a mortgage loan and later denied once her lender learned she was on maternity leave.⁸²

⁷⁶ Goodman, L., Zhu, J., and Bai, B. (2016). *Women are Better than Men at Paying Their Mortgages*. Urban Institute. Retrieved from the Urban Institute website: <https://www.urban.org/sites/default/files/publication/84206/2000930-Women-Are-Better-Than-Men-At-Paying-Their-Mortgages.pdf>

⁷⁷ Cheng, P., Lin, Z., & Liu, Y. (2015). Racial Discrepancy in Mortgage Interest Rates. *Journal of Real Estate Finance and Economics*, 51(1),101-120.

⁷⁸ Strozniak, P. (2017, October 17). Bellco CU Settles Alleged Discriminatory Housing Lawsuit. *Credit Union Times*. Retrieved March 1, 2018, from <https://www.cutimes.com/2017/10/17/bellco-cu-settles-alleged-discriminatory-housing-l>

⁷⁹ National Mortgage Professional Magazine. (2014, June 25). HUD Hits Mountain America Credit Union With \$25,000 Fine. *National Mortgage Professional Magazine*. Retrieved March 1, 2018, from <https://nationalmortgageprofessional.com/news/41558/hud-hits-mountain-america-credit-union-25000-fine>

⁸⁰ Woodstock Institute. (2014). *Unequal Opportunity: Disparate Mortgage Origination Patterns for Women in the Chicago Area*. Retrieved August 28, 2018, from <https://www.woodstockinst.org/advocacy/comment-letters/new-research-finds-disparities-in-mortgage-lending-to-women/>

⁸¹ Hanson, K. (2016). Disparate Impact Discrimination in Residential Lending and Mortgage Servicing Based on Sex: Insidious Evil. *Florida Coastal Law Review*, 17(3), 421-447.

⁸² Siegel Bernard, T. (2010, July 19). Need a Mortgage? Don't Get Pregnant. *New York Times*. Retrieved March 1, 2018, from <http://www.nytimes.com/2010/07/20/your-money/mortgages/20mortgage.html>

Summary

There is evidence that minorities and women continue to face certain disadvantages in accessing capital that is necessary to start, operate and expand businesses. Capital is required to start companies, so barriers to accessing capital can affect the number of minorities and women who are able to start businesses. In addition, minorities and women start businesses with less capital (based on national data). Several studies have demonstrated that lower start-up capital adversely affects prospects for those businesses. Other key results included the following:

- Minority- and women-owned employer businesses are more likely to use personal credit cards as a source of start-up capital, which is a more expensive form of debt than business loans from financial institutions.
- Personal and/or family savings of the owner was the main source of capital for startups amount many U.S. businesses, but African American and Hispanic American households had significantly lower amounts of wealth than whites.
- Compared to white-owned employer firms, minority-owned employer firms were less likely to use business loans from a bank or financial institution as a source of start-up capital.
- Apart from Asian American-owned firms, minority-owned firms were more likely to not apply for additional financing because firm owner(s) believed that they would not be approved by a lender.
- Except for Asian American-owned employer firms, minority-owned employer firms were more likely to indicate that access to financial capital negatively impacted firm profitability.
- Home equity is an important source of funds for business start-up and growth. Relatively fewer African Americans, Subcontinent Asian Americans, Hispanic Americans and Native Americans in Hawaii own homes compared with non-Hispanic whites. African Americans, Hispanic Americans and Native Americans who do own homes tend to have lower home values.
- High-income African American, Hispanic American, and Native Hawaiian or other Pacific Islander households applying for conventional home mortgages in Hawaii in 2012 were more likely than high-income non-Hispanic whites to have their applications denied.
- Before the collapse of the home mortgage market in the late 2000s, subprime loans accounted for a much larger share of the conventional home purchase and refinance loans issued to certain minority groups when compared to conventional loans issued to non-Hispanic whites and Asian Americans.

Any discrimination against certain minority groups in the home purchase and home mortgage markets can negatively affect the formation of firms by minorities in Hawaii and the success and growth of those companies.

APPENDIX H.

Success of Businesses in Construction, Engineering and Concessions Industries in Hawaii

The study team examined the success of minority- and women-owned business enterprises (MBE/WBEs) in construction, architecture and engineering (A&E) and food, beverage and selected retail industries. (The food, beverage and selected retail industry is also referred to as the “concessions industry” in this appendix.) The study team assessed whether business outcomes for MBE/WBEs differ from those of non-Hispanic white male-owned businesses (i.e., majority-owned businesses).

The study team examined outcomes for MBE/WBEs and majority-owned businesses in terms of:

- Business closures, expansions and contractions;
- Business receipts and earnings;
- Bid capacity; and
- Potential barriers to starting or expanding businesses.

As described in previous appendices, analysis of the racial and ethnic composition of Hawaii require a unique approach. Because the state has a significant portion of residents that identify as multiple races, the study team analyzed race and ethnicity in two ways: (a) using mutually exclusive definitions and (b) using non-mutually exclusive definitions.

In Keen Independent’s mutually exclusive analysis, one race/ethnicity was identified for each individual. To create these groups, the study team used a rank order methodology similar to that used in the 2000 Census data dictionary. Race/ethnicity groups used in the non-mutually exclusive analyses include all individuals who reported that group, including those who reported multiple race or ethnic categories. With the non-mutually exclusive analyses, Keen Independent was able to examine the five largest groups among reported Asian Pacific or Native Hawaiians (these groups include Filipino Americans, Japanese Americans, Native Hawaiians, other Asian Pacific and Pacific Islanders, and Chinese Americans).

Appendix I includes a more thorough discussion of both the mutually exclusive race definition and the non-mutually exclusive race definition methodologies.

Business Closures, Expansions and Contractions

The study team used Small Business Administration (SBA) data to examine business outcomes — including closures, expansions and contractions — for minority-owned businesses in Hawaii and in the U.S. The SBA analyses compare business outcomes for minority-owned businesses (by demographic group) to business outcomes for all businesses.

Business closures. A report from the State of Hawaii Department of Business, Economic Development & Tourism found that from 1994 to 2013, an average of 772 businesses closed per quarter in Hawaii. That number has generally declined since 2009, although the calculations do not include business owners with no employees.¹ Disparities in rates of business closures may reflect adverse business conditions for minority business owners.

Overall rates of business closures in Hawaii. A 2010 SBA report investigated business dynamics and whether minority-owned businesses were more likely to close than other businesses. By matching data from business owners who responded to the 2002 U.S. Census Bureau Survey of Business Owners (SBO) to data from the Census Bureau's 1989-2006 Business Information Tracking Series, the SBA reported on business closure rates between 2002 and 2006 across different sectors of the economy.^{2,3} The SBA report examined patterns in each state but not in individual metropolitan areas. Figure H-1 presents those data for African American-, Asian American- and Hispanic American-owned businesses as well as for white-owned businesses.

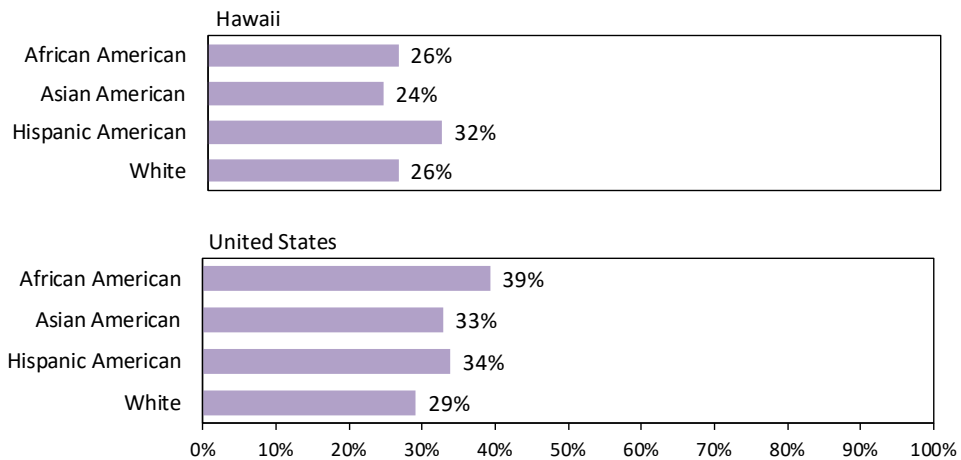
As shown in Figure H-1, 32 percent of Hispanic American-owned businesses operating in Hawaii in 2002 closed by the end of 2006, a higher rate than that of all other groups. African American-owned firms had closure rates equal to those of white-owned businesses in Hawaii. Asian American-owned firms had closure rates lower than those for white-owned businesses during this time period. Closure rates for each race/ethnicity group in Hawaii were less than their respective national closure rates, particularly for African American- and Asian American-owned businesses.

¹ State of Hawaii Department of Business, Economic Development & Tourism. (2014). *Hawaii New Business Formation: An analysis of business birth, deaths, and survival rates*. Retrieved from State of Hawaii website: http://files.hawaii.gov/dbedt/economic/reports/new_bus.pdf

² Lowrey, Y. (2010). *Race/Ethnicity and Establishment Dynamics, 2002-2006*. U.S. Small Business Administration Office of Advocacy. The study uses a non-mutually exclusive gender and race/ethnicity definition as defined by the U.S. Census Survey of Business Owners.

³ Businesses classifiable by race/ethnicity exclude publicly traded companies. The study team did not categorize racial groups by ethnicity. As a result some Hispanic Americans may also be included in statistics for African Americans, Asian Americans and whites.

Figure H-1.
Rates of business closure, 2002 through 2006, Hawaii and the U.S.



Note: Data refer to non-publicly held businesses only. As sample sizes are not reported, statistical significance of these results cannot be determined; however, statistics are consistent with SBA data quality guidelines.

Source: Lowrey, Y. (2010). Race/Ethnicity and Establishment Dynamics, 2002-2006. U.S. Small Business Administration Office of Advocacy.

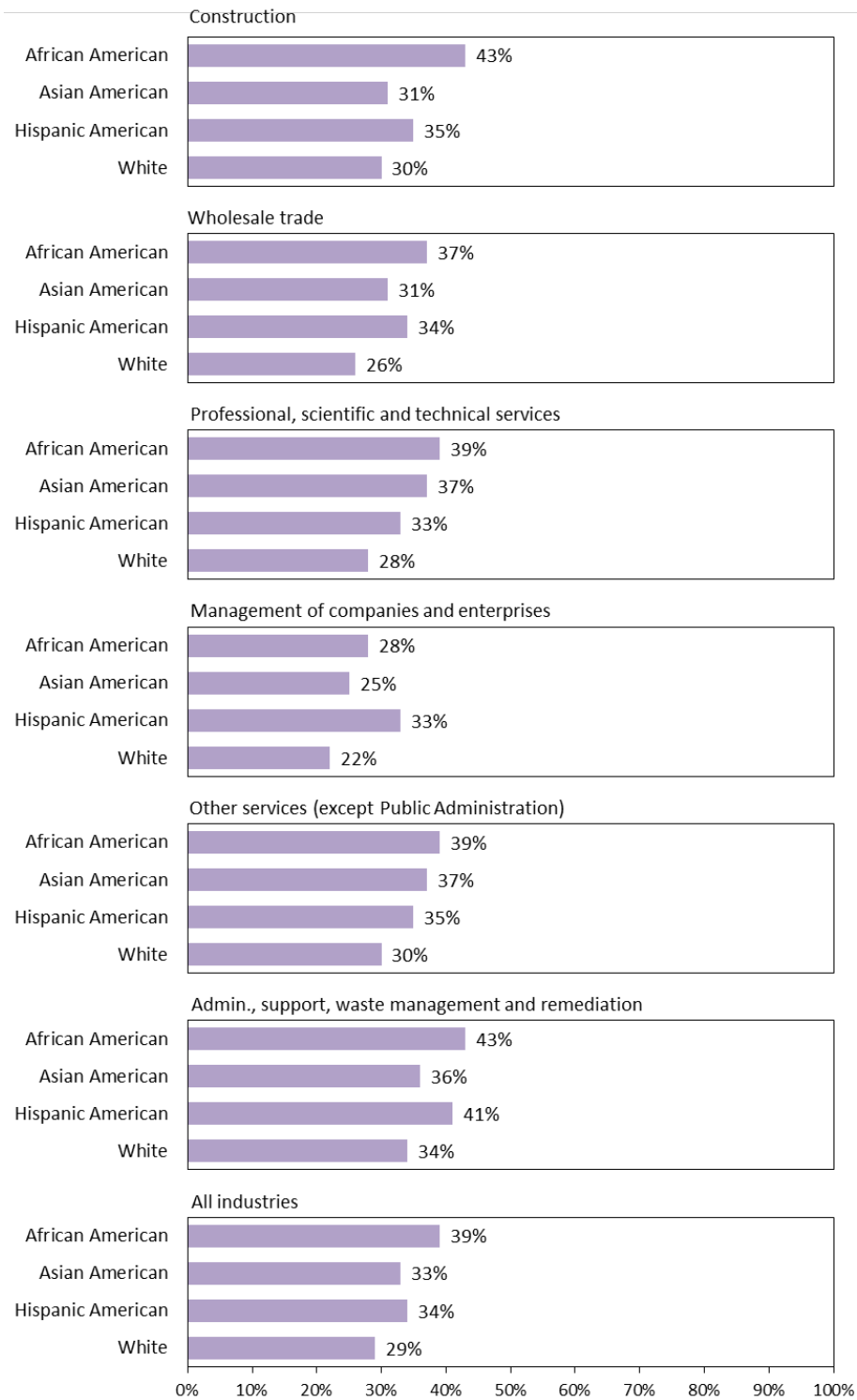
Rates of business closures by industry. The SBA report also examined business closure rates by race/ethnicity for 21 different industry classifications. Figure H-2 compares national rates of firm closure for construction; wholesale trade; professional, scientific and technical services; management of companies and enterprises; other services; and administration, support, waste management and remediation. Figure H-2 also presents closure rates for all industries by race/ethnicity.

In all industries and all study industries, minority-owned businesses that were operating in the United States in 2002 had a higher rate of closure by 2006 relative to white-owned businesses. African American-owned businesses that were operating in the United States in 2002 had the highest rate of closure by 2006 among all racial/ethnic groups — including white-owned businesses — in all industries (39%) and all relevant study industries with the exception of management of companies and enterprises.

Hispanic American-owned company and enterprise management businesses that were operating in 2002 had the highest rate of closure in 2006 (33%). The study team could not examine whether those differences also existed in the state of Hawaii because the SBA analysis by industry was not available for individual states or metropolitan areas.

Figure H-2.

Rates of business closure, 2002 through 2006, relevant study industries and all industries in the U.S.



Note: Data refer to non-publicly held businesses only. As sample sizes are not reported, statistical significance of these results cannot be determined; however, statistics are consistent with SBA data quality guidelines.

Source: Lowrey, Y. (2010). Race/Ethnicity and Establishment Dynamics, 2002-2006. U.S. Small Business Administration Office of Advocacy.

Unsuccessful closures. Not all business closures can be interpreted as “unsuccessful closures.” Businesses may close when an owner retires or a more profitable business opportunity emerges, both of which represent “successful closures.” The 1992 Characteristics of Business Owners (CBO) Survey is one of the few Census Bureau sources to classify business closures into successful and unsuccessful subsets.⁴ The 1992 CBO combines data from the 1992 Economic Census and a survey of business owners conducted in 1996. The survey portion of the 1992 CBO asked owners of businesses that had closed between 1992 and 1995, “Which item below describes the status of this business at the time the decision was made to cease operations?” Only the responses “successful” and “unsuccessful” were permitted. A firm that reported being unsuccessful at the time of closure was understood to have failed.

Figure H-3 presents CBO data on the proportion of businesses that closed due to failure between 1992 and 1995 in construction, wholesale trade, services and all industries.^{5, 6}

According to CBO data, African American-owned businesses in the United States were the most likely to report being “unsuccessful” at the time at which their businesses closed. About 77 percent of African American-owned businesses in all industries reported an unsuccessful business closure between 1992 and 1995, compared with only 61 percent of non-Hispanic white male-owned businesses. Unsuccessful closure rates were also relatively high for Hispanic American-owned businesses (71%) and for businesses owned by other minority groups (73%). The rate of unsuccessful closures for women-owned businesses (61%) was similar to that of non-Hispanic white male-owned businesses.

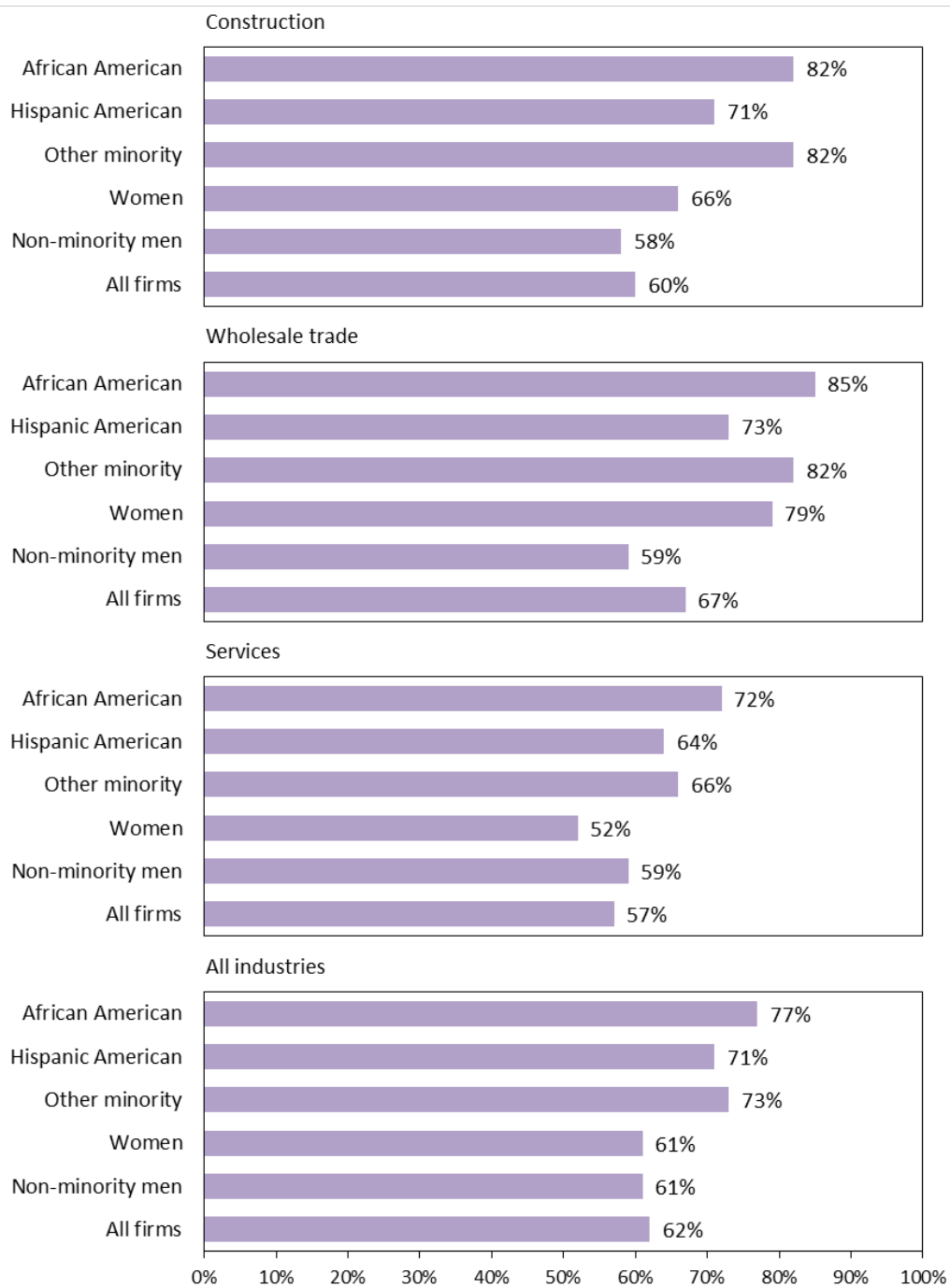
In the construction and wholesale trade industries, minority- and women-owned businesses were more likely to report unsuccessful business closures than non-Hispanic white male-owned businesses (58% and 59%, respectively). Those trends were similar in the services industry with one exception — women-owned businesses in the services industry (52%) were less likely to report unsuccessful closures than non-Hispanic white male-owned businesses (59%).

⁴ CBO data from the 1997 and 2002 Economic Censuses do not include statistics on successful and unsuccessful business closures. To date, the 1992 CBO is the only U.S. Census dataset that includes such statistics.

⁵ All CBO data should be interpreted with caution as businesses that did not respond to the survey cannot be assumed to have the same characteristics of ones that did. For further explanation, see Holmes, T.J., & Schmitz, J. A. (1996). Nonresponse Bias and Business Turnover Rates: The case of the Characteristics of Business Owners Survey. *Journal of Business & Economic Statistics*, 14(2), 231-241; and Headd, B. (2001). *Business Success: Factors leading to surviving and closing successfully*. Center for Economic Studies, U.S. Department of Commerce, Bureau of the Census.

⁶ Data for firms operating in the management of companies and enterprises and administrative, support, waste management and remediation industries were not available in the CBO survey.

Figure H-3.
Proportions of closures reported as unsuccessful between 1992 and 1995 in the U.S.



Source: U.S. Census Bureau, 1996 Characteristics of Business Owners Survey (CBO).

Reasons for differences in unsuccessful closure rates. Several researchers have offered explanations for higher rates of unsuccessful closures among minority- and women-owned businesses compared with non-Hispanic white-owned businesses:

- Unsuccessful business failures of minority-owned businesses may be largely due to barriers in access to capital. Regression analyses have identified initial capitalization as a significant factor in determining firm viability.⁷ Because minority-owned businesses secure smaller amounts of debt equity in the form of loans, they may be more liable to fail. Difficulty in accessing capital is particularly acute for minority-owned businesses in the construction industry.⁸ Access to capital is discussed in more detail in Appendix G.
- Prior work experience in a family member’s business or similar experiences are found to be strong determinants of business viability.⁹ Because minority business owners are much less likely to have such experience, their businesses are less likely to survive.¹⁰ Related research has been conducted for women-owned businesses and found similar gender-based gaps in the likelihood of business survival.¹¹
- Level of education is found to be a strong determinant of business survival. Educational attainment explains a substantial portion of the gap in business closure rates between African American-owned and nonminority-owned businesses.¹²

⁷ For example, see Fairlie, R.W., Robb, A.M., & United States. Minority Business Development Agency. (2010). Disparities in Capital Access between Minority and Non-minority-owned Businesses: The troubling reality of capital limitations faced by MBEs.; and Robb, A. M., & Fairlie, R. W. (2009). Determinants of Business Success: An examination of Asian-owned businesses in the USA. *Journal of Population Economics*, 22(4), 827.

⁸ Blanchflower, D. (2008). Minority Self Employment in the United States and the Impact of Affirmative Action Programs. NBER Working Paper Series, (13972).

⁹ Fairlie, R. W., & Robb, A. M. (2008). Race and Entrepreneurial Success: Black-, Asian-, and White-owned businesses in the United States. *MIT Press Books*.

¹⁰ Fairlie, R. W., & Robb, A.M. (2007). Why are Black-owned Businesses Less Successful than White-owned Businesses? The role of families, inheritances, and business human capital. *Journal of Labor Economics*, 25(2), 289-323.

¹¹ Fairlie, R. W., & Robb, A. M. (2009). Gender Differences in Business Performance: Evidence from the Characteristics of Business Owners survey. *Small Business Economics*, 33(4), 375.

¹² Ibid.; Fairlie, R., & Woodruff, C. M. (2010). Mexican-American Entrepreneurship. *The BE Journal of Economic Analysis & Policy*, 10(1).

- Nonminority business owners have broader business opportunities, increasing their likelihood of closing successful businesses to pursue more profitable business alternatives. Minority business owners, especially those who do not speak English, have limited employment options and are less likely to close a successful business.¹³
- The possession of greater initial capital and generally higher levels of education among Asian Americans are related to the relatively high rate of survival of Asian American-owned businesses compared to other minority-owned businesses.¹⁴

Expansions and contractions. A report from the State of Hawaii found that in 2013 nearly 74 percent of job growth was due to current businesses expanding, and 68 percent of total job loss was due to current businesses reducing their employment (i.e., contracting).¹⁵ Comparing rates of expansion and contraction between minority-owned and white-owned businesses is another way to assess the success of minority-owned businesses. As with closure data, only some of the data on expansions and contractions that were available for the nation were also available at the state level.

Expansions. The 2010 SBA study of minority business dynamics from 2002 through 2006 examined the number of non-publicly-held Hawaii businesses that expanded and contracted between 2002 and 2006. Figure H-4 presents the percentage of all businesses that increased their total employment between 2002 and 2006. Those data are presented for Hawaii and for the U.S.

Approximately 37 percent of white-owned Hawaii businesses expanded between 2002 and 2006, compared to 47 percent of African American-owned businesses, 31 percent of Asian American-owned businesses and 33 percent of Hispanic American-owned businesses. Expansion rates for Hawaii businesses were greater than national expansion rates for each race/ethnicity category.

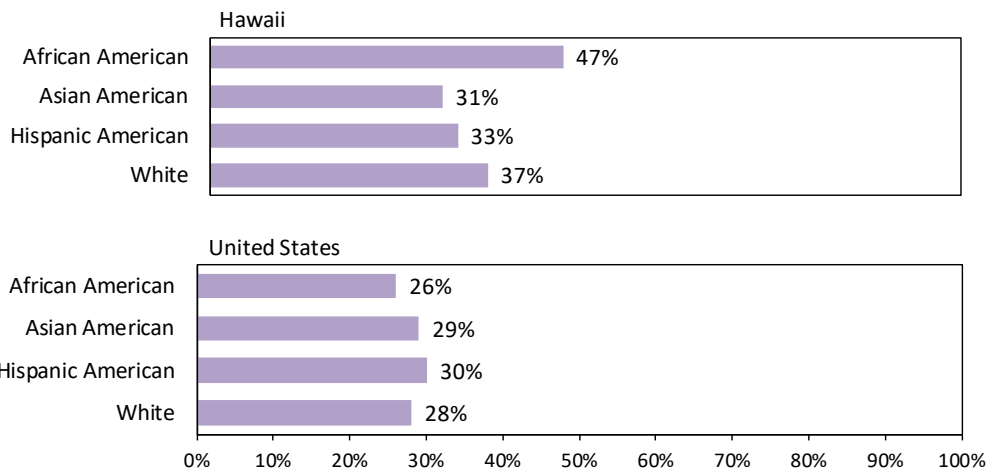
¹³ Bates, T. (2005). Analysis of Young, Small Firms that Have Closed: Delineating successful from unsuccessful closures. *Journal of Business Venturing*, 20(3), 343-358.

¹⁴ Robb, A. M., & Fairlie, R. W. (2009). Determinants of Business Success: An examination of Asian-owned businesses in the USA. *Journal of Population Economics*, 22(4), 827; Fairlie, R. W., Zissimopoulos, J., & Krashinsky, H. (2010). The International Asian Business Success Story? A comparison of Chinese, Indian and other Asian businesses in the United States, Canada and United Kingdom. In *International Differences in Entrepreneurship* (pp. 179-208). University of Chicago Press; and Fairlie, R. W., & Robb, A. M. (2008). Race and Entrepreneurial Success: Black-, Asian-, and White-owned businesses in the United States. *MIT Press Books*.

¹⁵ State of Hawaii Department of Business, Economic Development & Tourism. (2014). *Hawaii New Business Formation: An analysis of business birth, deaths, and survival rates*. Retrieved from State of Hawaii website: http://files.hawaii.gov/dbedt/economic/reports/new_bus.pdf

Figure H-4.

Percentage of businesses that expanded, 2002 through 2006, Hawaii and the U.S.



Note: Data refer to non-publicly held businesses only. As sample sizes are not reported, statistical significance of these results cannot be determined; however, statistics are consistent with SBA data quality guidelines.

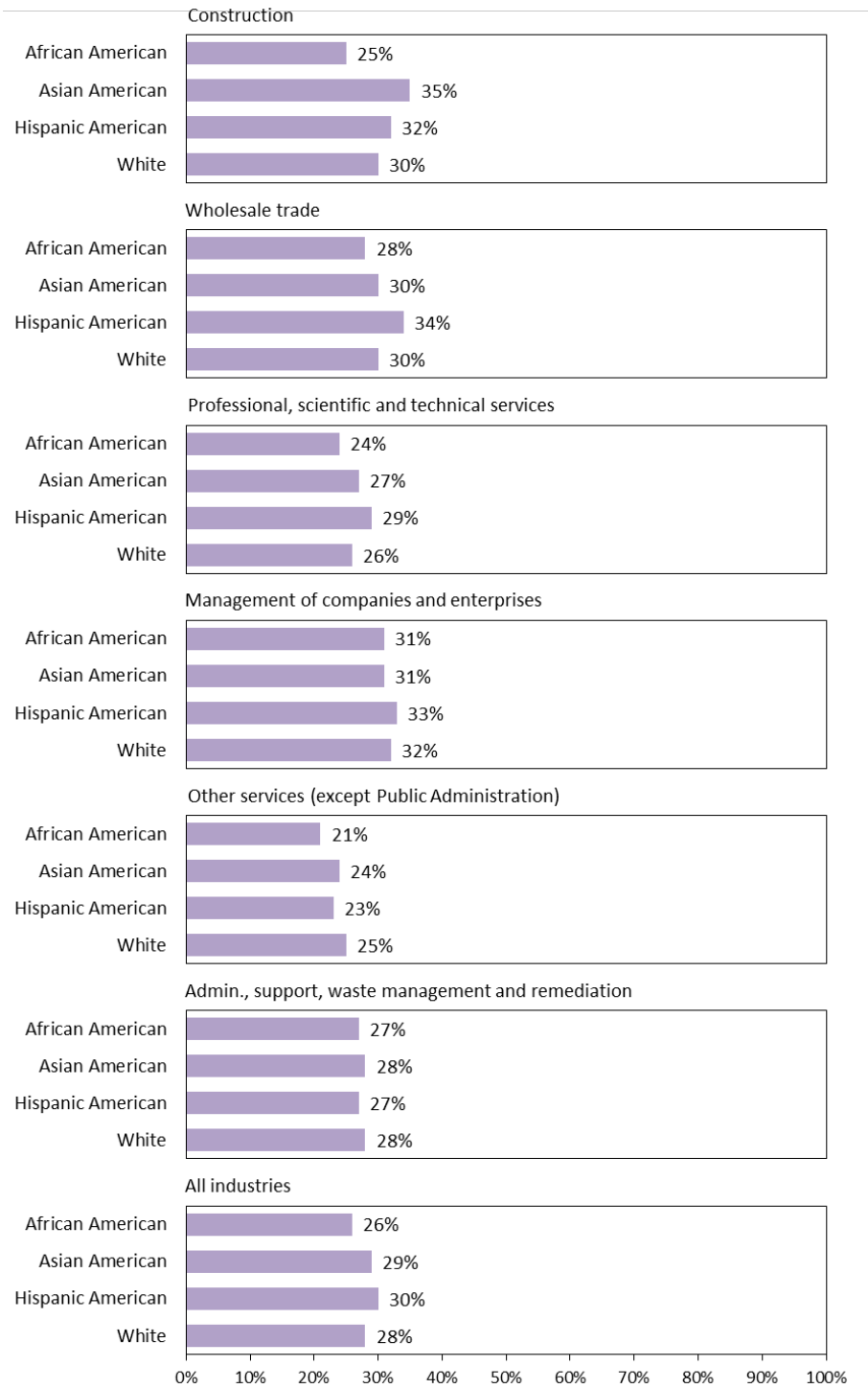
Source: Lowrey, Y. (2010). Race/Ethnicity and Establishment Dynamics, 2002-2006. U.S. Small Business Administration Office of Advocacy.

Figure H-5 presents the percentage of businesses that expanded in construction; wholesale trade; professional, scientific and technical services; management of companies and enterprises; other services; and administration, support, waste management and remediation and in all industries in the United States. The SBA study did not report results for businesses in individual industries at the state level.

At the national level, the patterns evident for study industries were similar to those observed for all industries:

- African American-owned businesses in the relevant study industries were less likely than white-owned businesses to have expanded between 2002 and 2006.
- Asian American-owned businesses in the management of companies and enterprises and other services industries were less likely than white-owned businesses to have expanded between 2002 and 2006.
- Hispanic American-owned companies in the construction; wholesale trade; professional, scientific and technical services, and management of companies and enterprises industries were more likely than white-owned businesses to have expanded between 2002 and 2006.

Figure H-5.
 Percentage of businesses that expanded, 2002 through 2006, relevant study industries
 and all industries in the U.S.

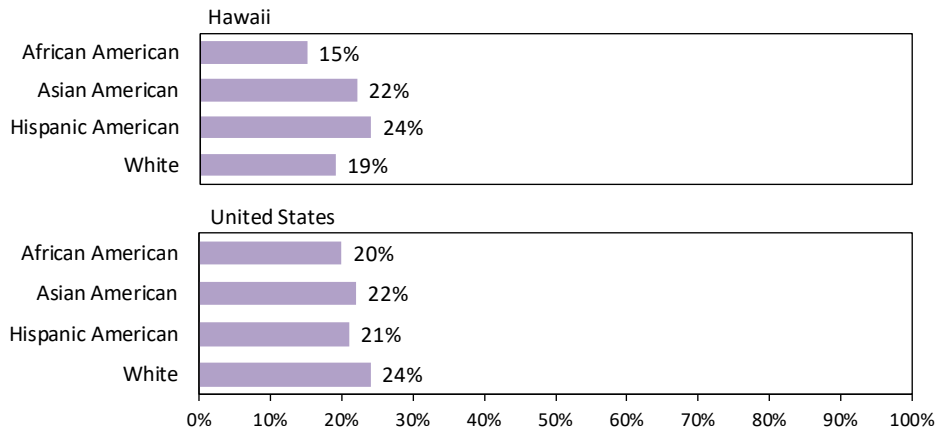


Note: Data refer to non-publicly held businesses only. As sample sizes are not reported, statistical significance of these results cannot be determined; however, statistics are consistent with SBA data quality guidelines.

Source: Lowrey, Y. (2010). Race/Ethnicity and Establishment Dynamics, 2002-2006. U.S. Small Business Administration Office of Advocacy.

Contraction. Figure H-6 shows the percentage of non-publicly held businesses operating in 2002 that reduced their employment (i.e., contracting) between 2002 and 2006 in Hawaii and in the U.S. In both Hawaii and the U.S., African American-owned businesses were less likely to have contracted in 2002 through 2006 than white-owned businesses. In Hawaii, Asian American- and Hispanic-American-owned businesses were more likely to have contracted than white-owned businesses.

Figure H-6.
 Percentage of businesses that contracted, 2002 through 2006, Hawaii and the U.S.

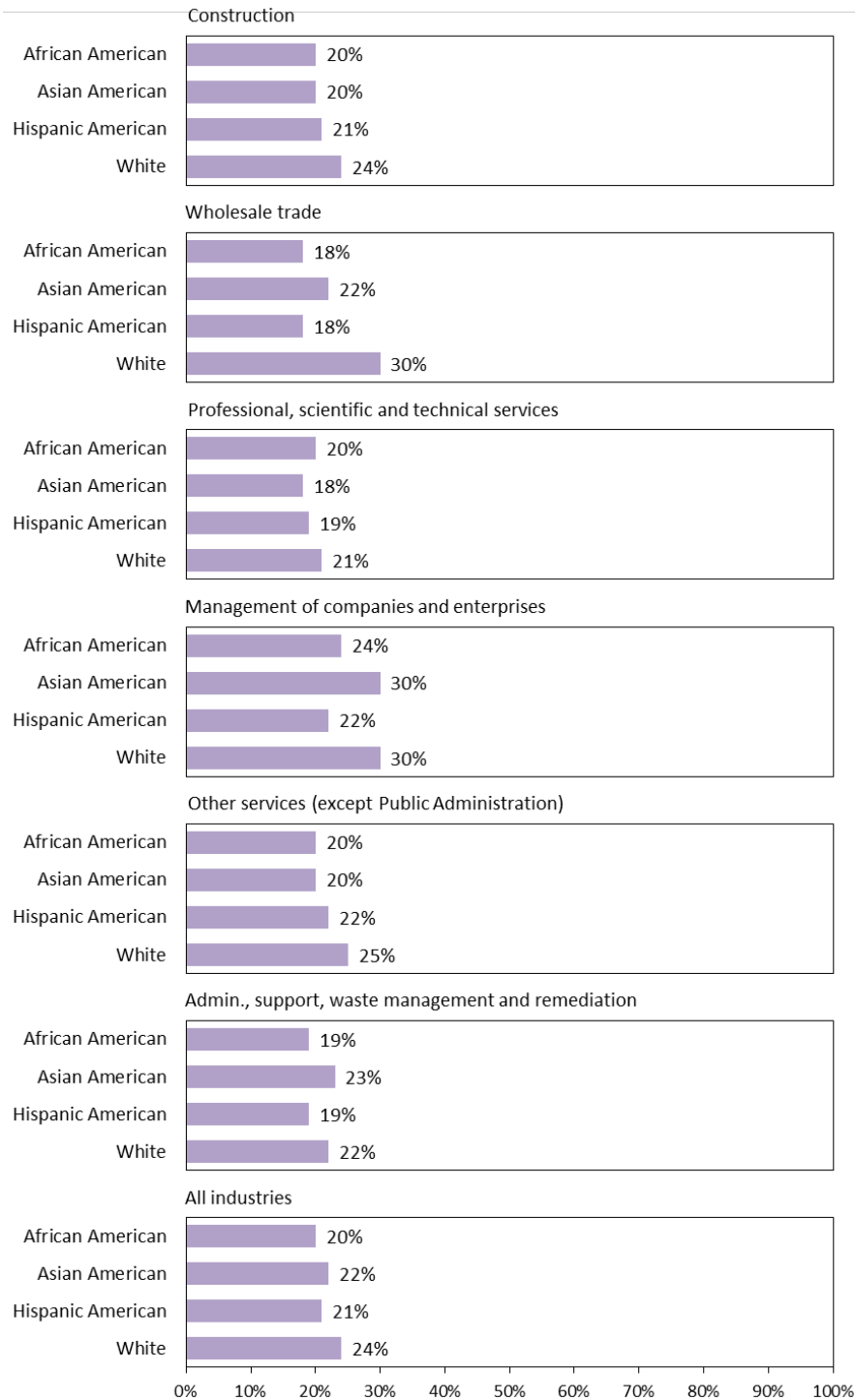


Note: Data refer to non-publicly held businesses only. As sample sizes are not reported, statistical significance of these results cannot be determined; however, statistics are consistent with SBA data quality guidelines.

Source: Lowrey, Y. (2010). Race/Ethnicity and Establishment Dynamics, 2002-2006. U.S. Small Business Administration Office of Advocacy.

The SBA study did not report state-specific results relating to contractions in individual industries. Figure H-7 shows the percentage of businesses that contracted in the relevant study industries and in all industries at the national level. Compared to white-owned businesses in the United States, in general, a smaller percentage of minority-owned businesses in the relevant study industries and in all industries contracted between 2002 and 2006.

Figure H-7.
 Percentage of businesses that contracted, 2002 through 2006, relevant study industries
 and all industries in the U.S.



Note: Data refer to non-publicly held businesses only. As sample sizes are not reported, statistical significance of these results cannot be determined; however, statistics are consistent with SBA data quality guidelines.

Source: Lowrey, Y. (2010). Race/Ethnicity and Establishment Dynamics, 2002-2006. U.S. Small Business Administration Office of Advocacy.

Business Receipts and Earnings

Annual business receipts and earnings for business owners are also indicators of the success of businesses. The study team examined:

- Business receipts data from the U.S. Census Bureau 2012 Survey of Business Owners (SBO);
- Business earnings data for business owners from the 2012–2016 American Community Survey (ACS); and
- Annual revenue data for firms in the study industries located in the Hawaii market area that the study team collected as part of availability interviews.

