



Availability and Disparity Study Report 2021

California Department of Transportation

FINAL REPORT

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Availability and Disparity Study Report 2021

Prepared for

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CHAPTER ES.

Executive Summary

CHAPTER ES.

Executive Summary

The California Department of Transportation (Caltrans) is responsible for managing more than 50,000 miles of California's federal and state highways. As a United States Department of Transportation (USDOT) fund recipient, Caltrans implements the Federal Disadvantaged Business Enterprise (DBE) Program, which is designed to address potential discrimination against DBEs in the award and administration of USDOT-funded contracts. Caltrans retained BBC Research & Consulting (BBC) to conduct a *disparity study* to help evaluate the effectiveness of its implementation of the Federal DBE Program in encouraging the participation of minority- and woman-owned businesses in Federal Highway Administration- (FHWA-) funded contracts.¹

A disparity study examines whether there are any disparities between:

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

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

- The legal framework surrounding minority- and woman-owned businesses programs;
- Marketplace conditions for minority- and woman-owned businesses; and
- Contracting practices and business programs agencies use to award contracts.

Caltrans could use information from the disparity study to help refine its implementation of the Federal DBE Program, including setting an overall goal for the participation of DBEs in its FHWA-funded contracts and procurements and determining which program measures to use to encourage the participation of relevant groups of minority- and woman-owned businesses.

BBC summarizes key information from the 2021 Caltrans Disparity Study in five parts:

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

¹ The study team considered a contract to be FHWA-funded if it included at least one dollar of FHWA funding.

A. Analyses in the Disparity Study

BBC examined extensive information related to outcomes for minority- and woman-owned businesses in Caltrans' transportation-related contracting as well as the agency's implementation of the Federal DBE Program:

- The study team conducted an analysis of regulations, case law, and other information to guide methodology for the disparity study, which included a review of legal requirements related to minority- and woman-owned business programs, and specifically, the Federal DBE Program (see Chapter 2 and Appendix B).
- BBC conducted quantitative analyses of outcomes for minorities, women, and minority- and woman-owned businesses throughout California. In addition, the study team collected anecdotal evidence about potential barriers individuals and businesses face in the local marketplace through in-depth interviews, surveys, public meetings, and focus groups (see Chapter 3, Appendix C, and Appendix D).
- BBC estimated the percentage of Caltrans transportation-related contract and procurement dollars minority- and woman-owned businesses are available to perform. That analysis was based on Caltrans data and information gathered from surveys the study team conducted with businesses that work in industries related to the specific types of transportation-related construction and professional services contracts and procurements Caltrans and subrecipient local agencies award (see Chapter 5 and Appendix E).
- BBC analyzed the dollars Caltrans and subrecipient local agencies awarded to minority- and woman-owned businesses on transportation-related construction and professional services contracts and procurements during the study period (see Chapters 4 and 6).
- BBC examined whether there were any disparities between the participation and availability of minority- and woman-owned businesses on transportation-related construction and professional services contracts Caltrans and subrecipient local agencies awarded during the study period (see Chapter 7 and Appendix F).
- BBC reviewed the measures Caltrans uses to encourage the participation of minority- and woman-owned businesses in its transportation-related contracts and procurements as well its implementation of the Federal DBE Program (see Chapter 8).
- BBC provided guidance related to Caltrans' next overall goal for the participation of DBEs in its FHWA-funded contracts and procurements as well as additional program options and potential refinements to current contracting practices (see Chapters 9 and 10).

B. Availability Analysis Results

BBC used a *custom census* approach to analyze the availability of minority- and woman-owned businesses for Caltrans' transportation-related prime contracts and subcontracts, which relied on information from surveys the study team conducted with thousands of potentially available businesses located in California and information about the contracts and procurements Caltrans and subrecipient local agencies awarded during the study period. That approach allowed BBC to develop a representative, unbiased, and statistically-valid database of relevant California businesses to estimate the percentage of relevant Caltrans contract and procurement dollars for

which minority- and woman-owned businesses are available. BBC presents availability analysis results overall and for different subsets of contracts and procurements.

1. All contracts and procurements. Figure ES-1 presents dollar-weighted availability estimates by relevant business group for Caltrans contracts and procurements. Overall, the availability of minority- and woman-owned businesses for relevant Caltrans work is 26.8 percent, indicating that minority- and woman-owned businesses might be expected to receive 26.8 percent of the transportation-related contract and procurement dollars Caltrans and subrecipient local agencies award in construction and professional services.

Figure ES-1.
Overall availability estimates by racial/ethnic and gender group

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

Source:
BBC Research & Consulting availability analysis.

Business group	Availability %
Non-Hispanic white woman-owned	5.8 %
Asian Pacific American-owned	3.1
Black American-owned	1.4
Hispanic American-owned	13.8
Native American-owned	1.2
Subcontinent Asian American-owned	1.5
Total Minority-owned	21.0 %
Total Minority- and Woman-owned	26.8 %

2. Funding source. As part of the Federal DBE program, Caltrans and subrecipient local agencies use DBE contract goals to award many individual FHWA-funded contracts and procurements. In contrast, because of Proposition 209, Caltrans does not use contract goals or any other race- or gender-conscious measures to award state-funded contracts or procurements. As shown in Figure ES-2, the availability of minority- and woman-owned businesses considered together is higher for Caltrans' FHWA-funded work (27.6%) than for state-funded work (23.4%). Among other factors, that result could be due to the fact that a larger share of FHWA-funded contracts and procurements include subcontracts when compared with state-funded contracts and procurements. Subcontracts tend to be much smaller in size than prime contracts and are thus often more accessible to minority- and woman-owned businesses.

Figure ES-2.
Availability estimates for FHWA- and state-funded work

Note:
Numbers rounded to nearest tenth of 1 percent and thus may not sum exactly to totals.
For more detail and results by group, see Figure F-11 and F-12 in Appendix F.

Source:
BBC Research & Consulting availability analysis.

Business group	Funding source	
	FHWA-funded	State-funded
Non-Hispanic white woman-owned	5.9 %	5.6 %
Asian Pacific American-owned	3.2	2.7
Black American-owned	1.4	1.2
Hispanic American-owned	14.4	11.1
Native American-owned	1.2	1.4
Subcontinent Asian American-owned	1.5	1.4
Total Minority-owned	21.7 %	17.8 %
Total Minority- and Woman-owned	27.6 %	23.4 %

3. Contract role. Many minority- and woman-owned businesses are small businesses and thus often work as subcontractors. Because of that tendency, it is useful to examine availability estimates separately for Caltrans prime contracts and subcontracts. As shown in Figure ES-3, the availability of minority- and woman-owned businesses considered together was lower for prime contracts (24.4%) than for subcontracts (34.3%). Again, that result could be due to the fact that subcontracts tend to be much smaller in size than prime contracts and are thus often more accessible to minority- and woman-owned businesses.

Figure ES-3.
Availability estimates for prime contracts and subcontracts

Note:

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

For more detail, see Figures F-7 and F-8 in Appendix F.

Source:

BBC Research & Consulting availability analysis.

Business group	Contract role	
	Prime contracts	Subcontracts
Non-Hispanic white woman-owned	4.7 %	9.4 %
Asian Pacific American-owned	2.7	4.2
Black American-owned	0.9	3.1
Hispanic American-owned	13.5	14.6
Native American-owned	1.0	1.8
Subcontinent Asian American-owned	1.6	1.3
Total Minority-owned	19.7 %	24.9 %
Total Minority- and Woman-owned	24.4 %	34.3 %

4. Industry. BBC examined availability analysis results separately for Caltrans construction and professional services work. As shown in Figure ES-4, the availability of minority- and woman-owned businesses considered together was higher for professional services work (28.3%) than for construction work (26.5%).

Figure ES-4.
Availability estimates for construction and professional services work

Note:

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

For more detail, see Figures F-5 and F-6 in Appendix F.

Source:

BBC Research & Consulting availability analysis.

Business group	Industry	
	Construction	Professional services
Non-Hispanic white woman-owned	5.0 %	9.9 %
Asian Pacific American-owned	2.5	5.9
Black American-owned	1.2	2.3
Hispanic American-owned	15.4	6.1
Native American-owned	1.3	0.7
Subcontinent Asian American-owned	1.1	3.3
Total Minority-owned	21.5 %	18.4 %
Total Minority- and Woman-owned	26.5 %	28.3 %

C. Utilization Analysis Results

BBC measured the participation of minority- and woman-owned businesses in Caltrans work in terms of *utilization*—the percentage of dollars Caltrans and subrecipient local agencies awarded to those businesses on relevant prime contracts and subcontracts during the study period. BBC measured the participation of minority- and woman-owned businesses in Caltrans work regardless of whether they were certified as DBEs.

1. All contracts and procurements Figure ES-5 presents the percentage of total dollars Caltrans and subrecipient local agencies awarded to minority- and woman-owned businesses on relevant construction and professional services prime contracts and subcontracts during the study period. As shown in Figure ES-5, minority- and woman-owned businesses considered together received 18.5 percent of the relevant contract and procurement dollars Caltrans and subrecipient local agencies awarded during the study period. Twelve percent of those dollars went to minority- and woman-owned businesses that were certified as DBEs. The groups that exhibited the highest levels of participation were Hispanic American-owned businesses (7.5%) and non-Hispanic white woman-owned businesses (6.5%).

Figure ES-5.
Overall utilization results

Note:

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

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

Source:

BBC Research & Consulting utilization analysis.

Business group	Utilization %
Minority- and Woman-owned	
Non-Hispanic white woman-owned	6.5 %
Asian Pacific American-owned	1.8
Black American-owned	0.7
Hispanic American-owned	7.5
Native American-owned	0.9
Subcontinent Asian American-owned	1.0
Total Minority-owned	12.0 %
Total Minority- and Woman-owned	18.5 %
DBE-certified	
Non-Hispanic white woman-owned	4.0 %
Asian Pacific American-owned	1.5
Black American-owned	0.7
Hispanic American-owned	4.0
Native American-owned	0.8
Subcontinent Asian American-owned	1.0
Total Minority-owned (DBE)	8.0 %
Total Minority- and Woman-owned (DBE)	12.0 %

2. Public Works. It is instructive to examine utilization analysis results separately for Caltrans' FHWA-funded contracts and state-funded contracts, because that comparison provides important information about the efficacy of DBE contract goals—which Caltrans and subrecipient local agencies used to award many FHWA-funded contracts during the study period—in encouraging the participation of minority- and woman-owned businesses. As shown in Figure ES-6, the participation of minority- and woman-owned businesses considered together was higher in FHWA-funded contracts (20.3%) than in state-funded contracts (10.8%), suggesting that Caltrans' use of DBE contract goals during the study period was at least somewhat effective in encouraging minority- and woman-owned business participation.

Figure ES-6.
Utilization analysis results
for FHWA- and state-funded
work

Note:

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

For more detail and results by group, see Figures F-11 and F-12 in Appendix F.

Source:

BBC Research & Consulting utilization analysis.

Business group	Funding source	
	FHWA-funded	State-funded
Non-Hispanic white woman-owned	7.1 %	3.6 %
Asian Pacific American-owned	1.9	1.6
Black American-owned	0.8	0.3
Hispanic American-owned	8.4	3.8
Native American-owned	1.0	0.6
Subcontinent Asian American-owned	1.1	0.8
Total Minority-owned	13.2 %	7.2 %
Total Minority- and Woman-owned	20.3 %	10.8 %

3. Contract role. Figure ES-7 presents utilization analysis results separately for relevant prime contracts and subcontracts Caltrans and subrecipient local agencies awarded during the study period. As shown in Figure ES-7, the participation of minority- and woman-owned businesses considered together was in fact higher in subcontracts (39.4%) than in prime contracts (11.8%). Among other factors, that result could be due to the fact that subcontracts tend to be smaller in size than prime contracts and thus may be more accessible to minority- and woman-owned businesses. In addition, many of the FHWA-funded contracts and procurements included in the analysis were subject to DBE contract goals, which are designed to encourage participation of minority- and woman-owned businesses in subcontracts.

Figure ES-7.
Utilization analysis results by
contract role

Note:

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

For more detail, see Figures F-12 and F-13 in Appendix F.

Source:

BBC Research & Consulting utilization analysis.

Business group	Contract role	
	Prime contracts	Subcontracts
Non-Hispanic white woman-owned	3.2 %	45.1 %
Asian American-owned	1.2	3.9
Black American-owned	0.0	29.5
Hispanic American-owned	0.1	0.5
Native American-owned	0.1	0.7
Total Minority-owned	1.3 %	34.6 %
Total Minority- and Woman-owned	4.5 %	79.7 %

4. Industry. BBC also examined utilization analysis results separately for transportation-related construction and professional services contracts and procurements to determine whether the participation of minority- and woman-owned businesses differs by industry. As shown in Figure ES-8, the participation of minority- and woman-owned businesses considered together was higher in construction work (19.4%) than in professional services work (14.1%).

Figure ES-8.
Availability estimates for
construction and professional
services work

Note:

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

For more detail, see Figures F-5 and F-6 in Appendix F.

Source:

BBC Research & Consulting utilization analysis.

Business group	Industry	
	Construction	Professional services
Non-Hispanic white woman-owned	6.6 %	5.7 %
Asian Pacific American-owned	1.6	2.9
Black American-owned	0.8	0.3
Hispanic American-owned	8.8	1.5
Native American-owned	1.1	0.0
Subcontinent Asian American-owned	0.5	3.6
Total Minority-owned	12.8 %	8.4 %
Total Minority- and Woman-owned	19.4 %	14.1 %

D. Disparity Analysis Results

Although information about the participation of minority- and woman-owned businesses in Caltrans' transportation-related contracts and procurements is useful on its own, it is even more useful when compared with the level of participation one might expect based on their availability for that work. As part of the disparity analysis, BBC compared the participation of minority- and woman-owned businesses in relevant Caltrans prime contracts and subcontracts with the percentage of contract dollars those businesses might be expected to receive based on their availability for that work. To do so, BBC calculated *disparity indices* for each relevant business group and for various contract sets by dividing percent utilization by percent availability and multiplying by 100. A disparity index of 100 indicates an exact match between participation and availability for a particular group for a particular contract set (referred to as *parity*). A disparity index of less than 100 indicates a disparity between participation and availability. A disparity index of less than 80 indicates a *substantial* disparity between participation and availability and is often taken by courts as *inferences of discrimination* against particular business groups.

1. All contracts and procurements. Figure ES-9 presents disparity indices for all relevant prime contracts and subcontracts Caltrans and subrecipient local agencies awarded during the study period. The line down the center of the graph shows a disparity index level of 100, which indicates parity between participation and availability. For reference, a line is also drawn at a disparity index level of 80, indicating a substantial disparity. As shown in Figure ES-9, overall participation for minority- and woman-owned businesses was substantially lower than one might expect given the availability of those businesses for that work. The disparity index of 69 indicates that minority- and woman-owned businesses received \$0.69 for every dollar they might be expected to receive based on their availability for the relevant prime contracts and subcontracts Caltrans and subrecipient local agencies awarded during the study period. Results for individual racial/ethnic and gender groups indicate that:

- All minority groups showed substantial disparities on all Caltrans and subrecipient local agency contracts considered together: Asian Pacific American-owned businesses (disparity index of 60), Black American-owned businesses (disparity index of 50), Hispanic American-

owned businesses (disparity index of 55), Native American-owned businesses (disparity index of 73), and Subcontinent Asian American-owned businesses (disparity index of 70).

- Non-Hispanic white woman-owned businesses did not exhibit a disparity on all Caltrans and subrecipient local agency contracts considered together (disparity index of 111).

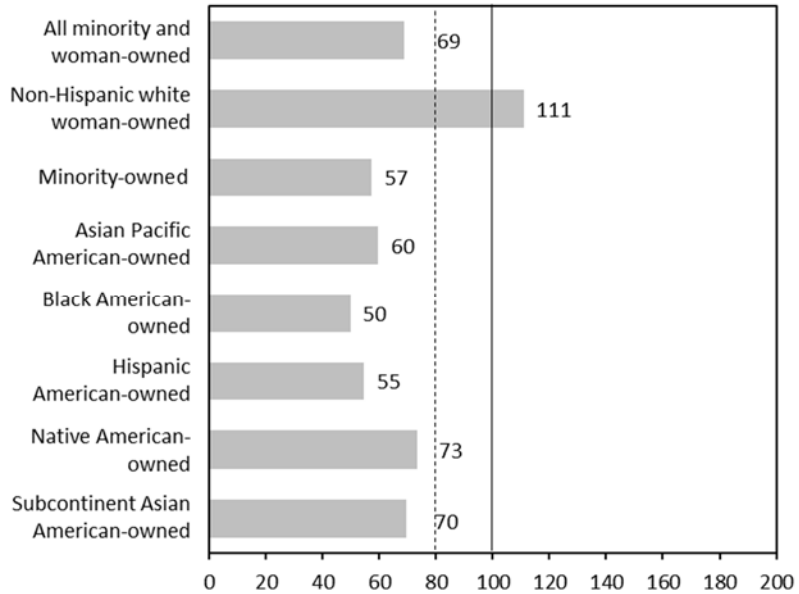
Figure ES-9.
Overall disparity analysis
results by racial/ethnic and
gender group

Note:

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

Source:

BBC Research & Consulting disparity analysis.



2. Funding source. As part of implementing the Federal DBE Program, Caltrans and subrecipient local agencies use DBE contract goals to award many FHWA-funded contracts and procurements. Thus, it is instructive to examine disparity analysis results separately for Caltrans’ FHWA-funded work and state-funded work, which Caltrans awarded without the use of any race- or gender-conscious measures due to Proposition 209. Figure ES-10 presents those results. As shown in Figure ES-10, minority- and woman-owned businesses considered together showed substantial disparities on both FHWA-funded contracts (disparity index of 74) and state-funded contracts (disparity index of 46). Disparity analysis results by individual racial/ethnic and gender groups indicate that:

- Most individual groups showed substantial disparities on FHWA-funded contracts and procurements. The exceptions were non-Hispanic white woman-owned businesses (disparity index of 121) and Native American-owned businesses (disparity index of 83). A disparity index of 83 indicates a disparity, but it does not reach the threshold of being considered substantial.
- All groups showed substantial disparities on state-funded contracts and procurements.

The results for FHWA-funded work suggest that Caltrans’ use of DBE contract goals is at least somewhat effective in increasing minority- and woman-owned business participation, particularly when compared with results for state-funded work.