Business receipts. A report from the State of Hawaii found that in 2012 there were nearly 100,000 non-employer businesses in the state, with the gross receipts of these businesses totaling \$4.5 billion.¹⁶ The study team examined receipts for businesses using data from the 2012 SBO, conducted by the U.S. Census Bureau.¹⁷ The study team also analyzed receipts for businesses in individual industries. The SBO reports business receipts separately for employer businesses (with paid employees other than owner and family members) and all businesses.¹⁸

Receipts for all businesses. Figure H-8 presents 2012 mean annual receipts for employer and non-employer businesses by race, ethnicity and gender. Race and ethnicity categories in Hawaii are reported separately and are not mutually exclusive. Respondents may also select multiple races when reporting business ownership. As such, SBO calculations use non-mutually exclusive race/ethnicity definitions. SBO data for businesses across all industries in Hawaii indicate that average receipts for most minority- and women-owned businesses were much lower than that for non-Hispanic-owned, white-owned or male-owned businesses, with some groups faring worse than others. Using the SBO groupings of minority-owned businesses:

- Average receipts of businesses owned by Filipino Americans (\$76,000), African Americans (\$122,000) and American Indians or other Alaska Natives (\$115,000) were less than one-third that of white-owned businesses (\$376,000).
- Hispanic-owned businesses (\$102,000) had revenues that were less than 30 percent of the average of non-Hispanic-owned businesses (\$355,000).
- Average receipts of Native Hawaiian-owned businesses (\$148,000) were less than 40 percent that of white-owned businesses.

¹⁶ State of Hawaii Department of Business, Economic Development & Tourism. (2014). *Hawaii New Business Formation: An analysis of business birth, deaths, and survival rates*. Retrieved from State of Hawaii website: http://files.hawaii.gov/dbedt/economic/reports/new_bus.pdf

¹⁷ The 2012 SBO data are not available at the same geographic level as Census and ACS data.

¹⁸ We use “all businesses” to denote SBO data used in this analysis. The data include incorporated and unincorporated businesses, but not publicly-traded companies or other businesses not classifiable by race/ethnicity and gender. The study team did not categorize racial groups by ethnicity. As a result, Hispanic Americans may also be included in statistics for each race.

- Average receipts of other Asian and Pacific Islander-owned businesses (\$188,000) and other minority-owned businesses (\$193,000) were about one-half that of white-owned businesses.
- Average receipts for women-owned businesses (\$159,000) were less than one-third of male-owned businesses (\$466,000).

However, Japanese American-owned businesses (\$412,000) had higher average receipts than white-owned businesses.

Disparities in business receipts for minority- and women-owned businesses compared to non-Hispanic white- and male-owned businesses in Hawaii are similar to those seen in the U.S. A 2007 SBA study identified differences similar to those presented in Figure H-8 when examining businesses in all industries across the U.S.¹⁹

Figure H-8.
Mean annual receipts (thousands) for all businesses, by race/ethnicity and gender of owners, 2012

	Hawaii	U.S.
Race		
African American	\$ 122	\$ 58
Asian Pacific or Native Hawaiian	211	228
Native Hawaiian	148	176
Chinese American	279	397
Filipino American	76	134
Japanese American	412	371
Other Asian and Pacific Islanders	188	195
Subcontinent Asian and other Asian American	240	430
American Indian or Alaska Native	115	142
Other minority	193	94
White	376	508
Ethnicity		
Hispanic	\$ 102	\$ 143
Non-Hispanic	355	482
Gender		
Female	\$ 159	\$ 144
Male	466	638

Note: Includes employer and non-employer businesses. Does not include publicly-traded companies or other businesses not classifiable by race/ethnicity and gender. As sample sizes are not reported, statistical significance of these results cannot be determined.

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

¹⁹ Lowrey, Y. (2007). *Minorities in Business: A Demographic Review of Minority Business Ownership*. Office of Economic Research, Office of Advocacy, U.S. Small Business Administration.

Figure H-9 presents average annual receipts in 2012 for only employer businesses in Hawaii and in the United States. (Employer businesses are those with paid employees.) Minority- and women-owned businesses had lower average business receipts than non-Hispanic-, white- and male-owned employer businesses in Hawaii:

- Average receipts of Filipino American-owned employer businesses (\$640,000) were about a third of the average for white-owned businesses.
- Average receipts of African American-owned businesses (\$797,000) were about 41 percent less than that of the average for white-owned businesses.
- Other Asian and Pacific Islander-owned businesses had average receipts (\$890,000) were less than half that of the average of white-owned businesses.
- Hispanic American-owned businesses had average receipts (\$768,000) that were less than 45 percent than that of non-Hispanic-owned businesses (\$1.7 million).
- Average receipts of Native Hawaiian-owned businesses (\$1.3 million), American Indian or Alaska Native-owned businesses (\$1.3 million) and other minority-owned businesses (\$1.3 million) were about 65 percent of that of white-owned businesses (\$2 million).
- Average receipts for women-owned businesses (\$1.2 million) were less than 60 percent of the average of male-owned businesses (\$2.0 million).

In Hawaii, Japanese American-owned and Subcontinent Asian American-owned employer businesses had average receipts close but still below receipts of white-owned employer businesses.

Figure H-9.

Mean annual receipts (thousands) for employer businesses, by race/ethnicity and gender of owners, 2012

	Hawaii	U.S.
Race		
African American	\$ 797	\$ 948
Asian American	1,511	1,305
Asian Pacific or Native Hawaiian	1,099	1,257
Native Hawaiian	1,278	1,369
Chinese American	1,385	1,371
Filipino American	640	834
Japanese American	1,722	1,673
Other Asian and Pacific Islanders	890	1,213
Subcontinent Asian and other Asian American	1,725	1,323
American Indian or Alaska Native	1,257	1,209
Other minority	1,315	975
White	1,952	2,277
Ethnicity		
Hispanic	\$ 768	\$ 1,322
Non-Hispanic	1,708	2,191
Gender		
Female	\$ 1,187	\$ 1,150
Male	1,995	2,642

Note: Includes only employer businesses. Does not include publicly-traded companies or other businesses not classifiable by race/ethnicity and gender. As sample sizes are not reported, statistical significance of these results cannot be determined.

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

Receipts by industry. The study team also analyzed SBO receipts data separately for businesses in the relevant study industries for all firms (i.e., employer and non-employer businesses combined) and for employer firms only. Results are presented for each group of firms by industry: construction and engineering industries, and food, beverage and selected retail industry. Results are presented by racial, ethnic and gender group for both Hawaii and the U.S., using non-mutually exclusive race/ethnicity definitions.

Figure H-10 presents mean annual receipts in 2012 for all businesses (i.e., employer and non-employer businesses combined) in the construction and engineering industries.

Figure H-10.

Mean annual receipts (thousands) for all firms in the construction and engineering industries, by race/ethnicity and gender of owners, 2012

	All industries together	Construction	Wholesale trade	Professional, scientific and technical services
Hawaii				
Race				
African American	\$ 122	\$ N/A	\$ 1,725	\$ 62
Asian American	320	689	1,562	178
Asian Pacific or Native Hawaiian	211	654	730	133
Native Hawaiian	148	336	608	124
Chinese American	279	467	863	157
Filipino American	76	118	168	39
Japanese American	412	991	2,037	220
Other Asian and Pacific Islanders	188	1,005	542	79
Subcontinent Asian American and other Asian American	240	N/A	195	35
American Indian or Alaska Native	115	N/A	N/A	50
Other minority	193	N/A	817	N/A
White	376	450	2,275	160
Ethnicity				
Hispanic	\$ 102	\$ 206	\$ 344	\$ N/A
Non-Hispanic	355	587	1,894	178
Gender				
Female	\$ 159	\$ 602	\$ 1,283	\$ 70
Male	466	562	2,343	245
United States				
Race				
African American	\$ 58	\$ 81	\$ 529	\$ 76
Asian American	365	200	2,654	245
Asian Pacific or Native Hawaiian	228	238	1,618	140
Native Hawaiian	176	368	891	170
Chinese American	397	118	2,706	184
Filipino American	134	163	784	78
Japanese American	371	630	2,730	178
Other Asian and Pacific Islanders	195	173	1,457	128
Subcontinent Asian American and other Asian American	430	247	2,483	301
American Indian or Alaska Native	142	206	949	102
Other minority	94	86	852	105
White	508	455	4,422	235
Ethnicity				
Hispanic	\$ 143	\$ 117	\$ 1,502	\$ 121
Non-Hispanic	482	467	4,289	235
Gender				
Female	\$ 144	\$ 350	\$ 1,778	\$ 104
Male	638	415	5,059	301

Note: Does not include publicly-traded companies or other businesses not classifiable by race/ethnicity and gender. As sample sizes are not reported, statistical significance of these results cannot be determined. "N/A" indicates that estimates were suppressed by the SBO because publication standards were not met. "Other Asian and Pacific Islanders" includes Korean, Vietnamese, Guamanian, Samoan and other Pacific Islanders as available. These calculations are done using non-mutually exclusive race definitions.

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

In Hawaii, when considering all industries together, average 2012 receipts for most minority and female-owned businesses were lower than the average for non-Hispanic, white- and male-owned businesses. In general, these trends persisted when analyzing industry-specific data in Hawaii. Within the study industries, where data were available for specific minority groups and females, those groups generally earned less than non-Hispanic, white- and male-owned businesses.

Figure H-11 shows mean annual receipts in 2012 for all firms (employer and non-employer combined) in the food, beverage and selected retail industry. Results are presented by racial, ethnic and gender group for both Hawaii and U.S., using non-mutually exclusive race/ethnicity definitions.

The general trend of businesses owned by minority groups and females earning less on average than non-Hispanic, white- and male-owned businesses persists in the food, beverage and selected retail industry as shown in Figure H-11.

Subcontinent Asian- and other Asian American-owned employer firms had significantly higher average receipts in the accommodation and food services industry and, consequently, in the combined all food, beverage and selected retail industry. This variation may be due to small sample size.

Patterns in receipts for employer only firms in the construction and engineering industry (shown in Figure H-12) are consistent with those found in all firms (shown in Figure H-10). SBO data indicated that average receipts were higher for employer businesses than for all businesses (i.e., employer and non-employer businesses combined). As with all firms, these calculations use non-mutually exclusive race/ethnicity definitions.

Within the study industries, where data were available for specific minority groups and females, those groups generally earned less than non-Hispanic, white- and male-owned businesses. However, most racial minority groups and females earned more than white- and male-owned businesses in construction.

Figure H-13 presents average receipts for employer firms in the food, beverage and selected retail industry using non-mutually exclusive race definitions. In all food, beverage and selected retail industries combined, most minority groups and female-owned businesses had lower annual receipts on average than white-, non-Hispanic- and male-owned firms.

As with all firms, Subcontinent Asian- and other Asian American-owned employer firms had significantly higher average receipts in the accommodation and food services industry and, consequently, in the all food, beverage and selected retail industry. This variation may be due to small sample size.

Figure H-11.

Mean annual receipts (thousands) for all firms in the food, beverage and selected retail industries, by race/ethnicity and gender of owners, 2012

	All food, beverage and selected retail	Rental, leasing and real estate	Retail trade	Accommodation and food services	Other services
Hawaii					
Race					
African American	\$ 75	\$ N/A	\$ 75	\$ N/A	\$ N/A
Asian American	364	151	527	689	89
Asian Pacific or Native Hawaiian	258	108	358	485	62
Native Hawaiian	160	89	191	323	36
Chinese American	504	181	386	945	N/A
Filipino American	100	57	117	190	37
Japanese American	417	125	729	724	92
Other Asian and Pacific Islanders	175	58	362	242	52
Subcontinent Asian American and other Asian American	3,238	12	688	15,393	48
American Indian or Alaska Native	37	37	N/A	N/A	N/A
Other minority	38	N/A	47	N/A	29
White	632	196	828	1,424	79
Ethnicity					
Hispanic	\$ 66	\$ N/A	\$ 107	\$ N/A	\$ 25
Non-Hispanic	459	183	635	935	82
Gender					
Female	\$ 213	\$ 115	\$ 202	\$ 493	\$ 43
Male	687	231	1,133	1,274	110
United States					
Race					
African American	\$ 81	\$ 57	\$ 107	\$ 142	\$ 17
Asian American	349	133	719	486	59
Asian Pacific or Native Hawaiian	255	127	419	378	65
Native Hawaiian	163	84	214	191	N/A
Chinese American	288	130	526	432	63
Filipino American	142	90	195	248	35
Japanese American	352	251	482	605	69
Other Asian and Pacific Islanders	240	95	344	435	51
Subcontinent Asian American and other Asian American	404	125	887	536	71
American Indian or Alaska Native	149	84	291	182	39
Other minority	137	70	202	247	30
White	479	186	943	696	94
Ethnicity					
Hispanic	\$ 192	\$ 88	\$ 358	\$ 284	\$ 37
Non-Hispanic	451	183	902	638	80
Gender					
Female	\$ 149	\$ 102	\$ 200	\$ 260	\$ 32
Male	659	227	1,478	821	111

Note: Does not include publicly-traded companies or other businesses not classifiable by race/ethnicity and gender. As sample sizes are not reported, statistical significance of these results cannot be determined. "N/A" indicates that estimates were suppressed by the SBO because publication standards were not met. "Other Asian and Pacific Islanders" includes Korean, Vietnamese, Guamanian, Samoan and other Pacific Islanders as available. These calculations are done using non-mutually exclusive race definitions.

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

Figure H-12.

Mean annual receipts (thousands) for employer firms in the construction and engineering industries, by race/ethnicity and gender of owners, 2012

	All industries together	Construction	Wholesale trade	Professional, scientific and technical services
Hawaii				
Race				
African American	\$ 797	\$ N/A	\$ 10,235	\$ 922
Asian American	1,511	2,201	3,974	931
Asian Pacific or Native Hawaiian	1,099	2,421	3,289	730
Native Hawaiian	1,278	1,400	4,542	853
Chinese American	1,385	2,139	3,193	896
Filipino American	640	633	875	337
Japanese American	1,722	2,424	4,530	1,015
Other Asian and Pacific Islanders	890	5,509	3,297	549
Subcontinent Asian American and other Asian American	1,725	N/A	1,875	79
American Indian or Alaska Native	1,257	N/A	N/A	534
Other minority	1,315	N/A	3,024	N/A
White	1,952	1,730	7,018	808
Ethnicity				
Hispanic	\$ 768	\$ 1,019	\$ 3,790	\$ N/A
Non-Hispanic	1,708	1,979	5,025	890
Gender				
Female	\$ 1,187	\$ 2,611	\$ 4,286	\$ 456
Male	1,995	2,042	6,430	1,071
United States				
Race				
African American	\$ 948	\$ 1,096	\$ 5,134	\$ 816
Asian American	1,305	1,223	5,061	1,154
Asian Pacific or Native Hawaiian	1,257	1,408	5,157	993
Native Hawaiian	1,369	1,749	6,684	1,259
Chinese American	1,371	838	4,821	992
Filipino American	834	914	3,177	646
Japanese American	1,673	2,257	5,112	975
Other Asian and Pacific Islanders	1,213	1,383	5,365	1,018
Subcontinent Asian American and other Asian American	1,323	1,577	5,743	1,244
American Indian or Alaska Native	1,209	1,266	5,167	605
Other minority	975	839	3,764	1,139
White	2,277	1,730	9,774	983
Ethnicity				
Hispanic	\$ 1,322	\$ 1,005	\$ 5,431	\$ 865
Non-Hispanic	2,191	1,749	9,367	999
Gender				
Female	\$ 1,150	\$ 1,561	\$ 6,471	\$ 620
Male	2,642	1,842	10,421	1,167

Note: Does not include publicly-traded companies or other businesses not classifiable by race/ethnicity and gender. As sample sizes are not reported, statistical significance of these results cannot be determined. "N/A" indicates that estimates were suppressed by the SBO because publication standards were not met. "Other Asian and Pacific Islanders" includes Korean, Vietnamese, Guamanian, Samoan and other Pacific Islanders as available. These calculations are done using non-mutually exclusive race definitions.

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

Figure H-13.

Mean annual receipts (thousands) for employer firms in the food, beverage and selected retail industries, by race/ethnicity and gender of owners, 2012

	All food, beverage and selected retail	Rental, leasing and real estate	Retail trade	Accommodation and food services	Other services
Hawaii					
Race					
African American	\$ 443	\$ N/A	\$ 443	\$ 875	\$ N/A
Asian American	1,273	886	2,690	1,006	511
Asian Pacific or Native Hawaiian	1,009	264	1,876	846	377
Native Hawaiian	843	374	1,729	929	341
Chinese American	1,452	1,066	2,203	1,087	N/A
Filipino American	965	1,518	1,273	781	287
Japanese American	1,502	599	3,709	1,130	568
Other Asian and Pacific Islanders	600	264	1,171	301	346
Subcontinent Asian American and other Asian American	16,236	N/A	1,519	46,142	1,048
American Indian or Alaska Native	N/A	N/A	N/A	N/A	N/A
Other minority	235	N/A	302	N/A	168
White	1,756	842	3,074	2,489	617
Ethnicity					
Hispanic	\$ 420	\$ N/A	\$ 611	\$ N/A	\$ 229
Non-Hispanic	1,441	934	2,750	1,497	583
Gender					
Female	\$ 895	\$ 828	\$ 1,410	\$ 918	\$ 423
Male	1,882	1,055	3,824	2,014	634
United States					
Race					
African American	\$ 947	\$ 661	\$ 1,703	\$ 1,104	\$ 321
Asian American	783	649	1,579	631	275
Asian Pacific or Native Hawaiian	858	459	1,716	621	292
Native Hawaiian	941	318	1,921	586	N/A
Chinese American	766	505	1,702	533	324
Filipino American	879	624	1,884	726	283
Japanese American	1,373	2,092	2,189	827	384
Other Asian and Pacific Islanders	683	459	1,185	833	199
Subcontinent Asian American and other Asian American	824	683	1,561	708	345
American Indian or Alaska Native	962	504	2,246	639	459
Other minority	659	381	1,279	649	326
White	1,551	1,002	3,533	1,106	564
Ethnicity					
Hispanic	\$ 1,028	\$ 505	\$ 2,524	\$ 699	\$ 383
Non-Hispanic	1,436	993	3,222	1,003	528
Gender					
Female	\$ 724	\$ 580	\$ 1,402	\$ 620	\$ 293
Male	1,818	1,231	4,219	1,186	636

Note: Does not include publicly-traded companies or other businesses not classifiable by race/ethnicity and gender. As sample sizes are not reported, statistical significance of these results cannot be determined. "N/A" indicates that estimates were suppressed by the SBO because publication standards were not met. "Other Asian and Pacific Islanders" includes Korean, Vietnamese, Guamanian, Samoan and other Pacific Islanders as available. These calculations are done using non-mutually exclusive race definitions.

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

Business earnings. In order to assess the success of self-employed minorities and women in the relevant study industries, the study team examined earnings of business owners using Public Use Microdata Series (PUMS) data from the 2012–2016 ACS. Respondents were asked throughout the year to report total pre-tax business earnings accrued during the 12 months immediately preceding the month of the survey. Accordingly, earnings corresponding to the 2012–2016 ACS timeframe consist of 60 individual reference periods spanning 2011–2016.²⁰ The study team analyzed earnings of incorporated and unincorporated business owners age 16 and older who reported positive business earnings. All dollar amounts are presented in 2016 dollars. These calculations were done using mutually exclusive race and ethnicity definitions.

Construction business owner earnings, 2012–2016. The 2012–2016 ACS construction business owner earnings data correspond to the 2012–2016 ACS timeframe consisting of 60 individual reference periods spanning 2011–2016.

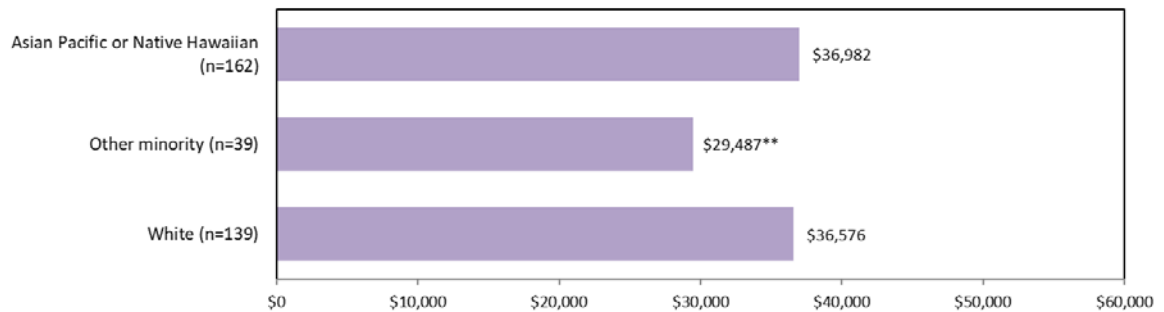
Figure H-14 shows earnings in 2012 through 2016 for business owners by race in the construction industry in Hawaii. Due to sample sizes for individual minority groups, African Americans, Subcontinent Asian, Hispanic, Native American and other minorities were combined.

- On average, Asian Pacific or Native Hawaiian business owners had similar earnings (\$36,982) to that of non-Hispanic white business owners (\$36,576) in 2012–2016, not a statistically significant difference.
- Other minority business owners (\$29,487) earned on average less than non-Hispanic white business owners in 2012–2016. That difference was statistically significant.
- Female business owners in Hawaii (\$31,653) earned less than male business owners (\$35,993) on average but, because of the small number of women-owned construction firms, the sample size is too small to draw any conclusions.

²⁰ For example, if a business owner completed the survey on January 2012, the figures for the previous 12 months would reference January 2011 to December 2011. Similarly, a business owner completing the survey in March 2014 would reference amounts between March 2013 and February 2014.

Figure H-14.

Mean annual business owner earnings in the construction industry, 2012 through 2016, Hawaii



Note: ** Denotes statistically significant differences between groups at the 95% confidence level.

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

Source: Keen Independent Research from 2012–2016 ACS. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

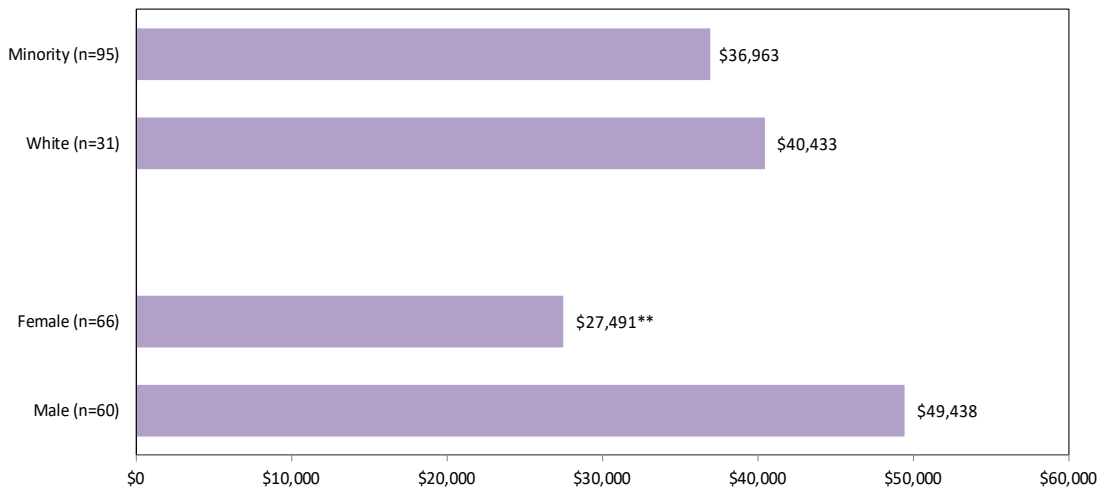
Engineering business owner earnings, 2012–2016. As with earnings data for the construction industry, earnings for engineering business owners that were reported in the 2012–2016 ACS data were for the time period between 2011 and 2016. Due to small sample sizes, no conclusions can be drawn about differences between any race/ethnic group of business owner earnings in the engineering industry.

- On average, minority business owners in Hawaii (\$48,040) earned less in 2012–2016 than non-Hispanic white business owners (\$61,119). Because of low numbers of minority- and white-business owners in the industry, no statistically significant difference can be determined.
- Female engineering business owners (\$46,577) earned less on average than male engineering business owners (\$58,128) in Hawaii from 2012–2016. As with minority and non-Hispanic white business owner earnings, the sample size of female business owners in this industry is too small to make any conclusions.

Food, beverage and selected retail business owner earnings, 2012–2016. Figure H-15 presents reported 2012–2016 earnings for food, beverage and selected retail business owners. These calculations were done using mutually exclusive race and ethnicity definitions and all dollar amounts are presented in 2016 dollars. Again, due to small sample sizes, all minority business owners were combined into a single category.

- Average earnings for minority business owners in the food, beverage and selected retail industry (\$36,963) were less than earnings for non-Hispanic white business owners in the industry (\$40,433) in Hawaii in 2012 through, not a statistically significant difference.
- Average earnings for female business owners in the food, beverage and selected retail industry (\$27,491) were less than male business owners (\$49,438), a statistically significant difference.

Figure H-15.
 Mean annual business owner earnings in the food, beverage and selected retail industry, 2012 through 2016, Hawaii



Note: The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 2016 dollars.
 ** Denotes statistically significant differences between groups at the 95% confidence level.

Source: Keen Independent Research from 2012–2016 ACS. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Regression analyses of business earnings. Differences in business earnings among different racial/ethnic and gender groups may be at least partially attributable to race- and gender-neutral factors such as age, marital status and educational attainment. The study team created statistical models through “regression analysis” to examine whether there were differences in business earnings between minorities and non-Hispanic whites and between women and men after controlling for certain race- and gender-neutral factors. Data came from the ACS for the state for 2012–2016.

The study team applied an ordinary least squares regression model to the data that was very similar to models reviewed by courts after other disparity studies.²¹ The dependent variable in the model was the natural logarithm of business earnings. Business owners that reported zero or negative business earnings were excluded, as were observations for which the U.S. Census Bureau had imputed values of business earnings. Along with variables for the race/ethnicity and gender of business owners, the model also included available measures from the data considered likely to affect earnings potential, including age, age-squared, marital status, ability to speak English well, disability condition and educational attainment.

²¹ For example, National Economic Research Associates, Inc. 2012. *The State of Minority- and Women-Owned Business Enterprise in Construction: Evidence from Houston*. Prepared for the City of Houston; BBC Research & Consulting. 2012. *Availability and Disparity Study*. Prepared for the California Department of Transportation.

The study team developed models for business owner earnings in 2012 through 2016 for Hawaii in the following industries:

- A model for business owner earnings in the construction industry that included 340 observations; and
- A model for business owner earnings in the food, beverage and selected retail industry that included 126 observations.

Because of small sample size the study team did not model business owner earnings for the engineering industry. Both models below use mutually exclusive race definitions.

Construction industry regression results, 2012 through 2016. Figure H-16 illustrates the results of the regression model for 2012 through 2016 earnings in the construction industry in Hawaii. The model indicated that no race- and gender-neutral factors significantly affected earnings of business owners in the construction industry in Hawaii.

Figure H-16.
Hawaii construction business owner earnings model, 2012–2016

Note:

*,** Denotes statistical significance at the 90% and 95% confidence level, respectively.

Source:

Keen Independent Research from 2012–2016 ACS. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Variable	Coefficient
Constant	7.319 **
Age	0.092
Age-squared	-0.001
Married	0.326
Speaks English well	0.546
Disabled	-0.063
Less than high school	-0.587
Some college	-0.136
Four-year degree	-0.054
Advanced degree	0.674
Asian Pacific or Native Hawaiian	-0.034
Other minority	-0.410

Food, beverage and selected retail industry regression results, 2012 through 2016. Figure H-17 presents the results of the regression model of business owner earnings specific to the Hawaii food, beverage and selected retail industry for 2012 through 2016. The model indicated that some race- and gender-neutral factors significantly affected earnings of business owners in the food, beverage and selected retail industry in Hawaii:

- Older business owners tended to have greater business earnings than younger business owners; however, the oldest individuals have slightly lower earnings; and
- Educational attainment impacted business earnings. Having less than a high school diploma was associated with greater business earnings; however, having a college or advanced degree was also associated with greater business earnings.

After accounting for race- and gender-neutral factors, the model indicated a statistically significant disparity in earnings for female business owners. Being a minority business owner did not have a statistically significant effect on earnings.

Figure H-17.
Hawaii food, beverage and selected retail
business owner earnings model, 2012–2016

Note:

*, ** Denotes statistical significance at the 90% and 95% confidence level, respectively.

Source:

Keen Independent Research from 2012–2016 ACS. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

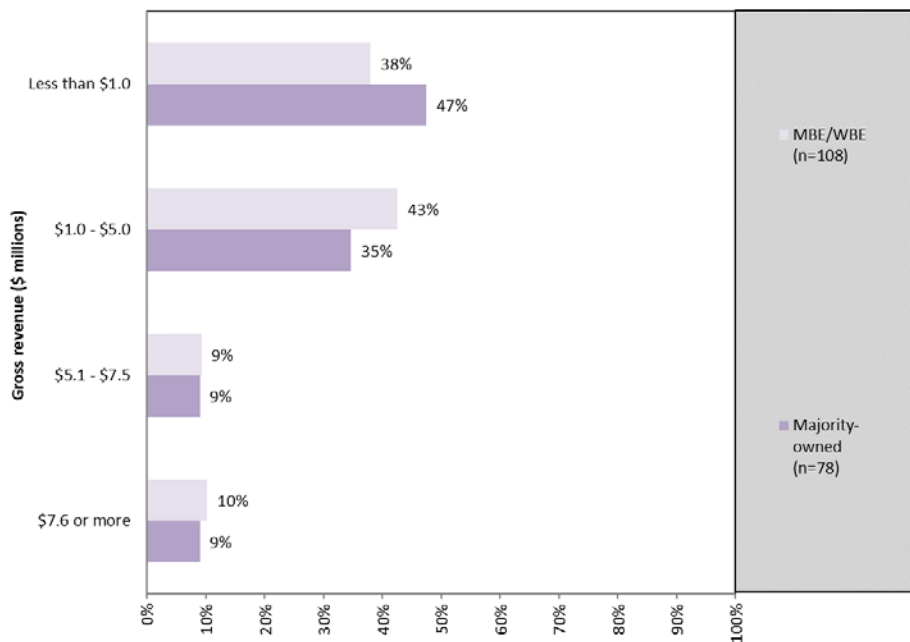
Variable	Coefficient
Constant	2.249
Age	0.245 *
Age-squared	-0.002 *
Married	-0.556
Disabled	0.107
Speaks English well	-0.604
Less than high school	1.537 *
Some college	1.211
Four-year degree	2.211 **
Advanced degree	1.961 **
Minority	0.753
Female	-0.811 *

Gross revenue of firms from availability interviews. As discussed previously, total revenue is a key measure of the economic success of businesses. In the availability telephone interviews that Keen Independent conducted (discussed in Appendix D), firm owners and managers were asked to identify the size range of their average annual gross revenue in the previous three years: from 2016 through 2018. Only firms with locations in Hawaii were included in the availability interviews. Note that variation in results may be due to low sample size, particularly with WBEs in the construction and engineering industries.

Construction. Figure H-18 presents the reported annual revenue for MBE, WBE and majority-owned construction businesses in the Hawaii availability interviews.

Majority-owned construction firms were somewhat more likely than minority- and women-owned firms in the industry to report average gross revenue of less than \$1 million. MBE/WBE and majority-owned construction firms were about as likely to indicate average gross revenue of more than \$5 million (19% and 18%, respectively).

Figure H-18.
Average annual gross revenue of company over previous three years,
Hawaii construction industry



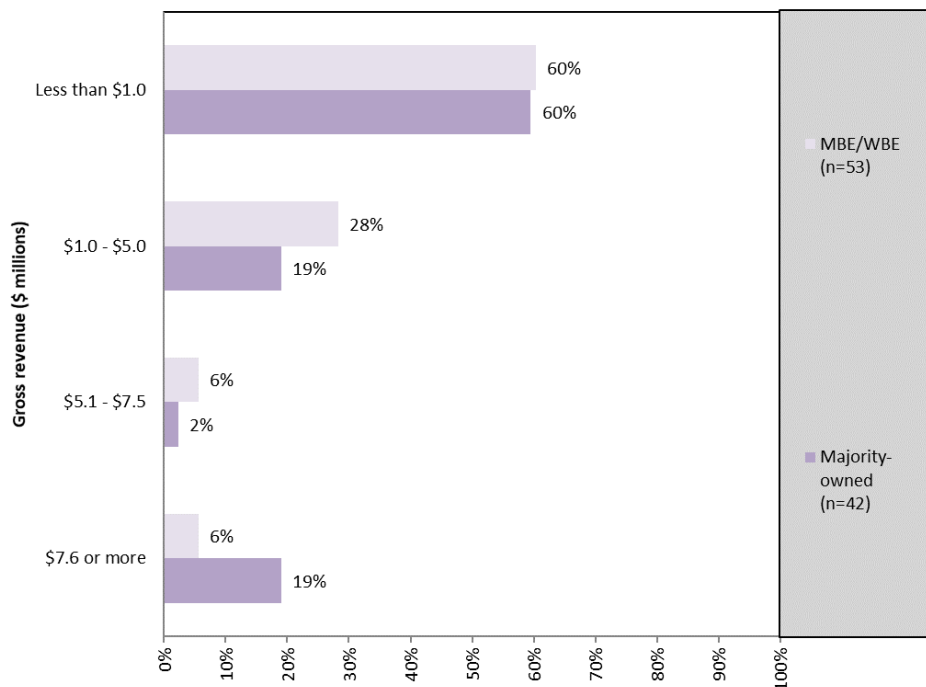
Note: “WBE” represents white women-owned firms, “MBE” represents minority-owned firms and “Majority-owned” represents non-Hispanic white male-owned firms.

Source: Keen Independent Research from 2018 availability interviews.

Engineering. Figure H-19 presents the reported annual revenue for MBEs, WBEs and majority-owned engineering businesses in Hawaii. MBEs and WBEs were more likely to report lower annual revenues compared to majority-owned businesses.

- MBE/WBEs and majority-owned engineering businesses reported similar average revenue of less than \$1 million per year (60%).
- Fewer MBE/WBE firms (6%) indicated average revenue of \$7.6 million or more when compared with majority-owned businesses (19%).

Figure H-19.
Average annual gross revenue of company over previous three years,
Hawaii engineering industry



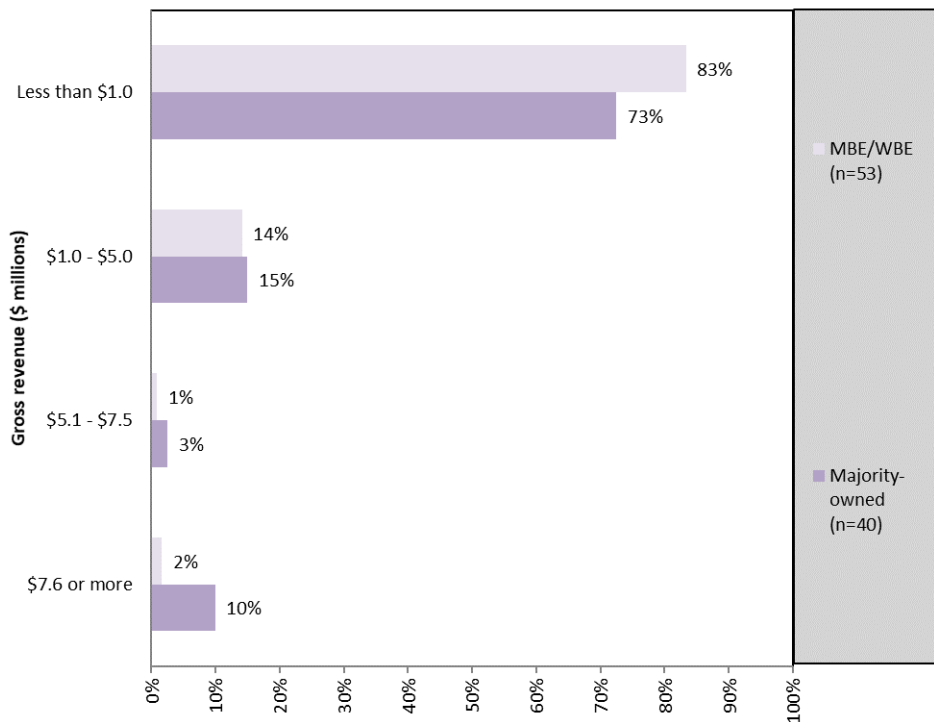
Note: “WBE” represents white women-owned firms, “MBE” represents minority-owned firms and “Majority-owned” represents non-Hispanic white male-owned firms.

Source: Keen Independent Research from 2018 availability interviews.

Food, beverage and selected retail. Figure H-20 presents reported annual gross revenue of firms in the airport food, beverage and selected retail industry. Majority-owned firms in the industry were more likely to report high average annual revenue relative to minority-owned food, beverage and selected retail firms in Hawaii.

- About 83 percent of MBE/WBE firms in the food, beverage and selected retail firms reported average revenue of less than \$1 million per year compared to 73 percent of majority-owned firms.
- MBE/WBEs (14%) were about as likely as majority-owned firms (15%) to report average revenue between \$1 million and \$5 million per year.
- Majority-owned firms (10%) were more likely to indicate annual revenue of \$7.6 million or more when compared with MBE/WBEs (2%).

Figure H-20.
Average annual gross revenue of company over previous three years,
Hawaii airport food, beverage and selected retail industry



Note: “WBE” represents white women-owned firms, “MBE” represents minority-owned firms and “Majority-owned” represents non-Hispanic white male-owned firms.

Source: Keen Independent Research from 2018 availability interviews.

Relative Bid Capacity

Some legal cases regarding race- and gender-conscious contracting programs have considered the importance of the “relative capacity” of businesses included in an availability analysis.²²

Keen Independent directly measured bid capacity in its availability analysis.²³

Through this analysis, Keen Independent was able to distinguish firms based on the largest contracts or subcontracts they had performed or bid on (i.e., “bid capacity” as used in this study). Although additional measures of capacity might be theoretically possible, the bid capacity concept can be articulated and quantified for individual firms for specific time periods.

Data. The availability analysis produced a database of construction and engineering businesses for which bid capacity could be examined. Keen Independent does not examine largest bids for goods firms, as these contracts are often bid as indefinite quantity contracts with unit prices. The study team also does not analyze bids for food, beverage and selected retail, as airport concessions are reported by gross receipts.

“Relative bid capacity” for a business is measured as the largest contract or subcontract that the business performed or reported that they had bid on within the seven years preceding when Keen Independent interviewed it. Note that results for WBEs may vary due to small sample size within each industry.