Figure ES-10.
Disparity analysis results
for FHWA- and state-
funded work

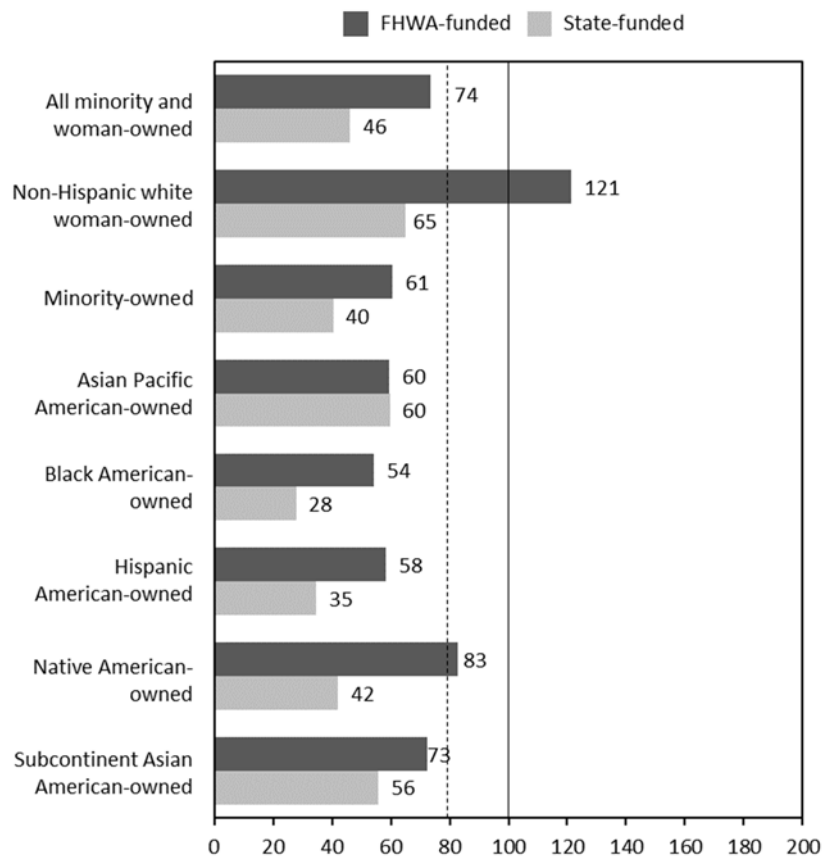
Note:

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

For more detail and results by group, see Figure F-11 and F-12 in Appendix F.

Source:

BBC Research & Consulting disparity analysis.



3. Contract role. Because minority- and woman-owned businesses are more likely to work as subcontractors than prime contractors, it is useful to examine disparity analysis results separately for relevant prime contracts and subcontracts. As shown in Figure ES-11, minority- and woman-owned businesses showed substantial disparities on prime contracts (disparity index of 48) but did not show disparities on subcontracts (disparity index of 115). Caltrans and subrecipient local agencies used DBE contract goals to award many contracts and procurements during the study period. DBE contract goals are designed to increase the participation of minority- and woman-owned businesses in subcontracts. Results for individual groups indicated that:

- All groups except for non-Hispanic white woman-owned businesses (disparity index of 88) showed substantial disparities on prime contracts. A disparity index of 88 indicates a disparity, but it does not reach the threshold of being considered substantial.
- Only two groups exhibited disparities on subcontracts: Black American-owned businesses (disparity index of 85) and Subcontinent Asian American-owned businesses (disparity index of 85). Neither disparity reached the threshold to be considered substantial.

The results for subcontracts suggest that Caltrans' use of DBE contract goals is at least somewhat effective in increasing minority- and woman-owned business participation, particularly when compared with results for prime contracts.

Figure ES-11.
Disparity analysis results
for prime contracts and
subcontracts

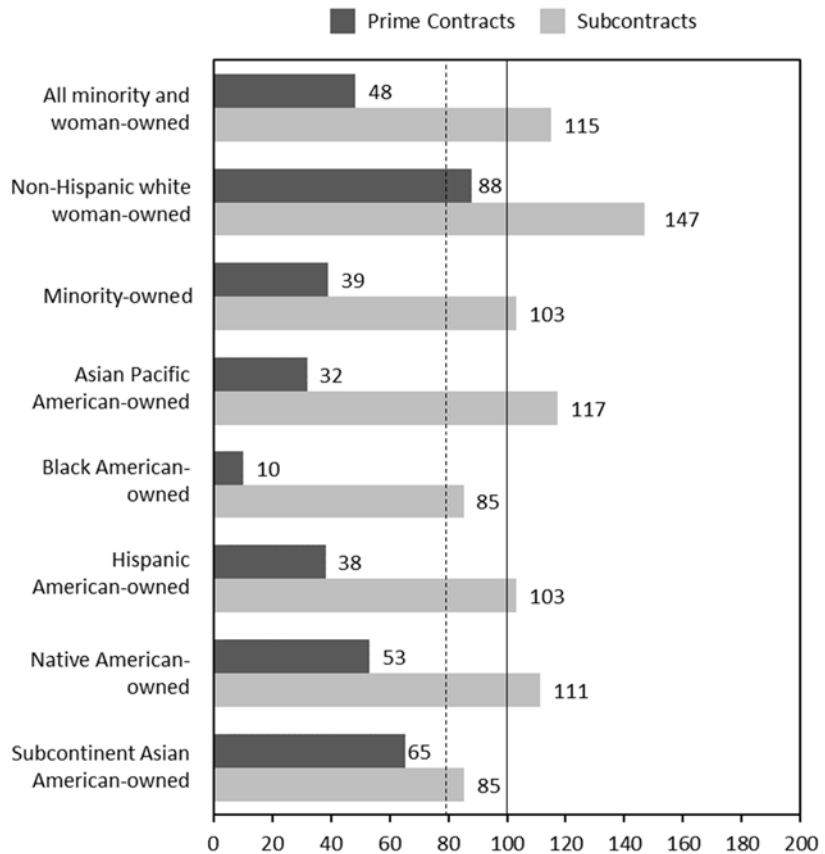
Note:

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

For more detail, see Figures F-7 and F-8 in Appendix F.

Source:

BBC Research & Consulting disparity analysis.



4. Industry. BBC also examined disparity analysis results separately for construction and professional services work to assess whether contracting outcomes differ by industry. As shown in Figure ES-12, minority- and woman-owned businesses considered together exhibited substantial disparities on both construction (disparity index of 73) and professional services (disparity index of 50) contracts. Results for individual groups indicate that:

- All groups except non-Hispanic white woman-owned businesses (disparity index of 133) and Native American-owned businesses (disparity index of 81) showed substantial disparities on construction contracts. A disparity index of 81 indicates a disparity, but it does not reach the threshold to be considered substantial.
- All groups except Subcontinent Asian American-owned businesses (disparity index of 110) showed substantial disparities on professional services contracts.

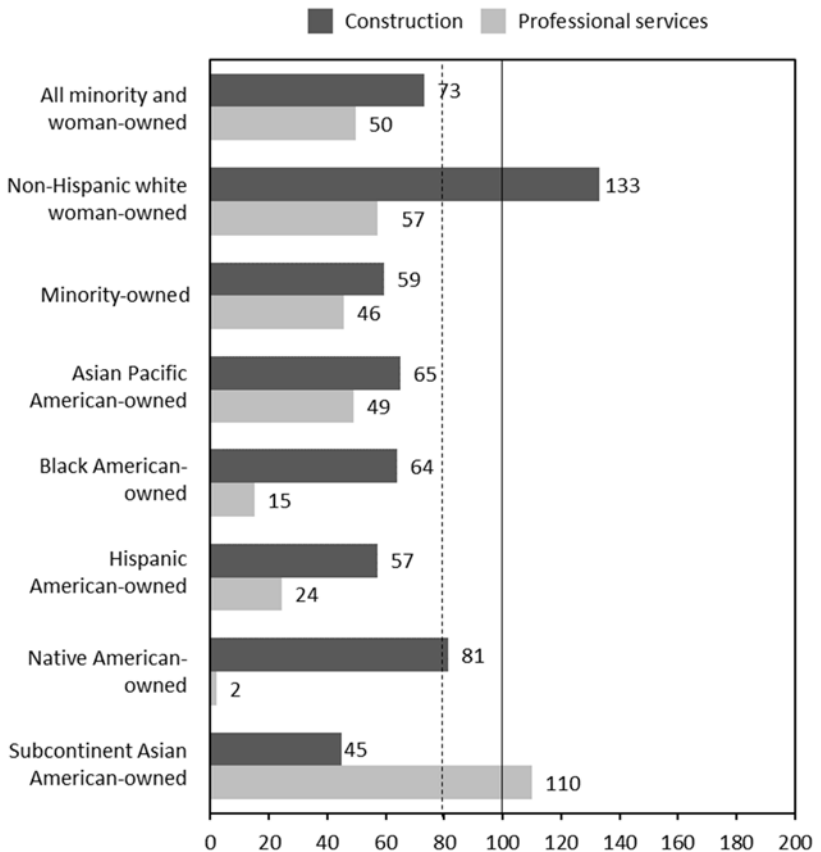
E. Program Considerations

The disparity study provides substantial information Caltrans should examine as it considers potential refinements to its implementation of the Federal DBE Program and ways to further encourage the participation of minority- and woman-owned businesses in its contracts and procurements. BBC presents several key considerations below.

Figure ES-12.
Disparity analysis results
for construction and
professional services
work

Note:
 Numbers rounded to nearest tenth
 of 1 percent and thus may not sum
 exactly to totals.
 For more detail, see Figures F-5 and
 F-6 in Appendix F.

Source:
 BBC Research & Consulting disparity
 analysis.



1. Overall DBE goal. As part of its implementation of the Federal DBE Program, Caltrans is required to set an overall goal for DBE participation in its FHWA-funded contracts and procurements, which is currently set at 17.6 percent. Results from the disparity study—particularly the availability analysis, analyses of marketplace conditions, and anecdotal evidence—can help Caltrans establish a new overall DBE goal for its FHWA-funded work. The availability analysis indicated that potential DBEs might be expected to receive 22.2 percent of relevant contract and procurement dollars, which the agency could consider as the *base figure* of its new overall DBE goal. In addition, the disparity study provides information Caltrans should review in considering whether an adjustment to its base figure is warranted, particularly information about the volume of work in which DBEs have participated in the past; barriers in California related to employment, self-employment, education, training, and unions; barriers in California related to financing, bonding, and insurance; and other relevant information.

2. DBE contract goals. Disparity analysis results indicated that, during the study period, all relevant business groups showed substantial disparities on state-funded contracts, which Caltrans and subrecipient local agencies awarded without the use of race- and gender-conscious measures due to Proposition 209. In addition, minority- and woman-owned businesses showed smaller disparities (although substantial disparities still existed for most groups) on FHWA-funded contracts, many of which Caltrans and subrecipient local agencies awarded with the use of DBE contract goals. Based on those results, disparity analysis results for other contract sets, and anecdotal evidence the study team collected, Caltrans should consider continuing its use of DBE contract goals in the future. Because the use of DBE contract goals is a race- and gender-

conscious measure, Caltrans must ensure that their use meets the *strict scrutiny standard* of constitutional review, including demonstrating a compelling government interest for the use of DBE contract goals and ensuring the use of DBE contract goals is narrowly tailored. In addition, Caltrans should consider:

- Making improvements to its good faith efforts (GFEs) policies to ensure they lead to more meaningful contact between prime contractors and potential subcontractors;
- Requiring prime contractors to meet DBE contract goals at the time of bid submission through the use of first-tier subcontractors to ensure prime contractors have responsibility for meeting DBE goal requirements; and
- Monitoring work types for potential overconcentration of minority- and woman-owned businesses to prevent undue burdens on non-DBEs working in those areas

3. Data collection. Caltrans collects subcontract data for first-tier subcontracts worth more than \$10,000 or 0.5 percent of total contract amounts but does so using paper copies of forms prime contractors submit to contract managers or resident engineers. Caltrans should consider implementing an electronic data collection system for subcontracting data and consider streamlining and simplifying the forms required for reporting subcontractor participation. A subcontract database would help Caltrans track data more efficiently, identify when contract managers or resident engineers have not submitted subcontract data, and reduce potential mistakes in interpreting hand-written forms. Caltrans should also consider collecting comprehensive data on all Local Assistance subcontracts, regardless of subcontractors' characteristics or whether they are certified as DBEs for *all* relevant prime contracts (e.g., state- and FHWA-funded contracts). Collecting subcontract data on all relevant contracts will help ensure Caltrans monitors the participation of minority- and woman-owned businesses accurately, identifies additional businesses that could become certified as DBEs, and identifies future subcontracting opportunities for minority- and woman-owned businesses.

4. Small business prime program. Disparity analysis results indicated substantial disparities for most relevant racial/ethnic and gender groups on prime contracts Caltrans and subrecipient local agencies awarded during the study period. Caltrans might consider reserving select small prime contracts for small business bidding to encourage the participation of minority- and woman-owned businesses as prime contractors. To ensure a small business prime program effectively encourages the participation of small businesses, including many minority- and woman-owned businesses, Caltrans should consider limiting bidding on eligible contracts to certified small businesses, regardless of whether larger business are able to submit lower bids.

5. Subcontracting minimums. Subcontracts often represent accessible opportunities for small businesses, including many minority- and woman-owned businesses, to become involved in an organization's contracting and procurement. To increase subcontract opportunities, Caltrans could consider implementing a program that requires prime contractors to subcontract a minimum amount of project work. For specific types of contracts where subcontracting opportunities might exist, Caltrans could set a minimum percentage of work to be subcontracted. Prime contractors would then have to meet or exceed those minimums in order for their bids or proposals to be considered responsive. If Caltrans were to implement such a

program, it should include GFEs provisions that would require prime contractors to document their efforts to identify and include potential subcontractors in their bids or proposals.

6. Subcontract commitments. Anecdotal evidence suggests subcontractors are often not used to the full extent of their subcontracts with prime contractors. Caltrans should consider tracking subcontractor participation electronically on an invoice-by-invoice basis to ensure prime contractors use subcontractors on projects to the full extent of their subcontracts. In addition to tracking subcontractor payments, establishing points of contact between subcontractors and Caltrans to address any underutilization or subcontractor substitutions may help ensure minority- and woman-owned businesses receive the work they were committed at the time of bid. Interview and public meeting participants made a number of additional suggestions to maximize work on subcontracts, including inviting subcontractors to contract negotiation meetings, notifying the entire team when contracts have been awarded, establishing stricter regulations around subcontract changes and subcontractor substitutions, and considering prime contractors' past use of subcontractors relative to subcontract commitments as a factor during bid evaluations.

7. Using the same businesses. The disparity study indicated that a substantial portion of the contract and procurement dollars Caltrans and subrecipient local agencies awarded to minority- and woman-owned businesses during the study period were largely concentrated with a relatively small number of businesses. Caltrans could consider using bid and contract language to encourage prime contractors to partner with subcontractors and suppliers with which they have never worked. For example, Caltrans might ask prime contractors to submit information about the efforts they made to identify and team with businesses with which they have not worked in the past as part of their bids. Caltrans could award evaluation points or price preferences based on the degree to which prime contractors partner with new subcontractors.

8. Working with Caltrans staff. Anecdotal evidence indicates that when businesses experience challenges during contract performance, finding the appropriate Caltrans employee to contact can be difficult. Many businesses report that they are given the "run around." That is, they are redirected to Caltrans staff who are either unwilling or incapable of resolving their issues. With payment issues, subcontractors are typically redirected to their prime contractors, even if the issues are because of lack of responses from their prime contractors. Caltrans should increase the visibility of appropriate points of contact for contract issues and District Small Business Liaisons for small business advocacy. Creating additional liaison positions, or expanding the responsibilities of existing staff, to resolve issues between prime contractors and subcontractors about payment, contract specifications, and other issues would empower many small businesses to perform Caltrans work more successfully.

CHAPTER 1.

Introduction

CHAPTER 1.

Introduction

The California Department of Transportation (Caltrans) is responsible for managing more than 50,000 miles of California's federal and state highways. As a United States Department of Transportation (USDOT) fund recipient, Caltrans implements the Federal Disadvantaged Business Enterprise (DBE) Program, which is designed to address potential discrimination against DBEs in the award and administration of USDOT-funded contracts. Caltrans retained BBC Research & Consulting (BBC) to conduct a *disparity study* to help evaluate the effectiveness of its implementation of the Federal DBE Program in encouraging the participation of minority- and woman-owned businesses in its Federal Highway Administration (FHWA)-funded contracts.

A disparity study examines whether there are any disparities between:

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

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

- Local marketplace conditions for minority- and woman-owned businesses;
- Contracting practices and business programs the agency currently has in place; and
- Various aspects of implementing the Federal DBE Program effectively and in a legally-defensible manner.

There are several reasons why information from the 2021 Caltrans Disparity Study is potentially useful to the agency:

- The study provides information about how well minority- and woman-owned businesses fare in Caltrans' transportation-related contracting relative to their availability for that work.
- The study assesses how effective Caltrans' implementation of the Federal DBE Program is in improving outcomes for minority- and woman-owned businesses in the agency's transportation-related contracting.
- The study identifies barriers minorities, women, and minority- and woman-owned businesses face in the local marketplace that might affect their ability to compete for Caltrans' transportation-related contracts and procurements.
- The study provides insights into how to refine contracting processes and program measures to better encourage the participation of minority- and woman-owned businesses in Caltrans' transportation contracts and help address marketplace barriers.

- An independent review of the participation of minority- and woman-owned businesses is valuable to Caltrans and external groups that monitor the agency's contracting practices.
- Government organizations that have successfully defended their implementations of the Federal DBE Program and other minority- and woman-owned business programs in court have typically relied on information from disparity studies.

BBC introduces the 2021 Caltrans Disparity Study in three parts:

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

A. Background

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

1. Setting an overall goal for DBE participation. As part of the Federal DBE Program, an agency is required to set an overall aspirational goal for DBE participation in its FHWA-funded contracts every three years.¹ If DBE participation for a particular year is less than the overall DBE goal, then the agency must analyze the reasons for the difference and establish specific measures that enable the agency to meet the goal in the next year. The Federal DBE Program describes the steps an agency must follow in establishing its overall DBE goal. To begin the process, an agency must develop a *base figure* based on demonstrable evidence of the availability of DBEs to participate in its FHWA-funded contracts and procurements. Then, the agency must consider conditions in the local marketplace for minority- and woman-owned businesses and other factors and determine whether an upward or downward adjustment to its base figure is necessary to ensure its overall DBE goal is as precise as possible (referred to as a *step-2 adjustment*). An agency is not required to make a step-2 adjustment to its base figure, but it is required to consider various relevant factors and explain its decision to FHWA.