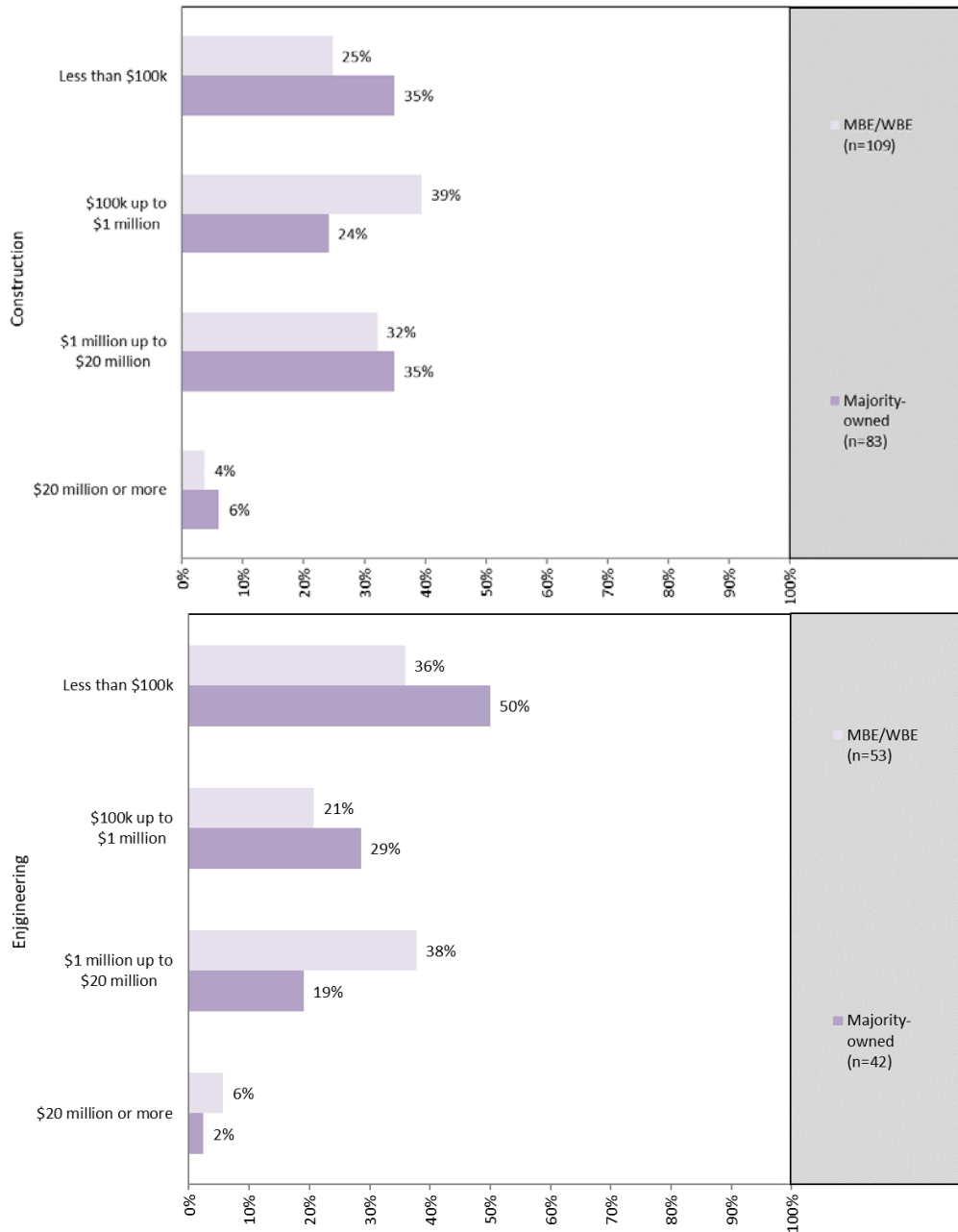
Results. As shown in Figure H-21, relatively few firms reported performing or bidding on contracts of \$20 million or more. Majority-owned firms in the construction industry were more likely than women- and minority-owned firms to indicate that the largest contract they had bid on or been awarded was \$100,000 or less. Majority-owned firms in the construction industry were also the most likely to report being awarded or bidding on a project of \$1 million or more.

Many firms in the engineering industry reported performing or bidding on contracts of less than \$100,000. Majority-owned firms were more likely than other groups to indicate being awarded or bidding on engineering projects between \$100,000 and \$1 million. Minority- and women-owned firms were more likely to report performing or bidding on contracts of \$1 million or more.

²² For example, see the decision of the United States Court of appeals for the Federal Circuit in *Rothe Development Corp. v. U.S. Department of Defense*, 545 F.3d 1023 (Fed. Cir. 2008).

²³ See Appendix D for details about the availability interview process.

Figure H-21.
 Largest contract bid on or awarded (bid capacity) by industry for construction and engineering firms in Hawaii



Note: "WBE" represents white women-owned firms, "MBE" represents minority-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

Source: Keen Independent Research from 2018 availability interviews.

Above median bid capacity. Keen Independent further explored bid capacity on a subindustry level. Subindustries such as construction management and development tend to involve relatively large projects. Other subindustries, such as roofing, typically involve smaller contracts. Figure H-22 reports the median relative bid capacity among Hawaii businesses in 20 subindustries. Results categorized companies according to their primary line of business.

Figure H-22.
Median relative capacity of Hawaii businesses by subindustry

Subindustry	Median bid capacity
Construction industry	
Wrecking and demolition	\$15 million
Asphalt, concrete or other paving	\$11 million to \$15 million
Steel work	\$11 million to \$15 million
Office and public building construction	\$7.5 million to \$11 million
Landscaping and related work including erosion control	\$7.5 million
General road construction and widening	\$5 million to \$7.5 million
Electrical work including lighting and signals	\$5 million to \$7.5 million
Roofing	\$5 million to \$7.5 million
Excavation, site prep, grading and drainage	\$5 million to \$7.5 million
Striping or pavement marking	\$5 million to \$7.5 million
Other concrete work	\$5 million to \$7.5 million
Plumbing, heating and air conditioning	\$1 million to \$5 million
Trucking and hauling	\$1 million to \$5 million
Other - construction	\$5 million to \$7.5 million
Architecture and engineering industry	
Construction management	\$7.5 million to \$11 million
Environmental consulting	\$5 million to \$7.5 million
Architecture and engineering	\$1 million to \$5 million
Inspection and testing	\$1 million to \$5 million
Surveying and mapping	\$1 million
Other - architecture and engineering	\$1 million to \$5 million

Source: Keen Independent Research from 2018 availability interviews.

Comparison of above median bid capacity for MBEs, WBEs and majority-owned firms. Based on the median bid capacity figures identified in Figure H-22, Keen Independent classified firms into “above median bid capacity,” “at median bid capacity,” and “below median bid capacity” for their subindustry. About 44 percent of MBE/WBEs had above median bid capacity for their subindustry compared 65 percent of majority-owned firms.

Figure H-23.
Percent of firms above median bid capacity for their subindustry, Hawaii, 2018



Source:
Keen Independent Research from 2018 availability interviews.

Availability Interview Results Concerning Potential Barriers

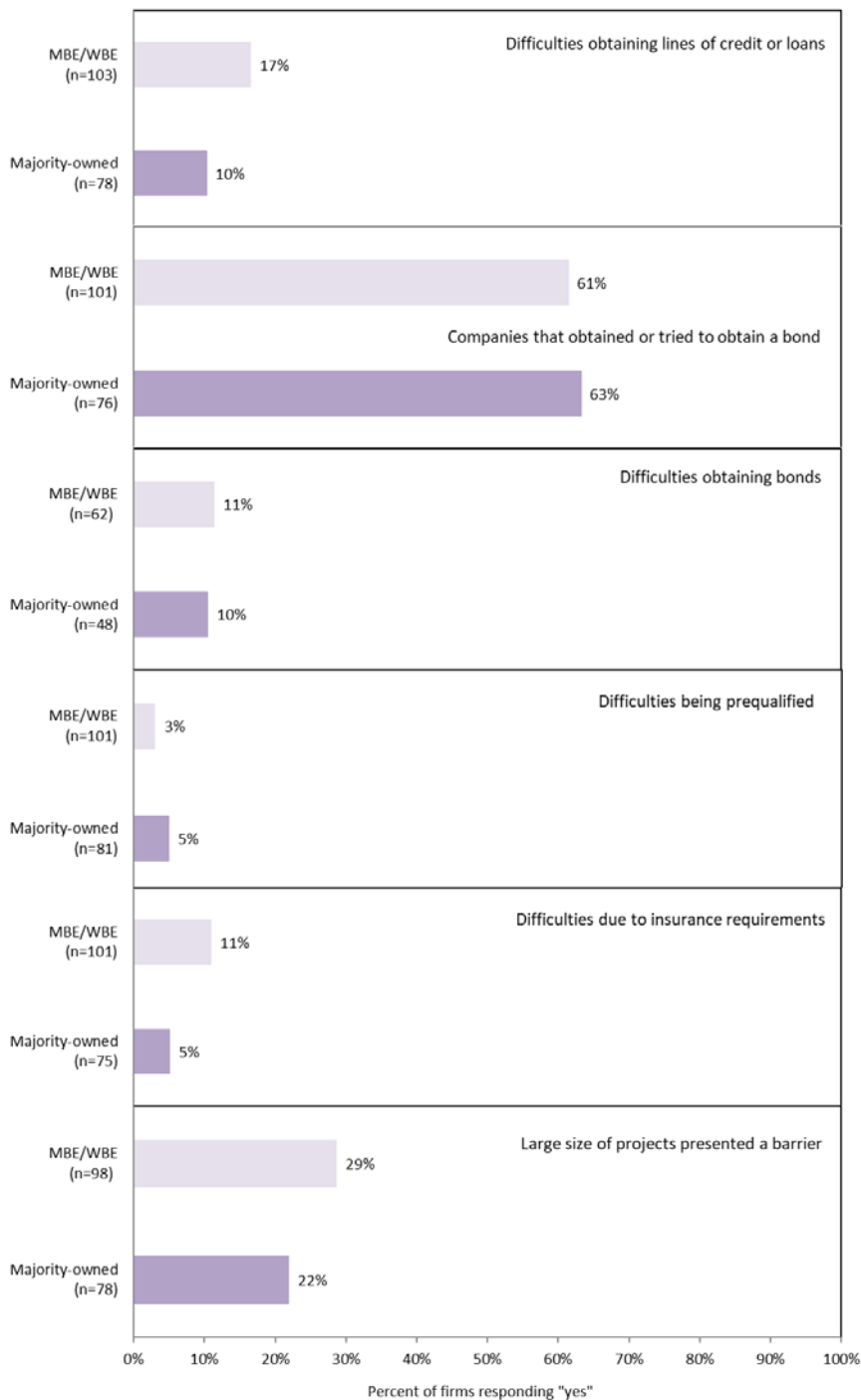
As part of the availability interviews conducted with Hawaii businesses, Keen Independent asked firm owners and managers if they had experienced barriers or difficulties associated with starting or expanding a business or with obtaining work. Appendix D explains the survey process and provides the survey questions.

Results for interview questions are discussed within the context of the relevant study industry; some questions were industry-specific and not asked of all available businesses. The analysis is grouped into three sets for each study industry: barriers relating to access to capital and project requirements, barriers to learning about bid opportunities, and barriers related to receipt of payment.

Construction. In the availability survey, construction firms were asked about obtaining financing and bonding, being prequalified for work, insurance requirements and whether project size was a barrier to bidding. Note that variations in WBE responses may be due to small sample size. Figure H-24 shows results.

- About 17 percent of MBE/WBE construction firms surveyed reported difficulties associated with obtaining lines of credit or loans compared with only 10 percent of majority-owned firms.
- Almost two-thirds of construction firms surveyed had obtained or tried to obtain bonds. There was little difference in the share of MBE/WBEs (11%) and majority-owned firms (10%) that indicated difficulties obtaining bonds.
- Three percent of MBE/WBE construction firms reported difficulties being prequalified for work, about the same as the 5 percent of majority-owned firms.
- A larger percentage of MBE/WBEs (11%) than majority-owned firms (5%) reported that insurance requirements on contracts were a barrier to bidding.
- MBE/WBEs (29%) were more likely than majority-owned construction firms (22%) to indicate that large contract size presented a barrier to bidding.

Figure H-24.
 Responses to availability interview questions concerning loans, bonding and insurance, prequalification and size of projects, Hawaii MBE, WBE and majority-owned construction firms

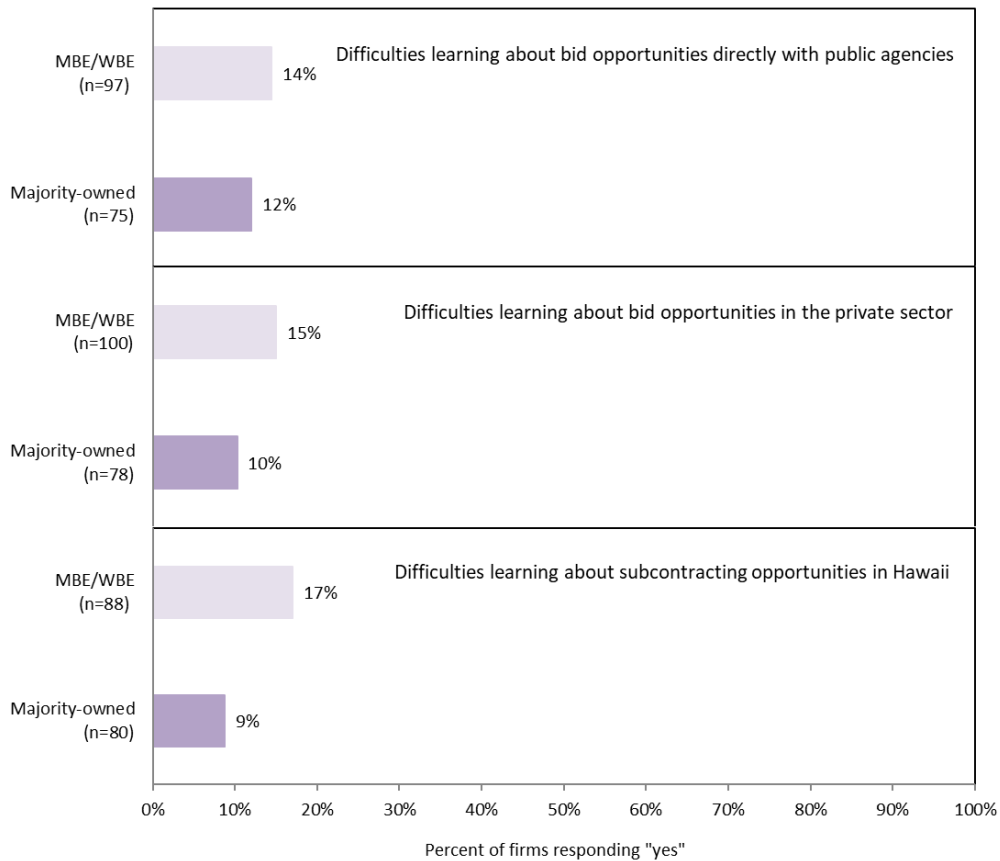


Note: “WBE” represents white women-owned firms, “MBE” represents minority-owned firms and “Majority-owned” represents non-Hispanic white male-owned firms.

Source: Keen Independent Research from 2018 availability interviews.

The survey also asked construction firms about any difficulties learning about bid opportunities. In general, relatively more MBE/WBEs than majority-owned firms indicated difficulties learning about bid opportunities directly with public agencies, learning about bid opportunities in the private sector and learning about subcontracting opportunities, as shown in Figure H-25.

Figure H-25.
Responses to availability interview questions concerning learning about work,
Hawaii MBE, WBE and majority-owned construction firms



Note: "WBE" represents white women-owned firms, "MBE" represents minority-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

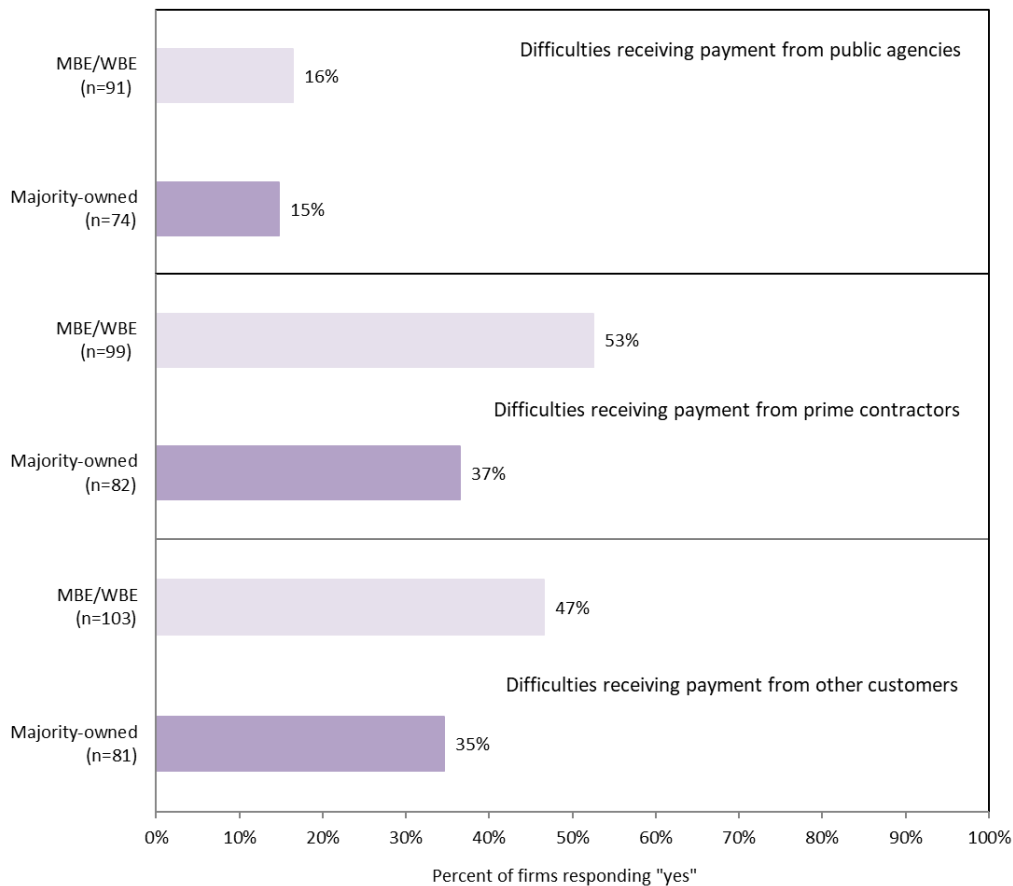
Source: Keen Independent Research from 2018 availability interviews.

Keen Independent also examined the proportion of firms reporting difficulty receiving payments, as shown in Figure H-26.

- About the same proportion of MBE/WBEs (16%) reported difficulty receiving payment from public agencies as majority-owned firms (15%).
- About one-half of MBE/WBE construction firms said that they had experienced difficulties receiving payment from prime contractors, compared with 37 percent of majority-owned construction firms.
- MBE/WBEs (47%) were more likely than majority-owned construction firms (35%) to indicate difficulties receiving payment from other customers.

Figure H-26.

Responses to availability interview questions concerning receipt of payment, Hawaii MBE, WBE and majority-owned construction firms



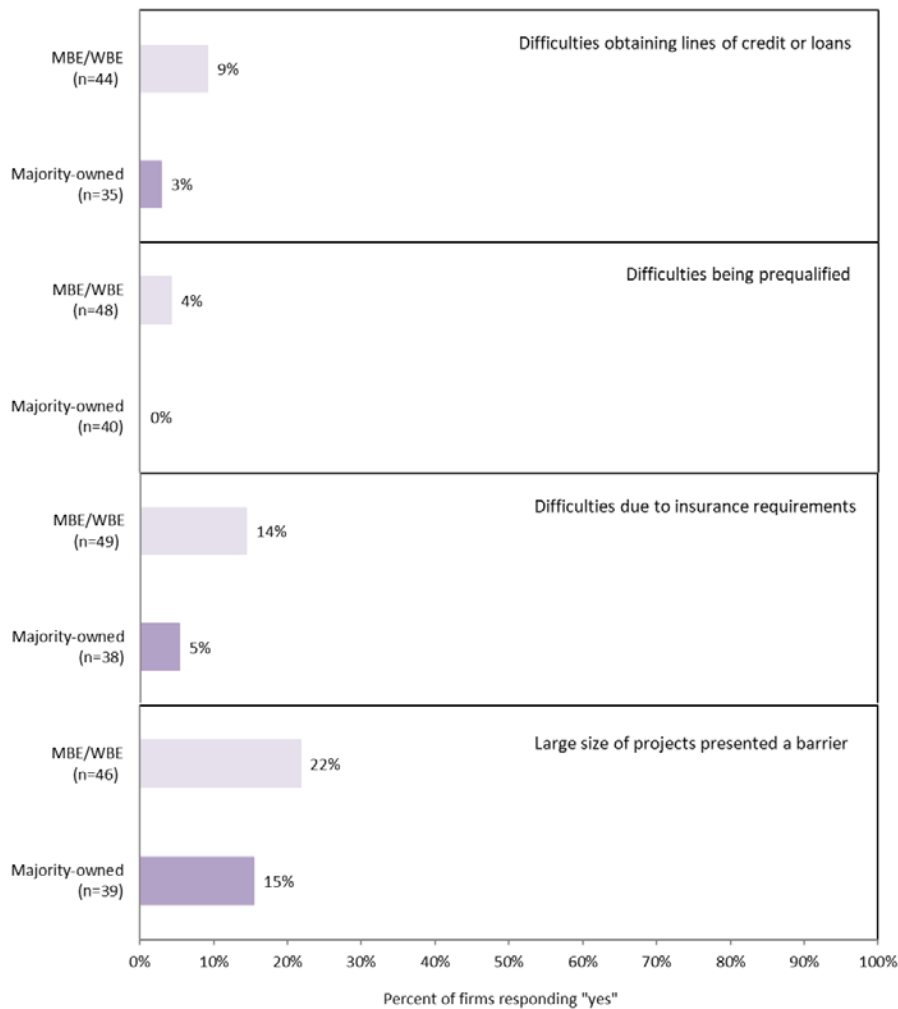
Note: "WBE" represents white women-owned firms, "MBE" represents minority-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

Source: Keen Independent Research from 2018 availability interviews.

Engineering. The study team asked similar questions about marketplace barriers in the availability interviews with engineering firms. These results are presented in Figure H-27. As with WBEs in the construction industry, results for WBEs in the engineering industry may vary due to small sample size.

- MBE/WBEs were more likely than majority-owned firms to report difficulties obtaining lines of credit or loans and difficulties being prequalified.
- More MBEs and WBEs (14%) reported difficulties due to insurance requirements when compared with majority-owned engineering firms (5%).
- MBEs and WBEs (22%) were more likely to report large project size as a barrier compared with majority-owned firms (15%).

Figure H-27.
Responses to availability interview questions concerning loans, prequalification, insurance and size of projects, Hawaii MBE, WBE and majority-owned engineering firms



Note: "WBE" represents white women-owned firms, "MBE" represents minority-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

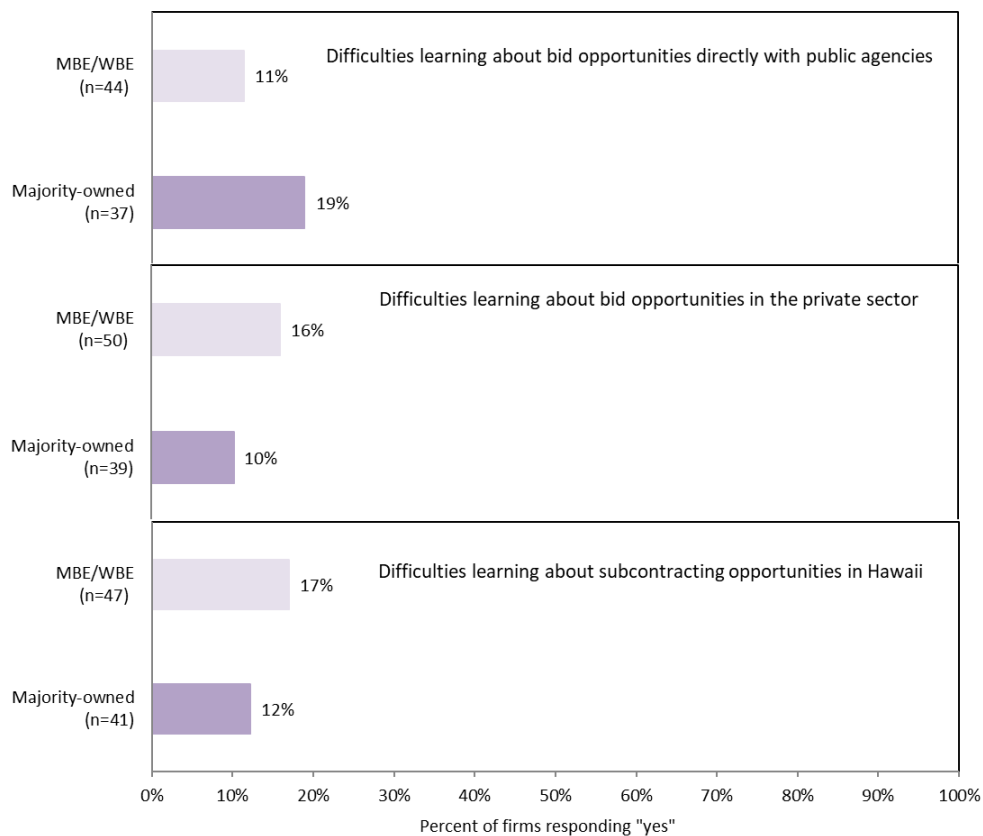
Source: Keen Independent Research from 2018 availability interviews.

The survey also included questions about learning about bid opportunities. Responses are shown in Figure H-28.

- About 19 percent of majority-owned engineering firms reported difficulties learning about bid opportunities directly with public agencies, compared with 11 percent of MBEs and WBEs.
- WBEs and MBEs (16%) were more likely than majority-owned firms (10%) in the industry to indicate difficulties learning about bid opportunities in the private sector.
- Somewhat more WBEs and MBEs (17%) indicated difficulties learning about subcontracting opportunities in Hawaii when compared with majority-owned (12%) firms in the engineering industry.

Figure H-28.

Responses to availability interview questions concerning learning about work, Hawaii MBE, WBE and majority-owned engineering firms



Note: "WBE" represents white women-owned firms, "MBE" represents minority-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

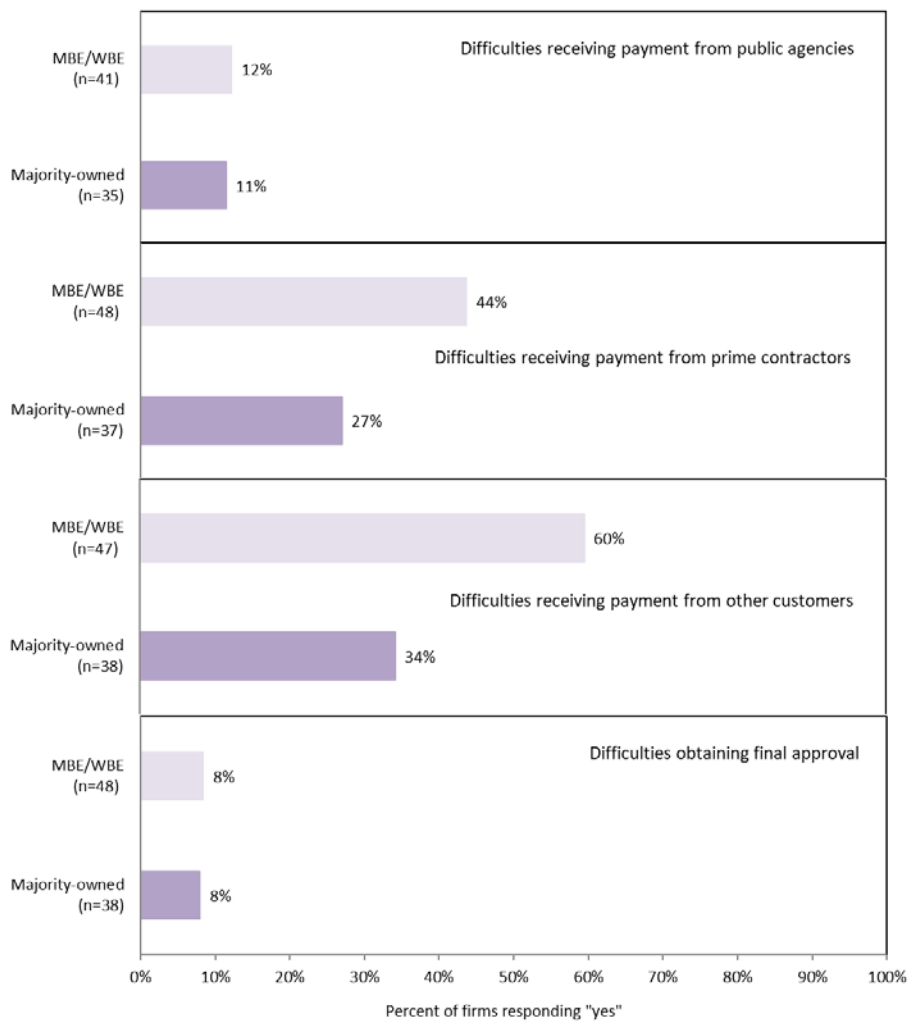
Source: Keen Independent Research from 2018 availability interviews.

Figure H-29 provides responses of engineering firms for questions relating to receipt of payment.

- Twelve percent of MBE and WBE engineering firms reported difficulties receiving payment from public agencies, similar to that of majority-owned firms (11%).
- MBE and WBE firms (44%) in the industry were more likely to indicate difficulties receiving payment from prime contractors than majority-owned firms (27%).
- More MBEs and WBEs (60%) said that they had difficulty receiving payment from other customers when compared with majority-owned firms (34%).
- When it came to obtaining final approval, the same percentage of MBE/WBEs and majority-owned firms reported difficulties (8%).

Figure H-29.

Responses to availability interview questions concerning receipt of payments and approval of work, Hawaii MBE, WBE and majority-owned engineering firms



Note: "WBE" represents white women-owned firms, "MBE" represents minority-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

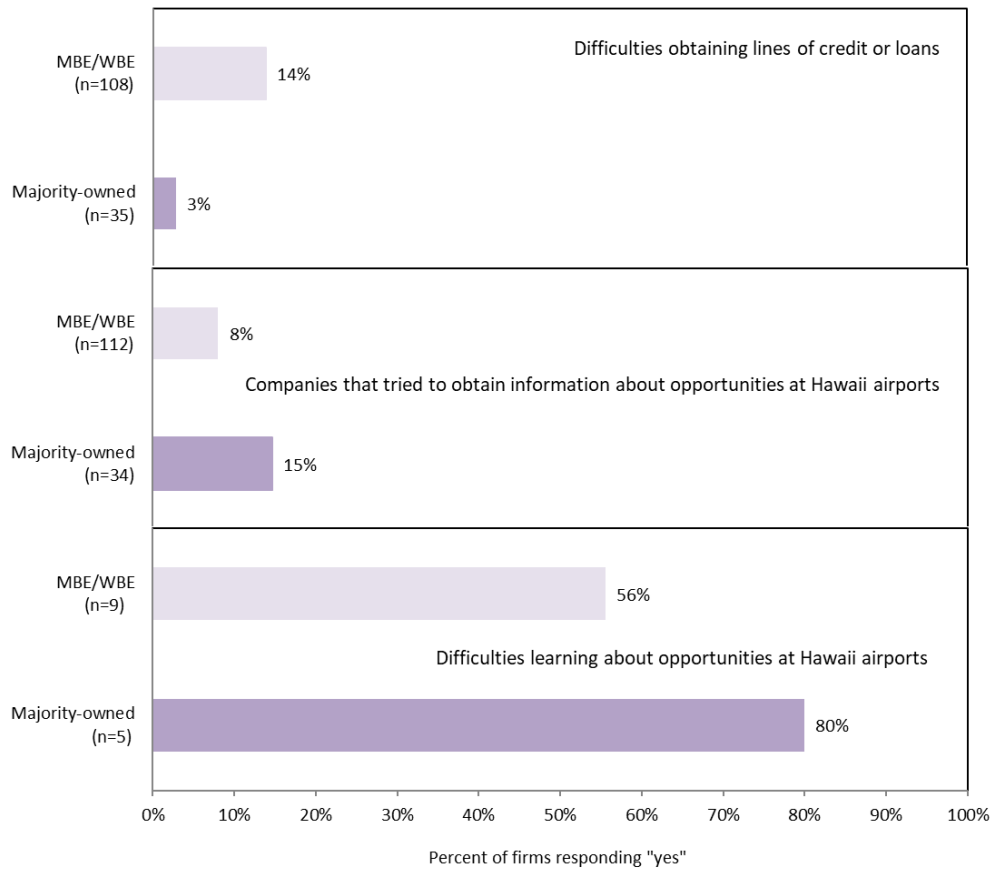
Source: Keen Independent Research from 2018 availability interviews.

Food, beverage and selected retail. As with construction and engineering, Keen Independent examined any difficulties relating to access to capital and difficulties in learning about opportunities for food, beverage and selected retail firms in Hawaii. Figure H-30 provides these results.

- Relatively more MBE/WBEs (14%) reported difficulties obtaining lines of credit or loans when compared with majority-owned (3%) food, beverage and selected retail firms.
- More majority-owned firms (15%) than MBE/WBEs (8%) indicated that they had tried to obtain information about opportunities in Hawaii airports. Of those firms, a substantial portion of MBEs and WBEs (56%) and majority-owned firms (80%) reported difficulties learning about opportunities at Hawaii airports.

Figure H-30.

Responses to availability interview questions concerning loans, bonding, insurance and size of projects, Hawaii MBE, WBE and majority-owned food, beverage and selected retail firms



Note: "WBE" represents white women-owned firms, "MBE" represents minority-owned firms and "Majority-owned" represents non-Hispanic white male-owned firms.

WBE was excluded from results for "Difficulties learning about opportunities at Hawaii airports" due to small sample size.

Source: Keen Independent Research from 2018 availability interviews.

Summary

The study team used the 2010 SBA study of minority business dynamics to examine business closures, expansions and contractions. That study found that, between 2002 and 2006 in Hawaii:

- Among the racial/ethnic groups examined, Hispanic American-owned firms in all industries were the most likely to close and contract.
- African American-owned businesses were the most likely to expand and the least likely to contract.
- Asian American-owned businesses were more likely to contract and less likely to expand than non-Hispanic white firms. They were also the least likely to close.

The study team examined several different datasets to analyze business receipts and earnings for minority- and female-owned businesses.

- Analysis of 2012 SBO data indicated that, in Hawaii, average receipts for most groups of minority- and women-owned businesses were lower compared to those of nonminority- and male-owned businesses in the study industries.
- Data from 2012–2016 ACS indicated that, in Hawaii:
 - Construction businesses owned by minorities other than Asian Pacific or Native Hawaiians had statistically significant lower earnings on average than white business owners; and
 - Concessions industry business owned by women had statistically significantly lower earnings than male business owners.
- Regression analyses using U.S. Census Bureau data for business owner earnings indicated that there was a statistically significant effect of gender on business earnings in the concessions industry. After statistically controlling for certain gender-neutral factors, being female was associated with lower business earnings in Hawaii in 2012 through 2016.
- Data from availability surveys conducted for this study showed that in both the engineering and the concessions in Hawaii, MBE/WBEs (combined) were more likely to be low-revenue firms compared with majority-owned firms.

When asked about the largest contract firms had been awarded or bid on, MBE/WBE survey respondents in the construction and engineering industries were more likely than majority-owned firms to report an amount below the median response for their subindustry.

Answers to questions concerning marketplace barriers in the availability survey indicated the relatively more MBE/WBEs than majority-owned firms in both the construction and engineering industries face the following barriers:

- Obtaining loans and lines of credit;
- Being prequalified for work (among engineering firms);
- Insurance requirements;
- Large project sizes;
- Learning about bid opportunities in the private sector as well as subcontracting opportunities; and
- Receiving payment from prime contractors and other customers.

In summary, analysis of many different data sources and measures indicates evidence of disparities in marketplace outcomes and barriers for minority- and women-owned businesses in Hawaii.

APPENDIX I.

Description of Data Sources for Marketplace Analyses

To perform the marketplace analyses presented in Appendices E through H, the study team used data from a range of sources, including:

- The 2012–2016 five-year American Community Survey (ACS), conducted by the U.S. Census Bureau;¹
- The 2012 Survey of Business Owners (SBO), conducted by the U.S. Census Bureau;
- The 2015 Annual Survey of Entrepreneurs (ASE), conducted by the U.S. Census Bureau; and
- Home Mortgage Disclosure Act (HMDA) data provided by the Federal Financial Institutions Examination Council (FFIEC).

The following sections provide further detail on each data source, including how the study team used it in its marketplace analyses. (See Appendix D for a description of the availability survey.)

U.S. Census Bureau PUMS Data

Focusing on the construction, architecture and engineering, and the food, beverage and selected retail industries, the study team used PUMS data to analyze:

- Demographic characteristics;
- Measures of financial resources; and
- Self-employment (business ownership).

PUMS data offer several features ideal for the analyses reported in this study, including historical cross-sectional data, stratified national and local samples, and large sample sizes that enable many estimates to be made with a high level of statistical confidence, even for subsets of the population (e.g., racial/ethnic and occupational groups).

The study team obtained selected Census and ACS data from the Minnesota Population Center's Integrated Public Use Microdata Series (IPUMS). The IPUMS program provides online access to customized, accurate datasets.² For the analyses contained in this report, the study team used the 2012–2016 five-year ACS sample.

¹ The 2013-2017 five-year ACS data were not released until December 2018. Because Keen Independent began marketplace analyses before their release, 2013-2017 ACS data were not used. The study team used the most current data available when marketplace analysis began.

² Ruggles, S., Flood, S., Goeken, R., Grover, J., Meyer, E., Pacas, J., & Sobek, M. IPUMS USA: Version 8.0 [dataset]. Minneapolis, MN: IPUMS 2018. <https://doi.org/10.18128/D010.V8.0>

2012–2016 ACS. The study team examined 2012–2016 ACS data obtained through IPUMS. The U.S. Census Bureau conducts the ACS which uses monthly samples to produce annually updated data for the same small areas as the 2000 Census long form.³ Since 2005, the Census has conducted monthly surveys based on a random sample of housing units in every county in the U.S. (along with the District of Columbia and Puerto Rico). Currently, these surveys cover roughly 1 percent of the population per year. The 2012–2016 ACS five-year estimates represent average characteristics over the five-year period of time, and correspond to roughly 5 percent of the population. For the state of Hawaii, the 2012–2016 ACS dataset includes 71,133 observations which — according to person-level weights — represent 1,413,673 individuals.

Categorizing individual race/ethnicity. To define race/ethnicity, the study team used the IPUMS race/ethnicity variables — RACED and HISPAN — to categorize individuals into seven groups:

- White;
- Hispanic American;
- African American;
- Asian Pacific or Native Hawaiian (including Chinese American, Filipino American, Japanese American and other Asian and Pacific Islanders);
- Subcontinent Asian American;
- American Indian or Alaska Native; and
- Other minority (unspecified).

To accurately analyze the unique multi-racial and ethnic background of Hawaii’s population, the study team used two different race/ethnicity definitions in the marketplace analysis: non-mutually exclusive definitions and mutually exclusive definitions.

The non-mutually exclusive race/ethnicity definitions included all individuals who identified as that particular race/ethnicity, regardless of other race/ethnicities identified by that individual. A significant portion of the population in Hawaii identifies as more than one race/ethnicity. These larger sample sizes allow for more specificity for some non-mutually exclusive race/ethnicity calculations. Within the Asian Pacific or Native Hawaiian category, non-mutually exclusive calculations were found for Native Hawaiian, Chinese American, Filipino American, Japanese American and other Asian and Pacific Islander when possible.

The study team created the mutually exclusive race definitions using a rank ordering methodology similar to that used in the 2000 Census data dictionary. An individual was considered “non-Hispanic white” if they did not report Hispanic ethnicity and indicated being white only — not in combination with any other race group. Using the rank ordering methodology, an individual who identified multiple races or ethnicities was placed in the reported category with the highest ranking in the study team’s ordering. All self-identified Asian Pacific and Native Hawaiians were considered Asian Pacific and Native Hawaiian, regardless of any other race or ethnicity identification. After Asian Pacific and

³ U.S. Census Bureau. *American Community Survey Design and Methodology (January 2014)*. Washington D.C.: U.S. Government Printing, 2014. Available at https://www2.census.gov/programs-surveys/acs/methodology/design_and_methodology/acs_design_methodology_report_2014.pdf

Native Hawaiians (which was first), the rank was then American Indian or Alaska Native, Subcontinent Asian American, African American, other (non-specified) minority, followed by Hispanic American. For example, if an individual identified themselves as “Hispanic,” that person was placed in the Hispanic American category. If the individual identified themselves as “Hispanic” in combination with “Filipino,” the individual was considered Asian Pacific or Native Hawaiian.

- The Asian Pacific or Native Hawaiian category included the following race groups: Burmese, Cambodian, Chamorro, Chinese, Fijian, Filipino, Guamanian, Hmong, Indonesian, Japanese, Korean, Laotian, Malaysian, Mongolian, Native Hawaiian, Samoan, Taiwanese, Thai, Tongan and Vietnamese. This category also included other Polynesian, Melanesian and Micronesian races, as well as individuals identified as Pacific Islanders.
- The Subcontinent Asian American category included: Asian Indian (Hindu), Bangladeshi, Bhutanese, Nepalis, Pakistani and Sri Lankan. Individuals who identified themselves as “Asian,” but who were not clearly categorized as Subcontinent Asian, were placed in the Asian Pacific American group.
- The American Indian and Alaska Native group included those race groups as well as Latin American Indian groups.
- If an individual was identified with any of the above groups and an “other race” group, the individual was categorized into the known category. Individuals identified as “other race,” “Hispanic and other race” or “white and other race” were categorized as “other minority.”
- The Hispanic group included individuals that identified as Hispanic/Spanish/Latino origin. This group also included people of Portuguese descent (identified using the IPUMS detailed ancestry variables, ANCESTR1D and ANCESTR2D).