2. Projecting the portion of the overall DBE goal to be met through race- and gender-neutral means. FHWA also requires an agency to project the portion of its overall DBE goal it will meet through *race- and gender-neutral* measures and the portion it will meet through any *race-or gender-conscious* measures. Race- and gender-neutral measures are designed to encourage the participation of all businesses—or all small businesses—in an agency's contracting, regardless of the race/ethnicity or gender of business owners (for examples of race- and gender-neutral measures, see 49 Code of Federal Regulations (CFR) Section 26.51(b)). If an agency cannot meet its goal solely through the use of race- and gender-neutral measures, then it must consider also using *race- and gender-conscious* measures. Race- and gender-conscious measures are specifically designed to encourage the participation of minority- and woman-owned businesses in an agency's contracting (e.g., using DBE goals to award individual contracts).

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

The only race- and gender-conscious measure Caltrans uses is applying DBE contract goals in awarding many of its FHWA-funded contracts. Prime contractors bidding on those contracts must meet the goals by: 1) being DBEs themselves; 2) making subcontracting commitments to certified DBEs; or 3) submitting *good faith efforts* (GFE) documentation. Caltrans reviews GFE documentation and approves it if prime contractors demonstrate genuine efforts towards compliance with DBE goals, even if they were unsuccessful in partnering with DBE subcontractors. If prime contractors do not meet the goals through subcontracting commitments with DBEs or through approved GFE, then Caltrans rejects prime contractors' bids.

Caltrans does not use any race- or gender-conscious measures when awarding state-funded contracts because of Proposition 209. Proposition 209, which California voters passed in 1996, amended the California constitution to prohibit discrimination and the use of race- and gender-based preferences in public contracting, public employment, and public education. Thus, Proposition 209 prohibited government agencies in California—including Caltrans—from using race- or gender-conscious measures when awarding state-funded contracts. However, Proposition 209 did not prohibit those measures if an agency is required to take them “to establish or maintain eligibility for any federal program,” which is why Caltrans continues to use race- and gender-conscious measures in awarding FHWA-funded contracts.

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

B. Study Scope

Information from the disparity study will help Caltrans continue to encourage the participation of minority- and woman-owned businesses in its FHWA-funded contracts and implement the Federal DBE Program effectively and in a legally defensible manner.

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

a. Minority- and woman-owned businesses. BBC focused its analyses on the minority- and woman-owned business groups presumed to be disadvantaged in the Federal DBE Program:

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

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

BBC considered businesses as minority- or woman-owned regardless of whether they were, or could be, certified as DBEs. Analyzing the participation and availability of minority- and woman-owned businesses regardless of DBE certification allowed the study team to assess whether there are disparities affecting all minority- and woman-owned businesses and not just certified businesses.

b. Businesses owned by minority women. BBC's definition of minority-owned businesses included businesses owned by minority men and minority women. For example, BBC grouped results for businesses owned by Black American men with results for businesses owned by Black American women.

c. Woman-owned businesses. Because BBC classified minority woman-owned businesses according to their corresponding racial/ethnic groups, analyses and results pertaining to woman-owned businesses pertain specifically to results for *non-Hispanic white woman-owned businesses*. As with minority-owned businesses, BBC considered businesses to be woman-owned based on the known genders of business owners, regardless of whether the businesses were certified as DBEs.

d. Majority-owned businesses. BBC considered businesses to be majority-owned if they are businesses owned by non-Hispanic white men. In certain disparity study analyses, the study team coded each business as minority-, woman-, or majority-owned.

e. DBEs. DBEs are minority- and woman-owned businesses specifically certified as such by Caltrans. A determination of DBE eligibility includes assessing business' gross revenues and business owners' personal net worth. Some minority- and woman-owned businesses do not qualify as DBEs because their gross revenues or net worth are too high. Businesses seeking DBE certification in California are required to submit an application to Caltrans. The application is available online and requires businesses to submit various information, including business name, contact information, tax information, work specializations, and race/ethnicity and gender of the owners. Caltrans reviews each application, which involves on-site meetings and additional documentation to confirm business information.²

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

f. Potential DBEs. Potential DBEs are minority- and woman-owned businesses that are DBE-certified or appear they could be DBE-certified based on revenue requirements described in 49 CFR Part 26 (regardless of actual certification). The study team did not consider businesses that have been decertified or have graduated from the DBE Program as potential DBEs in the study.

² Businesses owned by non-Hispanic white men can be certified as DBEs if those businesses meet the certification requirements in 49 CFR Part 26.

BBC examined the availability of potential DBEs as part of helping Caltrans calculate the base figure of its next overall DBE goal.

2. Analyses in the disparity study. BBC examined whether there are any disparities between the participation and availability of minority- and woman-owned businesses on relevant Caltrans contracts and procurements. The study focused on transportation-related construction and professional services contracts Caltrans and subrecipient local agencies awarded between January 1, 2015 and December 31, 2019 (i.e., the study period). Information is organized in the disparity study report in the following manner:

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

b. Marketplace conditions. BBC conducted quantitative analyses of the success of minorities and women and minority- and woman-owned businesses in the California transportation contracting industry. BBC compared business outcomes for minorities, women, and minority- and woman-owned businesses to outcomes for non-Hispanic white men and majority-owned businesses in key business areas. In addition, the study team collected anecdotal evidence about potential barriers minority- and woman-owned businesses face throughout California from public hearings, in-depth interviews, and other efforts. Information about marketplace conditions is presented in **Chapter 3, Appendix C, and Appendix D**.

c. Data collection and analysis. BBC examined data from multiple sources to complete the utilization and availability analyses, including surveys the study team conducted with thousands of businesses throughout California. The scope of the study team's data collection and analysis for the study is presented in **Chapter 4**.

d. Availability analysis. As part of the availability analysis, BBC estimated the percentage of Caltrans' prime contract and subcontract dollars minority- and woman-owned businesses are *ready, willing, and able* to perform. That analysis was based on Caltrans data and surveys the study team conducted with thousands of California businesses that work in industries related to the types of contracts Caltrans and subrecipient local agencies award. BBC analyzed availability separately for businesses owned by specific minority groups and white women and for different types of contracts and procurements. Results from the availability analysis are presented in **Chapter 5 and Appendix E**.

e. Utilization analysis. BBC analyzed prime contract and subcontract dollars Caltrans and subrecipient local agencies awarded to minority- and woman-owned businesses between January 1, 2015 and December 31, 2019, including information about associated subcontracts.³ BBC analyzed participation separately for businesses owned by specific minority groups and

³ Note that prime contractors—not Caltrans—actually *award* subcontracts to subcontractors. However, for simplicity, throughout the report, BBC refers to Caltrans as *awarding* subcontracts.

white women and for different types of contracts and procurements. Results from the utilization analysis are presented in **Chapter 6**.

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

g. Program measures. BBC reviewed measures Caltrans uses to encourage the participation of small businesses as well as minority- and woman-owned businesses in its contracting as well as its implementation of the Federal DBE Program. That information is presented in **Chapter 8**.

h. Overall DBE goal. Based on information from the availability analysis and other research, BBC provided Caltrans with information to help the agency set its next overall DBE goal for FHWA-funded contracts, including establishing a base figure and considering a step-2 adjustment. Information about Caltrans' overall DBE goal is presented in **Chapter 9**.

i. Considerations. BBC provided guidance related to additional program options and changes to current contracting practices Caltrans could consider. The study team's review and guidance for program implementation is presented in **Chapter 10**.

C. Study Team Members

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

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

2. Action Research. Action Research is a woman-owned research firm based in Oceanside, California. Action Research conducted in-depth interviews with California businesses and assisted the project team with community engagement and data collection tasks.

3. Luster National. Luster National is a Black American-owned construction and policy development firm based in Oakland, California. Luster National conducted in-depth interviews with California businesses and assisted the project team with community engagement and data collection tasks.

4. GCAP Services (GCAP). GCAP is a Hispanic American-owned program implementation firm based in Costa Mesa and Sacramento, California. GCAP assisted the project team with community engagement and data collection tasks.

5. Davis Research. Davis Research is a survey fieldwork firm based in Calabasas, California. The firm conducted telephone and online surveys with thousands of California businesses in connection with the availability and utilization analyses.

6. Holland & Knight. Holland & Knight is a law firm with offices throughout the country. Holland & Knight provided legal consulting services throughout the course of the study.

CHAPTER 2.

Legal Analysis

CHAPTER 2.

Legal Analysis

As a recipient of United States Department of Transportation (USDOT) funds, the California Department of Transportation (Caltrans) implements the Federal Disadvantaged Business Enterprise (DBE) Program, which is designed to encourage the participation of minority- and woman-owned businesses in an agency's USDOT-funded contracting. Caltrans uses a combination of *race- and gender-neutral* and *race- and gender-conscious* measures as part of its implementation of the program. Race- and gender-neutral measures are designed to encourage the participation of all businesses in an agency's contracting, regardless of the race/ethnicity or gender of business owners. Examples of such measures include networking and outreach efforts, technical assistance programs, and mentor-protégé programs that are not limited to minority- and woman-owned businesses. In contrast, race- and gender-conscious measures are specifically designed to encourage the participation of minority- and woman-owned businesses in an agency's contracting. The only race- and gender-conscious measure Caltrans uses as part of the Federal DBE Program is using DBE contract goals to award many of its USDOT-funded contracts. Prime contractors bidding on those contracts must meet the goals by: 1) being DBEs themselves; 2) making subcontracting commitments to DBEs; or 3) submitting *good faith efforts* documentation demonstrating they made genuine efforts to meet the goals but failed to do so.

Because Caltrans uses both race- and gender-neutral and race- and gender-conscious measures as part of its implementation of the Federal DBE Program, it is instructive to review information related to the legal standards governing their use. BBC Research & Consulting (BBC) summarizes legal information in four parts:

- A. Legal standards for different types of measures;
- B. Seminal court decisions;
- C. Relevant state law and regulations; and
- D. Addressing requirements.

Appendix B presents additional details about the above topics.

A. Legal Standards for Different Types of Measures

There are different legal standards for determining the constitutionality of minority- and woman-owned business programs, depending on whether they rely only on race- and gender-neutral measures or if they also include race- and gender-conscious measures.

1. Programs that rely only on race- and gender-neutral measures. Government agencies that implement minority- and woman-owned business programs that rely only on race- and gender-neutral measures must show a *rational basis* for their programs. Showing a rational basis requires agencies to demonstrate their contracting programs are rationally related to a legitimate government interest. It is the lowest threshold for evaluating the legality of programs

that could impinge on the rights of others. When courts review programs based on a rational basis, only the most egregious violations lead to programs being deemed unconstitutional.

2. Programs that include race- and gender-conscious measures. Minority- and woman-owned business programs that include both race- and gender-neutral and race- and gender-conscious measures—such as Caltrans’ implementation of the Federal DBE Program—must meet the *strict scrutiny* standard of constitutional review.¹ In contrast to a rational basis, the strict scrutiny standard presents the highest threshold for evaluating the legality of government programs that could impinge on the rights of others, short of prohibiting them altogether. Under the strict scrutiny standard, government agencies must show a *compelling governmental interest* in using race- and gender-conscious measures and ensure the use of such measures is *narrowly tailored*.

a. Compelling governmental interest. Government agencies using race- and gender-conscious measures have the initial burden of showing evidence of discrimination—including statistical and anecdotal evidence—that supports the use of such measures. Agencies cannot rely on national statistics of discrimination to draw conclusions about market conditions in their own regions. Rather, they must assess discrimination within their own relevant market areas.² It is not necessary for government agencies themselves to have discriminated against minority- or woman-owned businesses for them to take remedial action. They could take remedial action if evidence demonstrates they are *passive participants* in race- or gender-based discrimination that exists in their relevant geographic market areas (RGMAs).

b. Narrow tailoring. In addition to demonstrating a compelling governmental interest, government agencies must also demonstrate their use of race- and gender-conscious measures is *narrowly tailored* to meet their objectives. There are a number of factors courts consider when determining whether the use of such measures is narrowly tailored, including:

- The necessity of such measures and the efficacy of alternative race- and gender-neutral measures;
- The degree to which the use of such measures is limited to those groups that actually suffer discrimination in the local marketplace;
- The degree to which the use of such measures is flexible and limited in duration, including the availability of waiver and sunset provisions;
- The relationship of any numerical goals to the relevant business marketplace; and
- The impact of such measures on the rights of third parties.³

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

² See e.g., *Concrete Works, Inc. v. City and County of Denver* (“Concrete Works I”), 36 F.3d 1513, 1520 (10th Cir. 1994).

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

B. Seminal Court Decisions

Two United States Supreme Court cases established the strict scrutiny standard for evaluating the constitutionality of minority- and woman-owned business programs that include race- and gender-conscious measures:

- *City of Richmond v. J.A. Croson Company (Croson)*;⁴ and
- *Adarand Constructors, Inc. v. Peña (Adarand)*.⁵

Many subsequent decisions in district courts and federal courts have expanded requirements for the use of race- and gender-conscious measures as part of minority- and woman-owned business programs, including several cases in the Ninth Circuit, the jurisdiction in which Caltrans operates. BBC briefly summarizes the United States Supreme Court's decisions in *Croson* and *Adarand* as well as the Ninth Circuit Court of Appeals' decisions in two other seminal cases related to minority- and woman-owned business programs: *Western States Paving Co. v. Washington State Department of Transportation (Western States)* and *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al. (AGC, San Diego)*.^{6, 7}

1. *Croson* and *Adarand*. The United States Supreme Court's landmark decisions in *Croson* and *Adarand* are the most important court decisions to date in connection with minority- and woman-owned business programs, race- and gender-conscious measures, and disparity study methodology. In *Croson*, the Supreme Court struck down the City of Richmond's race-based subcontracting program as unconstitutional, and in doing so, established various requirements government agencies must meet when considering the use of race-conscious measures as part of their contracting:

- Agencies' use of race-conscious measures must meet the strict scrutiny standard of constitutional review—that is, in remedying any identified discrimination, they must establish a *compelling governmental interest* to do so and must ensure the use of such measures is *narrowly tailored*.
- In assessing availability, agencies must account for various characteristics of the prime contracts and subcontracts they award and the degree to which local businesses are *ready, willing, and able* to perform that work.
- If agencies show *statistical disparities* between the percentage of dollars they awarded to minority-owned businesses and the percentage of dollars those businesses might be available to perform, then *inferences of discrimination* could exist, justifying the use of narrowly-tailored race-conscious measures.

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).

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

⁷ *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, 713 F.3d 1187 (9th Cir. 2013).

The Supreme Court's decision in *Adarand* expanded its decision in *Crosby* to include federal government programs—such as the Federal DBE Program—that include race-conscious measures, requiring that those programs must also meet the strict scrutiny standard.

2. *Western States*. *Western States* represented the first time the Ninth Circuit Court of Appeals considered the constitutionality of a state department of transportation's implementation of the Federal DBE Program. In *Western States*, the Court struck down the Washington State Department of Transportation's (WSDOT's) implementation of the Federal DBE Program, because it did not satisfy the narrow tailoring requirement of the strict scrutiny standard. Specifically, the Court held that:

- WSDOT did not present compelling evidence of race- or gender-based discrimination in the Washington transportation contracting industry, and agencies must have evidence of such discrimination for their use of race- and gender-conscious measures to be considered narrowly tailored and serving a remedial purpose.
- Even when evidence of discrimination exists within agencies' RGMA, the use of race- and gender-conscious measures is narrowly tailored only when it is limited to those business groups that have been shown to actually suffer from discrimination in their marketplaces.
- Agencies can rely on statistical disparities between the participation and availability of minority- and woman-owned businesses on contracts they awarded to show discrimination against particular business groups in the marketplace if those contracts were awarded using only race- and gender-neutral measures.
- In assessing availability, agencies must account for various characteristics—such as capacity, firm size, and contract size—of the prime contracts and subcontracts they award as well as of the businesses located in their RGMA.
- WSDOT only provided minimal statistical evidence and no anecdotal evidence regarding race- and gender-based discrimination in its RGMA, and sufficient amounts of both are necessary to show the use of race- and gender-conscious measures is narrowly tailored.

3. *AGC, San Diego*. *AGC, San Diego* was the only other time the Ninth Circuit Court of Appeals considered the constitutionality of a state department of transportation's implementation of the Federal DBE Program after *Western States*. However, in contrast to its decision in *Western States*, the Court upheld Caltrans' implementation of the Federal DBE Program as constitutional, ruling that it met both the compelling governmental interest and narrow tailoring requirements of the strict scrutiny standard. Caltrans' implementation of the Federal DBE Program and its defense of its program was based in large part on a 2007 disparity study BBC conducted.

C. Relevant State Law and Regulations

Although Caltrans uses race- and gender-conscious measures to award many of its USDOT-funded contracts, it does not use any race- or gender-conscious measures to award state-funded contracts because of Proposition 209, which California voters passed in 1996 and became effective in 1997. Proposition 209 amended Section 31, Article 1 of the California Constitution to prohibit discrimination and the use of race- and gender-based preferences in public contracting, public employment, and public education. Thus, Proposition 209 prohibits government agencies

in California—including Caltrans—from using race- or gender-conscious measures when awarding state-funded contracts. Proposition 209 does not prohibit those measures if an agency is required to take them “to establish or maintain eligibility for any federal program, if ineligibility would result in a loss of federal funds to the state,” which is why Caltrans can legally use race- and gender-conscious measures as part of the Federal DBE Program.

No government agencies in California have successfully used race- or gender-conscious measures as part of awarding state- or locally-funded contracts since Proposition 209 passed. The City of San Jose implemented a minority- and woman-owned business program that included race- and gender-conscious measures, but the program was challenged in court, and the California Supreme Court found it violated Section 31, Article 1 of the California Constitution.⁸

D. Addressing Requirements

Many government agencies have used information from disparity studies as part of determining whether their contracting practices are affected by race- or gender-based discrimination and ensuring their use of race- and gender-conscious measures is narrowly tailored. Various aspects of the 2021 Caltrans Disparity Study specifically address requirements the United States Supreme Court and other federal courts have established around minority- and woman-owned business programs and race- and gender-conscious measures:

- The study includes extensive econometric analyses and analyses of anecdotal evidence to assess whether any discrimination exists for minorities, women, and minority- and woman-owned businesses in the RGMA and whether Caltrans is actively or passively participating in that discrimination.
- The study accounts for various characteristics of the prime contracts and subcontracts Caltrans and subrecipient local agencies award as well as specific characteristics of businesses working in the RGMA, resulting in estimates of the degree to which minority- and woman-owned businesses are *ready, willing, and able* to perform that work.
- The study includes assessments of whether minority- and woman-owned businesses exhibit substantial statistical disparities between participation and availability for Caltrans’ and subrecipient local agencies’ contracts and procurements, indicating whether any inferences of discrimination exist for individual groups.
- The study includes specific recommendations to help ensure Caltrans’ implementation of the Federal DBE Program is narrowly tailored in remedying any identified discrimination, including recommendations related to:
 - Identifying which racial/ethnic and gender groups exhibit substantial barriers;
 - Maximizing the use of race- and gender-neutral measures to address any barriers;
 - Ensuring race- and gender-conscious measures are flexible, rationally related to marketplace conditions, and not overly burdensome on third parties; and
 - Setting an overall DBE goal consistent with federal regulations and case law.