Education variables. The study team used the variable indicating respondents’ highest level of educational attainment (EDUCD) to classify individuals into four categories: less than high school, high school diploma (or equivalent), some college or associate degree, and bachelor’s degree or higher.⁴

Home ownership and home value. Rates of home ownership were analyzed using the RELATED variable to identify heads of household and the OWNERSHPD variable to define tenure. Heads of households living in dwellings owned free and clear, and dwellings owned with a mortgage or loan (OWNERSHPD codes 12 or 13) were considered homeowners. Median home values are estimated using the VALUEH variable, which reports the value of housing units in contemporary dollars. In the 2012–2016 ACS, home value is a continuous variable (rounded to the nearest \$1,000) and median estimation is straightforward.

⁴ In the 1940–1980 samples, respondents were classified according to the highest year of school completed (HIGRADE). In the years after 1980, that method was used only for individuals who did not complete high school, and all high school graduates were categorized based on the highest degree earned (EDUC99). The EDUCD variable merges two different schemes for measuring educational attainment by assigning to each degree the typical number of years it takes to earn it.

Definition of workers. Analyses involving worker class, industry and occupation include workers 16 years of age or older who are employed within the industry or occupation in question. Analyses involving all workers regardless of industry, occupation or class include both employed persons and those who are unemployed but seeking work.

Business ownership. The study team used the Census-detailed “class of worker” variable (CLASSWKD) to determine self-employment. The variable classifies individuals into one of eight categories, shown in Figure I-1. The study team counted individuals who reported being self-employed — either for an incorporated or a non-incorporated business — as business owners.

Figure I-1.
Class of worker variable
code in the 2012–2016
ACS

Source:
Keen Independent Research from
the IPUMS program:
<http://usa.ipums.org/usa/>.

Description	2012–2016 ACS CLASSWKRD codes
N/A	0
Self-employed, not incorporated	13
Self-employed, incorporated	14
Wage/salary, private	22
Wage/salary at nonprofit	23
Federal government employee	25
State government employee	27
Local government employee	28
Unpaid family worker	29

Business earnings. The study team used the Census “business earnings” variable (INCBUS00) to analyze business income by race/ethnicity and gender. The study team included business owners age 16 and over with positive earnings in the analyses.

Study industries. The marketplace analyses focus on three industries: construction, architecture and engineering, and food, beverage and selected retail. The study team used the IND variable to identify individuals as working in one of these industries. That variable includes several hundred industry and sub-industry categories. Figure I-2 identifies the IND codes used to define each study area.

Figure I-2.
2012–2016 Census industry codes used for construction, professional services, goods, and other services

Study industry	2012–2016 ACS IND codes	Description
Construction	0770	Construction industry
Architecture and engineering	7290	Architectural, engineering and related services
Food, beverage and selected retail	5470, 5570, 7080, 8680, 9090	Retail florists; gift, novelty, and souvenir shops; automotive equipment rental and leasing; restaurants and other food services; other personal services

Source: Keen Independent Research from the IPUMS program: <http://usa.ipums.org/usa/>.

Industry occupations. The study team also examined workers by occupation within the construction industry using the PUMS variable OCC. Figure I-3 summarizes the 2012–2016 ACS OCC codes used in the study team’s analyses.

Figure I-3.
2012–2016 ACS occupation codes used to examine workers in construction

2012–2016 ACS occupational title and code	Job description
Construction managers 2012-16 Code: 20, 220	Plan, direct, coordinate or budget, usually through subordinate supervisory personnel, activities concerned with the construction and maintenance of structures, facilities and systems. Participate in the conceptual development of a construction project and oversee its organization, scheduling and implementation. Include specialized construction fields, such as carpentry or plumbing. Include general superintendents, project managers and constructors who manage, coordinate and supervise the construction process.
Cost estimators 2012-16 Code: 600	Collect and analyze data in order to estimate the time, money, materials, and labor required to manufacture a product, construct a building, or provide a service.
First-line supervisors of construction trades and extraction workers 2012-16 Code: 6200	Directly supervise and coordinate the activities of construction or extraction workers.
Brickmasons, blockmasons and stonemasons 2012-16 Code: 6220	Lay and bind building materials, such as brick, structural tile, concrete block, cinder block, glass block and terra-cotta block. Construct or repair walls, partitions, arches, sewers and other structures. Build stone structures, such as piers, walls and abutments, and lay walks, curbstones or special types of masonry for vats, tanks and floors.
Carpenters 2012-16 Code: 6230	Construct, erect, install or repair structures and fixtures made of wood, such as concrete forms, building frameworks, including partitions, joists, studding, rafters, wood stairways, window and door frames, and hardwood floors.
Carpet, floor, and tile installers and finishers 2012-16 Code: 6240	Apply shock-absorbing, sound-deadening or decorative coverings to floors. Lay carpet on floors and install padding and trim flooring materials. Scrape and sand wooden floors to smooth surfaces, apply coats of finish. Apply hard tile, marble, wood tile, walls, floors, ceilings and roof decks.
Cement masons, concrete finishers and terrazzo workers 2012-16 Code: 6250	Smooth and finish surfaces of poured concrete, such as floors, walks, sidewalks or curbs using a variety of hand and power tools. Align forms for sidewalks, curbs or gutters; patch voids; use saws to cut expansion joints. Terrazzo workers apply a mixture of cement, sand, pigment or marble chips to floors, stairways and cabinet fixtures.
Construction laborers 2012-16 Code: 6260	Perform tasks involving physical labor at building, highway and heavy construction projects, tunnel and shaft excavations, and demolition sites. May operate hand and power tools of all types: air hammers, earth tampers, cement mixers, small mechanical hoists, surveying and measuring equipment, and a variety of other equipment and instruments. May clean and prepare sites, dig trenches, set braces to support the sides of excavations, erect scaffolding, clean up rubble and debris, and remove asbestos, lead and other hazardous waste materials. May assist other craft workers. Excludes construction laborers who primarily assist a particular craft worker.

Figure I-3. (continued)

2012–2016 ACS occupation codes used to examine workers in construction

2012–2016 ACS occupational title and code	Job description
<p>Miscellaneous construction equipment operators, including pile-driver operators 2012-16 Code: 6320</p>	<p>Operate one or several types of power construction equipment, such as motor graders, bulldozers, scrapers, compressors, pumps, derricks, shovels, tractors or front-end loaders to excavate, move and grade earth, erect structures, or pour concrete or other hard surface pavement. Operate pile drivers mounted on skids, barges, crawler treads or locomotive cranes to drive pilings for retaining walls, bulkheads and foundations of structures, such as buildings, bridges and piers.</p>
<p>Drywall installers, ceiling tile installers and tapers 2012-16 Code: 6330</p>	<p>Apply plasterboard or other wallboard to ceilings or interior walls of buildings, mount acoustical tiles or blocks, strips or sheets of shock-absorbing materials to ceilings and walls of buildings to reduce or reflect sound.</p>
<p>Electricians 2012-16 Code: 6355</p>	<p>Install, maintain and repair electrical wiring, equipment and fixtures. Ensure that work is in accordance with relevant codes. May install or service street lights, intercom systems or electrical control systems. Exclude “Security and Fire Alarm Systems Installers.”</p>
<p>Painters, construction and maintenance 2012-16 Code: 6420</p>	<p>Paint walls, equipment, buildings, bridges and other structural surfaces, using brushes, rollers and spray guns. Remove old paint to prepare surfaces prior to painting and mix colors or oils to obtain desired color or consistency.</p>
<p>Pipelayers, plumbers, pipefitters and steamfitters 2012-16 Code: 6440</p>	<p>Lay pipe for storm or sanitation sewers, drains and water mains. Perform any combination of the following tasks: grade trenches or culverts, position pipe or seal joints. Excludes “Welders, Cutters, Solderers and Brazers.” Assemble, install, alter and repair pipelines or pipe systems that carry water, steam, air or other liquids or gases. May install heating and cooling equipment and mechanical control systems. Includes sprinklerfitters.</p>
<p>Roofers 2012-16 Code: 6515</p>	<p>Cover roofs of structures with shingles, slate, asphalt, aluminum and wood. Spray roofs, sidings and walls with material to bind, seal, insulate or soundproof sections of structures.</p>
<p>Heating, air conditioning, and refrigeration mechanics and installers 2012-16 Code: 7315</p>	<p>Install or repair heating, central air conditioning, or refrigeration systems, including oil burners, hot-air furnaces, and heating stoves.</p>
<p>Driver/sales workers and truck drivers 2012-16 Code: 9130</p>	<p><i>Driver/sales workers</i> drive trucks or other vehicles over established routes or within an established territory and sell goods, such as food products, including restaurant take-out items, or pick up and deliver items, such as laundry. May also take orders and collect payments. Include newspaper delivery drivers. <i>Truck drivers (heavy)</i> drive a tractor-trailer combination or a truck with a capacity of at least 26,000 GVW, to transport and deliver goods, livestock or materials in liquid, loose or packaged form. May be required to unload truck. May require use of automated routing equipment. Requires commercial drivers’ license. <i>Truck drivers (light)</i> drive a truck or van with a capacity of under 26,000 GVW, primarily to deliver or pick up merchandise or to deliver packages within a specified area. May require use of automatic routing or location software. May load and unload truck. Excludes “Couriers and Messengers.”</p>

Source: Keen Independent Research from the IPUMS program: <http://usa.ipums.org/usa/>.

Survey of Business Owners (SBO)

The study team used data from the 2012 SBO to analyze mean annual firm receipts. The SBO is conducted every five years by the U.S. Census Bureau. Data for the most recent publication of the SBO was collected in 2012. Response to the survey is mandatory, which ensures comprehensive economic and demographic information for business and business owners in the U.S. All tax-filing businesses and nonprofits were eligible to be surveyed, including firms with and without paid employees. In 2012, approximately 1.75 million firms were surveyed. The study team examined SBO data relating to the number of firms, number of firms with paid employees and total receipts. That information is available by geographic location, industry, gender, race and ethnicity.

The SBO uses the 2002 North American Industry Classification System (NAICS) to classify industries. The study team analyzed data for firms in all industries and for firms in selected industries that corresponded closely to construction, architecture and engineering, and food, beverage and selected retail.

To categorize the business ownership of firms reported in the SBO, the Census Bureau uses standard definitions for women-owned and minority-owned businesses. A business is defined as women-owned if more than half of the ownership and control is by women. Firms with joint male-/female-ownership were tabulated as an independent gender category. A business is defined as minority-owned if more than half of the ownership and control is by African Americans, Asian Pacific or Native Hawaiians, Subcontinent Asian Americans, Hispanic Americans, American Indian or Alaska Native or by another minority group. Respondents had the option of selecting one or more racial groups when reporting business ownership, and ethnicity was reported separately. As such, all SBO calculations use non-mutually exclusive race/ethnicity definitions. The study team reported business receipts for the following racial, ethnic and gender groups according to Census Bureau definitions:

- Racial groups — African Americans, Asian Americans, Asian Pacific or Native Hawaiians, Subcontinent Asian American, American Indian or Alaska Native, other minority groups and whites.

The Asian Pacific and Native Hawaiian racial group includes Native Hawaiians, Chinese Americans, Filipino Americans, Japanese Americans and other Asian and Pacific Islanders. These races are examined individually as well as consolidated into one racial group.

- Ethnic groups — Hispanic Americans and non-Hispanics.
- Gender groups — men and women.

Annual Survey of Entrepreneurs (ASE) Data

Keen Independent analyzed selected economic and demographic characteristics for business owners collected through the ASE. The ASE includes nonfarm businesses that file tax forms as individual proprietorships, partnerships or any type of corporation, have paid employees, and have receipts of \$1,000 or more. Unlike the SBO, the ASE samples only firms with paid employees (the SBO includes both employer firms and non-employer firms). The 2015 ASE sampled approximately 290,000 businesses that operated at any time during that year. Response to the survey is mandatory, ensuring comprehensive data for surveyed businesses and business owners.

The ASE collects information on businesses as well as business ownership (defined as having 51 percent or more of the stock or equity in the business). Data regarding demographic characteristics of business owners include gender, ethnicity, race and veteran status. Race/ethnicity and gender categories in the ASE are the same as those used in SBO and Census data. Because ethnicity is reported separately and respondents have the option of selecting one or more racial groups when reporting business ownership, all ASE calculations use non-mutually exclusive race/ethnicity definitions.

Topics within the ASE include some business information covered in the SBO, as well as information relating to the businesses' sources of capital and financing. Keen Independent used ASE data to analyze main sources of capital used to start or acquire a firm, firms that secured business loans from a bank or financial institution, firms that avoided additional financing because they did not think the business would be approved by lender, and firms that cited access to financial capital as negatively impacting the profitability of their business. Analyses included comparisons across race/ethnicity and gender groups.

Home Mortgage Disclosure Act (HMDA) Data

The study team analyzed mortgage lending in the state of Hawaii using HMDA data that the Federal Financial Institutions Examination Council (FFIEC) provides. HMDA data provide information on mortgage loan applications that financial institutions, savings banks, credit unions and some mortgage companies receive. Those data include information about the location, dollar amount and types of loans made, as well as race/ethnicity, income and credit characteristics of loan applicants. Data are available for home purchase, home improvement and refinance loans.

Depository institutions were required to report 2017 HMDA data if they had assets of more than \$44 million on the preceding December 31 (\$36 million for 2007 and \$41 million for 2012), had a home or branch office in a metropolitan area, and originated at least one home purchase or refinance loan in the reporting calendar year. In 2017 a new standard narrowed the scope of depository institutions that were required to report HMDA data. Only depository institutions that met the requirements described above and also originated at least 25 home purchase loans (including refinancing of home purchase loans) in each of the two preceding calendar years had to report data.

Non-depository mortgage companies were required to report HMDA if they were for-profit institutions, had home purchase loan originations (including refinancing) either (a) exceeding 10 percent of all loan originations in the past year, or (b) exceeding \$25 million, had a home or branch office in an MSA (or received applications for, purchase or originate five or more mortgages in an MSA), and either had more than \$10 million in assets or made at least 100 home purchase or refinance loans in the preceding calendar year.

Information regarding loan rates are not reported for all HMDA data. Instead, loan rates that meet certain criteria must be reported and are then included in the HMDA data. In 2008, the FFIEC adjusted the requirements outlining which HMDA data were required to report loan rates.⁵ The result of this change was that fewer loan rate data had to be reported. For HMDA data for the state of Hawaii in 2012 and 2017, the majority of loan rate information data are missing (99.36% and 99.56%, respectively). As such, Keen Independent's analysis regarding loan rates also included more complete HMDA data from 2007.

The study team used HMDA data to examine differences in racial and ethnic groups for loan denial rates for 2012 and 2017, and subprime lending rates for 2007. Note that the HMDA data represent the entirety of home mortgage loan applications reported by participating financial institutions in each year examined. Those data are not a sample. Appendix G provides a detailed explanation of the methodology that the study team used for measuring loan denial and subprime lending rates.

⁵ Federal Deposit Insurance Corporation. (2009). Supervisory Insights. Retrieved from https://www.fdic.gov/regulations/examinations/supervisory/insights/sisum09/examiners_desk.html

APPENDIX J.

Qualitative Information from In-Depth Interviews, Surveys, Focus Groups, Public Meetings and Other Public Comments

Appendix J presents qualitative information that Keen Independent collected as part of the disparity study. It is based on input from more than 190 business owners and managers, trade association representatives and others. Appendix J includes eight parts:

- A. Introduction and methodology;
- B. Background on the firm and industry;
- C. Whether there is a level playing field for minority- and women-owned businesses and other small businesses in the Hawaii marketplace;
- D. Any unfair treatment, unfavorable work environment or disadvantages specific to minority- and women-owned businesses and other small businesses;
- E. Working with public agencies and specifically HDOT;
- F. Insights regarding business assistance programs and certification;
- G. Any other insights and recommendations for HDOT; and
- H. Availability and disparity study, public meetings, focus groups and other comments.

A. Introduction and Methodology

The Keen Independent study team gathered input through in-depth personal interviews and telephone, online and fax availability surveys from June 2018 through January 2019, as well as public comments via telephone/email/mail and other means.¹ Keen Independent held two external stakeholder group meetings in April and August of 2018 and conducted public meetings/focus groups at locations in Honolulu, Kahului, Lihue and Hilo in July 2019 after release of the draft Availability Study report. In addition, the draft Availability and Disparity report was published for public comment in February 2020. An additional public meeting was held in February 2020 in Honolulu with remote viewing at district offices on Maui, Kauai and Hawaii Island.

¹ In-depth interviewees are identified in Appendix J by #I-01, #I-02 and so on; availability survey respondents are identified as #AS-01, #AS-02 and so on; airport concessionaires are identified as #IC-01, #IC-02 and so on; public comments are identified by #PCs; and public meetings/focus groups are identified by #PMs.

Keen Independent collected additional public comments through the study website,² mail, designated telephone hotline (623-349-4384) and study email address.³

Through in-depth personal interviews, availability interviews, public meetings/focus groups and public comment processes, business owners and representatives had the opportunity to discuss their experiences working in construction, professional services, airport concessions, goods and other services; experiences working with Hawaii Department of Transportation and other public agencies; perceptions of certification programs (i.e., DBE, ACDBE, etc.); and other topics important to them.

Interviewees included male and female African American, Hispanic American, American Indian, Native Hawaiian, Japanese American, Chinese American, Filipino American, Vietnamese American, non-Hispanic white and other business owners and representatives. Note that some individuals have multiple racial and ethnic backgrounds (identifying as both Japanese American and Native Hawaiian, for example), but that only one identification is reported when referring to the individual. The racial or ethnic identity used in this appendix corresponds to the primary identification provided by the interviewee.

² www.keenindependent.com/hdotdisparitystudy2019

³ HDOTDisparityStudy2019@keenindependent.com

B. Background on the Firm and Industry

The Keen Independent study team asked business owners to report on their business history and industry. Topics included:

- Business history;
- Barriers to starting, sustaining and growing a business, and any barriers to industry entry;
- Geographic scope and any changes in regions over time;
- Type of work and any changes over time;
- Business size, and any expansion and contraction over time;
- Size of contracts and changes over time;
- Public or private sector, or both, and preferences/experiences in each;
- Finding out about public sector contract opportunities;
- Working as a prime or subcontractor/subconsultant;
- Building relationships as a prime or a subcontractor/subconsultant;
- Including DBE-certified firms and other small businesses;
- Current economic conditions in the Hawaii marketplace; and
- Keys to business success.

Business history. The Keen Independent study team asked interviewees about their business start-up history, and any barriers they faced at business launch and beyond.

Most business owners worked in the industry or a related industry, before starting their firms, or had related experience. Some business owners gained industry-related experience through family, friends or education and others started their own businesses after previously working for an employer in a similar industry. [e.g., #I-01, #I-05, #I-06, #I-10, #I-15, #I-16, #I-19, #I-23, #I-24, #I-25, #I-26, #I-29, #I-32, #I-33, #I-34, #I-38, #IC-01, #IC-04, #IC-06, #IC-09] For example:

- The Filipino American co-owner of a DBE construction services firm reported, “I was a [worker in a specialty contracting trade] for over 15 years before I started We thought there was [a] market and need [in the same industry].” [#I-31]
- A Native Hawaiian female owner of a DBE professional services firm stated, “I had been in [professional services and construction] my entire career and had worked for other companies That’s how I got my experience.” [#I-28]
- A Native Hawaiian business owner reported that the business was passed down through generations. [#IC-05]
- A Native Hawaiian co-owner of a DBE construction services firm reported that he gained experience at a professional services firm before starting his business. He added that as he gained expertise, he “saw the potential for being your own boss.” [#I-12]

- A Japanese American co-owner of a DBE specialty services firm reported that he was familiar with his current line of work because he and his business partner ran a similar company prior to starting their firm. He indicated that this made the transition less difficult. [#I-11a]
- The Chinese American male co-owner of a construction firm said that he and his partners had industry experience prior to starting the company.” [#I-22]
- A white female owner of a DBE professional services firm commented, “I’m [in professional services] by training ... it’s just the people that I know in the industry, I asked them if they could give me work so that’s how it started.” [#I-17]
- Although “economically there’s ups and downs,” the white owner of a professional services firm reported that his work experience allowed him to obtain consulting work immediately after leaving a previous position. [#I-27]

Trade association and business assistance association representatives discussed how members typically get into the work they perform. Comments include:

- When asked how firms typically get into the work that they perform, a representative of a business assistance association indicated that business owners typically have prior experience in their respective industries. He stated, “They seem to usually have the process in place.” [#TO-07]
- Regarding how firms typically get into the work they perform, the representative of a construction services trade organization reported that individuals who start their own business have been in the industry for a long time. He added, “Construction is not something you get into if you don’t know anything about it.” [#TO-10]
- One business assistance association representative described two “paths” to establishing a business on Hawaii Island. When asked how firms typically get into the work they perform, the Native Hawaiian female representative of a business assistance association stated, “I see two typical paths on Hawaiian Islands ... one is the traditional family path [where] it’s a business that the family has been engaged in for one or more generations The other path is the ‘opportunities [in Hawaii path]’, so you have people coming in from off-island.” [#TO-01]

Barriers to starting, sustaining and growing a business, and any barriers to industry entry.

The study team asked business owners and representatives to report on any barriers to conducting business in Hawaii.

Business owners reported early challenges to starting and growing a business. For some firms, these challenges persisted, especially for smaller firms competing in the marketplace. For example:

- A Japanese American female owner of a DBE professional services firm reported that securing adequate capital to survive the first six months in business was a challenge. [#I-19]
- A Japanese American owner of a DBE specialty services firm reported on-going operational challenges: “Making sure you don’t overpromise ... do your billing correctly ... [and] your bids are correct ... [those are] the hardest challenges.” [#I-11a]

Some other business owners across industries reported small size as a barrier to securing work.

Competition from larger firms puts many small businesses at a disadvantage when seeking contracts. Comments include:

- The white owner of a professional services firm stated, “Scale The kind of business that I’m in is also competing with larger corporations or larger entities.” He added, “A lot of people tend to just go with the larger companies ... rather than consider a smaller company.” [#I-27]
- Regarding barriers, an availability survey respondent reported that bigger companies get the majority of the large bids in his industry. [#AS-45]
- A survey respondent reported that due to the small size of his firm, they even have trouble competing for small business set-aside opportunities. [#AS-10]
- A female owner of a professional services firm reported, “Getting jobs ... we can’t really compete with the big companies.” [#I-24]

Opportunities to gain work experience can be especially challenging for some small business owners. Many business representatives reported that newer, less experienced firms are disadvantaged when bidding against firms that have been in business for many years. Some of the competition from more established firms is from out-of-state firms.

- The Native Hawaiian co-owner of a professional services firm reported that increased competition in his industry would make it challenging for new businesses to start up. He noted that advancements in technology have increased competition in Hawaii by allowing firms from outside the state to monitor solicitations. He continued, “A lot of it is based on experience of past projects so if you’re a new firm you really don’t have too much experience to hang your hat on to qualify for some of the projects.” [#I-15]
- An availability survey respondent reported that obtaining qualifications for specific work can be challenging. [#AS-08]

- One white female co-owner of an 8(a)-certified construction services firm reported that her business had to switch its business model dramatically to overcome increased competition from established firms. [#I-29]
- An African American business owner reported that airports ask for “two or three years of ... airport experience,” but commented, “How could you get the airport experience if you can’t even get into the airport?” [#IC-03]
- A Chinese American ACDBE concessionaire reported that having a lack of experience is the major challenge in starting a business in his line of work because there is a “unique retailing environment to the traveling public.” [#IC-06]

Some business owners began by reporting that having a business location in Hawaii presents unique barriers for many small business owners. For example:

- A Japanese American owner of a DBE materials supply firm reported that “working on an island” requires more planning. He reported, “Just being in Hawaii, you need to plan a month ... in advance.” He mentioned that transporting materials to Hawaii can take two to three weeks. [#I-05]
- The representative of a business assistance association reported, “The size of the islands alone is a big challenge.” [#TO-01]

Some availability survey respondents specifically addressed experience required to do work for Hawaii Department of Transportation. For example:

- An availability survey respondent reported that her firm has not been able to get work from HDOT due to past performance requirements that make it difficult for new firms to receive work. [#AS-22]
- An availability survey respondent reported that difficulties in getting the first project with HDOT can present a barrier to firms starting out, trying to expand or achieve success in their industry. [#AS-54]

Business owners described some business challenges as “cyclical.” A few business owners cited the ebb and flow of the construction industry as an on-going challenge for many businesses. Comments include:

- When asked about the barriers to starting a business, the representative of a construction services firm stated, “Construction is cyclical, so every seven to ten years it goes up and down You need to survive that. And to survive that you need to diversify your business” [#I-23]
- The Native Hawaiian co-owner of a DBE construction firm noted, “The industry [is] very cyclical, so sometimes it’s really slow and you go back to your ‘bread and butter’ ... your private work. And when it’s really busy ... there [is usually] public [sector] work.” [#I-12]

For some business owners, typical business challenges include limited marketing ability.

[e.g., #I-09, #I-12, #I-24, #I-32, #I-35, #IC-01, #AS-36, #AS-60, #AS-68] Some business owners, reported marketing as “difficult.” For example:

- In discussing challenges to start her business, an African American business owner reported that marketing her business is difficult. [#IC-08]
- A female survey respondent commented that there is limited marketing assistance from local authorities, stating that “ecotourism is underrepresented in Hawaii.” [#AS-67]
- The white co-owner of a professional services firm reported, “One of our challenges is selling our product to end users.” He added, “Our biggest challenge here in Hawaii is the prohibition against outdoor advertising/billboards.” [#IC-01]

Many interviewees and availability survey respondents reported challenges finding or retaining qualified employees either at start-up or beyond. [e.g., #I-26, #I-36, #I-38, #IC-10, #AS-01, #AS-04, #AS-07, #AS-11, #AS-12, #AS-13, #AS-15, #AS-16, #AS-18, #AS-19, #AS-20, #AS-21, #AS-29, #AS-33, #AS-38, #AS-39, #AS-40, #AS-47, #AS-48, #AS-49, #AS-50, #AS-51, #AS-55, #AS-59, #AS-63, #AS-66, #AS-70, #AS-71, #AS-72, #AS-73, #AS-76, #AS-77, #AS-78, #AS-79, #AS-83, #AS-86, #AS-88] Examples of these comments include:

- One Japanese American female representative of a small business assistance association stated that finding good employees and workers who will stay is challenging for firms because Hawaii has the lowest unemployment rate in the country. [#TO-06]
- A representative of a white male-owned construction services firm stated, “It’s very competitive, good employees are most important ... and are hard to find ... ones that show up that are responsible and can pass our requirements That’s the most challenging thing.” [#I-21]
- A concessionaire’s representative reported that the biggest challenge for his business in Hawaii is finding qualified people, especially with such a low unemployment rate in the state. He added that his firm, a non-union employer, is at a disadvantage when compared with union jobs in the hotel industry (the pool of workers from which he recruits). [#IC-04]
- One concessionaire reported that securing good employees as a start-up is particularly difficult, as potential workers prefer more established firms. He added, “A lot of people don’t want to get on board with a company until there’s a significant amount of payroll Some people [are] not motivated to want to come to a start-up” [#IC-03]

Most business owners discussed some challenges with financing at business start-up and beyond. [e.g., #I-09, #I-10, #I-20, #I-30, #I-35, #I-37, #I-38, #I-39, #IC-03, #IC-09, #AS-03, #AS-05, #AS-14, #AS-15, #AS-23, #AS-31, #AS-44, #AS-56, #AS-62, #AS-64, #AS-65, #AS-69, #AS-75, #AS-79, #AS-80, #AS-82, #AS-89] Many business owners and representatives reported issues securing financing and working capital for operations and expansion, others reported challenges with cash flow and prompt payment that are ongoing. A number of business owners had difficulty paying themselves or making payroll. Comments include:

- The Native Hawaiian female owner of a DBE construction services firm reported, “... [challenges] are having enough money for finances, having customers that pay, [and] having somebody that could work with our customers to make sure we were getting paid on time.” [#I-01]

The same business owner added, “If somebody wanted to come into our industry and compete, there [would] definitely [be] financial barriers. If you can’t get access to at least a [\$250,000] worth of equipment, you’re not coming into this business” [#I-01]

- A representative of a small business assistance association stated, “I think that a major challenge is access to capital because it can be challenging to get money from the bank if you are just starting your business.” [#IO-06]
- A Native Hawaiian female owner of a DBE professional services firm reported that securing working capital until she gets paid for projects is challenging. [#I-28]
- The Chinese American co-owner of a construction firm commented that prompt payment can be a challenge to starting a business if you don’t have financing or lines of credit. [#I-22]
- The Japanese American male co-owner of a professional services firm reported that the biggest challenge was “collections” and indicated that his company went six months without pay when they started. [#I-18]
- Regarding barriers to entry into the industry, the Japanese American co-owner of a DBE specialty services firm reported, “You get paid ... within 30 to 90 days from a contractor Hopefully you are able to withstand that ... long holdout.” [#I-11a]
- Regarding barriers to expanding their business, a n availability survey respondent reported that not having funding to perform bigger projects slows the growth of firms. [#AS-24]

Some business owners indicated that they relied on relatives or self-funding to start and grow their firms. Many business owners reported borrowing money from relatives to make ends meet. For some, limited awareness of resources and fear of the lending process resulted in added challenges. Examples of comments include:

- The Filipino American male owner of a DBE construction firm stated, “It was rough in the beginning.” He reported that while he used his experience, he was still “limited to [his own] resources.” He added that he was unaware of the resources offered by the government. [#I-10]
- A Chinese American female co-owner of a construction services firm stated, “Cash flow is very important for construction.” She commented that she had to borrow from relatives in the first year of business until customers paid their invoices. [#I-13]
- The white female owner of a DBE construction services firm reported to have used personal resources to start her business and avoid the “cumbersome” process of seeking loans. [#I-17]

Interviewees reported that securing the work needed to build capacity is particularly challenging for some business owners. A number of interviewees reported finding new customers, others reported that newer businesses are particularly challenged and that “low bid” awards can be a disadvantage. Comments include:

- A white female owner of a DBE construction services firm reported that it is a challenge for her firm to secure work. She added, “There are a few companies that come to us, there are a few other private business owners that come to us and ... that’s how we ... [are] retaining work.” [#I-17]
- Regarding barriers to entry into the industry, the Filipino American male co-owner of a DBE construction services firm reported that the ability to obtain materials and contracts are especially difficult for new firms. [#I-31]
- A representative of a construction services firm owned by a Chinese American male reported, “Typical competition ... it’s all by bid so whoever is the lowest bidder gets the work.” [#I-33]

Some business owners reported that procurements, including public sector contracts, are often awarded based on previous relationships or connections. For some, not having those relationships was reported as a barrier to securing opportunities for new work. For example:

- A Filipino American female owner of a professional services firm reported the political nature of procurement was a challenge because contracts were awarded based on connections. She also mentioned that it was rare to see a woman in the room where construction meetings occurred, noting that it was intimidating at times. [#I-14]
- The representative of a white male-owned professional services firm indicated that there are barriers to entry in the public sector of his industry. He added that government agencies “naturally tend to work with companies and individuals that they’ve worked with before.” [#I-36]

Two interviewees reported experiencing barriers that have limited their ability to break into regionally- and culturally-closed networks. Comments include:

- One ACDBE concessionaire reported that because he and his business partner were not born in Hawaii, the most difficult part of starting his business was dealing with locals’ perceptions of individuals not from Hawaii. He explained, “That’s always hard for people who aren’t from here ... to kind of break into [work].” [#IC-02]
- A white female owner of a DBE professional services firm reported, “There’s certain cultures [in Hawaii] that are more resistant to having women involved.” She added, “A lot of it is just cultural background If they know me it’s usually not a problem, it’s the new ones that haven’t worked with me before [that] are really hesitant.” [#I-07]

Some interviewees reported bonding for construction projects as a barrier for small businesses attempting to do business in public sector. Several indicated that bonding was an even greater disadvantage at the early stage of their business. For instance:

- A white female co-owner of an 8(a)-certified construction services firm stated, “... a lot of jobs we do require bonding and that was one of the biggest hurdles in the beginning as a small company.” [#I-29]
- The Chinese American co-owner of a construction firm reported that obtaining bonding was a challenge when starting his firm. He reported that the founders of the firm did not have bonding capacity when they started the business and therefore had to submit bids to general contractors to work as subcontractors. [#I-22]
- One female survey respondent reported that the large size of contracts and bonding requirements are barriers to doing business. [#AS-57]

Many interviewees, across industries, experienced challenges with general business operations including managing paperwork and taxes and complying with rules and regulations. [e.g., #I-15, #I-37, #IC-08, #IC-10, #TO-01, #TO-09, #TO-10, #AS-02, #AS-06, #AS-09, #AS-17, #AS-25, #AS-30, #AS-37, #AS-43, #AS-46, #AS-52, #AS-81, #AS-84, #AS-85, #AS-87] Some business owners lacked awareness of where to seek business assistance or had limited business acumen at start-up and beyond. For example:

- A representative of a business assistance association indicated that firms have a lack of understanding of specific business needs when starting. He added, “For the well-established businesses, it’s more assisting them with ... general training needs, such as being updated on labor laws ... and also providing other educational workshops that we feel are appropriate at the present time.” [#TO-07]
- A Filipino American owner of a DBE construction firm reported that he was unaware of available resources when he started his business.” [#I-10]
- A white female concessionaire reported that challenges to starting a business in her line of work were learning how to operate a business and performing business tasks such as payroll. [#IC-09]
- One female availability survey respondent indicated that “office work” presents a barrier to starting and expanding a business or achieving success in her industry in Hawaii. [#AS-26]
- The white female co-owner of a construction firm stated, “The thing that bogs us down is the regulations The paperwork, the compliance. That weighs heavy.” [#I-08]
- The Filipino American female owner of a professional services firm reported that doing taxes, setting up retirement and “running the books” were challenging at first. [#I-14]

A number of business owners and representatives reported that understanding and complying with regulations are particularly challenging. Some business owners commented that compliance with restrictive rules and regulations and related processing times make building a business in Hawaii a challenge:

- One Filipino American co-owner of a DBE/WBE construction services firm stated, “Hawaii is probably the worst place ... to start a business Hawaii has so many rules, laws [and] taxes ... that it really makes it hard.” [#I-31]
- A male availability survey respondent reported that increased regulations ruined his business. [#AS-32]
- The representative of an 8(a)-certified professional services firm reported that changing regulations are challenging. She stated that the land use regulations in Hawaii, for example, are “more onerous” than elsewhere in the country.” [#I-16]

- A trade association representative reported that the difficult process of obtaining a building permit in Hawaii is a barrier preventing some small firms from entering the industry. She later commented, “It’s difficult to do business here in Hawaii because everything takes so long.” [#TO-09]
- When asked about barriers to doing business, the female Native Hawaiian concessionaire reported, “... rules and regulations going on with [HDOT].” [#IC-05]

Airport concessionaires reported on their unique challenges. Some concessionaires reported being limited by available, affordable space and limitations regarding signage. One noted that on-going construction at her airport also creates a barrier to her business success.

- An airport concessionaire’s representative indicated that a lack of affordable space to conduct business is a barrier. [#AS-74]
- One survey respondent reported that location of retail space poses a barrier to firms starting, expanding or trying to achieve success in his industry in Hawaii. [#AS-61]
- A concessionaire’s representative reported that the biggest challenge is inadequate space to conduct and expand operations. He indicated that space challenges have impacted business expansion and potential revenue growth. [#IC-04]
- A Native Hawaiian business owner reported that her firm’s location at the airport is a challenge because of on-going construction and lack of signage. She commented, “It’s been really hard getting along with [HDOT] because when we ask questions, things are not being done. It’s like we’re not being heard.” She indicated, for example, that recent construction at the airport has presented a barrier because it has diverted customers away from her business. [#IC-05]

Trade association and business assistance association representatives discussed barriers to entry and success in their members’ respective industries. Limited access to capital and other funding was one of the most often reported barriers. Comments include:

- A representative of a business assistance association reported, “I think that barriers have primarily to do with the cost of entering the business.” [#TO-01]
- A representative of a business assistance association reported, “The barriers that [businesses] face is entry into new markets. That’s where they tend to come to us for assistance [We provide] them with introductions to government officials who can then in turn introduce them to other people in the private sector so they can establish partnerships or subcontracts, or strategic alliances.” [#TO-03]
- A representative of a business assistance association reported, “Usually it’s financing, that’s usually the greatest challenge.” He later indicated that marketing can also be a challenge for young firms. He also said, “A lot of the barriers are ... [kind of] unspoken. The system, as it is, isn’t necessarily open to everyone in the community.” [#TO-08]

- A representative of an 8(a)-certified construction services firm reported that there are financial barriers to starting a business. He stated, “If you don’t have the money then you can’t get into the business This is always a constant challenge because a lot of it is fronting money and we won’t be reimbursed for another 30, 60 or even 90 days.” [#I-37]

One representative of a business assistance association reported that small businesses on Neighbor Islands are at a disadvantage. This representative reported that public sector contracts often originate on Oahu, which makes it a challenge for firms on other islands to learn about opportunities. She commented that there is an overall feeling that public contracts offer Oahu-based companies an unfair advantage. [#TO-01]

Some business owners reported limited barriers to entry in their industries. [e.g., #I-06, #I-07, #I-19, #I-21, #I-22, #I-23, #I-27, #I-34, #I-38, #IC-04, #IC-07, #TO-07] For example, one white owner of a professional services firm reported that he was fortunate because he did not experience regulatory barriers and his work experience allowed him to obtain work immediately after leaving his previous position. [#I-27]

Geographic scope and any changes in regions over time. Business owners and representatives reported where they conducted business and any changes in where they work.