⁸ *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068 (Cal. 2000).

CHAPTER 3.

Marketplace Conditions

CHAPTER 3.

Marketplace Conditions

Historically, there have been myriad legal, economic, and social obstacles that have impeded minorities and women from acquiring the human and financial capital necessary to start and operate successful businesses. Barriers such as slavery, racial oppression, segregation, race-based displacement, and labor market discrimination produced substantial disparities for minorities and women, the effects of which are still apparent today. Those barriers limited opportunities for minorities in terms of both education and workplace experience.^{1, 2, 3, 4} Similarly, many women were restricted to either being homemakers or taking gender-specific jobs with low pay and little chance for advancement.⁵ Historically, minority groups and women in California have faced similar barriers. For example, Black Americans and Hispanic Americans are incarcerated at high rates than non-Hispanic white Americans in California.⁶ Black Children in California are much more likely to live and grow up in poverty than other children after accounting for other demographic factors.⁷ In addition, Black Americans and Hispanic Americans have substantially higher poverty rates than non-Hispanic white Americans in California.⁸

In the middle of the 20th century, many reforms opened up new opportunities for minorities and women nationwide. For example, *Brown v. Board of Education*, *The Equal Pay Act*, *The Civil Rights Act*, and *The Women’s Educational Equity Act* outlawed many forms of discrimination. Workplaces adopted personnel policies and implemented programs to diversify their staffs.⁹ Those reforms increased diversity in workplaces and reduced educational and employment disparities for minorities and women.^{10, 11, 12, 13} However, despite those improvements, minorities and women continue to face barriers—such as incarceration, residential segregation, and family responsibilities—that have made it more difficult to acquire the human and financial capital necessary to start and operate businesses successfully.^{14, 15, 16, 17}

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

BBC Research & Consulting (BBC) conducted quantitative and qualitative analyses to assess whether minorities, women, and minority- and woman-owned businesses face any barriers in the California transportation-related construction and professional services industries. The study team also examined the potential effects any such barriers have on the formation and success of businesses and on their participation in, and availability for, transportation-related contracts and procurements the California Department of Transportation (Caltrans) awards. The study team examined marketplace conditions in four primary areas:

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

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

A. Human Capital

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

1. Education. Barriers associated with educational attainment may preclude the entry or advancement of certain individuals in certain industries, because many occupations require at least a high school diploma, and some occupations—such as occupations in professional services—require at least a four-year college degree. In addition, educational attainment is a strong predictor of both income and personal wealth, which are both shown to be related to business formation and success.^{28, 29} Nationally, minorities lag behind non-Hispanic whites in terms of both educational attainment and the quality of education they receive.^{30, 31} Minorities are far more likely than non-Hispanic whites to attend schools that do not provide access to core classes in science and math.³² In addition, Black American students are more than three times more likely than non-Hispanic whites to be expelled or suspended from high school.³³ For those and other reasons, minorities are far less likely than non-Hispanic whites to attend college, enroll at highly- or moderately selective four-year institutions, or earn college degrees.³⁴

Disparities in educational outcomes seem to exist in California as well. For example, Black Americans and Hispanic Americans are less prepared for college than non-Hispanic white

Americans in California, and Black Americans and Hispanic Americans are underrepresented relative to the population in the University of California system.³⁵ BBC’s analyses of the California labor force also indicate that certain groups are far less likely than others to earn college degrees. Figure 3-1 presents the percentage of California workers who have earned four-year college degrees by race/ethnicity and gender. As shown in Figure 3-1, Black American, Hispanic American, Native American, and other race minority workers are substantially less likely than non-Hispanic white workers to have four-year college degrees.

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

Notes:

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

Source:

BBC Research & Consulting from 2015-2019 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

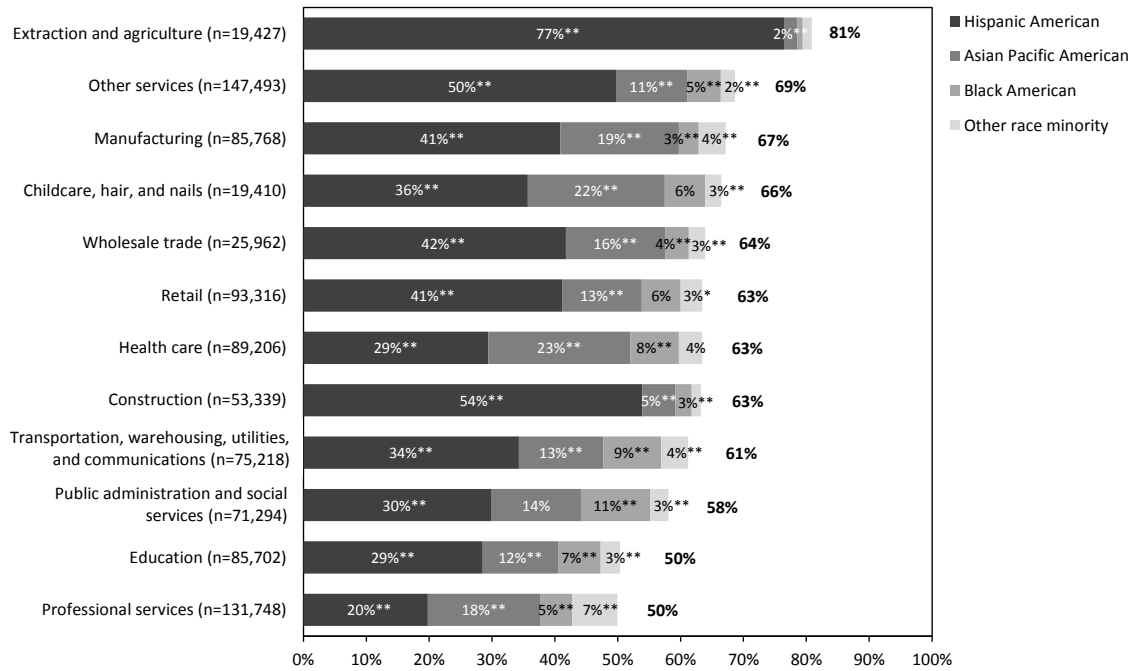
Group	Percent with college degrees
Race/ethnicity	
Asian Pacific American	55.6 % **
Black American	33.6 **
Hispanic American	15.7 **
Native American	31.8 **
Subcontinent Asian American	78.8 **
Other race minority	45.7 **
Non-Hispanic white	50.5
Gender	
Women	41.0 % **
Men	36.2

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

a. Employment. On a national level, prior industry experience has been shown to be an important precursor to business ownership and success. However, minorities and women are often unable to acquire that experience. They are sometimes discriminated against in hiring decisions, which impedes their entry into the labor market.^{36, 37, 38} When employed, they are often relegated to peripheral positions in the labor market and to industries that already exhibit high concentrations of minorities or women.^{39, 40, 41, 42, 43} In addition, minorities are incarcerated at a higher rate than non-Hispanic whites in California and nationwide, which contributes to many labor difficulties, including difficulties finding jobs and relatively slow wage growth.^{44, 45, 46, 47}

BBC’s analyses of the labor force in California are largely consistent with nationwide findings. Figure 3-2 presents the representation of minority workers in various California industries. As shown in Figure 3-2, the industries with the highest representations of minority workers are extraction and agriculture, other services, and manufacturing. The California industries with the lowest representations of minority workers are public administration and social services, education, and professional services.

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



Notes: *, ** Denotes that the difference in proportions between minority workers in the specified industry and all industries is statistically significant at the 90% and 95% confidence level, respectively.

The representation of minorities among all California workers is 14% for Asian Pacific Americans, 6% for Black Americans, 38% for Hispanic Americans, 3.6% for Other race minorities and 61% for all minorities considered together.

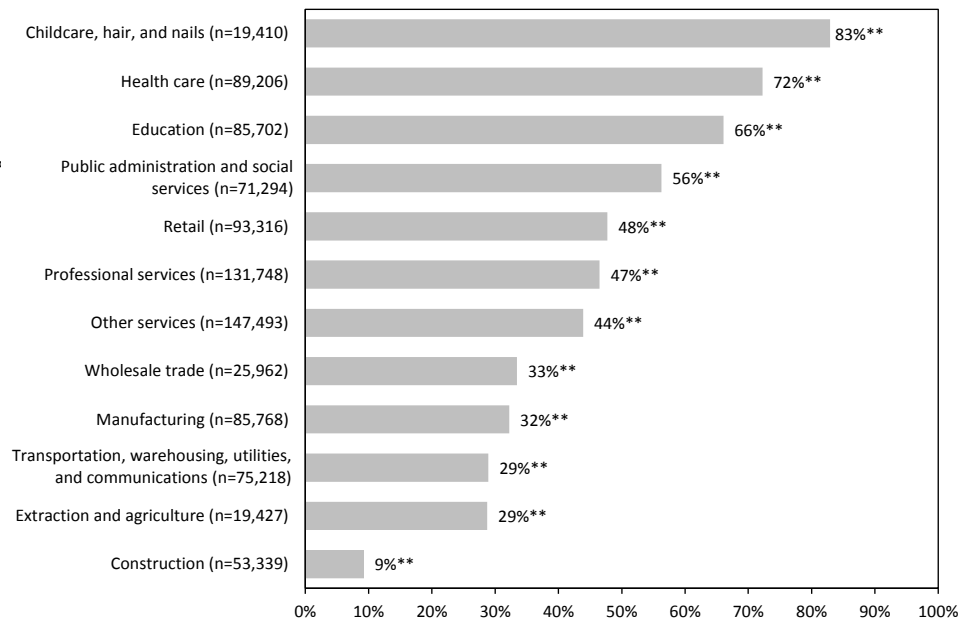
"Other race minority" includes Native Americans, Subcontinent Asian Americans, and other races.

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

Source: BBC Research & Consulting from 2015-2019 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>

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

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



Notes: *, ** Denotes that the difference in proportions between women workers in the specified industry and all industries is statistically significant at the 90% and 95% confidence level, respectively.

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

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

Source: BBC Research & Consulting from 2015-2019 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>

b. Management experience. Managerial experience is essential to business success, but discrimination remains a persistent obstacle to greater diversity in management positions.^{48, 49, 50} Nationally, minorities and women are far less likely than non-Hispanic white men to work in management positions.^{51, 52} Similar outcomes appear to exist for minorities and women in California as well. BBC examined the concentration of individuals of those groups in management positions in the California construction and professional services industries. As shown in Figure 3-4:

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

3. Intergenerational business experience. Having family members who own and work in businesses is an important predictor of business ownership and business success. Such

experiences help entrepreneurs gain access to important opportunity networks, obtain knowledge of best practices and business etiquette, and receive hands-on experience in helping run businesses. However, nationally, minorities have substantially fewer family members who own businesses and both minorities and women have fewer opportunities to be involved with those businesses.^{53, 54} That lack of experience makes it difficult for minorities and women to subsequently start their own businesses and operate them successfully.

Figure 3-4.
Percentage of workers who worked as a manager in the California construction and professional services industries

Note:

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

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

Source:

BBC Research & Consulting from 2015-2019 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

	Construction	Professional Services
Race/ethnicity		
Asian Pacific American	12.0 % **	2.5 % **
Black American	7.3 % **	5.4 %
Hispanic American	3.4 % **	1.9 % **
Native American	14.0 %	7.1 %
Subcontinent Asian American	14.0 %	3.2 %
Other race minority	9.1 % *	0.0 % †
Non-Hispanic white	15.9 %	4.2 %
Gender		
Women	9.2 %	2.1 % **
Men	8.6 %	4.0 %
All individuals	8.7 %	3.5 %

B. Financial Capital

In addition to human capital, financial capital has been shown to be an important indicator of business formation and success.^{55, 56, 57} Individuals can acquire financial capital through many sources, including employment wages, personal wealth, homeownership, and financing. If barriers exist in financial capital markets, minorities and women may have difficulty acquiring the capital necessary to start, operate, or expand businesses.

1. Wages and income. Wage and income gaps between minorities and non-Hispanic whites and between women and men exist throughout the country, even when researchers have statistically controlled for various personal factors ostensibly unrelated to race and gender.^{58, 59,}
⁶⁰ For example, national income data indicate that, on average, Black Americans and Hispanic Americans have household incomes that are less than two-thirds those of non-Hispanic whites.^{61,}
⁶² Women have also faced consistent wage and income gaps relative to men. Nationally, the median hourly wage of women is still only 82 percent the median hourly wage of men.⁶³

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

- Asian Pacific Americans, Black Americans, Hispanic Americans, Native Americans, and other race minorities earn substantially less than non-Hispanic whites; and
- Women earn substantially less than men

Figure 3-5.
Mean annual wages
in California

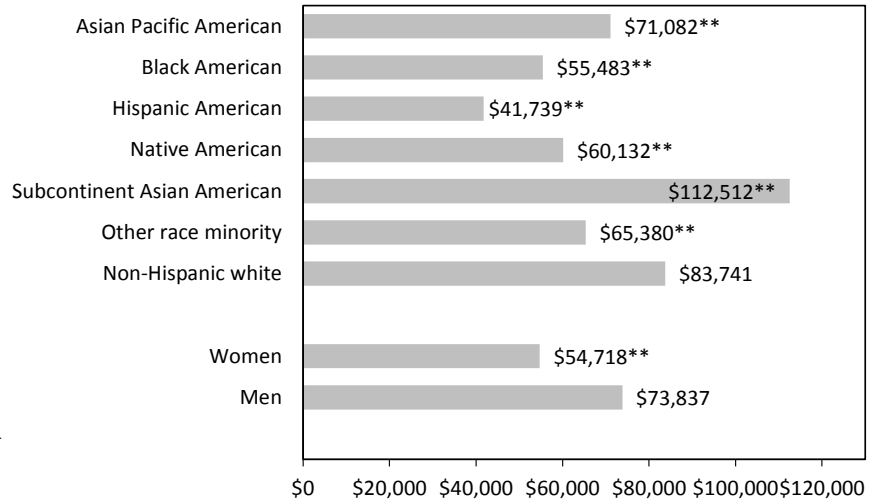
Note:

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

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

Source:

BBC Research & Consulting from 2015-2019 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.



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

2. Personal wealth. Another important source of business capital is often personal wealth. As with wages and income, there are substantial disparities between minorities and non-Hispanic whites and between women and men in terms of personal wealth.^{64, 65} For example, in 2019, Black Americans and Hispanic Americans across the country exhibited average household net worth that was 14 percent and 17 percent that of non-Hispanic whites, respectively.⁶⁶ In addition, approximately one-out-of-five Black Americans and one-out-of-six Hispanic Americans in the United States are living in poverty, compared to one-out-of-eleven non-Hispanic whites.⁶⁷ Wealth inequalities also exist for women relative to men. For example, the median wealth of non-married women nationally is approximately one-third that of non-married men.⁶⁸

3. Homeownership. Homeownership and home equity have also been shown to be key sources of business capital.^{69, 70} However, minorities appear to face substantial barriers nationwide in owning homes. For example, Black Americans and Hispanic Americans own homes at less than two-thirds the rate of non-Hispanic whites.⁷¹ Discrimination is at least partly to blame for those disparities. Research indicates that minorities continue to be given less information on prospective homes and have their purchase offers rejected because of their race.^{72, 73} Minorities who own homes tend to own homes worth substantially less than those of non-Hispanic whites and also tend to accrue substantially less equity.^{74, 75} Differences in home values and equity between minorities and non-Hispanic whites can be attributed—at least, in part—to depressed property values that tend to exist in racially-segregated neighborhoods.^{76, 77}

Minorities appear to face homeownership barriers in California similar to those observed nationally. As shown in Figure 3-6, all relevant racial/ethnic groups in California exhibit homeownership rates substantially lower than that of non-Hispanic whites.

Figure 3-6.
Home ownership rates in California

Note:

The sample universe is all households.

** Denotes statistically significant differences from non-Hispanic whites at the 95% confidence level.

Source:

BBC Research & Consulting from 2015-2019 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center:
<http://usa.ipums.org/usa/>.

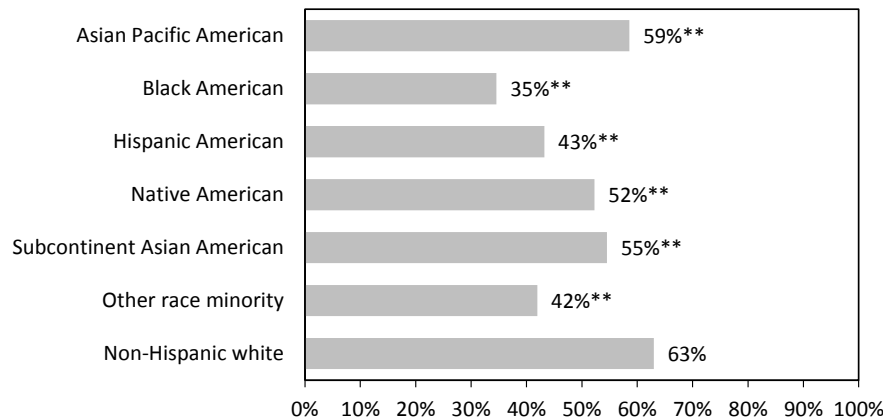


Figure 3-7 presents median home values among homeowners of different racial/ethnic groups in California. Those data indicate that California homeowners who identify as Asian Pacific Americans, Black Americans, Hispanic Americans, Native Americans, and other race minorities own homes that, on average, are worth less than those of non-Hispanic whites.

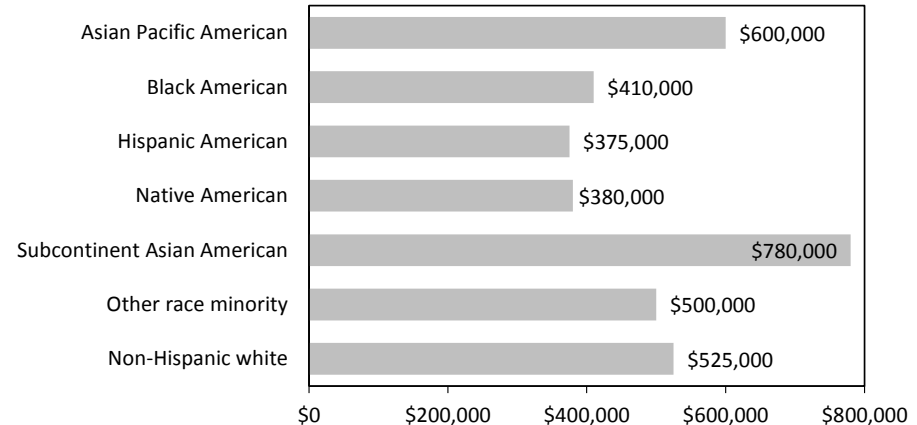
Figure 3-7.
Median home values in California

Note:

The sample universe is all owner-occupied housing units.

Source:

BBC Research & Consulting from 2015-2019 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center:
<http://usa.ipums.org/usa/>.



4. Access to financing. Minorities and women face many barriers in trying to access credit and financing, both for home purchases and for business capital. Researchers have often attributed those barriers to various forms of race- and gender-based discrimination that exist in credit markets.^{78, 79, 80, 81, 82, 83} BBC assessed difficulties minorities and women face in home credit and business credit markets in California.

a. Home credit. Minorities and women continue to face barriers when trying to access credit to purchase homes. Examples of such barriers include discriminatory treatment of minorities and women during the pre-application phase and disproportionate targeting of minority and women borrowers for subprime home loans.^{84, 85, 86, 87, 88} Race- and gender-based barriers in home credit

markets have led to decreases in homeownership among minorities and women and have eroded their levels of personal wealth.^{89, 90, 91, 92} To examine how minorities fare in the home credit market relative to non-Hispanic whites, the study team analyzed home loan denial rates for high-income households by race/ethnicity in California. As shown in Figure 3-8, high-income Black American and Native American households in California appear to have been denied home loans at higher rates than non-Hispanic white households. In addition, the study team’s analyses indicate that Black Americans, Hispanic Americans, and Native Americans in California are more likely than non-Hispanic whites to receive subprime mortgages (for details, see Figure C-13 in Appendix C).

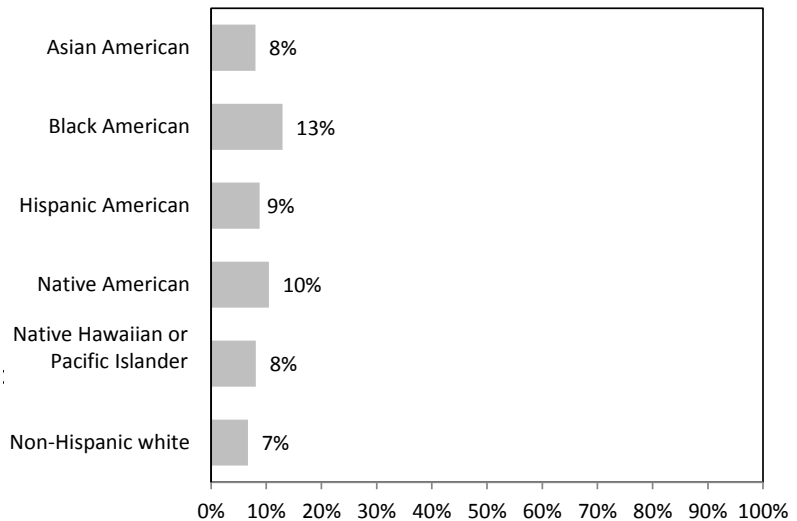
Figure 3-8.
Denial rates of conventional purchase loans for high-income households in California

Note:

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

Source:

FFIEC HMDA data 2019. The raw data was obtained from Consumer Financial Protection Bureau HMDA data tool: <http://www.consumerfinance.gov/hmda/explorable>.



b. Business credit. Minority- and woman-owned businesses also face substantial difficulties accessing business credit. For example, during loan pre-application meetings, minority-owned businesses are given less information about loan products, are subjected to more credit information requests, and are offered less support than their non-Hispanic white counterparts.⁹³ Researchers have shown that Black American-owned businesses and Hispanic American-owned businesses are more likely to forego submitting business loan applications and are more likely to be denied business credit when they do seek loans, even after accounting for various race- and gender-neutral factors.^{94, 95, 96} In addition, women are less likely to apply for credit than men and receive loans of less value when they do.^{97, 98} Without equal access to business capital, minority- and woman-owned businesses must operate with less capital than businesses owned by non-Hispanic white men and rely more on personal finances.^{99, 100, 101, 102}

C. Business Ownership

Nationally, there has been substantial growth in the number of minority- and woman-owned businesses in recent years. For example, from 2012 to 2018, the number of woman-owned businesses increased by 10 percent, Black American-owned businesses increased by 14 percent, and Hispanic American-owned businesses increased by 15 percent.^{103, 104} Despite the progress minorities and women have made with regard to business ownership, important barriers in starting and operating businesses remain. Black Americans, Hispanic Americans, and women are still less likely to start businesses than non-Hispanic white men.^{105, 106, 107, 108} In addition, although rates of business ownership have increased among minorities and women, they have

been unable to penetrate all industries evenly. They disproportionately own businesses in industries that require less human and financial capital to be successful and already include large concentrations of individuals from disadvantaged groups.^{109, 110, 111}

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

- Black Americans, Hispanic Americans, Native Americans, Subcontinent Asian Americans, and other race minorities own construction businesses at lower rates than non-Hispanic whites. In addition, women own construction businesses at a lower rate than men.
- Asian Pacific Americans, Black Americans, Hispanic Americans, Native Americans, and Subcontinent Asian Americans own professional services businesses at a lower rate than non-Hispanic whites. In addition, women own professional services businesses at a lower rate than men.

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

Note:

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

† Denotes significant differences in proportions not assessed due to small sample size.

Source:

BBC Research & Consulting from 2015-2019 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

California	Construction	Professional Services
Race/ethnicity		
Asian Pacific American	28.9 %	9.5 % **
Black American	16.1 % **	7.6 % **
Hispanic American	18.2 % **	9.4 % **
Native American	22.0 % **	11.1 % **
Subcontinent Asian American	22.3 % **	6.3 % **
Other Race Minority	16.4 % **	9.6 % †
Non-Hispanic white	29.8 %	18.6 %
Gender		
Women	14.3 % **	11.5 % **
Men	23.9 %	15.6 %
All individuals	23.0 %	14.5 %

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

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

compared to being non-Hispanic white. In addition, being a woman is associated with a lower likelihood of owning a professional services business compared to being a man.

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

Note:

The regression included 45,609 observations for construction and 9,075 observations for professional services.

Source:

BBC Research & Consulting from 2015-2019 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa>.

Industry and group	Coefficient
Construction	
Black American	-0.40
Hispanic American	-0.27
Native American	-0.17
Women	-0.47
Professional services	
Asian Pacific American	-0.28
Black American	-0.39
Hispanic American	-0.10
Subcontinent Asian American	-0.55
Women	-0.15

D. Business Success

There is a great deal of research indicating that, nationally, minority- and woman-owned businesses fare worse than businesses owned by non-Hispanic white men. For example, Black Americans, Native Americans, Hispanic Americans, and women exhibit higher rates of business closures than non-Hispanic whites and men. In addition, minority- and woman-owned businesses have been shown to be less successful than businesses owned by non-Hispanic whites and men, respectively, using a number of different indicators such as profits and business size (but also see Robb and Watson 2012).^{112, 113, 114} BBC examined data on business closures, business receipts, and business owner earnings to further explore business success in California.

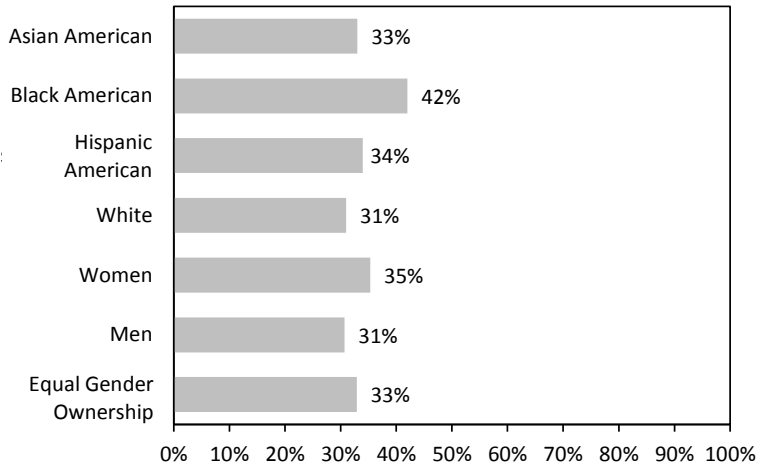
1. Business closure. The study team examined rates of closure among California businesses by the race/ethnicity and gender of the owners. As shown in Figure 3-11, Black American- and Hispanic American-owned businesses in California appear to close at higher rates than non-Hispanic white-owned businesses.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

Figure 3-11.
Rates of business closure in California

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

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

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

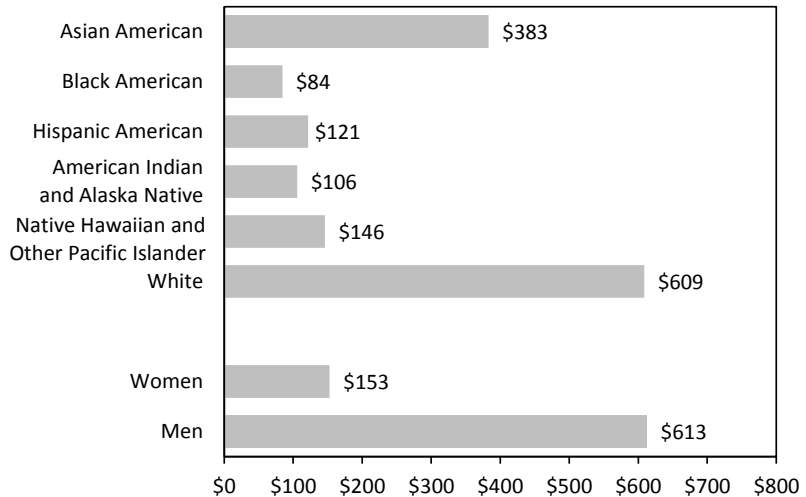


2. Business receipts. BBC also examined data on business receipts to assess whether minority- and woman-owned businesses in California earn as much as businesses owned by whites or men, respectively. Figure 3-12 shows mean annual receipts for businesses in California by the race/ethnicity and gender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

Figure 3-12.
Mean annual business receipts (in thousands) in California

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

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



3. Business owner earnings. BBC also analyzed business owner earnings to assess whether minorities and women in California earn as much from the businesses they own as non-Hispanic whites and men do. As shown in Figure 3-13:

- Asian Pacific Americans, Black Americans, Hispanic Americans, Native Americans, and other race minorities earn less on average from their businesses than non-Hispanic whites earn from their businesses; and
- Women earn less from their businesses than men earn from their businesses.

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

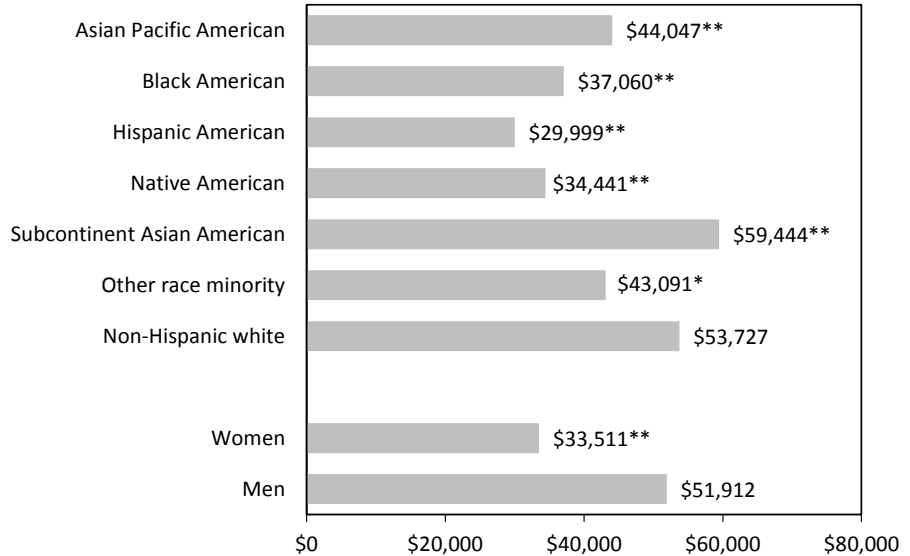
Note:

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

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

Source:

BBC Research & Consulting from 2015 - 2019 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center:
<http://usa.ipums.org/usa/>.



BBC also conducted regression analyses to determine whether differences in business owner earnings exist even after statistically controlling for various personal factors such as age, education, and family status. The results of those analyses indicated that, compared to being non-Hispanic white, being Black American or Native American was associated with substantially lower business owner earnings. Similarly, compared to being a man, being a woman was associated with substantially lower business owner earnings (for details, see Figure C-25 in Appendix C).

E. Summary

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

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

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CHAPTER 4.

Collection and Analysis of Contract Data

CHAPTER 4.

Collection and Analysis of Contract Data

Chapter 4 provides an overview of the contracts and procurements BBC Research & Consulting (BBC) analyzed as part of the disparity study and the process BBC used to collect relevant prime contract and subcontract data for the disparity study. Chapter 4 is organized into four parts:

- A. Collection and analysis of contract data;
- B. Collection of vendor data;
- C. Relevant types of work; and
- D. Agency review process.

A. Collection and Analysis of Contract Data

The study team examined transportation-related contracts and procurements the California Department of Transportation (Caltrans) and subrecipient local agencies awarded between January 1, 2015 and December 31, 2019 (i.e., the *study period*). The study team worked closely with Caltrans to collect data on its Federal Highway Administration- (FHWA-) and state-funded transportation-related construction and professional services prime contracts and subcontracts.¹ The study team also coordinated with local agency staff to collect data on contracts subrecipient local agencies awarded using FHWA funds from Caltrans.

1. Office Engineer (OE) contracts. BBC met with OE to determine what types of data were available about contracts and procurements the office awarded during the study period. OE provided BBC with a list of prime contracts the office awarded during the study period, but OE does not maintain information on associated subcontracts. To collect comprehensive data on OE subcontracts, BBC relied on hard copies of the following forms the Caltrans Office of Civil Rights (OCR) maintains:

- CEM-1201, Subcontracting Request;
- CEM-2402, Final Report—Utilization of Disadvantaged Business Enterprises First-tier Subcontractors; and
- CEM 2404, Monthly Disadvantaged Business Enterprises and Underutilized Disadvantaged Business Enterprises Trucking Verification.

OCR and OE advised BBC on how to interpret the forms and associated data. For each contract, BBC included all subcontractor data from CEM-1201 forms and augmented them with additional data from CEM-2402 and CEM-2404 forms.

¹ Caltrans considers a contract or procurement to be FHWA-funded if it includes at least \$1 of FHWA funding.

2. Division of Procurement and Contracting (DPAC) architecture and engineering (A&E) contracts.

BBC also met with DPAC to discuss available data on A&E contracts the division awarded during the study period. DPAC provided information on all prime contracts, but the division does not maintain information on associated subcontracts. To collect data on subcontracts, the study team relied on hard copies of the following forms OCR maintains:

- CEM-2402, Final Report—Utilization of Disadvantaged Business Enterprises First-tier Subcontractors;
- ADM 3059, Report of Utilization of Small/Micro Businesses and Disabled Veteran Business Enterprise State Funded Contracts Only; and
- ADM-3069, Monthly Disadvantaged Business Enterprise Utilization Report.

OCR and DPAC advised BBC on how to interpret the forms and associated data. Based on those data, BBC was able to collect subcontract data for the majority of relevant A&E contracts Caltrans awarded during the study period. OCR and DPAC reviewed a sample of prime contract and subcontract data the study team compiled to verify its completeness. BBC incorporated Caltrans' feedback into the final contract tables.

3. DPAC non-A&E contracts. BBC collected data on relevant non-A&E contracts (including minor B construction contracts) from several different sources. BBC met with DPAC to discuss what data were available on division contracts that did not fall under the oversight of DPAC A&E staff during the study period. DPAC provided BBC with a list of prime contracts the office awarded during the study period but did not provide data on associated subcontracts. To collect data on subcontracts, the study team relied on hard copies of the following forms OCR maintains:

- CEM-1201, Subcontracting Request;
- CEM-2402, Final Report—Utilization of Disadvantaged Business Enterprises First-tier Subcontractors;
- CEM 2404, Monthly Disadvantaged Business Enterprises and Underutilized Disadvantaged Business Enterprises Trucking Verification; and
- ADM 3059, Report of Utilization of Small/Micro Businesses and Disabled Veteran Business Enterprise State Funded Contracts Only.

4. Alternative delivery method projects. BBC also collected contract data for 13 projects Caltrans awarded using alternative contract delivery methods (e.g. design build contracts and construction manager/general manager contracts) from the Office of Innovative Design and Delivery. BBC verified data on those projects using information from the California Department of Industrial Relations website.² The data included extensive information about associated prime contractors, project descriptions, award dates, and contract award amounts. In some cases, those data overlapped with information OE and DPAC provided, in which case BBC worked with

² <https://www.dir.ca.gov/pwc100ext/ExternalLookup.aspx>, accessed late 2020.

those offices to remove duplicate contracts and consolidate data from all sources. To collect data on subcontracts, the study team relied on hard copies of the following forms OCR maintains:

- CEM-1201, Subcontracting Request; and
- CEM-2402, Final Report—Utilization of Disadvantaged Business Enterprises First-tier Subcontractors.

5. Division of Local Assistance (DLA) contracts. BBC met with DLA to discuss the types of data available for the contracts and procurements subrecipient local agencies awarded during the study period. The study team collected data on that work from various sources.

a. FHWA-funded DLA contracts. DLA provided BBC with a list of all FHWA-funded DLA contracts and procurements subrecipient local agencies awarded during the study period. DLA maintains hard copy 17-F Final Report—Utilization of Disadvantaged Business Enterprises and First Tier Subs forms that contain information on the subcontracts associated with many of those contracts and procurements, but those data were either incomplete or missing for some relevant contracts or procurements.³ For agencies with 25 or fewer relevant projects with missing information, BBC and Caltrans requested subcontract information for all of those projects. For agencies with 25 or more relevant projects with missing information, BBC requested information on the largest 25 projects.

The resulting sample included 2,275 FHWA-funded subrecipient local agency contracts and procurements. BBC worked with Caltrans to obtain contact information for all subrecipient local agencies. The study team then e-mailed forms to each agency requesting subcontract data on relevant contracts and sent follow-up requests to nonresponsive agencies. BBC worked with Caltrans to send a third data request to nonresponsive agencies representing the largest share of FHWA-funded contract and procurement dollars.

b. State-funded DLA contracts. DLA provided BBC with a list of all state-funded contracts and procurements subrecipient local agencies awarded during the study period. Caltrans district offices maintain subcontract information on those contracts, but DLA headquarters does not collect that information from the districts. For districts in which local agencies awarded fewer than 40 contracts, BBC requested subcontract information for all contracts. For districts in which local agencies awarded more than 40 relevant contracts and procurements during the study period, BBC requested subcontract information for all projects worth more than \$1.5 million and for a random sample of relevant projects worth \$1.5 million or less.