Most business owners and representatives reported working on multiple islands in Hawaii. [e.g., #I-02, #I-06, #I-07, #I-15, #I-23, #I-25, #I-26, #I-27, #I-30, #I-31, #I-32, #I-36, #I-38, #I-39, #IC-01, #IC-04, #IC-07, #TO-06] These included:

- The construction services firm that works on Oahu, Kauai, Molokai and Hawaii, in addition to doing work in other parts of the country. [#I-01]
- The professional services firm that works on “Oahu, the Big Island and Maui.” [#I-18]
- The professional services firm reported, “I work on Hawaii Island and Oahu.” [#I-25]
- The Chinese American representative of a construction services firm reported that being Maui-based with operations on Oahu, Kauai, the Big Island, Lanai and Molokai. [#I-33]
- One white female co-owner of a DBE construction firm that limits their work to Hawaii reported that they do most of their work on Kauai and have had a few jobs on Oahu. [#I-08]
- The professional services firm reported, “The majority of our work is within Maui County, but we do work statewide.” [#I-16]

Many interviewees reported mostly conducting work on Oahu. [e.g., #I-07, #I-11a, #I-11c, #I-13, #I-17, #I-24, #I-34, #I-35, #I-37, #IC-02, #IC-05, #TO-8] Some of these businesses may also work on other islands when conditions are favorable, for example:

- A Native Hawaiian female owner of a professional services firm reported she primarily worked on Oahu but received some small emergency work on the Big Island for volcanoes and hurricane damage. [#I-28]
- The Native Hawaiian female owner of a DBE professional services firm reported concentrating work on Oahu but also working on the Big Island, Maui, Kauai and Molokai. [#I-20]
- A Filipino American owner of a DBE construction firm reported, “When I was in my peak, [we] would pick up jobs from all the islands ... Kauai, Maui ... I just concentrate on Oahu right now.” He added, “The airfare going to the other islands has doubled ... tripled It’s very expensive to go out there now.” [#I-10]

A few interviewees limited their work to a single Neighbor Island. For example:

- Some firms only work on Maui. [#IC-08, #I-29, #I-03]
- A few companies said they solely on the Big Island. [#I-09, #I-05, #IC-09]

Many interviewees reported changes over time in the regions where their firms work, or that they adapt their operations to pursue opportunities on other islands. Some of these interviewees reported following work opportunities to other islands in Hawaii or to the mainland, for example. Others reported that where they work is economically driven. Comments include:

- A representative of a white male-owned professional services firm stated where they work is dependent upon “where most of the development and construction is occurring.” [#I-36]
- A concessionaire reported, “We have a lot of flexibility in the business and will seek opportunities in new communities.” [#IC-01]
- A representative of a white male-owned construction services firm indicated that the locations where his firm works follows changes in the economy and construction industry. [#I-39]
- A Chinese American female co-owner of a construction services firm stated, “[Where we work] changes all the time in terms of jobs, number of jobs and what we experience It comes and goes like the economy ... up and down.” [#I-13]
- The Chinese American co-owner of an Oahu-based construction firm reported that the business performs work on Neighbor Islands if the opportunity is valued at least \$3 million. He indicated that he needs a large project to pay for mobilization outside of Oahu. [#I-22]

- A representative of a business assistance association serving the Big Island reported, that many of their smaller companies that are exclusive to Hawaii Island are very small “mom- and pop-type” organizations, but some are companies that have based on Oahu and have satellite offices on the Big Island. However, she continued, “Even though they’re based on Oahu, they may have been started elsewhere, for instance California.” [#TO-01]

She added, “Many of our members do have statewide offices or virtual offices ... to be able to take advantage of opportunities statewide.” [#TO-01]

A few interviewees reported working locally as well as internationally in Asia, the Pacific Islands and other areas abroad. For example:

- A representative of a trade association reported that a few member consulting firms conduct work both locally and internationally. [#TO-09]
- A representative of a small business assistance association commented that over time it has been easier for some firms to work internationally. She added, “With the internet, now you can promote your products without necessarily being there The world is a much smaller place now ... it’s made it easier for everyone to expand and do things differently.” [#TO-06]
- A representative of a small business assistance association reported that the majority of represented firms are based on Oahu and that a small percentage of businesses conduct work “stateside” and internationally. [#TO-06]
- One Japanese American co-owner of a professional services firm reported that his firm works on all Hawaiian Islands, the continental United States and Asia. [#I-04]
- A Japanese American female owner of a DBE professional services firm reported working across Hawaii as well as other island nations in the Pacific. [#I-19]
- The white female owner of a DBE construction services firm reported that her firm works on many Hawaiian Islands and on other islands in the Pacific.” [#I-17]
- One Filipino American female owner of a professional services firm stated, “I’m based in Oahu, but because of the nature of the projects, I work in all of the islands.” She added that her firm has worked in Fiji and the Philippines as well. [#I-14]

Type of work and any changes over time. Some interviewees reported performing one or only a few types of work. [e.g., #I-11, #I-18] Others reported performing a wider range of disciplines. [e.g., #I-05, #I-07, #I-12, #I-30, #I-32, #I-33, #I-36]

To take advantage of opportunities for more work, some business owners and representatives reported expanding the services they perform. Comments include:

- A white female co-owner of a DBE construction firm stated, “Being on an island you can’t just do [specified specialty contracting] and that’s it. We adapt our business based on the demand.” [#I-08]
- One concessionaire said that the firm was initially a kiosk concessionaire before expanding its services. [#IC-02]
- A Japanese American female owner of a DBE professional services firm said that she has expanded beyond consulting work to other specialties. [#I-19]
- A Native Hawaiian female owner of a DBE construction services firm indicated that the firm’s services have changed over time and that DBE certification gave her firm the exposure needed to diversify work types. [#I-01]
- A trade association representative reported that some members start out in homebuilding before moving to commercial construction, high rise development or other large construction. [#TO-09]

On the other hand, some business owners reported little or no changes over time in the types of work that their firms perform. [e.g., #I-16, #I-21, #I-24, #I-25, #I-27, #I-34, #I-39, #IC-03, #IC-04, #IC-05, #IC-06] Examples include:

- When asked if her firm has had any changes in the type of work they perform, the white female owner of a DBE construction services firm indicated that her firm has only added one service over the last 15 years. [#I-17]
- The white co-owner of a professional services firm reported no changes over time in the type of work that his firm performs. He reported, “Generally we’ve been doing the same thing since we started but in different formats.” [#IC-01]

Business expansion and contraction over time. Business owners and representatives discussed business expansion and contraction.

Only a few interviewees indicated that the size of their firms has remained consistent over time. [e.g., #I-15, #I-36, #I-24]

Many business owners reported expanding and contracting their firms based on market conditions. [e.g., #I-06, #I-22, #I-33, #I-35, #I-37, #I-38, #IC-01] For example:

- A white female co-owner of an 8(a)-certified construction services firm indicated scaling up and down in workforce to meet the demands of the project load. [#I-29]
- Regarding changes in the size of the firm over time, the Filipino American co-owner of a DBE construction services firm stated, “We will grow and meet our needs and then we will shrink down back to our nucleus when needed.” [#I-31]
- A Native Hawaiian female owner of a DBE professional services firm indicated that the size of the company goes “up and down” depending on the types and sizes of contracts that they receive. [#I-20]
- The Japanese American owner of a DBE specialty services firm reported that some years they do not hire new staff while others they’ve hired multiple. He indicated that the firm expands and contracts to meet demand. [#I-11a]
- One ACDBE concessionaire reported that his firm expands and contracts in size depending on market conditions. He reported, “It just depends on the work ... [when] work is not plentiful, we try to keep things pretty slim.” [#IC-03]

Many other business owners and representatives reported expansion or controlled growth. [e.g., #I-02, #I-05, #I-06, #I-09, #I-10, #I-12, #I-13, #I-16, #I-19, #I-21, #I-23, #I-25, #I-28, #I-34] Some reported that business planning includes slow, steady growth. Comments include:

- When discussing changes in the size of the firm over time, an ACDBE concessionaire indicated that his firm is trying to grow. He added, “If you don’t grow, you become stagnant and die.” [#IC-06]
- A white female owner of a DBE construction firm stated, “We gradually have grown, but honestly we control our growth because it’s more important to do quality work than quantity.” [#I-08]

Some interviewees reported that their firm has downsized over time. [e.g., #I-14, #I-17, #I-30]

- A representative of a business assistance association reported that larger construction firms are now bidding on smaller projects than usual. He added that this is due to a slowdown in the number of available projects. [#TO-07]
- The Native Hawaiian female owner of a DBE construction services firm indicated that the firm significantly contracted after the UDBE program ended. She explained, “When the UDBE program changed ... guys weren’t incentivized to contact us.” [#I-01]

Size of contracts and changes over time. Business owners reported on size of contracts and whether their firms’ contract sizes varied, stayed the same or had grown or decreased in size over time.

Interviewees reported a wide range of contract sizes. [e.g., #I-02, #I-12, #I-13, #I-15, #I-20, #I-22, #I-23, #I-25, #I-26, #I-35, #I-37, #I-39] Examples follow:

- Some business owners reported primarily working on contracts in a specified size range such as “\$100,000 to \$200,000,” “up to \$500,000” or “below \$1 million.” [#I-06, #I-03, #I-10]
- Several reported considerably smaller contract sizes. One Native Hawaiian female owner of a DBE construction services firm reported “really small” contracts. [#I-34] A few others reported contracts in the \$20,000 to \$30,000 range, for example. [#I-01, #I-32] An owner of a professional services firm reported that her firms’ contracts range from \$1,000 to \$40,000. [#I-24]
- A Filipino American owner of a DBE construction services firm reported that his firm performs commercial, private and government projects. He added, “The sizes all vary ... it can go from \$1,000 to \$3 million.” [#I-31]
- The Japanese American owner of a professional services firm reported that contract sizes vary between \$1,000 to \$1 million. [#I-04]
- A representative of a DBE construction services firm reported that his firm works on contracts ranging in value from \$500 to \$1 million. [#I-38]

Several business owners reported that the size of contracts awarded to their firms or volume of work has grown over time, and the reasons for their success. [e.g., #I-07, #I-31] Comments include:

- The Native Hawaiian female owner of a DBE professional services firm reported, “In general we have larger contracts now.” She later indicated that her firm’s work has been steady over time and is increasing since she received her DBE certification. [#I-20]
- The Chinese American female owner of a construction services firm stated, “As we built on our experience and history of performance ... bigger companies started to have more confidence in us doing more and gave us bigger-sized jobs as we grew.” [#I-13]
- A white female owner of a DBE construction firm stated, “We’ve grown from zero to \$10 million a year We focus on work that we’re good at. We pick and choose the work we do based on the equipment, talent and resources we can use. We adapt our expertise.” [#I-08]

Public or private sector, or both, and preferences/experiences in each. Business owners and representatives reported preferences for working in public or private sectors.

Most business owners and representatives interviewed reported work that spanned both public and private sectors. [e.g., #I-01, #I-04, #I-05, #I-08, #I-09, #I-11c, #I-12, #I-13, #I-15, #I-16, #I-17, #I-18, #I-20, #I-21, #I-22, #I-24, #I-27, #I-30, #I-31, #I-34, #I-35, #IC-01, #IC-02, #IC-03, #IC-04, #TO-07] Comments include:

- A Filipino American owner of a DBE construction firm reported that the firm began performing private sector residential work and grew to a point where it could concentrate on commercial and public-sector government work. [#I-10]
- The representative of an 8(a)-certified professional services firm reported, “We have ... a mix of private and public sector clients.” She added that private sector clients find her via word-of-mouth or repeat business. She added, “[For public sector work] we submit our statement of qualifications every year to various county and state agencies to get on their list of professional service providers.” [#I-16]
- One Filipino American owner of a DBE construction firm reported, “I’m very satisfied with commercial [and] federal work. I know everybody in Oahu. It’s more than enough I think, for me.” [#I-10]
- The representative of a business assistance association reported that the member firms work in both sectors, but that they generally preferred to work in private industry. She explained that when the economic conditions were favorable, firms would still respond to bid requests, but price them higher so that they could focus on private sector work while not offending the public procurement offices. [#TO-01]

Some interviewees reported working predominantly in the public sector. [e.g., #I-02, #I-06, #I-07, #I-19, #I-26, #I-28, #I-33, #I-37, #I-38, #I-39] For example, a Filipino American female owner of a professional services firm stated, “Yes, a lot of public sector work with the State. I also worked for HDOT as well.” [#I-14]

A small number of other interviewees reported mostly private sector work. [e.g., #I-17, #I-25, #I-32, #I-36]

Finding out about public sector contract opportunities. Interviewees discussed how they learn about opportunities for work in the public sector.

Primes described how they find out about public sector contract opportunities. Many reported searching procurement websites or bid-listing services. [#I-09, #I-21, #I-22, #I-23, #I-27, #I-30, #I-31, #I-33, #I-36, #I-38, #I-39, #IC-04, #TO-07] For example:

- When asked how primes generally find out about work with HDOT, the Native Hawaiian female owner of a professional services firm reported that she tracks the projects on the procurement lists online. [#I-28] However, she added, “I’ve never won a project that I didn’t know about beforehand ... I usually track something for a year before it comes out.” She reported that she also hears about projects through word of mouth and commented, “The opportunities are there but again, you need to be ‘in the network’ to know where they’re going to be and when.” [#I-28]
- The white female owner of an 8(a)-certified construction services firm stated, “I get the bid service weekly bid book and I also get email notifications for county projects and state projects” [#I-29]
- A representative of an 8(a)-certified construction services firm reported that primes find out about public and private sector work through the General Contractors Association of Hawaii and BidService Hawaii. [#I-37]

Some business owners and representatives discussed how subcontractors find out about public and private sector work. Some business owners reported being contacted directly by primes or reaching out to primes on their own volition. Several reported following agencies’ postings or attending meetings and seminars regarding upcoming opportunities. [e.g., #I-09, #I-11c, #I-15, #I-24, #I-33, #I-36, #I-37, #I-38] For example:

- Regarding how subs find out about public and private sector work, the Native Hawaiian female owner of a DBE professional services firm reported, “Prime contractors will come to us and ... ask us for bids.” [#I-20]
- A white female owner of a DBE construction firm stated, “We contact our subs as soon as we decide to pursue a job.” [#I-08]
- When asked how ACDBEs generally find out about airport concession opportunities with HDOT, a concessionaire’s representative reported to reach out to the primes and attend meetings open to the public. [#IC-04]

- Regarding how subs find out about public sector work, the Chinese American owner of a construction firm reported, “They can do the same thing [as primes].” He added that subs can also call primes to inquire about opportunities on projects. [#I-22]
- The Native Hawaiian owner of a DBE construction firm indicated that, as with primes, subcontractors “check [general contractors] website[s], and the agencies’ website.” [#I-12]
- The Filipino American owner of a DBE construction services firm reported that HDOT posts projects and puts opportunities out in publications. [#I-31]
- Regarding how ACDBE firms generally find out about airport concessions opportunities with HDOT, the one ACDBE concessionaire reported that there are “all kinds of materials [and] seminars.” [#IC-06]

Working as a prime or subcontractor/subconsultant. The study team asked business owners and representatives whether they worked as a subcontractor/subconsultant, as a prime, or as both.

Many business owners (and trade associations representing multiple businesses) reported to serve as both subcontractors and prime contractors. [e.g., #I-04, #I-16, #I-18, #I-22, #I-24, #I-25, #I-27, #I-33, #I-36, #I-39, #TO-01, #TO-07, #TO-09]

A number of interviewees reported working primarily as a prime contractor or prime consultant. [e.g., #I-02, #I-06, #I-08, #I-12, #I-15, #I-29, #I-30, #I-32, #I-37, #IC-01, #IC-03, #IC-04]

Many other interviewees reported working most often as subcontractors or subconsultants. [e.g., #I-10, #I-13, #I-19, #I-20, #I-23, #I-26 #I-31, #I-35, #I-38]

Only a few business owners reported to have grown from serving as a subcontractor to bidding as a prime. Two examples follow:

- The Chinese American owner of a construction firm stated, “When we started out, we performed mostly work as a subcontractor.” He added, “Over a period of time as we obtained bonding capacity, and we would go into ... the public sector and bid on [prime contracting projects].” [#I-22]
- One Native Hawaiian female owner of a professional services firm reported that her firm has mostly performed work as a subcontractor and will soon begin work as a prime. [#I-28]

Building relationships as a prime or a subcontractor/subconsultant. Business owners and representatives reported on the importance relationship-building plays in public contracting. For example, a representative of a business assistance association indicated that it is important for firms to be sincere, have passion, service the customer in the right way and have a good reputation. He added, “We still live in a very small state ... people will start to find out how good or bad a company is.” [#TO-07]

Others discussed how long-established relationships disadvantage new businesses wanting to break into public contracting.

Many interviewees discussed the importance of building good prime contractor-subcontractor relationships. [e.g., #I-06, #I-11c, #I-13, #I-20, #I-21, #I-22, #I-23, #I-24, #I-26, #I-29, #I-33, #I-36, #I-38, #I-39, #IC-01, #IC-06] Interviewees described positive prime-subcontractor or subconsultant relationships as those built on “teamwork,” “trust,” “loyalty” and for some, prompt payment, for example:

- Regarding what gives one firm in his industry an advantage over another, the representative of a business assistance association stated, “In Hawaii a lot of it is your reputation.” [#IO-08]
- Regarding the general perceptions of contractor-subcontractor relationships, the white owner of a professional services firm reported, “You go in as a team and then you work as a team and your focus is for the Principal.” [#I-27]
- A representative of a construction services subcontractor owned by a Japanese American male reported, “I’d say we have really good relationships with most of our general contractors. They’ve been working with our owner quite a long time.” She went on to emphasize that the owner’s “loyalty” has strengthened those relationships. [#I-03]
- A Native Hawaiian owner of a DBE special contracting firm commented that a good relationships and communication between primes and subcontractors are important. He went on to say that he likes the primes he works with because “they pay on time.” [#I-09]

Business owners reported their efforts to hire subcontractors/subconsultants, which often included long-standing relationships and “nepotism.” [e.g., #I-06, #I-14, #I-16, #I-17, #I-18, #I-22, #I-26, #I-35, #I-36, #I-38, #I-39, #IC-10] Most of the prime contractor and prime consultants that used subcontractors had built previous relationships with them. Others engaged subcontractors that had been recommended to them by “word of mouth,” employee networks or other trusted advisors. Some interviewees reported how long-established prime-sub relationships prevent businesses outside those networks from securing opportunities. Comments follow:

- A representative of an 8(a)-certified construction services firm stated, “A positive past experience with that firm ... is definitely taken into consideration whether we’re going to award a subcontract or not” [#I-37]
- The representative of a construction services firm indicated that relationships are a major key to his firm’s success. He added, “We’re ... well established so we get a lot of invitational work or the larger generals just call us because we’ve worked with them before.” [#I-35]

- A representative of a business assistance association indicated that that prime contractors “of course ... call the same [subcontractors] over and over” due to established relationships. [#TO-01]
- The representative of a construction services firm reported “Relationships are important because you don’t bite the hand that feeds you. Generally, we work, for the last 40 or 50 years, with the same general contractor.” [#I-23]
- A representative of a construction services firm owned by a Japanese American male reported that the firm hires subcontractors “based on history and working relationships.” She added, “Our owner is very ‘loyal.’ It would have to be [work] that we don’t [already] have somebody to go to, if we’re going to try somebody new.” [#I-03]
- The Native Hawaiian owner of a DBE specialty contracting firm reported that he hires other specialty contracting firms as subcontractors on some projects. He commented that he learns about potential subcontractors through “word of mouth.” [#I-09]
- One Native Hawaiian female owner of a DBE professional services firm commented that she asks her employees for recommendations on subconsultants to engage based on project need. [#I-20]
- A Native Hawaiian female owner of a DBE construction services firm reported, “Relationships are very key. Some of the folks that are really in charge of these construction companies have ‘friends’ already, and so for us we needed time to build those relationships. Some [contractors have] been a little easier than others to talk to.” [#I-01]
- A white male concessionaire reported, “... there’s a huge degree of ‘nepotism’ in Hawaii If you’re an outsider you’re not going to get the same projects that other people are getting.” [#IC-10]
- The representative of a white male-owned construction services firm stated, “... Hawaii is a small place with unique challenges, and established contractors will definitely have an advantage over somebody who’s trying to break into the market.” [#I-39]

Some primes described having a broader, more inclusive reach, when seeking subcontractors or subconsultants. These firms reported to seek out subcontractors/subconsultants most suited to perform a specific scope of work. Some reported that experience, client comfort level and capacity to perform the work specified are pre-qualifiers. For example:

- The representative of a business assistance association reported that although qualifications and capacity may be challenges that primes face when working with minority- or women-owned businesses or other small businesses, he explained, “If firms show good work history and capacity, they will get the work.” [#TO-02]

- A representative of a white male-owned construction services firm reported, “If a project comes out for bid then generally, I’ll send out a request for quotation for a specific scope of work and I will solicit subcontractors who ... perform work ... within that given scope.” [#I-39]
- One representative of a white male-owned construction services firm indicated that they engage subconsultants based on whether they can meet the requirements, have expertise in the area and can complete the work. [#I-21]
- When asked how his firm selects subs, the Native Hawaiian male owner of a professional services firm reported, “Some of it is based on their specific experience on that type of work, some of it is dependent on their ‘capacity’ A lot of it is does the client feel comfortable with them also.” He added that on certain projects it is advantageous to include local subcontractors. [#I-15]
- One Native Hawaiian owner of a DBE construction firm reported that his firm uses an invitation to bid software to obtain subcontractors. He indicated that his firm also turns their name in as a plan holder and accepts quotes from potential subs. He later mentioned that his firm also retains a list of potential subcontractors. [#I-12]
- Regarding efforts to hire subcontractors, the white male owner of a professional services firm reported, “I’ve contracted with people on very specialized work I prefer to have those people directly contracted with the Principal and then I oversee their work.” [#I-27]
- An ACDBE concessionaire reported that his firm uses the internet to find subcontractors, prequalifying them based on licensing status. [#IC-02]
- Regarding how she engages subcontractors, a Filipino American female owner of a professional services firm stated “It’s the rapport. If I find others and develop a rapport with them, I will use them whether they are men, women or minority.” [#I-14]
- The white male owner of a professional services firm reported that the firm hires specialty services based on expertise. [#IC-01]
- A concessionaire’s representative reported engaging smaller, local businesses to give the products being offered a “local flair.” [#IC-04]

However, some interviewees emphasized that for a DBE subcontractor or other small business to be selected based on bid alone, that subcontractor must offer the “right price” and meet the prime’s scrutiny. Comments include:

- The representative of a DBE specialty services firm reported that pricing is “very competitive” in Oahu and good “rates and services” are the key to securing work. [#I-11c]

- A representative of a business assistance association reported on primes' willingness to comply with HDOT requirements for DBE participation: "In discussions with larger construction firms, they like to work with smaller companies if 'price is right' and HDOT sets the standards." He concluded that "primes will use DBEs if their price and work is competitive." [#TO-02]
- When asked how he generally perceives contractor-subcontractor relationships, the Native Hawaiian owner of a DBE construction firm indicated that his firm gives subcontractors an equal chance in the beginning and if they perform well and have a 'good price' then they use them again." [#I-12]
- When asked to describe his general perceptions of contractor-subcontractor relationships, the Filipino American owner of a DBE construction services firm reported, "They're the 'big boy,' we're the 'small guy' and at the end of the day you [have to] do what they say." He indicated that because the prime contractors hold the contract, the subcontractor is required to fulfill the conditions of their contract requirements. [#I-31]

Including DBE-certified firms and other small businesses. Interviewees discussed whether they made efforts to include DBE firms and other small business in their work.

Many prime contractors and business representatives reported that the requirement to comply with DBE goals motivates primes to offer work to subcontractors seeking opportunities on public sector jobs. Many reported that hiring DBEs helps firms secure contracts with DBE goals. [e.g., #I-08, #I-11c, #I-12, #I-13, #I-19, #I-23, #I-33, #I-36, #IC-04, #TO-01] For example:

- A representative of a business assistance association indicated that the businesses he represents will work with DBEs if required. He stated, "Whether it's a big or small contract, the larger firms want a 'reason' to use DBE firms." [#TO-02]
- When asked if his firm makes an effort to include DBEs in public contracts, the representative of a white male-owned professional services firm reported that his firm partners with DBEs because that would give them an advantage on their bid. [#I-36]
- A Chinese American male owner of a construction firm reported, "The State has a good program, they put a [DBE] requirement into their bid." He indicated that this helps these firms get established and receive opportunities. [#I-22]
- The Native Hawaiian male owner of a DBE specialty contracting firm reported that prime contractors ask him if his firm is DBE certified because DBE contract goals are attached to the project. [#I-09]
- When asked how prime contractors are encouraged to include subcontractors, the white female owner of a DBE construction firm stated, "The only way they are encouraged is when there is a requirement in the bid documents." However, she recommended that the DBE goals should be greater than 1 or 2 percent because those numbers are too easily obtainable in Hawaii. [#I-08]

- An ACDBE concessionaire indicated that primes utilize disadvantaged businesses when it is written into the prime concessionaire contracts that a certain percentage of their sub concessionaires must be ACDBE. [#IC-06]
- An Asian Pacific American female owner of a professional services firm indicated that prime contractors sometimes look for small businesses for their projects because they believe it may help them secure a project. [#I-24]
- The representative of a DBE specialty services firm reported that prime contractors are encouraged to use DBE firms and other small businesses because they receive credit. [#I-11c]
- Regarding how prime contractors are encouraged to include DBE firms, the representative of a white male-owned construction services firm stated, “There’s a DBE required goal that you’re encouraged to meet.” [#I-39]

A number of business owners and representatives commented on inclusion of DBE firms and other small businesses in public sector contracts, and any related challenges. [e.g., #I-11c, #I-12, #I-13, #I-28, #I-37, #I-38, #I-39, #TO-01, #TO-06] For example:

- A white female owner of a DBE construction services firm reported, “Yes, definitely ... we do have one DBE firm that we always go to.” She added that this firm is woman-owned and reported, “I want to support women-owned DBEs especially.” [#I-17]
- When asked if their firm makes a special effort to include DBE firms in contracts, a concessionaire’s representative reported specifically soliciting DBEs for work. [#IC-04]
- When asked if his firm tries to include DBEs in public contracts, the white male owner of a professional services firm reported, “It gets to what the assignment is, who’s best qualified to deal with it, that’s my primary interest.” He added the caveat that “in some cases [subs he reaches out to] only work with certain people ... that’s fine with me too.” [#I-27]

However, some other business owners reported limited efforts to include DBE-certified businesses and other small business in public sector work or other opportunities. Some of those business owners either utilized subcontractors and did not know whether they were certified, only engaged certified firms for reasons of contract compliance, or simply did not seek out DBE firms as subcontractors. [e.g., #IC-02, #I-24] For example:

- A Japanese American male owner of a professional services firm reported, “Because we’re not that large of a company, most of the people we work with are not that large [either], so some might be DBE[s].” [#I-04]

- When asked if the firm makes any efforts to work with DBEs on public contracts, a representative of a professional services firm owned by a Native Hawaiian male reported, “I think most of our subs are small business[es], [but] I don’t know if they’re DBE-certified [firms].” [#I-06]
- The representative of an 8(a)-certified professional services firm reported, “It’s not something that we explicitly look for, but I think many of the firms that we work with are small businesses ... and minority-owned businesses ... due to the nature of the ... firms doing work, particularly in Maui County.” [#I-16]
- A Native Hawaiian male owner of a DBE specialty contracting firm reported that he does not know if the subcontractors he works with are DBE. He explained that he does not research this prior to hiring them. [#I-09]
- When asked if her firm makes any efforts to hire DBE subconsultants, the white female owner of a DBE construction firm stated, “No, again if it’s a requirement we will, but we are 100 percent DBE so we would always meet that requirement, so from there it just becomes [a] competitive bid situation.” [#I-08]
- A female owner of a specialty contracting firm remarked that there are not enough incentives at the state level to include DBEs. [#PC-05]

Current economic conditions in the Hawaii marketplace. Interviewees reported on the economic conditions in the local marketplace, including public and private sector arenas.

Some interviewees reported increased competition in the Hawaii marketplace putting smaller firms at a disadvantage when seeking opportunities. Some business owners and representatives commented on increasing competition, for example.

- The representative of a Japanese American-owned DBE construction services firm said that there are more companies coming into the industry from outside Hawaii and increasing competition. [#I-38]
- An availability survey respondent reported that there has been a massive growth of new construction companies in her industry in Hawaii. [#AS-41]
- A representative of a business assistance association reported that there is a “larger amount of competitiveness.” He added, “If they are bidding on things they’re concerned because they now have to bid lower if they really want to get the job.” [#TO-07]
- Regarding the current economic conditions for companies in the Hawaii marketplace, a concessionaire reported that his industry is still seeing growth but commented that there is more competition now than there was ten years ago. [#IC-10]

- An ACDBE concessionaire reported, “Currently it’s pretty much just the big guys ... they pretty much control the ... [technology-related] market right now.” He noted that this “definitely” affects his ability to get work because larger companies can provide his service at a lower cost because they have access to better pricing. [#IC-02]
- When asked to describe current economic conditions in the marketplace, the representative of a business assistance association reported, “Most members are doing fine as the economy is doing well, [but] smaller businesses continue to struggle The ability to grow depends on the business they’re in and the services they provide Capacity is limited [in Hawaii] The larger companies which are a smaller part of our membership do well. We try to partner our small business firms with these larger ones.” [#TO-02]

A number of interviewees indicated that the economy is slowing in Hawaii. [e.g., #I-10, #I-13, #I-26, #I-37, #IC-07, #TO-05, #TO-10] Comments included observations such as:

- “I think right now the market for [construction] has slowed down a bit.” [#I-22]
- “Construction is slowing down just a little bit, which is not a bad thing because it was going so crazy” [#I-07]
- “It’s slowed down dramatically.” He indicated that this has impacted his firm’s ability to obtain work. [#I-25]
- “The recent tariffs will slow down projects.” [#I-14]
- One business assistance association representative reported that Hawaii was not supportive of businesses. “High taxes ... not a business-friendly economy. Businesses have to do more to survive.” [#TO-02]
- Business on the Big Island has been impacted by volcanic activity. [#IC-06]
- When asked to describe the current economic conditions for companies in the Hawaii marketplace, the Hispanic American owner of a DBE professional services firm reported, “It’s extremely difficult being on an Outer Island.” He added, “Most of the contracts, even on Maui, go to Oahu firms.” [#I-32]

Many interviewees reported a “good,” “healthy” or growing economy in Hawaii. [e.g., #I-02, #I-06, #I-07, #I-08, #I-16, #I-18, #I-20, #I-21, #I-23, #I-24, #I-27, #I-28, #I-34, #I-39, #IC-04] Some interviewees reported stable conditions, plentiful work and the low unemployment as indicators of a healthy economy. Comments include:

- A Native Hawaiian owner of a DBE specialty contracting firm reported, “There is a lot of work” He reported this is because there are not a lot of firms like his in the marketplace and noted that he sometimes turns down work because there are “too many” jobs. [#I-09]

- When asked about current economic conditions, the representative of a DBE specialty services firm described economic conditions as “healthy” and indicated that conditions have been stable. [#I-11c]
- A concessionaire reported that his industry is still seeing growth adding, “[The economy is] still pretty good.” [#IC-10]
- A representative of a business assistance association reported that the economy is doing well and that there is a low unemployment rate in Hawaii. She added, “... construction is okay I’m thinking there has to be some trickle-down effect to everyone. Everyone should be pretty much happy.” [#TO-03]
- Regarding the current economic conditions for companies in the Hawaii marketplace, a concessionaire stated, “The island has 2 percent unemployment rate right now People are desperate for staff.” [#IC-09]
- The owner of a DBE materials supply firm reported that current economic conditions in the Hawaii marketplace are favorable, stating, “Right now, all of us should be doing pretty well [The market] is the best that [it] could be right now We have a 2 percent unemployment rate, so everybody is working. The banks are still lending, and it’s hard to get workers.” [#I-05]

However, other interviewees reported a fluctuating economy with both highs and lows. These business owners reported observing ebb and flow in the economy, or some industries busier than others. One business representative reported that despite an “okay” economy, the cost of doing business in Hawaii makes it increasingly difficult to operate the firm. Comments include:

- One representative of a construction services trade organization stated, “We benefit and suffer from the fact that we are an island state.” He reported that firms in Hawaii are more susceptible to economic changes. [#TO-10]
- A concessionaire stated, “It goes up and down, it fluctuates.” [#IC-05]
- The owner of a DBE construction services firm reported, “I’ve seen a little bit of a drop-off, but we do see an ‘uptick’ now coming again.” He mentioned that the rail work has provided the “uptick” to the local economy. [#I-31]
- When asked to describe current economic conditions for companies in the Hawaii marketplace, the Japanese American male owner of a professional services firm reported, “I guess it’s okay, I’m not sure how everybody else is doing.” He added, “We’re not overly busy ourselves, but I think some firms are busy.” [#I-04]
- When asked about current economic conditions, the representative of a construction services firm owned by a Japanese American male reported, “There’s a lot of work ... but [despite a good economy] the cost of payroll is expensive, the cost of material is more expensive, and the cost of healthcare is ridiculous for a company of our size.” [#I-03]

Keys to business success. The study team asked interviewees to describe the specific factors that contributed to their and others' business success. Business owners and representatives were asked generally what gives one firm in the industry an advantage over another. Responses were broad.

A few business owners reported that, in Hawaii, "localism" and "name recognition" are unique factors that can significantly affect business success. For example:

- An owner of a DBE professional services reported that on Maui, for example, it is important that people know and recognize your local business. He added that the State of Hawaii, in general, places an emphasis on "localism." [#I-32]
- A white owner of a professional services firm reported that being a known entity in the Hawaii marketplace is an advantage. [#I-02]

Several interviewees reported financial stability and investment as key contributors to business success. For example:

- The Chinese American owner of a construction firm reported that his company has the financial ability to sustain itself despite untimely payments. [#I-22]
- The representative of a business assistance association identified "financing" as an important key to business success. [#TO-01]
- One Native Hawaiian female owner of a DBE professional services firm reported, "In general, I think ... cash flow ... keeping afloat." [#I-20]

Some business owners reported experience as well as a client-focused mission and responsiveness as keys to business success. For example:

- The Filipino American male owner of a DBE construction firm indicated that having previous experience in the industry is advantageous. [#I-10]
- One business representative observed that success is focusing [and] doing what you "know." "It looks like the businesses that focus on what they know do [fare] quite better than business[es] that attempt to change their mode of operation and go into another sector of the industry." [#TO-07]
- A Filipino American female owner of a professional services firm stated "I suppose it's the area of expertise There are very few people who can do what I do." [#I-14]
- When asked what are the key factors that contribute to her firm's success, the Native Hawaiian female owner of a professional services firm reported that her unique experience, work product and her attitude as a "pusher" are all factors. [#I-28]
- A white owner of a professional services firm reported, "Our strong suit is that we're so client-focused." He added, "Everything we do is really based on the client." [#I-02]

- A Hispanic American owner of a DBE professional services firm reported that his responsiveness to clients has been a key factor in contributing to the success of his firm. He later mentioned that the technical proficiency that he gained in previous positions has also contributed to his success in the industry. [#I-32]
- Regarding key factors that contribute to success, the white female owner of an 8(a)-certified construction services firm stated, “Experience.” [#I-29]
- The Native Hawaiian owner of a professional services firm reported, “Just our overall value that we bring to our clients. I think that has helped us be successful throughout the years.” [#I-15]
- The Japanese American female owner of a DBE professional services firm reported that the firm’s small size allows the company to quickly respond to customer needs and complete projects. [#I-19]
- A white female concessionaire reported, “When opportunities presented themselves, we jumped on them.” [#IC-09]

Some mentioned longevity, business acumen, adaptability, access to information and support of others as driving business success. For some of these businesses, support from “family” drives success. Comments include:

- Regarding what gives one firm an advantage over others in the industry, the Japanese American owner of a professional services firm reported, “Longevity Not trying to get too big.” [#I-04]
- A representative of a business assistance association stated, “Key factors include being good [at] business, [having] men and women with a good business acumen in order to succeed in the Hawaii market. Also, the ability to support others, ‘the Ohana approach.’ We’re family here and we help one another.” [#TO-02]
- One representative of a small business assistance association stated, “I think a lot of it is a willingness to ... listen and a willingness to adapt.” She added, “Trends change, market conditions change, and you have to be able to adapt your business to that or be able to see what’s coming Whatever their challenge is; being able to overcome it.” [#TO-06]
- When discussing key factors that contribute to his firm’s success, an ACDBE concessionaire reported that due diligence and research are the two most important factors. [#IC-03]
- A representative of a business assistance association listed financing, access to information and technology as the three factors that are crucial to a firm’s success. Regarding technology she expanded, “On Hawaii Island we don’t have the broadband capabilities that are on Oahu or on the mainland, so sometimes that lack of access can create a hardship for our companies.” [#TO-01]

- A Native Hawaiian female concessionaire reported, “It’s family ... my business is based upon my family and it’s always been like that.” She later added, “We have a lot of ‘aloha’ within my family ... you got to have that, you got to stand firm, you got to stay strong, you need to stay together You got to have love in your heart in order to continue ... a lot of people they don’t have it ... they lose a lot of customers to us.” [#IC-05]
- One business representative reported that knowledge of the bidding process is a key to success. This interviewee reported that “knowledge about the bidding process” is a major advantage for small businesses in the industry. She added that firms need to have the ability to “prepare a well-thought-out bid proposal” and “[be] cost-effective in the proposal.” [#TO-03]
- A representative of a construction services firm owned reported that dependable subcontractors and strong relationships with public agencies are equally important to his firm’s success. He stated, “You [have to] have really good subs and you [have to] ... develop that work relationship.” He indicated that his firm’s relationships with public agencies are also a key to their success. [#I-33]

Vendors and concessionaires reported strong inventory and quality products as keys to business success. Examples include:

- The Japanese American male owner of a DBE materials supply firm reported that “just having the inventory and the service” gives a firm an advantage in his industry. [#I-05]
- A concessionaire’s representative reported that local offerings for good products contribute to their firm’s advantage in the industry. [#IC-04]
- A concessionaire stated, “I compete well because I represent local businesses and local people.” [#IC-08]

A few business owners reported that DBE certification played an important role in their firm’s success. For example, several reported that DBE-certification contributes to business success:

- A Native Hawaiian female owner of a professional services firm commented that having the DBE certification has helped her firm “a lot.” [#I-20]
- Regarding key factors that contribute to success, the Chinese American female owner of a construction services firm stated, “Being a DBE helps.” [#I-13]
- A Native Hawaiian male owner of a construction firm reported that DBE certification has contributed to the firm’s success. He noted, “That’s been a factor ... for the highway jobs.” [#I-12]

- The white female owner of a DBE contracting firm mentioned that the only way she developed a competitive edge in the industry was by using the DBE Program to her advantage. She explained, “What I have found is that a lot of times, to me, the DBE Program is a foot in the door. It’s a chance to prove that I do good work, I’m responsive, I’m not change-order crazy. It’s that foot in the door.” She explained success as after working on jobs with DBE goals, some prime contractors would then ask her to price a job that did not include a DBE goal. [#I-07]

Some business owners and representatives mentioned that the size of a firm plays a key role in business success. Although the representative of a white male-owned construction services firm indicated that larger companies can have advantages on certain contracts and are at a disadvantage on other smaller contracts, [#I-39] most interviewees reported that small business size is a disadvantage in many industries:

- The Filipino American owner of a DBE construction services firm indicated that being a large company gives firms an advantage in his industry. [#I-31]
- When asked what gives one firm in the industry an advantage over another, an ACDBE concessionaire reported, “Scale, size and the ability to ... control the cost.” He noted that this makes it harder for small companies to compete. [#IC-02]
- When asked about advantages firms have over another, the Japanese American owner of a professional services firm stated, “Maybe it has to do with the size of the firms.” [#I-18]
- The white owner of a professional services firm indicated that larger firms have an advantage on larger projects. He added, “The larger projects go to the larger firms but in my mind that’s not indicative of the capability of a smaller firm to also deal with a large project.” [#I-27]
- When asked about advantages firms have over another, the Chinese American female owner of a construction services firm stated, “I think having enough resources, doing the work ... I do notice on bigger projects, the contractor will lean more to bigger subcontractors with more resources and more experience, unlike ours.” [#I-13]
- Regarding his firm’s advantages in the industry, a concessionaire’s representative reported that being part of a larger corporation affords his firm a supportive base and financial support that other small firms may not have. [#IC-04]

Most business owners and representatives agreed that success was achieved through networking, relationship building and word-of-mouth marketing with the goal of securing repeat customers and clients. [e.g., #I-02, #I-03, #I-05, #I-07, #I-09, #I-10, #I-13, #I-16, #I-20, #I-24, #I-28, #I-34, #I-36, #I-37, #IC-05, #TO-08, #TO-09] Comments include:

- In discussing key factors to business success for represented firms, the representative of a business assistance association reported that relationships with customers and others is “clearly” a key factor that contributes to the success of represented firms. [#TO-07]
- The representative of a DBE specialty services firm owned by a Japanese American reported that relationships and communication is a key factor to business success in the industry. [#I-11c]
- Regarding what gives one firm an advantage in the industry over others, the Native Hawaiian owner of a DBE construction firm reported, “With private sector work it’s the relationship you have with the customer, and the end product.” [#I-12]
- When asked what gives one firm an advantage over another in his industry, an ACDBE concessionaire reported that “relationships” and “networking” are important. [#IC-03]
- The representative of a white male-owned construction services firm stated, “Repeat business year after year is the secret to our success.” He added that reputation has led to repeat clientele. [#I-21]
- The representative of a white male-owned construction services firm stated, “Maintaining relationships with contractors, agencies, vendors [and] inspectors is always paramount to your success.” [#I-39]
- The white owner of a professional services firm reported, “It’s relationships, it’s success rate, it’s just ... the background and experience.” He added, “I’ve had several referrals from others that had work with me or heard of me.” [#I-27]
- Regarding key factors that contribute to success, a Native Hawaiian concessionaire reported, “There’s some different factors Number one is having good, repeat clientele.” [#I-15]
- The representative of a construction services firm owned by a Japanese American male reported the firm gets work through “word-of-mouth, referral business” [#I-03]

Many reported keys to business success as hard work, reputation, good customer service and quality work. [e.g., #I-03, #I-05, #I-20, #I-22, #I-23, #I-24, #I-39, #IC-04, #IC-05, #IC-07]
Comments from the in-depth interviews include:

- A concessionaire reported that “persistence is the key factor, and [also] creativity in product offerings” contribute to his success. [#IC-01]
- A representative of a professional services firm owned by a Native Hawaiian stated, “I would say [it’s] how well you apply or perform in the service that you provide. Sometimes you do go above and beyond for your clients, just to ensure that the work is done thoroughly and to their satisfaction We strive on doing quality work, and just making sure that the work that we do is in good quality. And, we do it on time and ... budget.” [#I-06]
- The Japanese American owner of a DBE professional services firm stated, “Doing the service we provide, doing the work on time, doing the work on or under budget, I think is very important in both the public and private sector. Also, addressing the issues that the client brings up That shows that we’re listening.” [#I-26]
- When asked about the key factors that contribute to his firm’s success, the representative of a DBE Japanese American-owned construction services firm indicated that his company provides quality work at a competitive price. He added that his firm is “timely” and indicated that they are reliable. [#I-38]
- A Native Hawaiian male owner of a DBE special contracting firm reported that “doing jobs on time and doing jobs when they are needed most” is important to his firm’s success. [#I-09]
- A representative of a professional services firm owned by a Hispanic American reported, “Attention to the client. Attention to quality. So, technical capabilities and quality control. Coming in on budget. Coming in on time.” [#I-30]
- A representative of a construction services firm owned by a Japanese American reported, “[Our] reputation is excellent We’re efficient [and] we’re good at what we do and have [many] years of experience.” [#I-03]
- A Native Hawaiian male owner of a DBE construction firm reported that his workers are meticulous and provide quality work. He added, “We get recommended from our previous customers, and some of our customers are repeat customers They keep calling us” [#I-12]

Access to capital and bonding impacted whether some businesses could successfully secure public sector and other contracts. Bonding requirements, for some, drove what jobs they could and could not bid. Comments include:

- The representative of a professional services firm owned by a Hispanic American indicated that securing a conventional loan as a Hispanic American was difficult. She reported that the owner of the firm was eventually able to get an SBA loan that helped her company. [#I-30]
- The representative of a small business assistance association stated, “Access to capital is also ... a really important factor because ... that can be a really big challenge for companies.” [#TO-06]
- The Filipino American owner of a DBE construction services firm reported, “[Financing] is probably the biggest factor of you being successful.” He added that trying to obtain a loan as a small company is “like pulling teeth.” [#I-31]
- Regarding what gives one firm in his industry an advantage over another, the representative of a business assistance association stated, “It’s always going to boil down to access to capital, if you have more money you can do more things, you can offer more services.” [#TO-08]
- A Filipino American owner of a DBE construction firm reported, “Right now, I’m trying to find out my funding capacity ... [so] I can be approved and do the next level, [which] is being a general contractor. That’s my next goal, funding, funding, funding.” [#I-10]
- The representative of a business assistance association explained, “Access to finance is an important one ... and in the state of Hawaii at large we have a challenge with that.” [#TO-01]
- The representative of a business assistance association reported, “I would think financing and bonding would be the top two, I think access to capital is always a challenge.” [#TO-03]
- An ACDBE concessionaire reported that bonding capacity is a key factor that contributes to business success. [#IC-03]
- When asked about bonding, the representative of a DBE specialty services firm owned reported being advantaged because the firm has never needed bonding because they typically work as a subcontractor. [#I-11c]

Some business owners reported using personal resources and “saving money” to fund their firms. Relying on personal resources can negatively affect one’s personal financial stability and ability to secure personal credit:

- A Native Hawaiian female owner of a DBE professional services firm stated that she was able to take out a loan against her home to finance the initial stages of the business and has since used personal resources for business purposes because her firm does not have many years of financial history. [#I-28]
- The Native Hawaiian female owner of a DBE construction services firm reported, “Whenever you’re in business only two or three years, you’re not going to get anything from a bank, period.” She added, “When you pay out of pocket on the personal side, your credit gets affected.” [#I-01]
- The Native Hawaiian owner of a DBE specialty contracting firm reported, “It took a while to ... build up ... capital and finance.” He commented that the first five years of a firm’s existence are the most difficult because a firm is still establishing itself financially during that time. He went on to say that “saving money” is a key factor to the firm’s success. [#I-09]

Having the ability to secure proper insurance was key, for a few interviewees. Despite the high price of insurance, the comfort of having the right insurance was necessary for some. For example:

- The white male owner of a professional services firm indicated that insurance is an important business expense and reported that obtaining it has never been a problem for his firm. [#I-02]
- The Native Hawaiian female owner of a DBE construction services firm indicated that insurance is a necessity in her industry. She noted that the State’s requirements are “a lot for a DBE,” however. [#I-01]
- The Japanese American male owner of a professional services firm stated, “For small firms ... for the guys that don’t get their insurance, they have problems getting government work ... a lot of firms cannot afford it. I think it’s like \$24,000 for \$1,000,000 of coverage And without insurance you cannot do government work.” [#I-18]

Many business owners and representatives reported that hiring and retaining qualified staff contributed significantly to business success. [e.g., #I-01, #I-09, #I-11a, #I-11c, #I-12, #I-15, #I-31, #I-36, #TO-08] Examples follow:

- A concessionaire stated, “It’s the people that we’ve been able to hire Good talent, I think that’s where it certainly starts.” [#IC-10]

- The representative of a white male-owned construction services firm stated, “Everybody performing their job to the best of their abilities within the company helps contribute to the company’ success. There’s no unimportant job within the company.” [#I-39]
- One representative of a construction services firm stated, “Our key is our employees.” He added that their operators must be qualified and that the project managers and project engineers must know how to control costs on a project. [#I-33]
- A representative of a certified professional services firm owned by a Hispanic American reported, “Continuity of staff. We pride ourselves on having key staff that have been here for a number of years.” [#I-30]
- The representative of a business assistance association indicated that it is difficult to find qualified employees because of the low unemployment rate in Hawaii. He later indicated that successful firms hire and retain competent workers. [#TO-07]
- A representative of a white male-owned construction services firm reported, “It’s the crew that we have in the field. We are very organized ... we run a tight ship The 20 or so guys we have in the field have a can-do sense.” [#I-21]
- The Japanese American owner of a DBE professional services firm stated, “Hiring the best people that you can find I’m not a micro-manager, our folks work with the ... client ... brainpower is really important as well.” [#I-26]

For some interviewees, hiring and retaining qualified staff was particularly difficult. Examples of related comments follow:

- The representative of a business assistance association commented that low unemployment in Hawaii makes hiring qualified staff challenging. [#TO-02]
- A Japanese American owner of a DBE materials supply firm reported that hiring employees is difficult because the economy is strong. He reported his company has three entry-level positions that he cannot fill and indicated that he recently made an out-of-state hire. [#I-05]
- Regarding hiring qualified staff, the white female owner of an 8(a)-certified construction services firm stated, “We struggle with employees because there are three to four large construction firms here, they ... take good employees. These large companies have gotten so large” [#I-29]
- Describing challenges to retaining good staff, the Native Hawaiian female owner of a DBE construction services firm stated, “We pay our employees way more than minimum wage, but they just move on They’re young and they start out great, but they just move on. It’s hard to get someone to stay.” [#I-34]

- The Native Hawaiian male owner of a DBE specialty contracting firm stated that it is “very difficult” to find qualified workers on the Big Island because there is no technical college in the area to prepare workers for his type of work. He reported that he trains new employees himself. [#I-09]

Awareness of the cost of equipment and materials and securing competitive pricing in the state of Hawaii is critical for some businesses. [e.g., #I-05, #I-08, #I-10, #I-11c, #I-21, #I-24, #I-25, #I-26, #I-29, #I-34, #I-36, #IC-02, #IC-04] Many indicated that access to favorable pricing drives success. Others found meeting the competitive pricing standards a challenge. For example:

- A representative of a business assistance association stated, “Many times when we have mainland firms bidding, they don’t recognize the cost of [specified materials] in Hawaii, so that can be a game changer.” [#TO-01]
- The representative of a business assistance association indicated that materials, equipment and favorable pricing is important. She reported, “Pricing on materials and equipment I think ... is a major challenge, especially going forward with the tariff wars we’re having. It may increase the cost of building materials.” [#TO-03]
- The representative of a Japanese American-owned DBE construction services firm reported that firms that have more equipment and more money have an advantage over others in his industry, as they can bid on larger projects. [#I-38]
- An African American business owner reported that favorable pricing is important in running a successful business. He added that access to favorable pricing is especially important to his firm when pursuing low-bid opportunities. [#IC-03]
- A representative of a business assistance association reported that “cost factors” contribute to the success of represented firms because businesses either must absorb rising costs or pass them along to clients. [#TO-07]
- The Native Hawaiian female owner of a DBE construction services firm reported, “We had some relationships with the vendors ... so we were very fortunate there. We were able to get the equipment we needed.” [#I-01]
- Favorable pricing on equipment and materials is a contributing factor to his firm’s success according to a Native Hawaiian owner of a DBE specialty contracting firm. He reported that being versatile and having all the equipment to do different types of jobs is another factor. [#I-09]
- A representative of a construction services firm reported that his business is always trying to find the “low cost,” saying, “We [have to] try to get the best pricing for material.” [#I-33]

- The representative of a white male-owned construction services firm mentioned that owning their own supply sources gives them an advantage in the industry. [#I-39]
- When discussing key factors that contribute to her firm’s success, the Japanese American female owner of a DBE professional services firm noted a benefit in receiving better rates and less mark up on goods and services. [#I-19]
- When discussing the keys to business success for her firm, the white female owner of a DBE construction firm stated, “Mostly resources ... equipment and people.” [#I-08]
- The Native Hawaiian owner of a DBE construction firm reported that “pricing, solely” is the advantage on public works contracts. He commented, “Sometimes you just don’t know how they got to that price, [or] if they made money or not.” [#I-12]

C. Whether there is a Level Playing Field for Minority- and Women-Owned Businesses and Other Small Businesses in the Hawaii Marketplace

Interviewees discussed challenges for minority- and women-owned firms or other small businesses not faced by other businesses. Many business owners and representatives reported that, in the Hawaii marketplace, there is not a “level playing field” for minority- and women-owned firms. [e.g., #I-03, #I-14, #I-25, #TO-01, #TO-8]

Topics regarding any barriers to leveling the playing field include:

- Obstacles that impact both minority and women business owners in the Hawaii marketplace, and how to level the playing field;
- Barriers specific to minority business owners in the Hawaii marketplace;
- Barriers that women business owners face in the Hawaii marketplace; and
- Barriers that small businesses face in the Hawaii marketplace.

Obstacles that impact minority and women business owners in the Hawaii marketplace, and how to level the playing field. Some business owners recommended unbundling of contracts and contracts targeted to minority- and women-owned businesses, as well as better communication with DBEs when setting contract goals. One representative reported a prime’s perspective regarding engaging subcontractors. Comments include:

- The Native Hawaiian owner of a DBE specialty contracting firm commented, “[small businesses] ... you can’t bid on bigger jobs.” He added that unbundling would be easier for smaller firms to compete. [#I-33]
- An African American business owner reported, “Historically both parties have been disenfranchised in certain industries.” [#IC-03]
- The representative of a construction services firm owned by an Asian Pacific American stated, “There are a lot of obstacles” [#I-35]
- A business assistance association representative reported minority business initiatives and set asides are necessary.” [#TO-02]
- One Native Hawaiian owner of a DBE specialty contracting firm commented that minority- and women-owned firms struggle to compete on large contracts. He reported that if contracts were broken into smaller contracts then it would be easier for those firms to compete. [#I-33]
- The representative of a construction services firm stated, “In order to give them a better shot at the work ... work [has] just got to be given to them or set aside where they can compete” [#I-33]
- The white female owner of a DBE construction firm stated, “There are some owners who only use union firms, which is a barrier for us A majority of the contractors in Hawaii are minorities so being [certified] is [keeping] the playing field even.” [#I-08]

- The representative of a white male-owned construction services firm stated, “As a prime contractor you are always looking for quality subs to perform work at the best price that they can. I think DBE contractors have to understand the prime contractor’s point of view We need to have confidence that they can perform that type of work and it’s kind of a ‘catch-22,’ if you’re not given the opportunity to perform that kind of work, it’s hard to build a resume.” [#I-39]

Barriers specific to minority business owners in the Hawaii marketplace. Examples include:

- A business assistance association representative reported that in Hawaii there are additional difficulties for minority- and women-owned firms and small businesses. He reported, “Small firms and minority businesses in the community need help to level the playing field. Larger businesses are much more competitive. In Hawaii, Native Hawaiians represent 20 percent of the business community They need help.” [#TO-02]
- The Hispanic American owner of a DBE professional services firm stated, “It doesn’t necessarily stem from Hawaii per se ... over my educational and professional lifetime there were obvious disadvantages.” He commented that in comparison to his former state, “Hawaii is a much more inclusive place to live and ... place to work because there [are] ... so many different cultures here all working together.” [#I-32]
- An African American female business owner said, “There’s some barriers ... because people who are in the same ... community ... they work together, and they lift each other up so it’s really hard to even get into a lot of things if you’re not one of the predominant cultures on this island.” [#IC-08]
- The representative of a business assistance association reported that he believes biases exist against Native Hawaiians in the marketplace. He commented that Native Hawaiians are often excluded from “the table.” [#TO-02]

Barriers that women business owners face in the Hawaii marketplace. Comments include:

- An Asian Pacific American female representative of a trade association reported, “There are not many women-owned firms” [#TO-09]
- A female owner of a DBE/WBE-certified professional services firm said that she responded to HDOT solicitations in her field, but “was never even considered,” even for opportunities that are her “core business.” She added that she no longer responds to their solicitations. [#PC-04]
- When asked about instances of unfair treatment or disadvantages for small businesses in the Hawaii marketplace, the representative of a professional services firm reported, “The feeling is that it’s difficult for women-owned firms to be able to break into the market [Women] feel like they’re ... marginalized and it’s harder for them to go after the bigger contracts.” [#I-30]

- The white female owner of an 8(a)-certified construction services firm indicated that women aren't taken "seriously" as business owners and are sometimes thought to be "in over [their] head." [#I-29]
- Regarding challenges for women, an African American female business owner stated, "I've noticed, a lot of the people that make the decisions on this island are male, but the females are the ones that are actually in view and so it's really hard to ... communicate with decision makers." She added, "Those connections might be easier to make if I was male." [#IC-08]
- The female owner of a DBE construction services firm reported, "One of the bigger [challenges] ... It's a male-dominated industry." She added, "People called [my business partner] when we started the business, [and asked him], 'What are you doing? Why do you have a woman for a partner?'" She added that women are perceived as not "capable of doing the job." [#I-01]
- A female representative of a professional services firm reported that women-owned firms are not treated as well as "the older, more established" firms, "which tend to be male-owned." [#I-30]
- The white female owner of a DBE construction services firm reported, "... it is such a discriminating environment and HDOT ... is the prime example for that ... [a] woman-owned firm is ... 'totally nothing' in Hawaii Consistently, woman-owned businesses get much less percentages" [#I-17]

Barriers that small businesses face in the Hawaii marketplace. Some interviewees indicated that small firms, in general, face challenges and may lose work opportunities because of size. [e.g., #I-06, #I-10, #I-27, #I-33, #IC-02] As minority- and women-owned businesses are disproportionately small, these barriers may result in added barriers for those firms. Comments include:

- Regarding disadvantages for his firm in the marketplace, the Japanese American owner of a DBE materials supply firm stated that his business is "competing with ... internet businesses like Amazon." He reported that internet-based companies are more competitive when customers want to buy in bulk, or supply projects. [#I-05]
- The Native Hawaiian female owner of a professional services firm reported not being awarded projects because of the firm's small size. She stated that in public sector other larger businesses are preferred that have "more capacity to fill the requirements." [#I-28]

- The Japanese American owner of a DBE professional services firm stated, “I think if federal money is involved and set-asides are in place, there are opportunities, so these small businesses need to put themselves in place to be able to qualify for these kinds of things. They’re not going to give a project to a small business because it’s a small business, they have to have the correct experience and knowledge. Those are going to be the barriers. I think the federal government tries to level the playing field and that’s the whole purpose of the program. In my experience, it’s been a big help.” He added, “If you’re a small business owner, it takes a while to be successful.” [#I-26]
- The representative of a business assistance association indicated that barriers were not so much a problem for women- and minority-owned contractors so much as small businesses in general. She reported that access to financing and carrying capacity posed difficulties for all small contractors, but not women and minorities especially. [#TO-01]
- When asked if there are disadvantages for small businesses in the field, the representative of a construction services trade organization reported that small firms may face barriers such as limited “ability to bond larger jobs.” [#TO-10]
- A female owner of a specialty contracting firm reported that while she could competitively bid during her first year of business, over time she noticed that the rules started to change based on the job. She went on to say that rules are added to exclude certain companies. [#PC-05]

D. Any Unfair Treatment, Unfavorable Work Environment or Disadvantages Specific to Minority- and Women-Owned Businesses and Other Small Businesses

Business owners and representatives reported on any experiences with or knowledge of unfair treatment in the Hawaii marketplace. Interviewees discussed:

- Issues with prompt payment;
- Denial of opportunity to bid;
- Unfair rejection of bid;
- Bid shopping and bid manipulation;
- Stereotyping and double standards for minority- or women-owned firms, certified firms and other small businesses when performing work;
- Unfair treatment regarding pursuit of work and approval of work for minorities and women, certified firms and other small businesses;
- Unfavorable work environment for minorities or women;
- Any knowledge of “fronts” or false reporting of good faith efforts;
- Any “good ol’ boy” networks, closed networks or other information networks exist that affect firms in the industry; and
- Any unfair treatment by HDOT specifically.

Issues with prompt payment. Most business owners and representatives reported knowledge of or experience with persistent untimely payments from primes or public agencies. [e.g., #I-01, #I-03, #I-10, #I-11a, #I-14, #I-19, #I-21, #AS-24, #AS-28, #AS-35, #AS-52, #AS-57]

Many reported challenges with outstanding invoices of 30 to 90 days; intentionally withheld payments; retainage that spanned years; or the trickle-down effect that subs face when primes do not submit timely invoices or are not promptly paid. For example:

- The representative of a construction services firm suggested that HDOT “streamline” processes to improve delays in payment. He mentioned, “We’re funding the project until the State pays for it.” [#I-33]
- A representative of an 8(a)-certified Japanese American-owned construction services firm reported on the challenge of payments that are untimely. He indicated that, for his firm, there is a lot of “fronting money,” explaining further, “we won’t be reimbursed for another 30, 60 or even 90 days.” [#I-37]
- The representative of a business assistance association indicated that untimely payment is a common issue in contractor-subcontractor relationships. She reported that late payments affect small firms the most because they struggle to cover business operational costs when invoices are unpaid. [#TO-01]

- A Japanese American female representative of an 8(a)-certified professional services firm reported, “It takes time ... for agencies to process invoices ... it’s a bureaucratic process and then when we’re in a subconsultant position we often will not get paid until our prime consultant gets paid [from the public entity]” [#I-16]
- The representative of a small business assistance association reported, “There’s probably a problem with the delayed payments and that’s something that you have to accept with being a subcontractor [because] the government is going to pay the prime and then prime is going to pay you, so there is going to be a lag.” [#TO-06]
- A Native Hawaiian female owner of a DBE professional services firm stated, “The biggest challenge that I have with the company is that we do the work and then we don’t get paid in a timely manner, particularly with state [and county] projects.” She added that with HDOT an added barrier was that her firm had issues with the inspector and recordkeeping of project hours on one job, for example. [#I-20]
- The Native Hawaiian owner of a DBE specialty contracting firm reported that his firm has been victim of late payment as well as payment being intentionally withheld. [#I-09]
- The Chinese American female owner of a construction services firm stated, “We’ve had situations where the general contractor hasn’t paid on time.” [#I-13]
- A representative of a white male-owned construction services professional services firm stated, “We did have payment issues on a project that we were working on” He added that the project manager did not get the paperwork in place to pay the consultants in a timely manner. [#I-36]
- The representative of a DBE construction services firm reported that “it takes too long to get paid.” He further commented that it can take years to get paid retainage fees. [#I-38]
- A Filipino American owner of a DBE construction services firm reported, “There’s nothing in place for the small guys [or DBEs] ... to get our funds to us I’ve never been on a job that has ever been on-time.” He added that prime contractors hold retention for subcontractors, which can be a barrier to working with HDOT, for example. [#I-31]
- A representative of a business assistance association reported commented, “We’ve certainly heard that payment at times is an issue ... an agency at the state level is waiting for the feds to release the funding and it just trickles on down” [#TO-01]

She added that some firms are considering prompt payment when making bidding decisions: “I think the other thing that they look at is what is the history of the respective department as far as payment goes; how long do they have to wait for payment?” [#TO-01]

- A Native Hawaiian female owner of a professional services firm commented that financing and obtaining working capital is a challenge for small businesses and recommended that electronic payment would allow for each contractor to be paid at the same time. She mentioned that subcontractors do not receive payment for 14 or 30 days after the prime contractor is paid. [#I-28]
- When discussing issues with prompt payment, the female representative of a professional services firm owned by a Hispanic American reported that her firm also has had prompt payment issues with private sector clients. [#I-30]

Some interviewees reported on their payment history with HDOT. One report was positive the others negative, for example:

- A representative of a minority-owned construction services firm mentioned that untimely payments affect his firm’s cashflow and its ability to make timely payments. He noted that his firm has issues with prompt payment from the counties, but HDOT pays faster and there are fewer people and processes to navigate. [#I-33]
- The Asian Pacific American female representative of a trade association reported, “It takes time to get paid [by HDOT] ... the smaller guys say this ... it prevents them from wanting to do more work.” [#TO-09]
- The white female owner of a DBE construction firm stated regarding work with HDOT, “There are always issues with getting paid It takes longer than we’d like.” [#I-08]
- When asked about work with HDOT, the Filipino American owner of a DBE construction services firm reported, “They do take extremely long to pay” [#I-31]

Some indicated that they have not witnessed or experienced any problems with prompt payment. [e.g., #I-05, #I-06, #I-11c, #I-12, #I-15, #I-17, #I-24, #I-25, #I-27, #I-39]

Denial of opportunity to bid. The study team asked interviewees about their awareness of any denial of opportunity to bid on a project.

Some business owners and representatives discussed instances in which they believe they were denied bid opportunities. [e.g., #I-01, #I-25] Some had specific examples where they were denied a bidding opportunity. Others reported that restrictive bidding requirements make bidding possible for only a select few. Some of these business owners also reported on airports concessions. For example:

- The Vietnamese American owner of a DBE specialty services firm reported that his firm has been denied opportunities to bid due to restrictive bidding requirements now in HDOT requests for proposals. He commented that he has not brought it up to anyone because it is “too small of a town to ... raise that ruckus.” [#IC-02]

- Regarding unfair rejections of bid, the white female owner of a DBE construction services firm reported that HDOT requires prime contractors to have past experience working with HDOT as a prime, noting that this closes out other potential primes from bidding HDOT projects. She described this a “catch-22” and “disturbing, disgusting.” [#I-17]
- When asked if she has experience with a denial of opportunity to bid, the representative of a business assistance association stated, “[Although] I’ve not heard anything like that, we’ve certainly seen folks filing [related] lawsuits.” [#TO-01]
- The Filipino American owner of a DBE construction services firm reported that he has worked on small HDOT projects and with other public sector agencies. He commented, “Pretty much all the agencies of the government are the same in how they work. They always ask [as a bidding qualifier] if you [have done] business with them [in the past].” [#I-10]
- The Filipino American male owner of a DBE construction services firm discussed how “good ol’ boy” networks exclude him from bidding, saying, “If I reported, ‘No,’ I’d be lying.” He added that these networks discourage his firm from attempting to bid on certain projects. [#I-31]
- The African American business owner reported that certain requirements are only able to be met by a handful of firms, which exclude businesses from participating and getting experience. He commented, “I have no problem with a prime, because one day the ACDBE or DBE company will be a prime ... but if you can’t [ever] get the experience to be a prime, and [there’s] always these mandatory requirements, then you’re never going to get the contract” [#IC-03]
- An airport concessionaire indicated that when HDOT does not set contract goals for airport concessions, ACDBEs are denied opportunities for large contracts. He reported that “awarding a ten-year [specified] concessions contract without an ACDBE goal” denies opportunity for ACDBE firms seeking work as a prime concessionaire. [#PC-02]
- A Native Hawaiian female owner of a DBE professional services firm reported, “When we put in proposals for airports, I think we have great staff that may not have done airport work at this airport, but some of them used to be with [the Army] Corps of Engineers and they did airports in Japan and Korea so they have that background, but we have not been selected.” [#I-28]

The same business owner added that this “could be construed” that the Airports Division will not let new firms gain access to contracts. She commented, “They’ll say, ‘you need experience at Honolulu Airport.’ ‘Well how do you get experience at Honolulu Airport?’” [#I-28]

One business owner wanted HDOT to speak “contractor language.” A representative of a white male-owned construction services firm recommended a simplified “less vague” bidding processes. He asked, “Why don’t you adopt the same language we [the contractors use]? It would be very helpful.” [#I-21]

Another business owner reported that the volume of HDOT materials requirements makes bidding extremely difficult for small businesses. This white female owner of a DBE construction firm stated, “Most of the time its emergency work It’s a ton of material and also hard-bid contracts.” [#I-08]

The Native Hawaiian female owner of a DBE construction services firm reported that since the retirement of UDBE certification, work, for her, has been more difficult to bid. This business owner reported that with the UDBE Program contractors were incentivized to offer her firm work separately, and without the Program, it is much more challenging to bid and secure work. [#I-01]

A Vietnamese American business owner suggested that there should be a method for firms to seek clarification and a fair hearing for why they are denied bid opportunities. He reported that he doesn’t have confidence that he can raise issues with HDOT because the problems come from the “top.” [#IC-02]

Some other interviewees indicated that they have not witnessed or experienced any issues regarding denial of opportunities to bid. [e.g., #I-05, #I-06, #I-10, #I-11c, #I-12, #I-16, #I-24, #I-30, #I-31, #I-39, #IC-06, #TO-06, #TO-07]

Unfair rejection of bid. Interviewees reported on any unfair rejection of bids.

Some interviewees expressed their experiences with unfair rejection of bids or did not receive any response to the bids they submitted. Comments follow:

- A white female owner of a DBE professional services firm reported that recently, she has asked to bid on many projects as a subcontractor but has not received any information or feedback from prime contractors. [#I-07]
- The white female owner of a DBE construction services firm reported that although her firm is DBE certified, HDOT never approaches her to bid, and when she has submitted bids to HDOT they were turned down. She commented, “We go to debriefings, they put us down and they always have rejection letters. It came to a point that ... nowadays ... I don’t even bother to respond to the solicitations Other Hawaii state organizations, more or less, they are kind of the same ... just [a] few of them, maybe more recently, gave us some small projects” [#I-17]
- A Native Hawaiian female owner of a DBE construction services firm reported having his bids rejected by primes who then say that they will be self-performing: “That ... basically eliminate[s] the need for us.” [#I-01]

- When asked if she has ever witnessed or experienced an unfair rejection of bid, the Japanese American female representative of a small business assistance association stated, “Yes.” She added the caveat that her answer was solely based on the perspective of the rejected bidder. [#TO-06]
- Regarding unfair rejection of bids, the Native Hawaiian owner of a professional services firm mentioned that one state agency rejected his firm’s bid and told them that they were not qualified and hired a firm from out of state. [#I-15]
- A Native Hawaiian female owner of a DBE professional services firm reported that she has had her bid as a subconsultant rejected twice because HDOT would not accept subconsultants on the specific project. She mentioned that HDOT doesn’t like subs. [#I-28]

Some other interviewees reported that they have not witnessed or experienced any issues with unfair rejection of bids. [e.g., #I-05, #I-06, #I-10, #I-11c, #I-12, #I-16, #I-24, #I-25, #I-30, #I-31, #I-33, #IC-06, #TO-07]

Bid shopping and bid manipulation. Interviewees described any experience with bid shopping or bid manipulation.

Many business owners and representatives reported that bid shopping/bid manipulation is prevalent in the Hawaii marketplace. [e.g., #I-07, #I-08, #I-09, #I-13, #I-23, #I-25, #I-28, #I-32, #TO-09] For example:

- A Native Hawaiian female owner of a DBE construction services firm reported, “We’ve seen guys take our prices and use them, and then use us more as a revenue generator by telling us, ‘Oh no, we changed our mind [and] we’re going to self-perform.’ That ... basically eliminate[s] the need for us.” [#I-01]
- Regarding bid shopping, the female representative of a Japanese American male-owned firm reported, “It’s done all the time. It’s a normal practice.” [#I-03]
- A Filipino American owner of a DBE construction firm commented, “I’ve heard those things before If I knew somebody that did that, I would stop bidding [with] them.” Regarding bid manipulation, he reported, “It happened to us. One of my estimators told me [about it].” [#I-10]
- The Japanese American male owner of a DBE firm indicated that bid shopping and bid manipulation affect his firm. He reported that others know his firm’s rates once his bid is submitted, and that these companies approach the prime contractor directly to offer a cheaper rate. [#I-11a]

He noted the importance of being vigilant in making sure they’re not “undercut” by other contractors in this way. He later reported that maintaining communication with prime contractors is “crucial” to avoid being undercut. [#I-11a]

One business owner commented that bid shopping and bid manipulation is spoken about but difficult to prove. Regarding bid shopping and bid manipulation, the Filipino American male owner of a DBE-certification construction services firm reported, “Often heard, never proven.” [#I-31]

Some indicated that they have not witnessed or experienced any bid shopping or manipulation. [e.g., #I-05, #I-06, #I-11c, #I-12, #I-24, #I-33, #IC-06, #TO-06, #TO-07] Two reported never to have witnessed bid shopping or bid manipulation on HDOT bids, for example:

- The white male owner of a professional services firm indicated that he has never witnessed or experienced bid shopping by HDOT. [#I-27]
- The representative of a white male-owned construction services professional services firm indicated that he has not experienced bid shopping or bid manipulation when working on projects for HDOT. [#I-36]

Stereotyping and double standards for minority- and women-owned firms, certified firms and other small businesses when performing work. Some firms discussed whether there are stereotypes or double standards that affect firms’ ability to perform or secure work.

A number of business owners and representatives gave examples of stereotyping and double standards. Some interviewees reported evidence of covert discrimination including not being asked to “the table” and discomfort with certain conversational nuances. Comments include:

- A Filipino American owner of a DBE construction firm indicated that he is aware of “many” double standards for minority- and women-owned firms when performing work. [#I-10]
- The representative of a business assistance association reported that he believes biases exist against Native Hawaiians in the marketplace and commented that there is a “political arena” that has existed for many years. He commented, “We bring a lot of clout and need to be part of the discussion and have a seat at the table.” [#TO-02]
- The female owner of a DBE construction services firm reported, “These guys still don’t see women as being capable of doing the job ... or ... they just don’t know how to work with women ... I think it’s easier just to shut the door, or to not open the door in the first place.” [#I-01]
- The white female owner of a DBE construction services firm indicated that double standards do exist when seeking opportunities with HDOT. [#I-17]

She commented on subtle acts of misogyny, “I did submit a proposal ... to HDOT and the HDOT person knew my husband and then he [commented negatively], ‘Oh your wife’s proposal.’ He doesn’t say, ‘This company’s proposal.’” She stated that this is not a professional thing to do. [#I-17]

- A representative of a business assistance association commented, “I’ve heard about double standards at all levels, and oftentimes it relates back to the relationship.” She added, “If one firm has a good relationship with a specific individual who is the inspector, other firms may feel that he or she is holding them to a higher standard ... it’s a relationship and a perception issue.” [#TO-01]
- The Native Hawaiian owner of a DBE special contracting firm indicated that while he has not experienced double standards for his firm, he has heard of it happening to other firms. [#I-09]
- The representative of a Hispanic American-owned professional services firm reported that young females are held to “old traditional” standards and are expected to be “more polite,” for example, when articulating an argument or addressing a problem. She added that some males do not listen to women. [#I-30]

One white female owner of a DBE professional services firm reported facing sexist behavior while performing in the Hawaii marketplace. She commented, “One of the biggest challenges for women in my line of work is restroom facilities. A lot of times the work is out in the boonies, the guys will go [wherever]” [#I-07]

The same business owner reported experiencing sexism and harassment by other workers. She stated, “There are some guys that will be absolutely obnoxious and will do their best to try to run you off ... crude and lude as they possibly can be” [#I-07]

She further commented, “If you want to work in this industry you just have to develop a tough skin and ignore it. And once they get to know you, usually then they settle down [I’ve had people] deliberately targeting at me to try to get a rise out of me.” [#I-07]

Some interviewees indicated that they have not witnessed or experienced any stereotyping or double standards for minority- and women-owned firms. [e.g., #I-05, #I-06, #I-11c #I-12, #I-15, #I-16, #I-19, #I-24, #I-25, #I-27, #I-31, #I-36, #TO-06, #TO-07]

Unfair treatment regarding pursuit of work and approval of work for minorities and women, certified firms and other small businesses. Interviewees discussed whether there are instances in which firms are treated unfairly when pursuing opportunities or when performing work in the Hawaii marketplace.

Many interviewees reported experiencing instances of unfair treatment for minorities, women and other small business owners when pursuing work or regarding approval of work and getting paid. Comments include:

- A representative of a business assistance association indicated that there are instances in which firms represented are treated unfairly when pursuing opportunities or when performing work in the field in the Hawaii marketplace. He stated and then, “Hawaii is lauded for having diversity” [#TO-08]

He added that there are different levels of discrimination that prohibit business owners from gaining access to financing, education, and housing. He commented, “Hawaii is really no different than anywhere else in the United States, it’s just that the way it’s publicized as probably better than anywhere else in the United States.” [#TO-08]

- The Asian Pacific American female owner of a DBE professional services firm reported that she “feels that there is great discrimination” in procurement. She commented that her firm has held their certification for many years and has only received one project as a result. On the project, she indicated that her firm was used by a prime contractor to meet the DBE contract goal and then was promptly fired. [#PC-01]
- When asked about unfair treatment regarding approval of work for certified firms, minorities and women, the representative of a Hispanic American-owned professional services firm reported, “I think there’s a little bit of a game that goes on with respect for young females ... there’s definitely the sense of you have to be more polite, you have to have other ways of presenting the problem, and the issue, and the resolution than perhaps if you were male There’s still a little bit of some of the old traditional [ideas] you’re female, you look younger, not sure I need to then necessarily listen to what you’re saying.” [#I-30]
- A Japanese American female representative of a business assistance association stated, “I definitely have heard of situations” She added, “Specifically with the government contracting we’ve had issues with subcontractors not getting paid by the prime contractors.” [#TO-06]
- A female owner of a specialty contracting firm commented that established firms can get away with not following regulations and standards that small firms have to follow, such as having current licenses. She noted that this makes it difficult to compete with the larger firms. [#PC-05]

A few interviewees reported favoritism in public contracting that disadvantages minority- and women-owned firms and other small businesses. For example:

- The white female owner of an 8(a)-certified construction services firm stated, "... one instance ... we were the lowest bidder and had the specialized equipment and the job was given to someone else because they had a personal relationship with the client and contractor" [#I-24]
- A representative of a Native Hawaiian-owned professional services firm reported that there are instances of unfair treatment for certain groups. He added that the firm sometimes misses opportunities for work it is capable of performing because the work is "pretty much stuck with firms that are already in the system with the public sector." [#I-06]
- The representative of a white male-owned professional services firm stated that his firm encountered barriers when pursuing public sector work in Hawaii, saying, "They favor the ... companies that they work with on a frequent basis." [#I-36]
- A representative of a business assistance association commented, "I think for the clients that I work with on the government contracting side, their issue ... it's hard to break into government contracting ... the nature of the beast I think." She indicated that there is a sentiment that firms in Hawaii are hired based on "who they know" rather than based on their qualifications. [#IO-06]
- One Native Hawaiian female owner of a professional services firm reported, "You're not chosen because ... you're small so you've only got [a few] people, so they'd rather pick somebody that has ... more capacity to fill the requirements." [#I-28]

Some described that how a project is awarded or how that award is perceived can disadvantage minority- and women-owned firms and other small businesses. These interviewees reported restrictive contract requirements that unfairly narrow the playing field; small firms excluded from larger projects; perceptions that minorities and women, if awarded a contract, are unworthy; and other unfair practices. Comments follow:

- Regarding instances in which firms are treated unfairly when pursuing opportunities or when performing work, the representative of an 8(a)-certified Japanese American-owned construction services firm stated, "... [HDOT] requires prior past experience and those requirements are really narrow so that only certain contractors will qualify. [#I-37]
- One female owner of a DBE professional services firm reported having a good understanding of the procurement process. She noted clients have asked her to do things she was not comfortable doing. Having the experience working at a large firm gave her the understanding and the knowledge of correct procurement practices. She also noted some clients take advantage of smaller firms. [#I-19]

- A female owner of a construction services firm stated, "... I feel getting the work is more challenging ... most of the time the larger projects go to the larger company." [#I-13]
- A Filipino American female owner of a professional services firm stated, "I'd like to think there are no gender barriers, but at one point all the decision makers were men. It bothers me that my friends would say 'oh you got that job because you are a woman and a minority' It should really be your qualifications." [#I-14]
- A representative of a business assistance association stated, "I wouldn't say it's deliberately unfair, but certainly Outer Island companies feel that it's unfair The perception is that things are somehow slanted to favor Oahu contractors and larger contractors." [#TO-01]
- The Hispanic American owner of a DBE professional services firm reported that people who are born and raised in Hawaii view transplants to the state as outsiders. He later added that he has been called a "haole" by local Hawaiians. He added that minority- and women-owned businesses on Outer Islands do not benefit from certification in the same way that firms on Oahu do. [#I-32]

One Native Hawaiian owner of a professional services firm reported history of a "pay-to-play" mentality in the marketplace that persists today. "On the public side ... in the past there was more of a 'pay-to-play' mentality ... with some of the reforms it's gotten better but I think there is still some pressure ... on donating to some political candidates to get work." [#I-15]

A few interviewees reported that a majority-minority state provides the unique opportunity to welcome diversity in Hawaii. For example:

- Regarding additional difficulties for minorities or women starting businesses in Hawaii, the Japanese American female representative of a small business assistance association stated, "Well this is Hawaii so [the] majority of firms are minority-owned." [#TO-06]
- When asked if minority- or women-owned firms face challenges in the Hawaii marketplace not faced by other businesses, the representative of a construction services firm owned by a Japanese American reported, "No ... Hawaii is a rare market where it's very diverse, so Japanese, Filipino, Hawaiian, [it] doesn't matter. We don't view different races like people on the mainland would." [#I-03]

Unfavorable work environment for minorities or women. Some interviewees discussed whether there is harassment based on race or gender on jobsites. Many interviewees indicated that minorities and women face additional difficulties. [e.g., #I-05, #I-09, #I-10, #I-11c, #I-12, #I-13, #I-16, #I-19, #I-21, #I-24, #I-25, #I-31, #I-36, #I-38, #IC-05, #IC-06, #TO-03, #TO-07] For example:

- The white female concessionaire reported that Marshallese individuals are discriminated against in Hawaii. [#IC-09]
- The Native Hawaiian male owner of a DBE construction firm reported, “I’ve heard ... a lot of ‘old school guys,’ I guess [they frown] upon [minorities and women] being general contractors.” [#I-12]
- A female owner of a DBE/WBE-certified professional services firm commented that “women are discriminated [against] in Hawaii.” She later added, “I do believe we can minimize discrimination against women through understanding of the [bid] process.” [#PC-04]
- The white female owner of an 8(a)-certified construction services firm stated, “... My husband’s biggest complaint is that you’re not big enough to be in ‘the club’ Like here are the bids for the biggest companies.” [#I-29]
- The representative of a business assistance association commented, “You certainly hear of [unfavorable work environment] at the employee level” [#TO-01]
- One representative of a construction services firm indicated that there aren’t a lot of women in the field and reported “It’s not a trade where women-owned businesses come.” [#I-23]
- A male owner of a DBE professional services firm reported that he lost a good female professional employee because of childcare obstacles. He commented, “I don’t have the answers, but I can see why it’s a tough field for women ... a lot of women tend to drop out and I don’t know how you overcome [it].” [#I-26]
- A representative of a Native Hawaiian-owned concessionaire reported challenges specific to operating a culturally traditional airport business. This individual stated that it is difficult to succeed as a traditional Native Hawaiian business. [#AS-58]

Any knowledge of “fronts” or false reporting of good faith efforts. Business owners and representatives reported on their experience with fronts or false reporting of good faith efforts. One interviewee reported “fronts” as common in Hawaii; another reported that primes “manipulate DBE requirements” to their advantage, for example:

- A Filipino American female owner of a professional services firm stated, “Well, that’s difficult to prove. It’s only when you talk to the owners, then you know who has the brains.” [#I-14]
- The Native Hawaiian female owner of a DBE construction services firm indicated that “fronts” and false reporting of good faith efforts are “common” occurrences in the Hawaii marketplace. [#I-01]
- One representative of a business assistance association mentioned “fronts” reporting, “I know that people are getting more savvy ... at least two contractors on Hawaii Island ... changed their model and made either their wives the primary or have found someone Native Hawaiian or Native American ... because they know they’ll get the extra advantage” [#TO-01]
- Regarding fronts, the white female owner of an 8(a)-certified construction services firm stated, “There are three to four large construction firms here, they ... take good employees. These large companies have gotten so large that they split into five or six smaller ‘independent’ companies, but they’re not independent.” [#I-29]
- The Filipino American owner of a DBE construction services firm reported that prime contractors often find ways to “manipulate DBE requirements.” [#I-31]
- One white female owner of a DBE construction services firm reported that large prime contractors attend DBE meetings “to look good” to HDOT. She indicated that prime contractors misrepresent their efforts to find qualified DBE subcontractors at the meetings, and stated, “This whole thing is a show ... a cover-up.” [#I-17]

Any “good ol’ boy” networks, closed networks or other information networks exist that affect firms in the industry. Many interviewees indicated that such networks do exist in the Hawaii marketplace and cause challenges for their businesses. [e.g., #I-09, #I-10, #I-11c, #I-12, #I-21, #IC-09, #PC-05, #AS-53] Furthermore, a male representative of an Asian Pacific American-owned construction services firm indicated that “good ol’ boy” or closed networks make it particularly difficult for women and minorities to make it into the industry, others agreed. [#I-35]

Many interviewees reported on their experiences with closed networks. Interviewees reported knowledge of closed networks, cronyism and nepotism in Hawaii that excludes business owners and businesses that are not “your people.”