The resulting sample included 465 state-funded contracts and procurements for which BBC attempted to collect subcontract data. BBC worked with OCR to obtain contact information for all Caltrans district offices. The study team then e-mailed data request forms to each district office and sent follow-up requests to nonresponsive offices. The study team worked with Caltrans to

³ Contracts and procurements that required additional information were those that did not have associated 17-F forms or had incomplete 17-F forms, including those that only included information on DBE subcontractors.

send a third data request to nonresponsive district offices representing the largest share of state-funded contract and procurement dollars.

6. Contracts included in study analyses. BBC collected information on 3,778 FHWA-funded prime contracts and 15,415 associated subcontracts Caltrans and subrecipient local agencies awarded during the study period, accounting for approximately \$15.0 billion of Caltrans spend. BBC also collected information on 1,721 state-funded prime contracts and 3,435 associated subcontracts Caltrans and subrecipient local agencies awarded during the study period, accounting for approximately \$3.5 billion. Figure 4-1 presents the number of contract elements by relevant contracting area for the prime contracts and subcontracts that the study team included in its analyses.

Figure 4-1.
Caltrans contracts and procurements included in the study

Source:
BBC Research & Consulting from
Caltrans contract and procurement data.

Contract type	Contract elements	Dollars (in millions)
FHWA-funded		
Construction	15,519	\$11,724
Professional services	3,674	\$3,275
Total	19,193	\$14,999
State-funded		
Construction	4,776	\$3,292
Professional services	380	\$250
Total	5,156	\$3,542
GRAND TOTAL	24,349	\$18,541

7. Prime contract and subcontract amounts. For each contract element—that is, prime contract or subcontract—included in the study team’s analyses, BBC examined the dollars Caltrans and subrecipient local agencies awarded to each prime contractor and the dollars prime contractors committed to any subcontractors. If a contract or procurement did not include any subcontracts, BBC attributed the entire dollar amount to the prime contractor. If a contract included subcontracts, BBC calculated subcontract amounts as the amounts committed to each subcontractor during the study period. BBC then calculated the prime contract amount as the total dollar amount less the sum of dollars committed to all subcontractors.

B. Collection of Vendor Data

BBC compiled the following information on businesses that participated in Caltrans’ transportation-related contracts and procurements during the study period:

- Business name;
- Physical addresses and phone numbers;
- Ownership status (i.e., whether each business was minority-owned or woman-owned);
- Ethnicity of ownership (if minority-owned);
- Certification status (i.e., whether each business was certified as a DBE, minority-owned business enterprise, or woman-owned business enterprise);

- Primary lines of work; and
- Business size.

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

- Caltrans contract and vendor data;
- California Department of General Services Directory of Certified Businesses;
- California Unified Certification Program database;
- California Public Utilities Certification Program database;
- Supplier Clearing House lists;
- Small Business Administration certification and ownership lists, including 8(a), HUBZone, and self-certification lists;
- Dun & Bradstreet (D&B) business listings and other business information sources;
- Surveys the study team conducted with business owners and managers as part of the utilization and availability analyses; and
- Business websites.

C. Relevant Types of Work

For each prime contract and subcontract, BBC determined the *subindustry* that best characterized the business that performed the work's primary line of work (e.g., heavy construction). BBC identified subindustries based on Caltrans contract and vendor data, surveys the study team conducted with prime contractors and subcontractors, business certification lists, D&B business listings, and other sources. BBC developed subindustries based in part on 8-digit D&B industry classification codes. Figure 4-2 presents the dollars the study team examined in the various subindustries BBC included in its analyses.

BBC combined related subindustries that accounted for relatively small percentages of total contracting dollars into three "other" subindustries: "other construction services," "other construction materials," and "other professional services." For example, the dollars Caltrans and subrecipient local agencies awarded to contractors for "welding" represented less than 1 percent of total dollars BBC examined in the study. So, BBC combined "welding" with other subindustries that also accounted for relatively small percentages of total dollars and that were relatively dissimilar to other subindustries into the "other construction services" subindustry.

There were also contracts and procurements BBC categorized in various subindustries the study team did not include as part of its analyses. BBC did not include contracts in its analyses that:

- Caltrans and subrecipient local agencies awarded to universities, government agencies, utility providers, hospitals, or other nonprofit organizations (\$21 million);
- Reflected *national markets* (i.e., subindustries dominated by large national or international businesses) or subindustries for which Caltrans and subrecipient local agencies awarded

the majority of dollars to businesses located outside the relevant geographic market area (\$17 million);⁴

- Reflected subindustries which often include property purchases, leases, or other pass-through dollars (\$3 million);⁵ or
- Reflected subindustries not typically included in disparity studies and account for small proportions of Caltrans' contracting dollars.⁶

Figure 4-2.
Caltrans dollars by subindustry

Note:

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

Source:

BBC Research & Consulting from Caltrans contract and procurement data.

Industry	Total (in thousands)
Construction	
Heavy construction	\$8,673
Concrete work	\$1,143
Excavation, drilling, wrecking, and demolition	\$964
Electrical work	\$717
Concrete, asphalt, sand, and gravel products	\$688
Painting, striping, marking, and weatherproofing	\$635
Fencing, guardrails, barriers, and signs	\$545
Traffic control and safety	\$439
Water, sewer, and utility lines	\$312
Landscape services	\$270
Dam and marine construction	\$239
Trucking, hauling, and storage	\$208
Rebar and reinforcing steel	\$205
Electrical equipment and supplies	\$121
Remediation and cleaning	\$27
Other construction services	\$99
Other construction materials	\$47
Total	\$15,334
Professional services	
Engineering	\$2,386
Testing and inspection	\$218
Transportation planning services	\$208
Construction management	\$172
Environmental services	\$134
Surveying and mapmaking	\$75
Other professional services	\$15
Total	\$3,207
GRAND TOTAL	\$18,541

⁴ Examples of such industries include computer manufacturing and proprietary software.

⁵ Examples of such industries include real estate services and banking services.

⁶ Examples of industries not typically included in a disparity study include vehicle repair services and equipment maintenance.

D. Agency Review Process

Caltrans reviewed contracting and vendor data several times during the study process. BBC met with Caltrans to review the data collection process, information the study team gathered, and summary results. BBC incorporated Caltrans' feedback into the final contract and vendor data the study team used as part of its analyses.

CHAPTER 5.

Availability Analysis

CHAPTER 5.

Availability Analysis

BBC Research & Consulting (BBC) analyzed the availability of minority- and woman-owned businesses *ready, willing, and able* to perform on the transportation-related construction and professional services prime contracts and subcontracts the California Department of Transportation (Caltrans) and subrecipient local agencies award.¹ Chapter 5 describes the availability analysis in six parts:

- A. Purpose of the availability analysis;
- B. Relevant geographic market area (RGMA);
- C. Availability analysis approach;
- D. Availability database;
- E. Availability calculations; and
- F. Availability results.

Appendix E provides supporting information related to the availability analysis.

A. Purpose of the Availability Analysis

BBC examined the availability of minority- and woman-owned businesses for Caltrans work to inform the agency's implementation of the Federal Disadvantaged Business Enterprise (DBE) Program. In addition, as part of the disparity analysis, BBC used availability analysis results as benchmarks against which to compare the actual participation of minority- and woman-owned businesses in the transportation-related contracts and procurements Caltrans and subrecipient local agencies awarded between January 1, 2015 and December 31, 2019 (i.e., the *study period*). Comparisons between participation and availability allowed BBC to determine whether certain business groups were *substantially underutilized* during the study period relative to their availability for Caltrans work (for details, see Chapter 7).

B. Relevant Geographic Market Area (RGMA)

To ensure their use of race- and gender-conscious measures meets the *strict scrutiny* standard of constitutional review, agencies must examine whether discrimination exists within their own *RGMA*s—that is, the geographical areas most relevant to their contracting and procurement processes. As a result, BBC based key disparity study analyses—including the availability analysis—on Caltrans' RGMA, which the study team determined by analyzing information about the locations of the contractors that actually participated in Caltrans' and subrecipient local agencies' transportation-related prime contracts and subcontracts during the study period. That analysis indicated that Caltrans and subrecipient local agencies awarded 98 percent of their

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

prime contract and subcontract dollars to businesses with locations in California, indicating that the RGMA for Caltrans' transportation-related contracting is the entire state of California.

C. Availability Analysis Approach

BBC's availability analysis focused on specific areas of work, or *subindustries*, related to the relevant types of transportation-related contracts and procurements Caltrans and subrecipient local agencies awarded during the study period, which served as a proxy for the transportation-related contracts and procurements they might award in the future. BBC began the availability analysis by identifying the specific subindustries in which Caltrans and subrecipient local agencies spend the majority of their transportation contracting dollars as well as information about where the contractors that perform the work are located.

BBC then conducted extensive surveys to develop a representative, unbiased, and statistically-valid database of potentially available businesses located in the RGMA that perform work within relevant subindustries. The objective of the survey process was not to collect information from each and every relevant business operating in the local marketplace. It was to collect information from an unbiased subset of the business population that appropriately represents the entire relevant business population operating in California. That approach allowed BBC to estimate the availability of minority- and woman-owned businesses for Caltrans work in an accurate, statistically-valid manner. That method of estimating availability is referred to as a *custom census* and has been accepted in federal court—including by the Ninth Circuit Court of Appeals—as the preferred methodology for conducting availability analyses.

1. Overview of availability surveys. The study team conducted telephone and online surveys with business owners and managers to identify California businesses potentially available for Caltrans' transportation-related prime contracts and subcontracts. BBC began the survey process by compiling a comprehensive and unbiased *phone book* of all types of businesses—regardless of the race/ethnicity or gender of business owners—the perform work in relevant industries and have a location within the RGMA. BBC developed that phone book based on information from Dun & Bradstreet (D&B) Marketplace. BBC collected information about all business establishments listed under 8-digit work specialization codes, as developed by D&B, most related to the transportation-related contracts and procurements Caltrans and subrecipient local agencies awarded during the study period. BBC obtained listings on 28,993 local businesses that perform work related to those work specializations. BBC did not have working phone numbers for 5,126 of those businesses but attempted availability surveys with the remaining 23,867 businesses.

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

- Status as a private sector business (as opposed to a public agency or nonprofit organization);
- Status as a subsidiary or branch of another company;
- Primary lines of work;

- Interest in performing work for government organizations in California;
- Interest in performing work as a prime contractor or subcontractor;
- Largest prime contract or subcontract bid on or performed in the previous five years;
- Geographical areas of service; and
- Race/ethnicity and gender of ownership.

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

- Being a private sector business;
- Having performed work relevant to Caltrans’ transportation-related construction or professional services contracts or procurements;
- Having bid on or performed construction or professional services prime contracts or subcontracts in either the public or private sector in the RGMA in the past five years; and
- Being interested in work for government organizations in California.²

BBC also considered the following information about businesses to determine if they were potentially available for specific prime contracts and subcontracts Caltrans and subrecipient local agencies award:

- The role in which they work (i.e., as a prime contractor, subcontractor, or both);
- The geographical areas in California in which they are able to perform work; and
- The largest contract they bid on or performed in the past five years.

D. Availability Database

After conducting availability surveys with thousands of California businesses, BBC developed a database of information about businesses potentially available for relevant Caltrans contracts and procurements. Information from the database allowed BBC to identify businesses ready, willing, and able to perform that work. The analysis included 1,412 businesses potentially available for specific transportation-related construction and professional services contracts and procurements Caltrans and subrecipient local agencies award. As shown in Figure 5-1, 41.6 percent of those businesses were minority- or woman-owned. The information in Figure 5-1 merely reflects a simple *head count* of businesses with no analysis of their availability for specific contracts or procurements. It represents only a first step toward analyzing the availability of minority- and woman-owned businesses for Caltrans’ transportation-related work. BBC’s approach to estimating availability goes further than a simple head count to account for specific business characteristics such as work type, relative business capacity, contractor role, geographical areas of service, and interest in relevant work.

² That information was gathered separately for prime contract and subcontract work.

Figure 5-1.
Percentage of businesses in the availability database that were minority- or woman-owned

Note:

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

Source:

BBC Research & Consulting availability analysis.

Business group	%
Non-Hispanic white woman-owned	10.5 %
Asian Pacific American-owned	4.2
Black American-owned	4.5
Hispanic American-owned	18.0
Native American-owned	1.8
Subcontinent Asian American-owned	2.6
Total Minority-owned	31.2 %
Total Minority- and Woman-owned	41.6 %

E. Availability Calculations

BBC analyzed information from the availability database to develop dollar-weighted estimates of the availability of minority- and woman-owned businesses for relevant Caltrans work. Those estimates represent the percentage of associated contracting and procurement dollars minority- and woman-owned businesses would be expected to receive based on their availability for specific types and sizes of the transportation-related prime contracts and subcontracts Caltrans and subrecipient local agencies award.

BBC used a bottom up, contract-by-contract matching approach to calculate availability. Only a portion of the businesses in the availability database was considered potentially available for any given prime contract or subcontract. BBC first examined the characteristics of each specific prime contract or subcontract (referred to generally as a *contract element*), including type of work, contract size, and location of work. BBC then identified businesses in the availability database that perform work of that type, in that role (i.e., as a prime contractor or subcontractor), in that location, and of that size. BBC identified the characteristics of each prime contract and subcontract included in the disparity study and then took the following steps to calculate availability for each contract element:

1. For each contract element, BBC identified businesses in the availability database that reported they:
 - Are interested in performing construction or professional services work in that particular role for that specific type of work for government organizations in California;
 - Can serve customers in the geographic location where the work took place; and
 - Have bid on or performed work of that size in the past five years.
2. BBC then counted the number of minority-owned businesses, woman-owned businesses, and businesses owned by non-Hispanic white men in the availability database that met the criteria specified in Step 1.
3. The study team translated the numeric availability of businesses for the contract element into percentage availability.

BBC repeated those steps for each contract element included in the disparity study, and then multiplied percentage availability for each contract element by the dollars associated with it, added results across all contract elements for a particular organization, and divided by the total dollars for all relevant contract elements. The result was dollar-weighted estimates of the availability of minority- and woman-owned businesses overall and separately for each relevant racial/ethnic and gender group. Figure 5-2 provides an example of how BBC calculated availability for a specific subcontract associated with a construction prime contract Caltrans awarded during the study period.

BBC's availability calculations are based on transportation-related prime contracts and subcontracts Caltrans and subrecipient local agencies awarded during the study period. A key assumption of the availability analysis is that the transportation-related contracts and procurements Caltrans and subrecipient local agencies awarded during the study period are representative of the transportation-related contracts and procurements they will award in the future. If the types and sizes of the transportation-related contracts and procurements they award in the future differ substantially from the ones they awarded in the past, then they should consider adjusting availability estimates accordingly.

F. Availability Results

BBC estimated the availability of minority- and woman-owned businesses for transportation-related construction and professional services prime contracts and subcontracts Caltrans and subrecipient local agencies awarded during the study period. BBC presents availability analysis results for that work overall and for different subsets of contracts and procurements.

1. Overall. Figure 5-3 presents dollar-weighted estimates of the availability of minority- and woman-owned businesses for Caltrans' transportation-related contracts and procurements. Overall, the availability of minority- and woman-owned businesses for that work is 26.8 percent, indicating those businesses might be expected to receive 26.8 percent of the transportation-related contracting dollars Caltrans and subrecipient local agencies award. Hispanic American-owned businesses (13.8%) and non-Hispanic white woman-owned businesses (5.8%) exhibited the highest availability among all relevant groups.

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

On a contract Caltrans awarded during the study period, the prime contractor awarded a subcontract worth \$618,764 for environmental services. To determine the overall availability of minority- and woman-owned businesses for the subcontract, BBC identified businesses in the availability database that:

- a. Indicated they perform environmental services;
- b. Reported bidding on work of similar or greater size in the past;
- c. Indicated they can serve customers in the geographical location where the work took place; and
- d. Reported interest in working as a subcontractor on government contracts or procurements.

BBC identified 76 businesses in the availability database that met those criteria. Of those businesses, 25 were minority- or woman-owned. Thus, the availability of minority- and woman-owned businesses for the subcontract was 32.9 percent (i.e., $25/76 \times 100 = 32.9$).

Figure 5-3.
Overall availability estimates

Note:

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

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

Source:

BBC Research & Consulting availability analysis.

Business group	Availability %
Non-Hispanic white woman-owned	5.8 %
Asian Pacific American-owned	3.1
Black American-owned	1.4
Hispanic American-owned	13.8
Native American-owned	1.2
Subcontinent Asian American-owned	1.5
Total Minority-owned	21.0 %
Total Minority- and Woman-owned	26.8 %

2. Agency. BBC also estimated the availability of minority- and woman-owned businesses separately for transportation-related work Caltrans awards directly and work subrecipient local agencies award. As shown in Figure 5-4, the availability of minority- and woman-owned businesses considered together is lower for contracts and procurements Caltrans awards (26.0%) than contracts and procurements subrecipient local agencies award (29.2%).

Figure 5-4.
Availability estimates for Caltrans and subrecipient local agency work

Note:

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

For more detail and results by group, see Figures F-17 and F-18 in Appendix F.

Source:

BBC Research & Consulting availability analysis.

Business group	Agency	
	Caltrans	Subrecipient local agencies
Non-Hispanic white woman-owned	5.8 %	6.0 %
Asian Pacific American-owned	3.0	3.3
Black American-owned	1.3	1.7
Hispanic American-owned	13.4	15.0
Native American-owned	1.2	1.4
Subcontinent Asian American-owned	1.4	1.8
Total Minority-owned	20.3 %	23.2 %
Total Minority- and Woman-owned	26.0 %	29.2 %

3. Funding source. Caltrans' implementation of the Federal DBE Program applies specifically to the agency's Federal Highway Administration- (FHWA-) funded contracts. As part of the program, Caltrans and subrecipient local agencies use DBE contract goals to award many individual FHWA-funded contracts and procurements.³ In contrast, because of Proposition 209, Caltrans does not use contract goals or any other race- or gender-conscious measures to award state-funded contracts or procurements. Thus, it is instructive to examine availability analysis results separately for Caltrans' FHWA-funded contracts and state-funded contracts. As shown in Figure 5-5, the availability of minority- and woman-owned businesses considered together is higher for Caltrans' FHWA-funded contracts (27.6%) than for state-funded contracts (23.4%). Among other factors, that result could be due to the fact that a larger share of FHWA-contracts comprise subcontracts when compared with state-funded contracts. The availability of

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

minority- and woman-owned businesses is typically higher for subcontracts than prime contracts because of the relatively small size of subcontracts.