- Regarding closed networks, the Hispanic American owner of a DBE professional services firm stated, “Business in Hawaii has ... a ‘cronyism, nepotism’ component to it that’s unfortunate That’s kind of the ‘good ol’ boy’ system where you kind of ensure that when work is available [that] it goes to ‘your people.’” [#I-32]

- One Vietnamese American business owner reported that difficulties in the marketplace are not brought on by being a minority or woman, but by “good ol’ boy” networks. He added that every industry in Hawaii is impacted by “good ol’ boy” networks. He reported that closed networks have to do with being “local.” [#IC-02]
- A business assistance association reported that there are two different “good ol’ boy” networks that exist in Hawaii. He mentioned that one network exists among “non-locals” and another exists for those “born on the islands.” [#TO-08]
- When asked if there are any “good ol’ boy” networks in Hawaii, the white male owner of a concessionaire stated, “Of course there are.” He added, “It just depends which one you want to be in.” [#IC-10]
- Regarding “good ol’ boy” networks, the Native Hawaiian female owner of a DBE construction services firm reported, “When we went out we got a lot of pushback from some of the other folks that were in the industry because their position was [they] got to use the guys [they] know, and ‘everybody knows everybody.’ And I think you see that a lot The guys ‘know’ each other. It’s a very male-dominated industry.” [#I-01]
- Regarding the existence of a “good ol’ boy” network, the female representative of a Hispanic American-owned professional services firm commented, “You’ve got firms who are lined up with specific clients. They like to use the same firms. They don’t want to mix it up a whole lot. In Hawaii, it’s very much like, well they understand how we’re doing it. If you’re not an insider [you’re treated differently].” The same business representative added, “Once you’re ‘aligned’ with a particular group ... it takes a lot for you to get thrown out.” [#I-30]
- A representative of a Chinese American male-owned construction services firm reported that networks impact the work “at the higher level.” He added, “I think it’s probably done more on the consultant side prior to the jobs coming out to the contractors. I think it’s more on the design and the [construction management] side that ... may have some effect ... who’s in charge.” [#I-33]
- The representative of a business assistance association reported that “good ol’ boy” networks exist and affect business opportunities for members. He commented, “[The organization] wants to have a voice and be heard. Not just sit back and [be complacent].” [#TO-02]
- A white female owner of an 8(a)-certified construction services firm stated, “Yes, the large companies have a very closed network and you have to know someone to even be considered for some type of subcontracting work It’s ‘definitely’ an ‘old boy’ mentality My husband is local and raised here and he never gets work from them.” [#I-29]
- Regarding “good ol’ boy” networks, the white female owner of a certified construction firm stated, “Sure, I think that’s the world, that’s everywhere.” [#I-08]

Some reported that closed networks in Hawaii result in the same businesses “getting all the projects.” A number of business owners and representatives reported on how the pattern of the same businesses receiving multiple contracts narrows the playing field, for example:

- When discussing “good ol’ boy” networks, the Native Hawaiian female owner of a DBE professional services firm reported, “I do think they exist, and ... affect the firms.” She reported that more work will go to certain firms because they are in the network or know people. [#I-20]
- When discussing “good ol’ boy” or closed networks, the white male owner of a professional services firm reported, “I wouldn’t want to characterize it as the ‘good ol’ boy,’ but ... if you look at the procurement of who gets what, it narrows down to ... a pretty consistent pattern.” [#I-27]

The same business owner reported that an old saying in Hawaii is, “In order to do business in Hawaii it’s not what you know, it’s ‘who you know.’” He commented that this may still have credibility today. [#I-27]

- Regarding “good ol’ boy” networks, the Chinese American female owner of a construction services firm stated, “We do see the same general contractors work with the same contractors on projects.” [#I-13]
- When asked if she has knowledge of any “good ol’ boy” networks, the owner of a professional services firm reported knowledge of closed networks. She indicated, for example, that there is a contractor who gets “all the projects,” despite having a criminal record. [#I-24]
- The African American business owner reported, “In some ... industries there are just a few people that keep winning all the contracts, you don’t have to be a smart person to figure that out ... How do they keep winning?” He added that certain requirements are only able to be met by a handful of firms, which exclude businesses from participating and getting experience. [#IC-03]

Several business owners reported that shunning and exclusion are examples of the covert actions of closed networks that disadvantage outsiders. Comments follow:

- This Native Hawaiian female representative of a business assistance association indicated, “The depth of relationship[s] here in Hawaii is far exceeding that [elsewhere] You can actually offend someone and not realize it.” She explained further, “We don’t want to be confrontational many times so we will often, even though you’ve offended us, not say anything directly to you, but at the next luau we go to we’ll tell our 800 closest friends and relatives what you did, and by virtue of that ‘coconut wireless’ someone can be excluded from the market.” [#TO-01]

- The white female owner of a DBE construction services firm reported, “The environment here is so tight ... they just won’t let you in.” She commented, “We are left with just being ‘little people’ and we are left being just the subcontractors ... [a] women-owned firm is ... ‘totally nothing’ in Hawaii.” [#I-17]
- A white female owner of a DBE professional services firm reported that “good ol’ boy” networks exist. She then added, “It makes it difficult for someone new to break in and compete.” She indicated that she is “pretty low on the totem pole,” which may be evidence that closed networks are working covertly to exclude her. [#I-07]

Some business owners reported awareness of a pay-to-play scenarios that exclude businesses or pressure businesses to donate to political campaigns. Examples include:

- Regarding “good ol’ boy” networks, the owner of a professional services firm stated, “Whether it’s factual or perceived, I think there is a little of that being talked about.” He indicated, for example, that there was a consulting firm that was encouraging other firms to donate to a specific campaign if they wanted to receive future work. [#I-15]
- A representative of an 8(a)-certified professional services firm stated, “I think they exist ... some of the work that we do is political, so to the extent that there is ... those types of networks in the political sphere that can impact the industry that we work in because ... when you’re talking about getting permits often it’s ... going to a commission or a council or a board ... and getting a vote ... there may be some of that going on” [#I-16]

A number of interviewees reported that although “good ol’ boy” networks exist in Hawaii, “it is getting better.” Some business owners indicated that they specifically avoid closed networks while doing business. Some responded by making conscious decisions to disassociate their businesses from closed networks by not seeking work in the public sector or other closed arenas. For example:

- When asked if there are any “good ol’ boy” or other closed networks that affect firms like his in the Hawaii marketplace, a representative of a professional services firm owned by a Native Hawaiian reported, “I would say ‘yes,’ but it’s not as [bad as] it used to be.” [#I-06]

The same business representative added, “ ... the ‘good ol’ boy’ system, they decide who gets the work I know now a lot of the decisions made [are by] the selection committee, and not necessarily the directors, or anybody who is politically influenced, which is better.” [#I-06]

- The representative of a business assistance association stated, “We are making great strides in that area ... I think certainly the ‘good ol’ boy’ network is perceived as being alive and well, however I believe that with this age of information and social media that great strides are being made to become more inclusive.” [TO-01]

- One representative of a construction services firm owned by an Asian Pacific American indicated that although existing “good ol’ boy” networks are known to exclude women and minorities, “It’s probably gotten better over time.” He added, “Now you just don’t want to be associated with the ‘good ol’ boy’ network.” [#I-35]
- Regarding knowledge of any “good ol’ boy” networks, the Filipino American female owner of a professional services firm stated, “In the early days in the 80’s it was mostly the ‘Japanese’ that had the hold of local government including the DOT, but that’s changed.” [#I-14]
- When discussing “good ol’ boy” networks, the representative of a white male-owned professional services firm stated, “I think that may have been the case 20 years ago but it’s ... becoming less and less of an issue.” He reported that these networks have diminished because the government has figured out better ways of procuring their professional services and is more conscious of eliminating that mentality. [#I-36]
- The Japanese American female owner of a DBE professional services firm reported knowledge of “good ol’ boy” networks. However, she noted that a firm may get work because they already do good work for a “well-known” contractor. [#I-19]
- One ACDBE concessionaire reported every industry in Hawaii is impacted by “good ol’ boy” networks, but his firm is less impacted by these networks because they have been in business long enough to earn some “street credibility.” [#IC-02]
- A Japanese American owner of a DBE professional services firm stated, “The political environment ... the ‘old boy’ network ... still exists, but ... you choose to not be a part of it I was very much aware of it when I came back to Hawaii.” [#I-26]
- A white male owner of a professional services firm reported, “The Asian companies are a ‘good ol’ boy’ network but they don’t infringe on me.” He added, “Basically they do all the municipal work, state, federal, county ... I don’t want to compete with them, and ... they don’t want to compete with me.” [#I-25]

One Native Hawaiian female owner of a professional services firm indicated being part of a closed network, and how it benefited her firm. She commented, “For me, that access to information, being part of a network where information flows, has been a benefit.” [#I-28]

Some other interviewees reported “hearing” of closed networks, but had no experience with them, or had “no proof” that they exist. [e.g., #I-05, #I-18, #I-23, #I-37, #I-38, #IC-04, #IC-05, #IC-06, #TO-07]

Any unfair treatment by HDOT specifically. Firms discussed whether they were ever treated unfairly by HDOT. An owner of a DBE/WBE professional services firm indicated, for example, that unfair treatment by HDOT is “unfortunate and not fair to Hawaii and women in Hawaii and elsewhere.” She added, “I do strongly believe that Hawaii deserves better than this.” [#PC-04]

Some business owners reported on a range of issues from their discouragement with the DBE Program to unfair regulatory burdens and other challenges that small businesses face. Several reported that restrictive contract provisions disadvantage their firms. Examples include:

- A female owner of a DBE professional services firm reported when addressing unfair treatment for small businesses, reported that she has been forced to work for another company because HDOT says that they do not want subcontractors on certain projects. She went on to say, “[HDOT] is heavily male-dominated I could definitely see how other female-owned businesses may not have the same opportunities.” [#I-28]
- A Vietnamese American business owner reported that contract language was changed on a contract the firm held in the past, making it “impossible” to bid this year. He noted that he thinks the change was made deliberately “to exclude his firm.” [#IC-02]
- When asked if she has witnessed unfair treatment by HDOT, the white female owner of a DBE construction services firm reported, “Yes.” She commented, “[Named HDOT representative] I think ... is just ... a guard to push people away from the DBE Program and HDOT” [#I-17]

The same business owner added that she asked HDOT for DBE usage statistics on certain types of contracts and was unable to obtain them. She commented, “[One] DBE representative ... says ... they don’t keep any statistics” [#I-17]

She also reported that HDOT requires prime contractors to have past experience working with HDOT as a prime, noting that this closes out other potential primes from bidding. She added that her firm actively pursues opportunities with other government agencies, which includes submitting statements of qualifications, creating brochures and attending small business annual meetings. She concluded, “I used to go to DBE Program meetings until I got totally disgusted with them Those people are the worst people among all the other groups that I have interacted” [#I-17]

- One representative of a Japanese American-owned construction services firm stated, “Again it’s the regulation, the taxation ... it’s just the amount of overhead that a small business has to do to run a business ... I think in itself is an unfair advantage [for] a large corporation that has the staffing to support all these requirements that are pulled upon the business. I think the state sometimes treats big businesses and small businesses the same Some of the requirements are quite burdensome.” [#I-37]

- The Native Hawaiian female owner of a DBE construction services firm reported, “I think sometimes the state’s insurance requirement is a lot for a DBE ... [and] the contractors sometimes try to beef up the insurance requirements well beyond what the state wants.” She described this practice as a method to keep out small businesses that contractors do not want to use. [#I-01]

Several interviewees reported on HDOT issues related to transparency. These business owners reported corruption or no communication from HDOT regarding issues that affect their business operation, for example:

- A Vietnamese American business owner recalled that when he first started his business and told people that he was bidding on state contracts, people “shuddered,” and told him “good luck.” He explained, “The perception is that it’s very corrupt and non-transparent.” [#IC-02]

The same business owner reported that his experiences were “completely transparent” until HDOT brought in a new person of authority. He reported that with the change in administration came a decrease in transparency and increase in corruption. He noted that there should be more oversight to make sure no “funny business” goes on. [#IC-02]

- Regarding unfair treatment by HDOT, the female Native Hawaiian concessionaire reported, “One thing, we’re paying property tax and we don’t own the property.” She added that HDOT does not communicate construction plans with the lei stand owners. [#IC-05]

A representative of a business assistance association commented that social media could be acting as a deterrent to any unfair treatment. She reported that she had not heard of any instances of unfair treatment by HDOT, and added, “And I would say that in this age of social media, if that were rampant, we would all know about it.” [#TO-01]

Some other interviewees reported no experiences with unfair treatment by HDOT. [e.g., #I-05, #I-10, #I-11c, #I-12, #I-16, #I-24, #I-31, #I-33, #I-36, #IC-04, #TO-06, #TO-07]

E. Working with Public Agencies and Specifically HDOT

Business owners and representatives were asked about their experiences regarding opportunities for contracts with HDOT. Some reported the experiences they had when conducting work with HDOT or other public agencies. Topics included:

- Performing work for HDOT and other public agencies;
- Major types of public sector contracts in the Hawaii marketplace;
- Deciding to pursue opportunities with public agencies and HDOT specifically;
- Any challenges learning about opportunities with HDOT;
- Any barriers or challenges when pursuing or performing public sector work in the Hawaii marketplace; and
- Business owners and business assistance representative offered suggestions for HDOT to improve the procurement practices.

Performing work for HDOT and other public agencies. Many business owners interviewed had secured work with HDOT, airports and other public agencies. [e.g., #I-01, #I-13, #I-16, #I-18, #I-19, #I-20, #I-21, #I-38, #IC-04, #IC-05]

For some, opportunities with HDOT were scarce or very small contracts. Some had never or not recently worked with HDOT; worked on very small projects; or were restricted to subcontracting opportunities with HDOT when they wanted to serve as a prime. Examples follow:

- Regarding work done for HDOT, the white female owner of a DBE professional services firm reported that she did work as a subcontractor on an HDOT project but added that “HDOT is one of the rarest [public agencies] that [she does] work for.” [#I-07]
- When asked if he has conducted work for HDOT, the small business owner of a professional services firm reported that he has not. He added, “I’d like to ... Every year I go onto the professional services list but have never been contacted.” He added, “Specifically to HDOT, I believe my scale is a deterrent, or at least an obstacle in trying to get an assignment from [HDOT].” [#I-27]
- When asked if his firm conducts work for HDOT, the Native Hawaiian owner of a professional services firm reported, “Yes, we’ve done work in the past ... we’d like to do more, we haven’t done too much [recently].” [#I-15]
- A Filipino American male owner of a DBE construction services firm reported that he has worked on “small” HDOT projects. [#I-10]
- One owner of a DBE materials supply firm reported that the firm has worked on HDOT projects. He reported that, in his opinion, supply contracts are small, and added that in his experience HDOT requests are as low as \$1,000 and as high as \$20,000. He commented, “That range is kind of small.” [#I-05]

- The representative of a construction services firm indicated that the firm performs very rarely on HDOT projects, commenting, “I think maybe here or there, but very small and very few.” [#I-03]

Some specifically reported scarce opportunities in airports concessions or at the airports. [e.g., #IC-07, #IC-08] Examples follow:

- An African American business owner indicated interest in doing work with HDOT in the future. He reported that there have not been many requests for proposals in Hawaii that pertain to his firm. [#IC-03]
- A white female owner of a DBE construction services firm reported that she has worked on contracts with HDOT and the Airports as a subcontractor. However, she explained that she is unable to get work with HDOT as a prime contractor because her firm has never participated in an HDOT contract as a prime in the past. She stated, “HDOT doesn’t respect that ... to give us work they think that you should be a prime contractor to get work from them.” [#I-17]
- Regarding her experiences as an airport concessionaire, the white female business representative reported, “We tried, we talked to the airport ... and we were told, ‘We are a big slow-moving machine.’” [#IC-09]

Many business owners reported having had work with several public sector clients, including HDOT. [e.g., #I-02, #I-04, #I-11c, #I-12, #I-14, #I-15, #I-29, #I-31, #I-32, #I-33, #I-35] Work with HDOT represented both prime and subcontracts in construction, professional services, goods and other services. Interviewees reported working across the agency, including in airports concessions. Comments include:

- When asked if her firm performs work for HDOT, the white female owner of a DBE construction firm stated, “We do work for the counties, state, the Navy base for the [federal government] We adapt as the opportunities arise knowing we can do public work.” She later commented, “Most of the work we’ve done with HDOT we’ve done as a general.” [#I-08]
- When asked if his firm has conducted work for HDOT, the representative of a white male-owned construction services firm reported that his firm has worked on projects for HDOT as both a prime and subcontractor. He added that his firm performs work for the counties on all of the major islands. [#I-39]
- One owner of a DBE professional services firm reported working on projects with the HDOT. He added that due to the size of the HDOT project, the firm has engaged subconsultants to assist. This business reported doing work with the Department of Veteran Affairs, as well. [#I-26]

- When asked if his firm has done work for HDOT, the representative of a white male-owned construction services firm stated that his firm has worked on design-build scenarios for the airports as a subcontractor. The same business representative commented that his firm has performed work for the City and County of Honolulu, as well as Maui County. [#I-36]
- A Chinese American male owner of a construction firm reported that his firm has worked on projects for HDOT and the counties both as a prime and subcontractor. He added that his firm has worked for the several divisions of HDOT. [#I-22]

Major types of public sector contracts in the Hawaii marketplace. Business owners and representatives discussed the types of public sector contracts that they are aware of in the Hawaii marketplace.

For example, a Filipino American owner of a DBE construction firm reported, “There are quite a few jobs out there ... to bid on. But for [HDOT], I don’t see a lot. I wish [HDOT] could get more.” He went on to indicate that the airport, however, has a healthy number of opportunities available. [#I-10] Other examples follow:

- Some business owners and representatives agreed that there are not a lot of highway contracts available with HDOT because of the lack of federal interstate highways; however, there is still airport, harbor and rail work in the marketplace. [e.g., #I-06, #I-16, #I-23, #I-26, #I-32, #TO-01]
- Several interviewees were aware of wastewater, water and underground utility projects and other infrastructure improvements coming out of the counties and other public agencies. [e.g., #I-06, #I-13, #I-22, #I-29, #I-35]
- Some described available projects as primarily “maintenance” rather than larger capital projects; others reported opportunity for renovation work. [e.g., #I-13, #I-18, #I-28, #I-29]
- A few reported opportunities with island schools and municipally owned buildings and private sector development projects. [e.g., #I-02, #I-36]

Deciding to pursue opportunities with public agencies and HDOT specifically. Business owners and representatives reported how they decide to pursue opportunities with HDOT.

Some DBEs and other certified firms specifically sought out work with contract goals or projects scaled to their firms’ capacity or unique ability. Most of these businesses sought work posted on procurement websites and other bid-posting services or from direct contact to and from prime contractors:

- One business owner of an ACDBE firm commented, “Most importantly, what makes me go after contracts, hands down, is does it have a goal? Is it conducive to our vision?” He concluded that if it doesn’t match his NAICS codes and meet the aforementioned requirements then his firm does not bid. [#IC-03]

- Regarding pursuing opportunities with HDOT, the representative of a DBE specialty services firm indicated that project size is the biggest factor when deciding to pursue HDOT and other public sector work opportunities. [#I-11c]
- A representative of a business assistance association explained, “They [the firms] look at what their carrying capacity is and what their in-house capability is.” She commented that some firms were overcoming this barrier, saying, “I have been hearing more ... smaller firms ... linking arms so that they can have a capacity to meet criteria and expectations.” [#TO-01]
- A DBE construction firm reported, “Number one is the scope of work. If I can see something that I can do, then I [forward it] to my estimators. Then if it is within range of what we can tackle, then yeah, we work on it right away.” [#I-10]
- Regarding bidding in the public sector, the owner of a DBE construction firm reported, “There’s a heavy bid season Typically, at the end of the fiscal year [when HDOT has] to use up their budget, and so that’s when all the jobs come out. He continued, “So the type of projects that we’ll look at during the bid season are jobs [where] you have to ‘think’ how to do it. The jobs from HDOT that “take more effort” and are worth “put[ting] a price together.” [#I-12]
- The owner of a DBE materials supply firm reported that the firm has an “obligation” by the manufacturer to “bid on all jobs” when selling certain materials. He explained, “It’s like a duty that’s imposed on us as a distributor. We can’t say, ‘Oh we’re not going to bid on this because we don’t like [it] and the margin’s going to be too small.’ We have to submit something Otherwise you jeopardize your distribution.” [#I-05]
- In terms of deciding to pursue opportunities with HDOT, the representative of an 8(a)-certified professional services firm reported, “If there’s a fit between the services sought and what we can offer then we would pursue it. Often, we are in the subcontract position, so if we have prime consultants approach us then we will partner with them.” [#I-16]
- Regarding how her firm decides to pursue opportunities with HDOT, owner of a DBE professional services firm reported that prime contractors approach her to join their team because of her firm’s specialized capabilities. [#I-20]

Many other businesses reported how they decide to pursue work. [e.g., #I-01, #I-06, #I-14, #I-18, #I-19, #I-23, #I-28, #I-29, #I-31, #I-33, #I-37, #I-38, #IC-01, #IC-02, #IC-04] Most of these businesses considered a myriad of factors such as scope of work, size, timing and location and other relevant factors. Most found opportunities to bid through procurement website postings or other bid-posting services. Comments include:

- A Chinese American owner of a construction firm reported, “We look at the project scope and ... we’ll look at it and see if it’s something that we’re capable of doing and if it is then we’ll look and see if we have people to staff it.” He added, “A lot of times [HDOT] projects might take six months, 12 months or longer so you have to make a commitment.” He reported that the logistics of working on projects for HDOT can be a “headache.” [#I-22]
- Regarding how her firm decides to pursue opportunities with HDOT, the white female owner of a DBE construction firm stated, “We look at each job individually ... we look at the location, where the job is Where our resources are and the duration. We look at it and make sure we can perform it and meet the expectations for state or county.” [#I-08]
- A representative of a construction services firm owned by an Asian Pacific American stated, “When the bids come out, we look it over and then we decide if we are going to bid on certain projects ... which is within our niche.” He added, “We will bid on anything that we ... know we can perform well on.” [#I-35]
- When asked about pursuing opportunities with HDOT, the representative of a white male-owned construction services firm stated, “I look at how large the potential work is. Usually, when the scope of work comes out, it’s pretty good detailing a story about how big the job is, and sometimes they have good enough detail.” [#I-21]
- Regarding how he decides to pursue opportunities with HDOT, the white owner of a professional services firm reported, “I annually put in my name for the professional services lists and try to get qualified for as many of the categories that I can and then wait for the year to see if my name pops up” [#I-27]

Any challenges learning about opportunities with HDOT. Interviewees discussed whether there are any challenges associated with learning about opportunities with HDOT. For example, the white female concessionaire stated, “Only that I wouldn’t know where to look for those opportunities.” [#IC-09]

Many reported challenges that made pursuing HDOT jobs difficult, and why. Some of these interviewees reported difficulty navigating the procurement process, for example:

- One business representative stated, “Yes, there has been a lot of electronic programs that you can log into and try and navigate. It can be a challenge.” [#I-21]
- Regarding how her firm decides to pursue opportunities with HDOT, the white female owner of a DBE professional services firm stated, “A general contractor calls me. That’s the only way I find out about HDOT projects I don’t even bother looking at HDOT projects anymore because I’m not going to take the time to go and get the bid documents myself That’s the only way [to get documents] and it just is too time consuming.” [#I-07]

The same business owner added, “One of the challenges is even if I pick up the bid documents from HDOT, I don’t know who the general contractors are that are bidding it, who to send my bids to, so unless someone asks me for something, I don’t [bid].” [#I-07]

- A Vietnamese American business owner reported, “Unless you know ... they’re not very well publicized They’re on the websites, and so if you know to check the websites [it’s helpful]. Unless you are in the system ... [it won’t help you]. Most businesses wouldn’t even know that ... was the process.” [#IC-02]
- Regarding challenges learning about opportunities in airport concessions with HDOT the African American business owner reported that her firm has attempted to work the Airport in the past. She stated, “I went up there to see ... if any of the stores wanted to carry any of my products and then I went up to see how to become a vendor but there was zero information available on how to become a vendor.” She added, “Every person I spoke to ... reported they are part of an entity or corporation of stores.” [#IC-08]
- The owner of a DBE materials supply explained, “If you miss the opportunity to bid for whatever reason, then you’ll be left out. In the case of government jobs, they don’t always come out and ... announce themselves, [so] you have to go into the site and look for them ... if you don’t have someone dedicated to that position, then there’s thousands of dollars that you could lose.” [#I-05]

- When asked about barriers that might affect minority- or women-owned business in learning about contracts with HDOT, the white female owner of a DBE professional services firm mentioned the importance of accessibility for DBEs and subcontractors. [#I-07]

The same business owner reported being unaware of any HDOT online postings, saying, “You have to go in and get [bidding documents] The second thing is having a list of plan holders, so that DBE subs, have a chance to call around and say, ‘Hey, I exist, I’d like to send you a bid. Can I send you a bid?’ Because if a DBE waits for the general ... they’re going to wait a long time.” [#I-07]

Other interviewees reported facing no challenges learning about opportunities with HDOT. [e.g., #I-06, #I-11c, #I-12, #I-18, #I-19, #I-22, #I-28, #I-37, #I-38, #IC-02, #IC-03] These business owners reported that largely due to electronic postings finding bidding opportunities is relatively easy. For example:

- The representative of a white male-owned construction services firm stated, “As technology has improved, there is definitely better real-time interaction with projects We can go to a website and see what projects have been advertised now.” He reported that his firm can now download project plans and specification directly from the website, which has been an advantage in procurement.” [#I-39]
- A representative of a construction services firm owned by a Chinese American indicated that his firm does not face challenges in learning about opportunities with HDOT. He added, “Everything is online and there’s different bid services that we also use to identify which bids are coming out.” [#I-33]
- The representative of an 8(a)-certified and Japanese American-owned professional services firm indicated that her firm submitted their statement of qualifications and selected to be part of a list of professional services providers. She added, “We are on the e-mail list I would say HDOT does a really good job about emailing ... whenever they have professional service solicitations.” She mentioned that the other counties also send out e-mails and have notifications through their websites. She clarified that this is typically how they find out about opportunities. [#I-16]
- One Chinese American owner of a construction firm reported that there are no barriers that affect minority- or women-owned businesses in learning about or participating in contracts with HDOT “because the government is prohibited from discriminating against bidders.” He reported, “With government it shouldn’t be hard because everything is advertised.” [#I-22]

Any barriers or challenges when pursuing or performing public sector work in the Hawaii marketplace. Business owners and representatives indicated barriers, such as heavy paperwork and “cumbersome” processes, when seeking public sector work. Many noted that small businesses are particularly disadvantaged as a result of “cumbersome” red tape, project delays and other challenges. As many minority- and women-owned firms are disproportionately small, the effect may be equally damaging for these businesses.

Regarding HDOT and other public agencies, many interviewees reported extreme paperwork with poorly communicated instructions and specifications that are particularly challenging for small businesses. [e.g., #I-22, #TO-06] For example:

- When asked if there are barriers for small- or minority-owned firms to get work with HDOT, the Native Hawaiian male owner of a professional services firm reported, “I think there’s ... more challenge.” He indicated that smaller, minority- and women-owned firms often do not have the administrative staff to handle intensive paperwork. [#I-15]
- The representative of a construction services firm owned by an Asian Pacific American stated, “The government side ... there’s a whole lot more of paperwork.” [#I-35]
- Regarding working for HDOT, the representative of a white male-owned construction services firm stated, “There is a lot of paperwork ... stuff that I was not aware of ... forms that needed to be filed out I can also say from an estimator standpoint, some of the bids I have worked on leave a lot of unknown wiggle room for interpretation into what the work should be. The jobs are posted on an online source and when you read the description, the interpretation is As an estimator you want to make sure everything is set up tight.” [#I-21]
- Refencing barriers to working with HDOT, the female representative of a construction services firm owned by a Japanese American male reported, “[There is] a lot of red tape. Our government projects have a ton of paperwork.” She added, “For a company [with] maybe [a] scope so small We got to fill out paperwork that would be for more general contractors. Three, four, five inches of [stacked] paperwork.” [#I-03]
- Regarding challenges learning about opportunities with HDOT, the white male owner of a professional services firm described the annual submittal of qualifications for professional services contracts as “cumbersome.” [#I-27]
- Due to time-consuming paperwork and no contract awards, the Asian Pacific American female owner of a professional services firm reported that she tried securing work via requests for proposals for about five years but gave up. [#I-24]

To better engage minority- and women-owned businesses and other small businesses, many interviewees reported that HDOT needs to streamline procedures and improve communications internally and externally. These business owners and representatives reported their frustration with departments that do not play well with each other and poor response to inquiries. Comments include:

- The white female owner of a DBE construction firm stated, “The process with regulation is very redundant and sometimes overkill There’s a lot of paperwork and a lot of regulations.” [#I-08]
- The Native Hawaiian male owner of a DBE specialty contracting firm reported, “It is challenging [to work with HDOT and the counties].” He reported that there are jobs that would only take “30 minutes” to do, yet the proposal paperwork takes “two weeks.” [#I-09]
- A male representative of a professional services firm indicated that the firm’s experiences working with HDOT have generally been positive, but there is a need to streamline the procurement process, and processes for executing changes or modifications on projects. [#I-06]
- A concessionaire reported, “Dealing with [HDOT] is frustrating as we have to deal with the [red tape]. This goes against creativity. We need government to be a partner. HDOT is not built to think out of the box.” [#IC-01]
- A representative of an 8(a)-certified construction services firm stated, “I think the main issue with the DOT is that there are too many divisions and departments and they’re all not on the same page. I don’t think they like each other either I don’t think they help each other either.” [#I-37]
- Regarding work done for HDOT, the white female owner of a DBE -certified professional services firm commented, “One of the frustrating things about [HDOT] is sometimes there’s a requirement [for submittals] You submit stuff [and] they acknowledge receipt, [but] they never approve. They don’t review, they don’t make sure that recommendations are carried out.” She later reported that there is a lack of oversight regarding contract regulations on HDOT projects. She explained that the contractors are responsible for following the contract but “they’re in production mode.” [#I-07]
- One owner of a professional services firm reported that the procurement process could be done “more efficiently.” He added, “I think communication from the agency could be better on what’s needed and how to get it done.” [#I-15]

He added that he would like to see HDOT be more efficient in the process of selecting consultants and streamlining contracts. [#I-15]

- A female owner of a DBE professional services firm reported the need to increase training for HDOT procurement staff to increase efficiency and execution of procurement rules. [#I-19]
- The representative of a business assistance association commented, “Communication is lacking ...” She explained, “One of the big complaints I’m hearing is the difficulty to get a live person on the phone. Both the State and the County have taken to voicemail and I’ve heard from people saying, ‘Do you have another number for this agency? I call and I call and I call, and it rings once and goes straight to voicemail.’” [#TO-01]

She also mentioned, “Some of our contractors are not set up to do everything by email and webinar now, so I think there needs to be a better effort to have agencies that are going to utilize offer opportunities for contractors to learn the ins and outs of how to utilize those technologies.” [#TO-01]

- An American Indian business owner indicated that finding a correct contact person [at HDOT] is challenging. She added, “I had spoken to one lady and she reported I had to speak to the boss ... then I tried speaking to the boss and they reported I had to go [to another department] ... it’s just a lot As opposed to being able to speak with one person who can say ‘yes I can help you get that done.’ There are so many chains you have to go through.” [#IC-07]
- The white male owner of a professional services firm suggested that HDOT “look for every access point Communicate ... through traditional media and social media.” He added, “Good communication ... [is critical].” [#IC-01]

Several business owners and representatives reported unexpected project delays that challenge small businesses when working with HDOT and other public sector agencies. For example:

- “As a Native Hawaiian, we are seeing a trend in some departments at county and state levels where people are so ... fearful that someone is going to play the ‘cultural card’ so they don’t make a decision at all,” commented the representative of a business assistance association. “They say, ‘Gee, I don’t want to be the one to decide this because it could be culturally controversial ...’ And that model has become a model for delaying projects.” [#TO-01]
- A representative of a professional services firm reported, “I think a lot of it boils down to procurement. If they could somehow improve that part of it, [it would help a lot]. Sometimes it just takes so long just to get your contract going, or sometimes if there’s a ... modification to a contract, it ... [takes] forever” [#I-06]
- The owner of a professional services firm indicated a need for HDOT to implement expedited procurement methods. She added, “It just takes way too long to bring people on whether it’s in construction or professional services.” [#I-28]
- An owner of a construction firm indicated that the lack of resources and back-up at state agencies can lead to delays in payments and project schedules. [#I-22]

- A representative of a construction services firm stated, “A lot of times the projects are held up because of funding” [#I-35]
- When asked about HDOT, the representative of a construction services firm stated that when HDOT gets busy they assign a Construction Manager to run inspections. He mentioned that this causes projects to move slower and delays payments and responses. [#I-33]
- Regarding barriers to working with HDOT, the representative of a construction services firm stated, “... [the risk is] you’re delayed and now you’re paying a penalty for incomplete work” [#I-21]

Regarding barriers to participating in airport concessions with HDOT, the white female owner of a concessionaire indicated that the process to establish her firm as an airport concessionaire proceeded too slowly. She stated, “Nothing happens fast, at all.” [#IC-09]

Some interviewees indicated that there are no barriers for minority- and women-owned businesses when seeking opportunities or working with HDOT. [e.g., #I-09, #I-11c, #I-16, #I-20, #I-21, #IC-06] A few business owners perceived that with HDOT having contract goals, minority- and women-owned firms are immune to any barriers regarding securing work with the agency or working on projects. For example:

- The representative of a Chinese American-owned construction services firm stated, “No because ... they have requirements ... or goals that’ [have to] be met” He mentioned that HDOT does a “good job” of ensuring that listed subcontractors are used and paid the agreed amount. [#I-33]
- One white owner of a professional services firm reported that preferences are given to women and minorities. He reported, “I don’t know why they would [face additional challenges]. In fact, there’s preference given to women and minorities.” [#I-02]

Business owners and business assistance representative offered suggestions for HDOT to improve the procurement practices. Many identified the need for greater transparency, “open” bidding opportunities, fewer bidding and contract restrictions and increased opportunities for DBEs. Some recommended standardized procurement practices across government agencies. [e.g., #I-11c]

A number of business owners and representatives stressed that HDOT and other public agencies in Hawaii need to increase outreach to minority- and women-owned firms and other small businesses and expand opportunities to include businesses that do not already have experience with that agency. For example:

- When asked if he has any suggestions for HDOT or other public agencies to improve procurement practices, a representative of a Native Hawaiian professional services firm reported, “I would say remove those barriers as far as restricting [selection to] firms that did certain types of work ... at the airport, for example; and look at qualifications of who can do the work I don’t know how much work they tend to give out to DBEs ... that might be an avenue [for improvement, as well].” [#I-06]

- In discussing suggestions for HDOT to improve procurement practices, the white female owner of a DBE construction services firm reported, "... they cannot keep going back to same-old [companies] ... it has to be 'open'" She added that they should be keeping DBE statistics and making goals, especially for women-owned businesses. [#I-17]
- The African American business owner reported, "... outreach, I can see you guys have started with the e-mail campaigns ... just things like that ... getting it out there" He added, "Encourage ... minority- [and] women-owned businesses to do business with you guys, to at least enroll." [#IC-03]
- An Asian Pacific American female owner of a professional services firm indicated that HDOT could improve procurement practices by not giving opportunities to the same contractors, spreading work to different firms and by conducting more outreach. [#I-24]
- A representative of a business assistance association stated, "I think the one program or practice that could be improved is better communication and outreach when public meetings are available." [#TO-01]

She further added, "HDOT has been largely very good, I think the people who are working for the most part is excellent, and I think they're committed and passionate about what they're doing. So again, the only thing I would recommend is to really be mindful about the communication, and also be mindful that we are a state of multiple islands and not fall into the rabbit-hole of being Oahu-centric. I think sometimes we do that inadvertently (and certainly without intent), but it does happen." [#TO-01]

A number of interviewees emphasized that more projects should have contract goals, small business and minority business preferences or "set pricing." Comments follow:

- The African American business owner suggested that there should be more contracts with mandatory percentages for minority- and women-owned firms to participate. [#IC-03]
- A Chinese American owner of a construction firm recommended that HDOT attach a 5 percent preference to bids from small businesses or minority-owned firms that have been in business for less than two years. [#I-22]
- Recommending HDOT improvements, the white female owner of a DBE construction firm suggested, "Have percentages and procedures in place to help [certified] businesses get more work. The percentages are too low." [#I-08]
- The Native Hawaiian owner of a DBE specialty contracting firm reported that "set price" for simple jobs would simplify and improve HDOT and other public agencies' procurement. [#I-09]

A few business owners suggested that unbundling of contracts can help level the playing field for minority- and women-owned businesses and other small businesses. For example:

- A white male owner of a professional services firm encouraged that HDOT unbundle large contracts to allow smaller firms to work its contracts. [#I-27]
- The white female owner of a construction services firm stated to improve participation of minority- and women-owned firms and other small businesses, “Break up the contracts into smaller chunks ... instead of large jobs.” [#I-29]

A few business owners and representatives reported the need for improved or standardized requests for proposals/bids and communication of amendments, and on their confusion with new RFP processes. For example:

- The representative of a white male-owned firm stated, “One of the things I think is challenging across commercial and federal and state work is the people who write the [RFPs] may never have been the guy reading the proposals” [#I-21]
- One representative of a Japanese American-owned professional services firm reported that the annual process of submitting a statement of qualifications for professional services differs between the counties and HDOT. She stated that a standard process should be implemented across the different agencies. [#I-16]
- The owner of a DBE construction firm stated, “If you’re clear on specifications, then you’ll get a competitive price.” [#I-08]
- An owner of a DBE construction firm reported that every other of the states have DOT highway procurement standardized bid item descriptions. He commented that though HDOT is not as standardized. He said, “...It should be standardized across all states, and I’m not sure why HDOT isn’t” [#I-12]
- One representative of a construction services firm stated, “If there is an amendment or addendum to a project, putting that out in a timely fashion so that contractors have the opportunity to properly assess the changes to scope on a project.” He added, “The more defined the scope of work is for a contractor, the easier it is for a contractor to bid work with confidence.” [#I-39]
- Regarding suggestions for HDOT to improve its awarding or management of airport concessions contracts, a concessionaire’s representative indicated that the previous request for proposal process was a good process and easy to work with. He is concerned about the new process for airport concessions. He indicated that the RFP process as it exists today will be replaced with a process which requires making a presentation to a board. [#IC-04]

In response to barriers reported earlier in this appendix, business owners and representatives want streamlined paperwork and procurement processes that respond to the limited resources of small businesses. For example:

- A Native Hawaiian female owner of a DBE construction services firm reported that HDOT is treating firms like they're 'big business' when they are DBEs. [#I-01]
- The female representative of a Japanese American-owned construction services reported, "I would say once we're in good standing they should streamline the rest of the paperwork ... the fundamental ones, [such as] your name, your number, your EIN number. 'If you know us ... you know us,' and we should be able to circumvent a lot of that other junk. It's just so repetitive." [#I-03]
- The white female owner of a DBE professional services firm reported that making contracts "searchable" through techniques, such as flagging, and using keywords would be helpful for small businesses and others. She noted that identifying contracts that have a DBE goal would make finding projects to bid on much easier. [#I-07]

Some business owners encouraged HDOT and other public agencies to add daily or automated alerts that make finding bidding opportunities easier for small businesses. Comments include:

- One Vietnamese American business owner reported that the main difficulty is finding out about opportunities. He suggested that HDOT create an automated alert system that firms can sign up for to hear about work in their sectors. [#IC-02]

The same business owner later reported there is a lack of oversight in the procurement process. He explained that HDOT should be following procedures and regulations that require them to put certain contracts out for bid. [#IC-02]

- The Filipino American owner of a DBE construction firm reported, "It would be nice if [HDOT] could send me opportunity notifications every day. I would be more than willing to go over each with my estimators. That would be great!" [#I-10]

Some business owners and representatives want more policing of the DBE Program and greater accountability and transparency regarding how the program is performing for minority- and women-owned businesses. For example:

- A Filipino American male owner of a DBE construction services firm reported that HDOT should “police” the Federal DBE Program to ensure that the program is being used correctly. [#I-31]
- A male representative of a business assistance association reported, “I would like to see statistics to see where HDOT is in the program, whether the program is working and where gaps exist In Hawaii, DBEs represent a good portion of Hawaii qualified firms We need to see statistics, especially for Native Hawaiians so we can go back to our members to provide opportunities or identify opportunities for them.” [#TO-02]

The same business assistance association representative continued, “There are so many HDOT categories A good portion of the firms meet HDOT qualifications, so HDOT should have no problem meeting goals. Certified businesses like women-owned and Native Hawaiian-owned businesses need more help, so HDOT should help these firms more.” [#TO-02]

A number of business owners and representatives encourage greater enforcement of prompt payment from prime to subs. As reported earlier in the appendix, prompt payment is a barrier for many minority- and women-owned businesses and other small businesses. Some reported the need for HDOT to better regulate the promptness of payments from primes to subs and sub-tier subs waiting to get paid. These comments include:

- One Native Hawaiian female owner of a DBE professional services firm commented that enforcing timely payment would be a benefit to small businesses. [#I-20]
- The Japanese American female owner of a DBE professional services firm reported that payment issues persist. She later explained that increased training of procurement staff could increase overall efficiency and execution of procurement rules. [#I-19]
- A Native Hawaiian female owner of a DBE construction services firm reported that, for HDOT contracts, there be a requirement for prime contractors to pay DBEs independent of when they receive payment from HDOT. She stated that some prime contractors receive late payment “due to their [own] negligence” because they do not submit the required paperwork to HDOT in time. [#I-01]

The same business owner also suggested that DBEs be paid within a “specific time period” on HDOT and other public sector projects rather than when general contractors get paid. [#I-01]

- The Chinese American male owner of a construction firm recommended that state agencies issue checks every week rather than bimonthly. [#I-22]

One business owner recommended that HDOT look to the City and County of Honolulu as a model for procurement. Regarding suggestions for HDOT’s procurement practices, the owner of a DBE professional services firm stated, “I can’t speak for the other counties, [but] City and County of Honolulu is doing pretty well. I have been quite impressed with their professionalism and use of technology [HDOT needs] to go benchmark and take a look at what the City’s doing and copy them” [#I-07]

An American Indian business owner made recommendations to increase the “local experience” in airport concessions. She stated, “Reaching out to the local people and the mom and pop shops. A lot of times the airport favors corporate companies or companies that they feel [are corporate] ... when the client gets off the plane, they see it and recognize ‘oh this is Chanel, let me grab this and that.’ I think when people come to Hawaii, they come here for the local experience, so to have more local places in [the airport] than corporate places [would be positive]” [#IC-07]

Another concessionaire suggested other improvements. This business owner suggested that HDOT add more parking for concession customers and lengthen parking times beyond the allotted ten minutes for shopping customers. She also suggested that HDOT improve signage so that customers know how to find her concession. [#IC-05]

F. Insights Regarding Business Assistance Programs and Certification

Business owners and representatives reported whether they had taken advantage of or had any knowledge of any contract goals programs or any business assistance programs in Hawaii. Topics included:

- Contract goals;
- Business assistance programs (including financing, bonding, mentor-protégé and others); and
- Experiences and perception of DBE certification and other certifications.