Figure 5-5.
Availability estimates for FHWA- and state-funded work

Note:

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

For more detail and results by group, see Figure F-11 and F-12 in Appendix F.

Source:

BBC Research & Consulting availability analysis.

Business group	Funding source	
	FHWA-funded	State-funded
Non-Hispanic white woman-owned	5.9 %	5.6 %
Asian Pacific American-owned	3.2	2.7
Black American-owned	1.4	1.2
Hispanic American-owned	14.4	11.1
Native American-owned	1.2	1.4
Subcontinent Asian American-owned	1.5	1.4
Total Minority-owned	21.7 %	17.8 %
Total Minority- and Woman-owned	27.6 %	23.4 %

4. Contract role. Many minority- and woman-owned businesses are small businesses and thus often work as subcontractors. Because of that tendency, it is useful to examine availability estimates separately for Caltrans prime contracts and subcontracts. As shown in Figure 5-6, the availability of minority- and woman-owned businesses considered together was lower for prime contracts (24.4%) than for subcontracts (34.3%). That result could be due to the fact that subcontracts tend to be much smaller in size than prime contracts and are thus often more accessible to minority- and woman-owned businesses.

Figure 5-6.
Availability estimates for prime contracts and subcontracts

Note:

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

For more detail, see Figures F-7 and F-8 in Appendix F.

Source:

BBC Research & Consulting availability analysis.

Business group	Contract role	
	Prime contracts	Subcontracts
Non-Hispanic white woman-owned	4.7 %	9.4 %
Asian Pacific American-owned	2.7	4.2
Black American-owned	0.9	3.1
Hispanic American-owned	13.5	14.6
Native American-owned	1.0	1.8
Subcontinent Asian American-owned	1.6	1.3
Total Minority-owned	19.7 %	24.9 %
Total Minority- and Woman-owned	24.4 %	34.3 %

5. Industry. BBC also examined availability analysis results separately for Caltrans construction and professional services work. As shown in Figure 5-7, the availability of minority- and woman-owned businesses considered together was higher for professional services work (28.3%) than for construction work (26.5%).

Figure 5-7.
Availability estimates for
construction and professional
services work

Note:

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

For more detail, see Figures F-5 and F-6 in Appendix F.

Source:

BBC Research & Consulting availability analysis.

Business group	Industry	
	Construction	Professional services
Non-Hispanic white woman-owned	5.0 %	9.9 %
Asian Pacific American-owned	2.5	5.9
Black American-owned	1.2	2.3
Hispanic American-owned	15.4	6.1
Native American-owned	1.3	0.7
Subcontinent Asian American-owned	1.1	3.3
Total Minority-owned	21.5 %	18.4 %
Total Minority- and Woman-owned	26.5 %	28.3 %

CHAPTER 6.

Utilization Analysis

CHAPTER 6.

Utilization Analysis

Chapter 6 presents information about the participation of minority- and woman-owned businesses in the transportation-related construction and professional services prime contracts and subcontracts the California Department of Transportation (Caltrans) and subrecipient local agencies awarded between January 1, 2015 and December 31, 2019 (i.e., the *study period*).¹ BBC Research & Consulting (BBC) measured the participation of minority- and woman-owned businesses in Caltrans and subrecipient local agency work in terms of *utilization*—the percentage of prime contract and subcontract dollars the agencies awarded to those businesses during the study period. For example, if 5 percent of prime contract and subcontract dollars went to woman-owned businesses, the utilization of woman-owned businesses would be 5 percent. BBC measured the participation of minority- and woman-owned businesses in Caltrans and subrecipient local agency work regardless of whether they were certified as Disadvantaged Business Enterprises (DBEs).

A. All Contracts

Figure 6-1 presents the percentage of total dollars Caltrans and subrecipient local agencies awarded to minority- and woman-owned businesses on relevant construction and professional services prime contracts and subcontracts during the study period. As shown in Figure 6-1, minority- and woman-owned businesses considered together received 18.5 percent of the relevant contract and procurement dollars Caltrans and subrecipient local agencies awarded during the study period. Twelve percent of those dollars went to minority- and woman-owned businesses that were certified as DBEs. The groups that exhibited the highest levels of participation were Hispanic American-owned businesses (7.5%) and non-Hispanic white woman-owned businesses (6.5%).

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

Figure 6-1.
Overall utilization results

Note:

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

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

Source:

BBC Research & Consulting utilization analysis.

Business group	Utilization %
Minority- and Woman-owned	
Non-Hispanic white woman-owned	6.5 %
Asian Pacific American-owned	1.8
Black American-owned	0.7
Hispanic American-owned	7.5
Native American-owned	0.9
Subcontinent Asian American-owned	1.0
Total Minority-owned	12.0 %
Total Minority- and Woman-owned	18.5 %
DBE-certified	
Non-Hispanic white woman-owned	4.0 %
Asian Pacific American-owned	1.5
Black American-owned	0.7
Hispanic American-owned	4.0
Native American-owned	0.8
Subcontinent Asian American-owned	1.0
Total Minority-owned (DBE)	8.0 %
Total Minority- and Woman-owned (DBE)	12.0 %

B. Agency

BBC also calculated the participation of minority- and woman-owned businesses separately for relevant contracts and procurements Caltrans awarded and contracts and procurements subrecipient local agencies awarded. As shown in Figure 6-2, the participation of minority- and woman-owned businesses was lower in contracts and procurements Caltrans awarded during the study period (18.0%) than in work subrecipient local agencies awarded (19.9%).

Figure 6-2.
Utilization analysis results for Caltrans and subrecipient local agencies

Note:

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

For more detail and results by group, see Figures F-17 and F-18 in Appendix F.

Source:

BBC Research & Consulting utilization analysis.

Business group	Agency	
	Caltrans	Subrecipient local agencies
Non-Hispanic white woman-owned	6.9 %	5.0 %
Asian Pacific American-owned	1.4	3.1
Black American-owned	0.6	1.0
Hispanic American-owned	7.0	9.2
Native American-owned	0.9	0.9
Subcontinent Asian American-owned	1.2	0.7
Total Minority-owned	11.1 %	14.9 %
Total Minority- and Woman-owned	18.0 %	19.9 %

C. Funding Source

As part of the Federal DBE Program, Caltrans and subrecipient local agencies use DBE contract goals to award many individual Federal Highway Administration- (FHWA-) funded contracts and procurements.² In contrast, because of Proposition 209, Caltrans does not use contract goals or any other race- or gender-conscious measures to award state-funded contracts or procurements. Thus, it is instructive to examine utilization analysis results separately for Caltrans' FHWA-funded contracts and state-funded contracts, because that comparison provides important information about the efficacy of DBE contract goals in encouraging the participation of minority- and woman-owned businesses in Caltrans and subrecipient local agency work. As shown in Figure 6-3, the participation of minority- and woman-owned businesses considered together was higher in FHWA-funded contracts (20.3%) than in state-funded contracts (10.8%), suggesting that Caltrans' use of DBE contract goals during the study period was relatively effective in encouraging minority- and woman-owned business participation.

Figure 6-3.
Utilization analysis results
for FHWA- and state-funded work

Note:

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

For more detail and results by group, see Figures F-11 and F-12 in Appendix F.

Source:

BBC Research & Consulting utilization analysis.

Business group	Funding source	
	FHWA-funded	State-funded
Non-Hispanic white woman-owned	7.1 %	3.6 %
Asian Pacific American-owned	1.9	1.6
Black American-owned	0.8	0.3
Hispanic American-owned	8.4	3.8
Native American-owned	1.0	0.6
Subcontinent Asian American-owned	1.1	0.8
Total Minority-owned	13.2 %	7.2 %
Total Minority- and Woman-owned	20.3 %	10.8 %

D. Contract Role

Many minority- and woman-owned businesses are small businesses and thus often work as subcontractors, so it is useful to examine utilization analysis results separately for prime contracts and subcontracts. As shown in Figure 6-4, the participation of minority- and woman-owned businesses considered together was in fact substantially higher in subcontracts (39.4%) than in prime contracts (11.8%). Among other factors, that result could be due to the fact that subcontracts tend to be smaller in size than prime contracts and thus may be more accessible to minority- and woman-owned businesses. In addition, many of the FHWA-funded contracts included in this analysis were subject to subcontracting goals, which are designed to encourage the participation of minority- and woman-owned businesses.

² The study team considered a contract to be FHWA-funded if it included at least one dollar of FHWA funding.

Figure 6-4.
Utilization analysis results
for prime contracts and
subcontracts

Note:
 Numbers rounded to nearest tenth of 1 percent and thus may not sum exactly to totals.
 For more detail and results by group, see Figures F-7 and F-8 in Appendix F.
 Source:
 BBC Research & Consulting utilization analysis.

Business group	Contract role	
	Prime contracts	Subcontracts
Non-Hispanic white woman-owned	4.1 %	13.8 %
Asian Pacific American-owned	0.9	4.9
Black American-owned	0.1	2.6
Hispanic American-owned	5.2	15.1
Native American-owned	0.6	2.0
Subcontinent Asian American-owned	1.0	1.1
Total Minority-owned	7.7 %	25.6 %
Total Minority- and Woman-owned	11.8 %	39.4 %

E. Industry

BBC also examined utilization analysis results separately for construction and professional services contracts and procurements to determine whether the participation of minority- and woman-owned businesses differs by industry. As shown in Figure 6-5, the participation of minority- and woman-owned businesses considered together was higher in construction work (19.4%) than in professional services work (14.1%).

Figure 6-5.
Utilization analysis results for
construction and professional
services work

Note:
 Numbers rounded to nearest tenth of 1 percent and thus may not sum exactly to totals.
 For more detail, see Figures F-5 and F-6 in Appendix F.
 Source:
 BBC Research & Consulting utilization analysis.

Business group	Industry	
	Construction	Professional services
Non-Hispanic white woman-owned	6.6 %	5.7 %
Asian Pacific American-owned	1.6	2.9
Black American-owned	0.8	0.3
Hispanic American-owned	8.8	1.5
Native American-owned	1.1	0.0
Subcontinent Asian American-owned	0.5	3.6
Total Minority-owned	12.8 %	8.4 %
Total Minority- and Woman-owned	19.4 %	14.1 %

F. Concentration of Dollars

BBC analyzed whether the contract and procurement dollars Caltrans and subrecipient local agencies awarded to each relevant group of minority- and woman-owned businesses during the study period were spread across a relatively large number of businesses or were concentrated with relatively few businesses. The study team assessed that question by calculating:

- The number of different businesses within each group to which Caltrans and subrecipient local agencies awarded contract and procurement dollars during the study period; and
- The number of different businesses within each group that accounted for 75 percent of the group's total contracting dollars during the study period.

Figure 6-6 presents those results for each relevant business group. Most notably, although Caltrans and subrecipient local agencies awarded contract and procurement dollars to 271 different non-Hispanic white woman-owned businesses, 17 of them (or, 6.3%) accounted for 75 percent of those dollars. One non-Hispanic white woman-owned business accounted for 33 percent of all dollars that went to non-Hispanic white woman-owned businesses by itself. Similarly, although Caltrans and subrecipient local agencies awarded contract and procurement dollars to 294 Hispanic American-owned businesses, 21 of them (or, 7.1%) accounted for 75 percent of those dollars. One Hispanic American-owned business accounted for 22 percent of all dollars that went to Hispanic American-owned businesses by itself.

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

Source:
 BBC Research & Consulting utilization analysis.

Business group	Utilized businesses	Businesses accounting for 75% of dollars	
		Number	Percent
Non-Hispanic white woman-owned	271	17	6.3 %
Asian Pacific American-owned	104	16	15.4
Black American-owned	50	5	10.0
Hispanic American-owned	294	21	7.1
Native American-owned	38	5	13.2
Subcontinent Asian American-owned	48	6	12.5

CHAPTER 7.

Disparity Analysis

CHAPTER 7.

Disparity Analysis

As part of the disparity analysis, BBC Research & Consulting (BBC) compared the actual participation, or *utilization*, of minority- and woman-owned businesses in transportation-related prime contracts and subcontracts the California Department of Transportation (Caltrans) and subrecipient local agencies awarded between January 1, 2015 and December 31, 2019 (i.e., the *study period*) with the percentage of contract dollars those businesses might be expected to receive based on their *availability* for that work.¹ Chapter 7 presents the disparity analysis in three parts:

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

Additional, detailed disparity study results are presented in Appendix F.

A. Overview

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

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

A disparity index of 100 indicates *parity* between actual participation and availability. That is, the participation of a particular business group is in line with its availability. A disparity ratio of less than 100 indicates a *disparity* between participation and availability. That is, the group is considered to have been *underutilized* relative to its availability. Finally, a disparity index of less than 80 indicates a *substantial disparity* between participation and availability. That is, the group is considered to have been *substantially underutilized* relative to its availability. Many courts—including the Ninth Circuit Court of Appeals—have considered substantial disparities *inferences of discrimination* against particular business groups, and they often serve as justification for organizations to use relatively aggressive measures—such as *race- and gender-conscious* measures—to address corresponding barriers.²

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

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

B. Disparity Analysis Results

BBC measured disparities between the participation and availability of minority- and woman-owned businesses for various contract sets Caltrans and subrecipient local agencies awarded during the study period.

1. Overall. Figure 7-1 presents disparity indices for all relevant prime contracts and subcontracts Caltrans and subrecipient local agencies awarded during the study period. The line down the center of the graph shows a disparity index level of 100, which indicates parity between participation and availability. For reference, a line is also drawn at a disparity index level of 80, indicating a substantial disparity. As shown in Figure 7-1, overall participation for minority- and woman-owned businesses was substantially lower than one might expect given the availability of those businesses for that work. The disparity index of 69 indicates that minority- and woman-owned businesses received \$0.69 for every dollar they might be expected to receive based on their availability for the relevant prime contracts and subcontracts Caltrans and local agencies awarded during the study period. Results for individual racial/ethnic and gender groups indicate that:

- All minority groups showed substantial disparities on relevant Caltrans and subrecipient local agency contracts and procurements considered together: Asian Pacific American-owned businesses (disparity index of 60), Black American-owned businesses (disparity index of 50), Hispanic American-owned businesses (disparity index of 55), Native American-owned businesses (disparity index of 73), and Subcontinent Asian American-owned businesses (disparity index of 70).
- Non-Hispanic white woman-owned businesses did not exhibit a disparity on relevant Caltrans and subrecipient local agency contracts and procurements considered together (disparity index of 111).

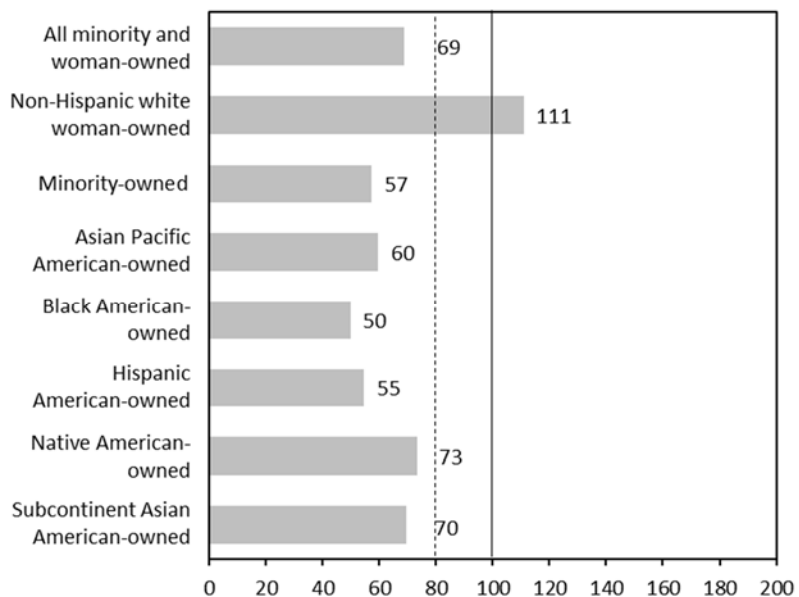
Figure 7-1.
Overall disparity analysis results by racial/ethnic and gender group

Note:

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

Source:

BBC Research & Consulting disparity analysis.



2. Agency. BBC also calculated disparity analysis results for minority- and woman-owned businesses separately for relevant Caltrans and subrecipient local agency contracts and procurements. As shown in Figure 7-2, considered together, minority- and woman-owned

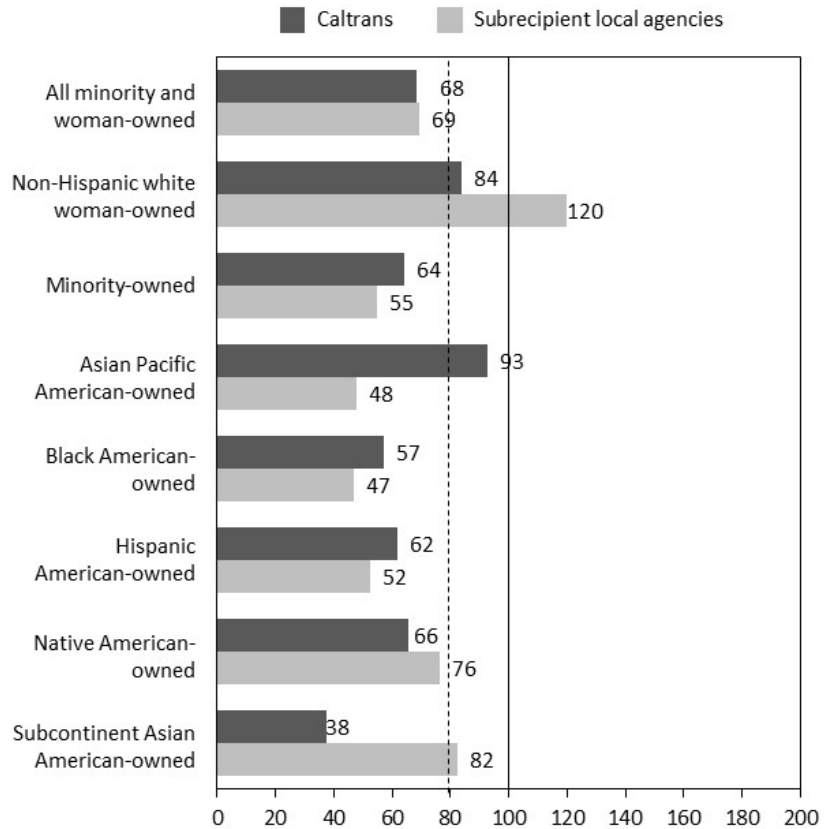
businesses exhibited similar disparities on Caltrans contracts and procurements (disparity index of 68) and subrecipient local agency contracts and procurements (disparity index of 69). Results for individual racial/ethnic and gender groups indicate that:

- Four groups showed substantial disparities on Caltrans contracts and procurements: Black American-owned businesses (disparity index of 57), Hispanic American-owned businesses (disparity index of 62), Native American-owned businesses (disparity index of 66), and Subcontinent Asian American-owned business (disparity index of 38).
- Four groups also showed substantial disparities on subrecipient local agency contracts and procurements: Asian Pacific American-owned businesses showed a substantial disparity on subrecipient local agency contracts (disparity index of 48), Black American-owned business (disparity index of 47), Hispanic American-owned businesses (disparity index of 52), and Native American-owned businesses (disparity index of 76).
- Non-Hispanic white woman-owned businesses was the only group that did not exhibit a substantial disparity on either Caltrans contracts and procurements (disparity index of 84) or subrecipient local agency contracts and procurements. (disparity index of 120).