Contract goals. Some interviewees discussed topics and issues that related to enforcement of DBE contract goals. Others discussed ACDBE and airport concessions goals.

Several reported awareness of contract goals, whether they applied to their businesses. For example:

- An ACDBE concessionaire indicated that he is aware that airport concessions contracts have ACDBE goals. [#IC-06]
- The Native Hawaiian female owner of a professional services firm indicated that she knows of contract preference goals. [#I-28]
- When asked if he has taken advantage of or has any knowledge of contract preference goals programs in Hawaii, the representative of an 8(a)-certified construction services stated, “I know they’re out there, but not personally. If the need arises [to become DBE certified], then [we’ll pursue it].” [#I-37]
- When asked for suggestions for how HDOT can improve, the representative of a Chinese American-owned construction services firm suggested that there should be DBE goals for all projects, not just for federally funded projects. [#I-33]

Others reported being in support of DBE and ACDBE contract goals applied by HDOT. A few also gave their input on the enforcement of contract goals and opportunities for program improvement. For example:

- A representative of a business assistance association indicated that he supports contract goals programs. [#TO-02]
- When asked if there are other difficulties trying to get work with HDOT, the Filipino American owner of a DBE construction services firm reported, “No ... it’s all bid-based.” He added that he would like HDOT to apply DBE goals to further level the playing field for small firms. [#I-31]
- An African American business owner reported that HDOT should make sure it includes mandatory goals, rather than allowing firms to meet those goals based on good faith efforts. [#IC-03]

- The representative of a Chinese American owned construction services firm stated, “[HDOT has] requirements ... or goals that [have to] be met.” He mentioned that HDOT does a “good job” of ensuring that listed subcontractors are used and paid the agreed amount. [#I-33]
- A Chinese American female owner of a construction services firm recommended that small business set-asides be established by HDOT. [#I-13]
- The Native Hawaiian owner of a DBE construction firm reported, “Increase the percentage of DBEs for every job. Make that percentage higher.” When asked if he thinks the percentage is currently too low, he reported, “For the majority of the work, yes The minimal percentage is only one percent.” [#I-12]
- The white female owner of a DBE construction services firm indicated that she would like to see the DBE program improved and reported that it has a long way to go. [#I-17]

To improve their program, the same business owner suggested, “In [HDOT’s] solicitations they can have percentages allocated for ... different minority categories, woman-owned business categories.” She added, “They can at least keep ... statistics or [a] database of ... what they are doing with their program” [#I-17]

Some business owners and representatives reported being unaware of any contracts where HDOT applied DBE or ACDBE contract goals or had no related knowledge. [e.g., #I-06, #I-08, #I-20, #I-36, #IC-03, #IC-05]

One airports concessionaire indicated that when HDOT does not set contract goals for airports concessions, ACDBEs are denied opportunities for large contracts. An African American business owner stated, “[My firm] feels there’s a disparity in the advertising [of the airport] concessions program.” He reported that “awarding a 10-year ... concessions contract without an ACDBE goal” denies opportunity for ACDBE firms from bidding on or participating in work with the airports and serving as a concessionaire. [#PC-02]

Business assistance programs. Many business owners and representatives reported awareness of or had taken advantage of business assistance programs in Hawaii.

Many interviewees reported programs delivered through HDOT, other state-sponsored small business initiatives, the U.S. Small Business Administration (SBA) and SCORE, local small business incubators and chambers, and other small business support. For example:

- The Japanese American owner of a professional services firm reported, “We don’t normally go to any classes ... but sometimes if they have a class or they want to educate us about certain programs, we would look at attending it, but it’s very infrequent as far as I know.” [#I-04]
- A representative of a Chinese American-owned construction services firm reported that his firm has attended helpful HDOT workshops. [#I-33]

- One ACDBE concessionaire indicated that he has attended business assistance programs in Hawaii through HDOT. [#IC-06]
- A Native Hawaiian owner of a DBE construction firm reported attending HDOT - classes courses that were helpful. [#I-12]
- The representative of a white male-owned construction services firm reported that he has experience with “speed networking” sessions hosted by HDOT. He added, “The SBA has classes for new and upcoming contractors and vendors ... they also have networking sessions.” [#I-39]
- The Japanese American female representative of a small business assistance association reported that as part of the DBE Program, HDOT provides several events throughout the year. She also indicated that there are business assistance programs for working on the rail project in Hawaii. [#TO-06]
- A Native Hawaiian owner of a professional services firm reported that he takes advantage of HDOT workshops. He commented, “Whether it be technical or actually helping with procurement and contracting ... that’s a positive.” [#I-15]
- The owner of a professional services firm reported that he has not participated in any programs with HDOT but has attended events sponsored by the SBA focused on obtaining government contracts. [#I-27]
- The representative of a business assistance association reported awareness of certain business assistance programs, “The State of Hawaii, through a small business initiative, is working to provide minority opportunities through the state procurement system [a named Senator], is working to establish minority set-asides ... and a small business program for Native Hawaiian women, minorities and service-disabled veterans.” [#TO-02]
- When discussing business assistance programs in Hawaii, the representative of an 8(a)-certified professional services firm reported, “We’ve ... taken courses or attended workshops from the SBA ... here in Hawaii.” She added that the classes were for, “small business certification.” She mentioned that SBA also hosts small business fairs that they have attended. [#I-16]
- One concessionaire indicated that he is familiar with the SBA and small business incubators. He commented that he went to the Hawaii Small Business Development Center at start-up to get excise tax information in Hawaii. [#IC-10]
- A representative of a business assistance association reported that he has recommended firms to attend business assistance programs provided by SCORE and the SBA. [#TO-08]

- The representative of a business assistance association reported, “I think the SBA, especially for DBEs, provides a great entry into the kinds of work that service companies enter into.” [#TO-03]

When asked why, she reported, “Given Hawaii’s strong military presence, there’s a lot of federal contracts that can be gotten that way. I would advise any small business that has a track record to make sure they visit the SBA.” [#TO-03]

- A Filipino American owner of a DBE construction firm reported, “I think I have taken most available seminars.” [#I-10]
- A Japanese American female owner of a DBE professional services firm reported taking advantage of the one-on-one matchmaking sessions and attending informational sessions with the Chamber of Commerce. [#I-19]

One business owner reported being skeptical of mentor-protégé relationships but had taken advantage of an SBA loan to purchase office space in Hawaii. He explained, “We’ve been approached by firms that want to be our mentor ... but I’ve been pretty careful, and I’ve declined participating in that.” He reported that his firm has declined this opportunity because he heard that there is one firm that uses protégés to get projects, but then takes most of the work.” [#I-15]

He added that the cost of living in Hawaii is high. He mentioned that, with the help of a local bank and SBA, his firm was able to qualify for a loan that allowed them to purchase their own office space. He added that this will be a good long-term investment strategy to be able to control their overhead on their office space. [#I-15]

A number of business owners and representatives reported limited or no knowledge of business assistance programs or chose not to participate for varied reasons. [e.g., #I-03, #I-05, #I-11c, #I-25, #I-31, #I-35, #I-36, #I-38, #IC-01, #IC-02, #IC-03, #IC-04, #IC-07, #TO-03] Several reported not knowing of any small business assistance on Maui or the Big Island, for example:

- A representative of a Japanese American-owned professional services firm reported, “Participation in small business [events] are ... useful for firms like ours ... I know a lot of federal entities participate in those ... I don’t know if there are opportunities for HDOT to participate in those as well.” [#I-16]
- Although the concessionaire indicated that he is familiar with SBA and small business incubators, he was not aware of any state-funded business assistance programs across Hawaii. [#IC-10]
- The Hispanic American owner of a DBE professional services firm reported, “I know that HDOT offers workshops for DBEs, but they’re held on Oahu ... a financial cost” He indicated that he is unaware of any HDOT workshops in Maui. [#I-32]

- The Native Hawaiian owner of a DBE specialty contracting firm reported that he is not aware of business assistance programs in Hawaii, although it “would be nice to know” of such assistance. He went on to say that he has heard of workshops and programs in Honolulu, but not the Big Island. [#I-09]

The same business owner commented that he would like to see programs that bring DBE firms together. He reported it would be a good opportunity to network with each other. He added that he would like to see technical assistance programs as well. [#I-09]

Experiences and perception of DBE certification and other certifications. Interviewees discussed whether there are benefits to DBE certification. Many reported that HDOT’s DBE Program is not well-known. Others had positive comments, stating that being DBE is an advantage for some firms.

Many were positive stating that certification helps open doors; one interviewee described DBE certification as “an extra lottery ticket.” For example:

- The representative of a business assistance association indicated that DBE certification is “an extra lottery ticket” for the procurement process. [#TO-01]
- A Hispanic American owner of a DBE professional services firm reported, “When starting a business, I wanted to pursue every avenue of potential business that I can.” He added, “Because I am a minority and because I was aware of the program, I wanted to pursue it.” [#I-32]
- A Filipino American owner of a DBE construction firm reported, “There [are] no disadvantages at all. It’s always an advantage opens the market for you” [#I-10]
- The Native Hawaiian owner of a DBE specialty contracting firm reported that certification benefits his firm because primes call him before they call anyone else. He added that primes find out about his firm from DBE directories. [#I-09]
- A Native Hawaiian owner of a DBE construction firm reported, “I don’t see any disadvantages. The advantage is ... on HDOT projects they specify a percentage that the [general] contractor ... has to meet that’s a definite advantage.” [#I-12]
- A Native Hawaiian female owner of a DBE professional services firm reported, “We definitely got a lot more requests for bids from the general contractors, I think they saw our name on the ‘DBE list’” She added that getting more work from DBE certification has allowed her to create more relationships with clients. [#I-20]
- The Native Hawaiian owner of a professional services firm mentioned that his firm is pursuing DBE certification because he hopes to be considered for more projects. He added, “I know HDOT, as well as some of the other agencies[although] I look at it as something that would add ... a ‘feather in our cap’ when we submit our statement of qualifications.” [#I-15]

- The Chinese American owner of a construction firm reported, “HDOT has the [DBE] Program so I think that’s a great advantage for the minorities to get into the market.” [#I-22]

Some reported a need for greater outreach, or that the benefits of DBE certification, for some, are unclear. Comments follow:

- A concessionaire’s representative reported that many small businesses and minority- or women-owned businesses don’t know about the HDOT DBE Program, adding that it is not advertised and HDOT needs to have a better way to get the word out. They later commented that HDOT needs to be more proactive in reaching out specifically to minority- and women-owned firms. [#IC-04]
- When asked if represented firms have conducted work for HDOT, the representative of a small business assistance association stated, “I have clients who have gone through DBE certification. I don’t know how far they’ve gotten ... beyond getting the certification.” [#TO-06]
- A Native Hawaiian female owner of a professional services firm reported that DBE certification is helpful for construction firms, however, certification has not helped her professional services firm obtain work. [#I-28]
- When discussing her firm’s experience with certification, the Filipino American female owner of a professional services firm stated, “It was not necessary after a while. If you look at the rules ... everyone is pretty much a minority here.” [#I-14]
- The Native Hawaiian owner of a professional services firm mentioned that his firm was previously certified under other owners who did not continue certification because they were uncomfortable sharing personal financial information. [#I-15]
- One Chinese American owner of a construction firm commented that HDOT could take a more “proactive approach” to let people know about the DBE Program because he knows of business owners that might qualify for the program but have never heard of it. He mentioned that they could present the program at organizations that help small businesses and minority- and women-owned businesses, for example. [#I-22]

Several business owners reported on that the DBE Program is open to abuse by large minority-owned firms that certify and women-owned firms that leverage their certification to others' disadvantage. Their comments include:

- The Vietnamese American business owner reported that there is a sentiment among DBE business owners that there are too many firms that qualify for the programs. He commented that because the state is composed primarily of “racially-disadvantaged people,” large companies that don’t need the programs still qualify. He reported this makes it harder for small companies to compete, although he attributes his firm’s subcontracting work with HDOT to DBE requirements. [#IC-02]

The same business owner explained, “So many of the companies here are ... owned by Japanese Americans, so they can ... get the DBE [certification] ... even when they are super large It gives them the advantage.” [#IC-02]

He added that there are “definitely advantages” to being certified because of DBE requirements on concessions contracts. However, he mentioned that despite DBE requirements it is still hard for new firms to get on subcontracts because most primes have existing relationships with DBEs. Most DBE subs at the airport, he added, have been there for 20 years and have a network that is hard to break in to. [#IC-02]

- The Japanese American co-owner of a DBE specialty services firm reported that DBE certification “does help” in some ways, though it also affects his firm by allowing women-owned companies to “undercut” his firm by leveraging their certification. He commented, “[Certification] helps, but it really helps a certain group Is it being used or abused? We got it to defend ourselves more than we got it to ... help us get jobs. But in all honesty ... it can be used more as a weapon.” [#I-11a]

The same business owner indicated that women-owned firms benefit most from certification. He reported that “a lot of [women-owned-firms] hide under the [certification]” and use it for leverage. He added that when negotiating, women-owned firms oftentimes have the upper-hand in the construction industry. [#I-11a]

- The representative of a DBE specialty services firm owned by a Japanese American reported that women benefit most from certification because contractors are more accommodating to them. She added that when a female is involved, contractors have to “soften the lines,” and commented, “[Contractors] are not as cut-throat to a woman as they are to a man.” [#I-11b]

Others reported being aware of DBE and ACDBE certification but had not pursued any certification due to their firm’s ineligibility or lack of interest or perception of the time commitment required for application. [e.g., #I-06, #I-22, #IC-04] For example, the American Indian female business owner stated, “I was certified as a woman-owned business when I was in [another state]. Being in Hawaii, I have not gotten a minority-owned business certification yet . . . I thought of it but haven’t taken time to do so.” [#IC-07]

A few interviewees were unaware of DBE/ACDBE and other certification programs. [e.g., #IC-08, #IC-09, #TO-08]

Other interviewees reported negatively on the operation of and/or benefits from former UDBE certification. Comments include:

- Regarding the Underutilized Disadvantaged Business Enterprise (UDBE) certification, the Native Hawaiian business owner commented, “It was just getting to the point where [UDBE certification] was [going to be] really good for us.” She added that HDOT “dropped the ball” on the program, and that her firm would have expanded to a larger building because there was “a guarantee [of] money to grow the business.” [#I-01]
- The Asian Pacific American female owner of a DBE professional services firm reported that the DBE Program was meant to benefit small businesses, minority- and women-owned businesses and other disadvantaged businesses, but it has not helped her firm. She mentioned that she was encouraged when HDOT upgraded her DBE certification to UDBE, but that the certification did not lead to an increase in work. [#PC-01]
- The white female co-owner of a DBE construction firm stated, “The UDBE certification has not gotten us any work. That’s the bottom line. It [was] part of the regulation . . . It really [didn’t] get us anywhere. Let’s just say it’s less than 5 percent in the last 10 years.” [#I-08]

Some business owners and representatives discussed whether certification is easy or difficult to obtain. Many reported that the process is overly “time consuming,” “long and tedious” and paper intensive. [e.g., #I-03, #I-14, #I-15, #I-39] Comments include:

- The Native Hawaiian male co-owner of a DBE construction firm stated, “The paperwork was difficult. It was a long and tedious process . . .” [#I-12]
- When asked if his firm intends to renew their certification, the representative of a white male-owned construction services professional services firm stated, “It took a while . . . in order to get that certification.” He added that the process was very “time consuming.” [#I-36]

- An Asian Pacific American female owner of a professional services firm reported, “It was a long process, I submitted a lot of things and I didn’t get anything out of it It felt like a lot of work for nothing.” She went on to report that she would never attempt to become certified as a DBE again and would not recommend it to other firms. [#I-24]

She added that HDOT could have been more helpful in assisting her with the DBE-certification process. She commented, “When I got denied HDOT small business status, they could have maybe helped me a little bit [more].” [#I-24]

- A Hispanic American owner of a DBE professional services firm recommended that other government agencies apply the DBE Program (not only HDOT). He indicated that it is difficult for small businesses to have to apply for various certifications and recommended that if you qualify for one certification and are in the system then it should be easier to obtain subsequent certifications. [#I-32]

Some interviewees indicated that the certification process is manageable. [e.g., #I-01, #I-05, #I-08, #I-09, #I-11c, #I-13, #I-17, #I-20, #I-30, #I-31, #I-38, #IC-02, #IC-06] For example, one Filipino American owner of a DBE construction firm stated, “It’s very simple [and] very easy to get in. As long as you’re able to provide the minimum requirements, you should get it. There’s no question about that.” [#I-10] An African American business owner gave Hawaii an “A-+” in reference to its certification process. [#IC-03]

G. Any Other Insights and Recommendations for HDOT

Interviewees provided insight and suggestions for how to improve HDOT procurement practices and other related issues. Many suggestions, such as the need to enforce prompt payment, are previously reported in this appendix. [e.g., #I-10, #I-20, #I-22, #I-31, #AS-42, #TO-06]

Topics in Part G include:

- Strategies for improving outreach through local industry associations, business services providers and other local government agencies;
- What HDOT is doing well;
- Good steps that airport concessions implemented through its ACDBE Program;
- Suggestions for how HDOT can improve working with airport concessions;
- Comments from public meetings/focus groups; and
- Support for the HDOT disparity study.

Strategies for improving outreach through local industry associations, business services providers and other local government agencies. Comments follow:

- The Japanese American male representative of a white male-owned professional services firm reported, “If you really want to address that issue ... go and set up some kind of a meeting or conference with the [minority- and women-owned firms]. He added that participation at this event would increase if it were hosted by multiple agencies. [#I-36]

When asked for other suggestions for how HDOT can improve, the same business representative stated, “Send out a questionnaire to all the different service firms.” He added, “Send out a questionnaire to the [professional] organizations ... and what we can do is to circulate it ... and come up with a summary [#I-36]

- A representative of a business assistance association noted that his members are more likely to attend events that are sponsored by his organization than other entities. For this reason, he recommended that HDOT connect with industry associations and other organizations in planning events. He added that his organization receives untimely information on upcoming HDOT workshops that is too late to distribute to all his members. He mentioned that he would like to receive the information 90 days in advance. [#TO-07]

What HDOT is doing well. Some of these interviewees discussed what HDOT is generally doing well in its implementation of the DBE Program. [e.g., #I-06, #I-10, #I-15, #I-17, #I-33] Others gave input on what works and what does not work:

- A Native Hawaiian female representative of a business assistance association stated, “... HDOT has been largely very good, I think the people who are working for the most part is excellent, and I think they’re committed and passionate about what they’re doing. So again, the only thing I would recommend is to really be mindful about the communication, and also be mindful that we are a state of multiple islands and not fall into the ‘rabbit hole of being Oahu-centric.’ I think sometimes we do that inadvertently.”
- One Vietnamese American business owner reported that DBE requirements on concessionaire contracts are a positive, but that the lack of oversight of the requirements is something that can be improved. [#IC-02]
- Regarding what HDOT is doing well, the Native Hawaiian female owner of a DBE construction services firm reported, “Creating that website ... was a great idea. When I got requalified I did it all online.” [#I-01]
- When asked what participating entities are doing well, the representative of a white male-owned construction services firm stated, “Keeping the list of DBEs updated, that’s always a good thing ... it’s a resource for general contractors to look for ... and solicit small businesses to bid on projects.” [#I-39]

Good steps that airport concessions implemented through its ACDBE Program. For example:

- One owner reported, “Hawaii just put out an RFQ for a concessions operator [with] mandatory [inclusion] of an ACDBE firm, which I just thought was phenomenal, because now an ACDBE firm has a chance to [partner] with a major prime concessionaire, or it could just be 100 percent ACDBE.” He added that if more contracts like this came out that would help level the playing field for ACDBEs. [#IC-03]
- When asked what HDOT is doing well in its ACDBE program, the representative of a concessionaire reported positively that HDOT specifies use of DBEs at Hilo and Kona airports. [#I-04]

Suggestions for how HDOT can improve working with airport concessions. These comments focused on the need for improved communications, for example:

- The Native Hawaiian business owner suggested that HDOT “be a little bit more open” with lei stand vendors and provide them with more information. She added, “Sometimes ... we get forgotten ... like we don’t even exist” [#IC-05]
- When asked for suggestions for how airport concessions with HDOT can improve, a concessionaire’s representative reported that they would like to see improved communications, more meetings and emails, especially with current vendors. [#IC-04]
- A business owner stated, “There seems to be a disconnect in communication on how to get into [airport concessions] because I’ve been a part of many business resource studies and classes [and] I’ve never heard anything about HDOT.” She recommended a partnership between HDOT and the SBA on Maui, where it can be communicated to vendors that there are options at the airport. [#IC-08]

H. Availability and Disparity Study Public Meetings, Focus Groups and Other Comments

Keen Independent held public meetings/focus groups in July 2019 at HDOT offices in Honolulu, Kahului, Lihue and Hilo. Business owners and representatives, other members of the public and one representative of FHWA gave input on the disparity study and shared other insights and general comments; comments were accepted through July 29. An additional public meeting was held on February 24, 2020 in Honolulu with remote viewing at district offices on Maui, Kauai and Hawaii Island. About four business representatives and about six public entity representatives were in attendance at this meeting.

Broad range of input. The participants in the public meetings and others providing comments had a broad range of input. One business owner, for example, indicated that HDOT should promote the construction trades to the next generation of workers. She stated, “We need young people.” [#PM-03a] Regarding DBE certification, the same business owner commented that the personal net worth criterion for DBE status “has to be evaluated.” She indicated that it is too low, and commented, “At some point, I’m not going to meet that goal.” She added that this is “a serious flaw” in the system because it seems as though there are big companies “tweaking” or “working” the system in order to meet the personal net worth criterion. [#PM-03a]

Another participant indicated that working with DBE firms can be a challenge sometimes. He said that DBE specialty firms in particular do not offer competitive pricing because they know that they have few DBE competitors. [#PM-04g]

Some participants had comments relating to DBE contract goals. For example:

- A male representative of a construction company commented, “From the point of view of a contractor, I would think the federal highways would have a higher DBE goal than the airports.” He said that airports have more restrictions and prequalification requirements than highway projects and that these requirements are difficult to meet. [#PM-04b]
- A female public entity representative commented, “there is already a statute” for small business programs, there “is just no implementing rules.” [#PM-05c]

Other comments include:

- A Federal Highway Administration representative commented, “I can’t believe that there is 25 percent availability and our past participation is only 8 percent.” She added, “In Hawaii there are many millionaire minorities that own companies and do not qualify as DBEs, but [they] get included in the 25 percent.” [#PM-04d]
- A female minority representative of a woman-owned professional services firm commented that she has not “broken the barriers” to secure work yet with HDOT. [#PM-05a]

- A female representative of a professional services firm commented, “talent is leaving the state.” She added that there should be more access to HDOT opportunities for DBE participation. [#PM-05d]
- Regarding unions and work opportunities in Hawaii, a male representative of a construction-related firm commented that they face challenges getting work with primes who are unionized since they are not a unionized firm. [#PM-05b]
- A female minority representative of a goods and services firm remarked, “...they get everything from the mainland ... how do we get a piece ... good faith ...?” [#PM-05e]
- Regarding work opportunities in Hawaii, a male business representative commented, “If we don’t advocate for it ... it never ... [happens].” [#PM-05f]

He added that “after bidding seven times” with the same qualifications and never getting the job, he “wants a debrief” from the public entity. [#PM-05f]

- A representative of a construction firm reported that her firm encourages small businesses to become certified to take advantage of contract goals. She explained that a lot of firms do not understand certifications or are not aware of them. She went on to say that she has heard that some SBA 8(a) firms are discouraged from pursuing DBE certification. [#PM-02b]
- Another construction firm representative reported that his firm always invites DBEs that are listed even when projects do not have participation goals because it is the “standard best practice” to make good faith efforts. [#PM-04a]

One participant commented on “good ol’ boy” networks and unfair treatment by prime contractors. A business owner reported that certain people in the construction industry get into high positions because of family relations or who they know. He added that because of this there are many people in the industry who “learn as they go.” [#PM-01a]

He also commented that Hawaii is making it more difficult for small companies to be specialized in certain areas of work. He said that on multiple occasions his firm has met contract goals before being removed after the bidding process. He indicated that this is because fine print states that the prime contractor can adjust the percentage of work performed by a sub at any point. [#PM-01a]

A few of the participants discussed breaking-up, or unbundling, large public contracts. [e.g., #PM-03a] A male representative of a construction company remarked, “The amount of paperwork for the prime, the sub and the State would explode” if HDOT broke up contracts into smaller pieces. Another construction firm representative commented that DBEs rarely have the resources to complete jobs, leaving more work for prime contractors. [#PM-04a, #PM-04b]

A few other participants discussed late payments. One public meeting participant commented that a new system is being implemented that requires prime contractors to show that they are paying their subs on public projects. He added that the system also allows for subs to mark that they have received payment. [#PM-02e] Other comments include:

- The owner of a construction firm reported that he faced challenges with receiving prompt payment when he started the firm. He said, for example, that it took up to four months to receive payment on a public project. [#PM-02d]

He went on to say that HDOT tends to not be aware of the late payment issues that subcontractors face. [#PM-02d]

- Another business owner reported that his firm has issues with prompt payment “from time to time.” He said that this is because there are no strict rules that enforce when prime contractors must pay subs. He reported that primes often do not track if subs have “second tier” firms to pay. [#PM-01a]

Support for the HDOT disparity study. A white male owner of a professional services firm commented that he applauds HDOT for taking this step with its disparity study. [#I-27] A female owner of a specialty contracting firm commented that it seems the study has enough important information to lead to logical improvements by HDOT. [#PC-05] A DBE-certified business owner said, “I reviewed the draft study regarding the DBE program in Hawaii. The methodology appears to be fair and thorough.” She added, “Looks good to me.” [#PC-03]

APPENDIX K.

Business Assistance Programs in Hawaii

Local and state agencies, not-for-profit organizations and other groups operate a broad range of assistance programs in Hawaii. This appendix describes those programs. The organization of this Appendix is as follows:

- A. Federal program examples; and
- B. Statewide program examples.

A. Federal Program Examples

A summary of federal program examples follows.

Federal ACDBE Program. An agency receiving Federal Aviation Administration (FAA) funds is also required to implement the Federal Airport Concessions Disadvantaged Business Enterprise (ACDBE) Program related to certain airport concessions activities.¹ HDOT's Airports Division operates the Federal ACDBE Program.

Federal DBE Program. The U.S. Department of Transportation requires state and local governments that receive Federal Highway Administration (FHWA), Federal Transit Administration (FTA) and Federal Aviation Administration (FAA) funding to implement the Federal DBE Program. The Federal DBE Program applies to contracts funded by the U.S. Department of Transportation (USDOT). As such, the Hawaii Department of Transportation (HDOT) has contracts where it applies the Federal DBE Program, typically by setting DBE contract goals.²

To be DBE-certified, a firm must be socially and economically disadvantaged. Revenue limits, personal net worth limits and other restrictions apply. Most DBEs are minority- or women-owned firms, but white male-owned firms that can demonstrate social and economic disadvantage can also be DBE-certified.³

Under the Federal DBE Program, a public agency can set DBE contract goals where prime contractors and prime consultants must either include a level of DBE participation in their bid or proposal that meets the goal set for the contract, or show good faith efforts to do so.

¹ See https://www.faa.gov/about/office_org/headquarters_offices/acr/bus_ent_program/.ed

² See <https://www.fhwa.dot.gov/civilrights/programs/dbess/>

³ See <https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise/definition-disadvantaged-business-enterprise>

Hawaii Small Business Development Center (SBDC). The SBDC provides professional business consulting, research and training to business owners and new entrepreneurs. It links federal, state and local resources, the educational community and the private sector to meet the needs of Hawaii's businesses. Its services are underwritten through funding from the U.S. Small Business Administration and the State of Hawaii.⁴

Minority Business Development Agency (MBDA). MBDA fosters the establishment and growth of minority-owned businesses by providing technical assistance and resources related to business financing, contract opportunities and job creation and retention.⁵

Small Business Innovation Research (SBIR). SBIR program solicitations are issued by 11 Federal agencies, including USDOT.⁶ The State of Hawaii has received approximately 98 SBIR awards totaling nearly \$38 million since 2015.⁷

Small Business Technology Transfer (STTR). STTR is a competitively awarded, three-phase Federal Government program, designed to stimulate technological innovation and provide opportunities for small businesses. This teaming of the private and public sectors includes joint venture opportunities for small businesses and the nation's premier nonprofit research institutions.⁸

U.S. Department of Veterans Affairs, Office of Small and Disadvantaged Business Utilization (OSDBU). OSDBU assists veteran-owned businesses through their business verification and procurement assistance program, and their veteran-owned Small Business Mentor-Protégé program.⁹

U.S. Economic Development Administration (EDA). EDA solicits applications from applicants in rural and urban areas to provide investments that support construction, non-construction, technical assistance and revolving loan fund projects under EDA's Public Works and Economic Adjustment Assistance programs. Grants and cooperative agreements made under these programs are designed to leverage existing regional assets and support the implementation of economic development strategies that advance new ideas and creative approaches to advance economic prosperity in distressed communities.¹⁰

U.S. Small Business Administration (SBA) Office of Veterans Business Development. The U.S. SBA Office of Veterans Business Development provides business training, counseling and assistance, and oversees federal procurement programs for veteran- and service-disabled veteran-owned small businesses.¹¹

⁴ See <https://www.hisbdc.org/>

⁵ See <https://www.mbda.gov/>

⁶ See <https://www.sbir.gov/>

⁷ See https://www.sbir.gov/reports/state-summary?program_tid%5B%5D=105791&state%5B%5D=LA

⁸ See <https://www.sbir.gov/about/about-sttr>

⁹ See <https://www.opportunitylouisiana.com/small-business/grow-a-business>

¹⁰ See <https://www.eda.gov/>

¹¹ See <https://www.opportunitylouisiana.com/small-business/grow-a-business>

U.S. Small Business Administration (SBA) Office of Native American Affairs. The Office of Native American Affairs mission is to ensure that American Indians, Alaska Natives and Native Hawaiians seeking to create, develop and expand small businesses have full access to the necessary business development and expansion tools available through the SBA’s entrepreneurial development, lending and procurement programs. The Office of Native American Affairs engages in outreach activities including tribal consultations, development and distribution of promotional materials, attendance and participation in national economic development conferences.¹²

Veterans Business Outreach Center (VBOC). VBOC provides entrepreneurial development services including business training, counseling and resource partner referrals to transitioning service members, veterans, National Guard and Reserve members and military spouses interested in starting or growing a small business.¹³

8(a) Business Development Program. The 8(a) Business Development Program is a business assistance program for small disadvantaged businesses. It offers a broad scope of assistance to firms that are at least 51 percent owned and controlled by socially and economically disadvantaged individuals.¹⁴

B. Statewide Program Examples

A summary of statewide program examples follows.

Chamber of Commerce Hawaii. Chamber of Commerce Hawaii operates six chambers of commerce organizations in various regions in Hawaii that provide business assistance in the form of training, networking, workshops and seminars, among others, for its 2,000 plus member organizations. There are more than one dozen additional island, community and ethnic Chambers in Hawaii which operate independently from the Chamber of Commerce Hawaii.¹⁵

Council for Native Hawaiian Advancement (CNHA). The Council for Native Hawaiian Advancement is a member-based 501(c)3 non-profit organization with a mission to enhance the cultural, economic, political and community development of Native Hawaiians. The CNHA provides access to capital, financial education, and individualized financial counseling services. CNHA also provides grants and loans targeting underserved communities in Hawaii.¹⁶

Hawaii Enterprise Zones (EZ) Partnership Program. The EZ Partnership Program helps to stimulate business activity and employment in high-need areas.¹⁷

¹² See <https://www.sba.gov/offices/headquarters/naa>

¹³ See <https://www.sba.gov/offices/headquarters/ovbd/resources/1548576>

¹⁴ See <https://www.sba.gov/category/business-groups/minority-owned>

¹⁵ See <https://www.cochawaii.org/>

¹⁶ See <http://www.hawaiiancouncil.org/>

¹⁷ See <https://invest.hawaii.gov/business/ez/>

Hawaii Strategic Development Corporation (HSDC). HSDC directly invests in venture capital partnerships with promising Hawaii-based companies. It leverages public funds with private capital and utilizes the investment acumen of the private sector in selecting suitable investments.¹⁸

Hawaii Technology Development Corporation (HTDC). HTDC is a state agency that aims to accelerate the growth of Hawaii's technology industry by providing capital, building infrastructure and developing talent to foster innovation.¹⁹

Hawaii Venture Capital Association (HVCA). HVCA fosters entrepreneurial development through education, seminars and networking opportunities.²⁰

Hi'ilei Aloha LLC. Hi'ilei Aloha LLC is a non-profit sub entity of the Office of Hawaiian Affairs. Hi'ilei Aloha's mission is to identify, promote, develop and support culturally-appropriate, sustainable opportunities that benefit Native Hawaiians. The capacity-building programs and projects for small businesses offered by Hi'ilei Aloha include training covering starting a business in Hawaii, entrepreneurship training classes, assistance with government contracting, securing loans for Native Hawaiian businesses, and accounting and fiscal management for Native Hawaiians.²¹

HI9-PTAC. PTAC assists small businesses in Hawaii secure government contracts and subcontracts, maximize partnerships between eligible small businesses with prime contractors or large businesses and build small business capacity in government contracting through training.²²

Office of Hawaiian Affairs (OHA), Hua Kanu Business Loan. Hua Kanu Business Loans are available to Native Hawaiians who own established small businesses who qualify for either a loan or line of credit in an amount ranging from \$200,000–\$1,000,000.²³

Patsy T. Mink Center for Business & Leadership (MCBL). Patsy T. Mink Center for Business & Leadership at the Oahu YWCA promotes the economic and leadership advancement of women entrepreneurs and professionals at all levels and stages in their careers. MCBL's mission is to equip women to become successful entrepreneurs and leaders by providing one-on-one business counseling, innovative workshops and unique, specialized programs in a nurturing environment.²⁴

SCORE Hawaii. SCORE assists pre-venture and early stage businesses in achieving their goals for business startup and growth through education and mentorship. SCORE also offers local workshops and online training seminars.²⁵

¹⁸ See <http://hsdc.hawaii.gov/>

¹⁹ See <https://www.htdc.org/>

²⁰ See <https://hvca.org/>

²¹ See <http://www.hiilei.org/>

²² See <https://invest.hawaii.gov/business/financing/>

²³ See <https://loans.oha.org/business/hua-kanu-business-loan/>

²⁴ See <https://www.mcblhawaii.org/>

²⁵ See <https://hawaii.score.org/>

Small Business Revitalization Grant Program for Lanai and Molokai. This program assists small businesses with fewer than 10 employees who do business in communities in Lanai and Molokai. Grants may be used for new equipment, renovation, websites, marketing materials or other purposes that will help business growth, prosperity and job creation.²⁶

U.S. Small Business Administration (SBA) Hawaii District Office. The Hawaii District Office oversees the delivery of SBA's programs throughout the State of Hawaii, Guam, American Samoa, the Northern Mariana Islands, the Federated States of Micronesia, Palau and the Marshall Islands. The SBA's Hawaii District Office offers free counseling to aspiring entrepreneurs, international trade assistance and financial assistance for new or existing businesses working with area banks. The SBA works with lenders to provide loans to small businesses. Rather than simply lending money directly to small business owners, the SBA sets guidelines for loans made by its partnering lenders, community development organizations and micro-lending institutions. The SBA makes it easier for small businesses to obtain loans, reduces risk for lenders and makes it easier for lenders to access capital.²⁷

²⁶ See <https://www.mauicounty.gov/148/Grants-Awards>

²⁷ See <https://www.sba.gov/offices/district/hi/honolulu/about-us>