Figure 7-2.
Disparity analysis results
for Caltrans and
subrecipient local
agencies

Note:
 For more detail, see Figure F-17 and F-18 in Appendix F.

Source:
 BBC Research & Consulting disparity analysis.



3. Funding source. As part of the Federal Disadvantaged Business Enterprise (DBE) program, Caltrans and subrecipient local agencies use DBE contract goals to award many individual Federal Highway Administration- (FHWA-) funded contracts and procurements.³ In contrast,

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

because of Proposition 209, Caltrans does not use contract goals or any other race- or gender-conscious measures to award state-funded contracts or procurements. Thus, it is instructive to examine disparity analysis results separately for Caltrans' FHWA-funded and state-funded work. As shown in Figure 7-3, minority- and woman-owned businesses considered together showed substantial disparities on both FHWA-funded (disparity index of 74) and state-funded contracts and procurements (disparity index of 46). Disparity analysis results by individual racial/ethnic and gender groups indicate that:

- Most individual groups showed substantial disparities on FHWA-funded work. The exceptions were non-Hispanic white woman-owned businesses (disparity index of 121) and Native American-owned businesses (disparity index of 83). A disparity index of 83 indicates a disparity but it does not reach the threshold of being considered substantial.
- All groups showed substantial disparities on state-funded contracts and procurements.

Disparity indices for FHWA-funded contracts and procurements suggest that Caltrans' use of DBE goals is somewhat effective in encouraging minority- and woman-owned business participation when compared with disparity indices for state-funded contracts, which indicate larger disparities between the participation and availability of minority- and woman-owned businesses.

Figure 7-3.
Disparity analysis results
for FHWA- and state-
funded work

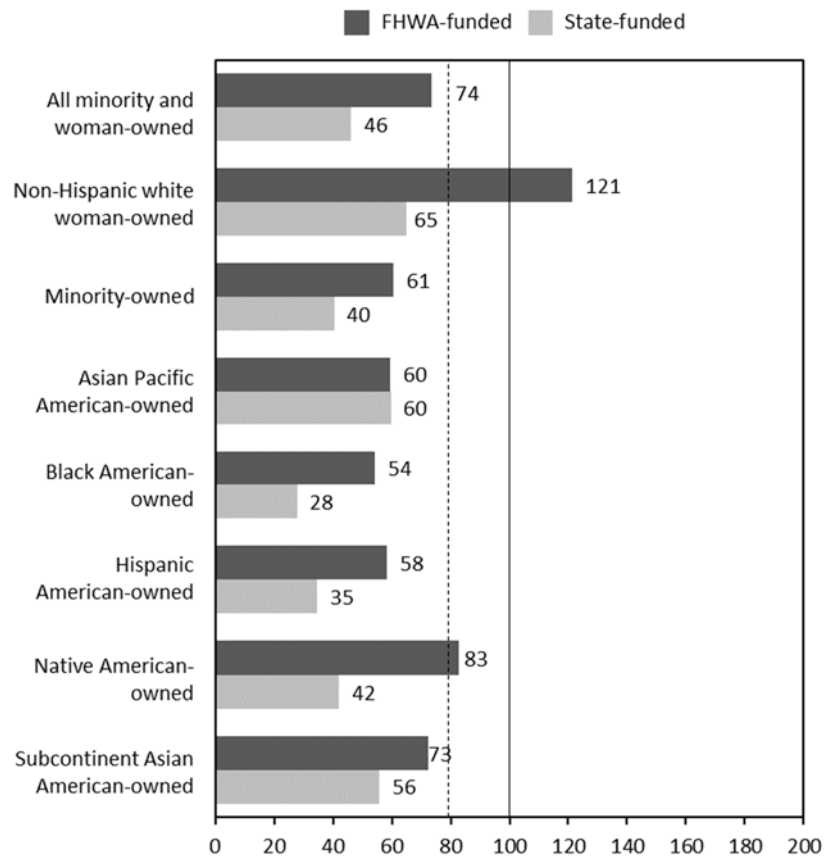
Note:

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

For more detail and results by group, see Figure F-11 and F-12 in Appendix F.

Source:

BBC Research & Consulting disparity analysis.



4. Contract role. Many minority- and woman-owned businesses are small businesses and thus often work as subcontractors. Because of that tendency, it is useful to examine disparity analysis results separately for Caltrans and subrecipient local agency prime contracts and subcontracts.

As shown in Figure 7-4, minority- and woman-owned businesses showed substantial disparities on prime contracts (disparity index of 48) but did not show disparities on subcontracts (disparity index of 115). Caltrans and subrecipient local agencies used race- and gender-conscious contract goals to award many contracts and procurements during the study period, which are designed to increase the participation of minority- and woman-owned businesses on subcontracts in particular. Results for individual groups indicated that:

- All groups except for non-Hispanic white woman-owned businesses (disparity index of 88) showed substantial disparities on prime contracts. A disparity index of 88 indicates a disparity, but it is not below the threshold to be considered substantial.
- Only two groups exhibited disparities on subcontracts: Black American-owned businesses (disparity index of 85) and Subcontinent Asian American-owned businesses (disparity index of 85). Neither disparity was below the threshold to be considered substantial.

The results for subcontracts suggest that Caltrans’ DBE goals program is somewhat effective in increasing minority- and woman-owned business participation when compared with disparity indices for prime contracts, which indicate larger disparities between the participation and availability of minority- and woman-owned businesses.

Figure 7-4.
Disparity analysis results
for prime contracts and
subcontracts

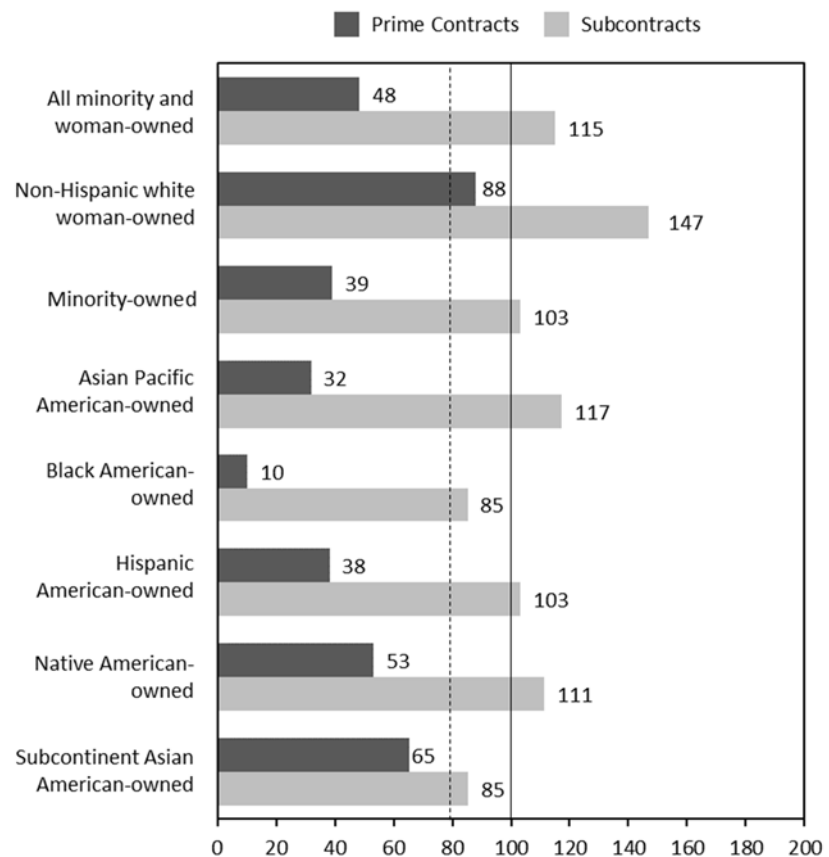
Note:

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

For more detail, see Figures F-7 and F-8 in Appendix F.

Source:

BBC Research & Consulting disparity analysis.



5. Industry. BBC also examined disparity analysis results separately construction and professional services work to assess whether contracting outcomes differ by industry. As shown in Figure 7-5, minority- and woman-owned businesses considered together exhibited substantial

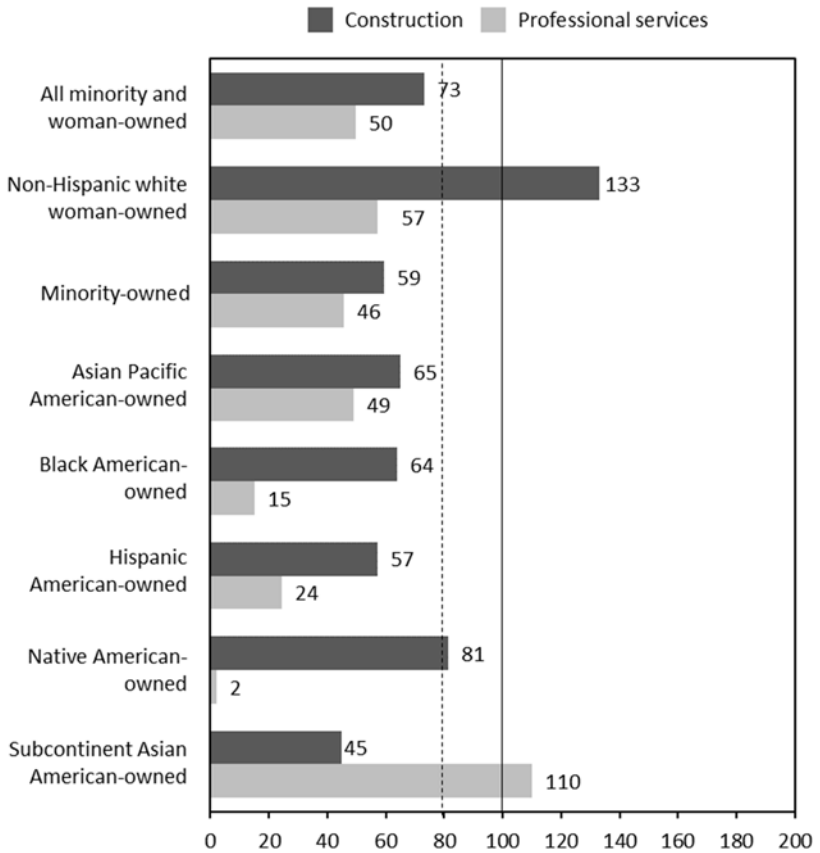
disparities on both construction (disparity index of 73) and professional services (disparity index of 50) contracts. Results for individual groups indicate that:

- All groups except non-Hispanic white woman-owned businesses (disparity index of 133) and Native American-owned businesses (disparity index of 81) showed substantial disparities on construction contracts. A disparity index of 81 indicates a disparity, but it is not below the threshold to be considered substantial.
- All groups except Subcontinent Asian American-owned businesses (disparity index of 110) showed substantial disparities on professional services contracts.

Figure 7-5.
Disparity analysis results for construction and professional services work

Note:
Numbers rounded to nearest tenth of 1 percent and thus may not sum exactly to totals.
For more detail, see Figures F-5 and F-6 in Appendix F.

Source:
BBC Research & Consulting disparity analysis.



C. Statistical Significance

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

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

winning it were equal to the number of businesses from that group available for it divided by the total number of businesses available for it. The Monte Carlo simulation then randomly chose a business from the pool of available businesses to win the contract element.

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

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

2. Results. BBC ran Monte Carlo simulations on state-funded contracts to assess whether the substantial disparities that relevant business groups exhibited for those contracts were statistically significant. BBC ran statistical significance testing on state-funded contracts, because Caltrans awards those contracts without the use of DBE goals, that is, in a race- and gender-neutral environment. As shown in Figure 7-6, results from the Monte Carlo analysis indicated that the disparity that all minority- and woman-owned businesses exhibited for state-funded Caltrans contracts was statistically significant at the 95 percent confidence level, as were the disparities that non-Hispanic white woman-owned businesses, all minority-owned businesses considered together, Asian Pacific American-owned businesses, Black American-owned businesses, Hispanic American-owned businesses, and Native American-owned businesses exhibited. The substantial disparity found for Subcontinent Asian American-owned businesses was statistically significant at the 90 percent confidence level.

Figure 7-6.
Monte Carlo simulation results for state-funded Caltrans contracts

Business Group	Disparity index	Number of simulation runs out of one million that replicated observed utilization	Probability of observed disparity occurring due to "chance"
State-funded contracts			
Minority-owned and woman-owned	46	0	<0.1 %
Non-Hispanic white woman-owned	65	1,011	0.1 %
Minority-owned	40	0	<0.1 %
Asian Pacific American-owned	60	12,004	1.2 %
Black American-owned	28	20	<0.1 %
Hispanic American-owned	35	0	<0.1 %
Native American-owned	42	2,022	0.2 %
Subcontinent Asian American-owned	56	25,156	2.5 %

Source: BBC Research & Consulting disparity analysis.

CHAPTER 8.

Program Measures

CHAPTER 8.

Program Measures

As part of implementing the Federal Disadvantaged Business Enterprise (DBE) Program, the California Department of Transportation (Caltrans) uses a combination of *race- and gender-neutral* and *race- and gender-conscious* measures to encourage the participation of minority- and woman-owned businesses in its transportation-related contracting.¹ Race- and gender-neutral measures are designed to encourage the participation of all businesses—or, all small businesses—in an organization’s contracting. Participation in such measures is not limited to minority- and woman-owned businesses. In contrast, race- and gender-conscious measures are designed specifically to encourage the participation of minority- and woman-owned businesses in an organization’s contracting (e.g., using minority-owned business subcontracting goals to award individual contracts).

To meet the *narrow tailoring* requirement of the *strict scrutiny* standard of constitutional review, agencies that implement the Federal DBE Program must meet the maximum feasible portion of their overall DBE goals through the use of race- and gender-neutral measures.² If an agency cannot meet its overall DBE goal through the use of race- and gender-neutral measures alone, then it must consider also using race- and gender-conscious measures. When submitting documentation related to its overall DBE goal to the United States Department of Transportation, an agency must project the portion of its overall DBE goal it expects to meet through race- and gender-neutral measures and what portion it expects to meet through race- and gender-conscious measures.

BBC Research & Consulting (BBC) reviewed measures Caltrans currently uses to encourage the participation of minority- and woman-owned businesses in its contracting. BBC reviewed Caltrans’ program measures in three parts:

- A. DBE Certification;
- B. Race- and gender-neutral measures; and
- C. Race- and gender-conscious measures.

A. DBE Certification

Caltrans’ Office of Civil Rights (OCR) implements the Federal DBE Program, including certifying DBEs. The application is entirely online and is free to submit with the exception of a notary fee in some cases. To be eligible, business owners must prove they are part of a “socially and economically disadvantaged” group as defined in 49 Code of Federal Regulations (CFR) Part 26.

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

² 49 CFR Section 26.51.

The business owner must have 51 percent interest in the business, including management and control of day-to-day decisions, must be a United States citizen or legal resident, and must have a personal net worth of less than \$1.32 million. The business itself must be independent and have average revenue of less than \$26.29 million over three years. The certification process takes 90 days and includes a site visit (or virtual visit during the COVID-19 pandemic).

Once businesses are certified, they are added to the California Unified Certification Program (CUCP) database, which is searchable and is one of the primary resources prime contractors can use to find DBE subcontractors. Certain measures Caltrans uses as part of the Federal DBE Program—including networking opportunities like OCR’s DBE Summit—are only available to certified businesses.

B. Race- and Gender-Neutral Measures

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

- Business outreach and communication;
- Technical assistance;
- Finance and bonding programs;
- Prompt payment; and
- Data collection, monitoring, and reporting.

1. Business outreach and communication. Caltrans conducts several outreach and communication efforts across California to encourage the participation and growth of small businesses and minority- and woman-owned businesses. In each of Caltrans’ 12 districts, district small business liaisons (DSBLs) act as points of contact on behalf of the agency for small businesses, including DBEs and many other minority- and woman-owned businesses. DSBLs help prime contractors identify potential subcontractors and also lead more focused outreach such as local procurement fairs, workshops, and small business events. DSBLs are also primarily responsible for facilitating various outreach efforts, including:

- Meetings and relationship building;
- Website communications;
- Advertisements of contract opportunities; and
- Other outreach events and workshops.

a. Meetings and relationship building. In an effort to engage stakeholders, Caltrans meets regularly with a wide range of interest groups, including construction and engineering trade associations as well as small business and DBE representatives.

i. Trade association meetings. Each quarter, Caltrans hosts stakeholder meetings with major construction and engineering trade associations, including the Associated General Contractors of America (AGC), the American Council of Engineering Companies (ACEC), and United Contractors. Caltrans hosts those meetings each quarter at its headquarters (or virtually) in partnership with a representative from each organization. Individuals must be members of the AGC, ACEC, or United Contractors in order to attend the meetings. The meetings center around construction and engineering contracting and address various topics, including project advertisement and schedule, DBE updates, safety topics, project specifications, and new business opportunities. Between 10 and 25 members of each organization typically attend each meeting.

ii. Small Business Council meetings. Caltrans hosts Small Business Council (SBC) meetings six times a year with members of small business trade associations representing at least 35 members that are organized under the laws of California and have small business interests in Caltrans contracts and projects (specifically, construction, commodities, and architecture and engineering, or A&E). The locations for the SBC meetings alternate between Caltrans headquarters in Sacramento and various district offices throughout California. Caltrans uses the meetings to provide information on future contract opportunities and engage small businesses and minority- and woman-owned businesses in the Caltrans contracting process. In addition, the SBC holds committee meetings that cover more detailed topics related to construction, engineering, and commodities contracting. The committees are responsible for discussing those issues and presenting recommendations to the main membership body.

OCR manages invitations to the Caltrans SBC meetings, and the meetings are not exclusive to members—non-members who are interested in the meetings can also attend. In addition to the statewide SBC meetings, other Caltrans districts—such as Districts 4 and 11—organize their own SBC meetings to focus on local issues.

b. Website communications. Caltrans revises and updates the OCR website regularly. The website currently provides access to various resources including links to relevant information, such as:

- DBE certification database;
- DBE certification workshop presentations, guidelines, frequently asked questions, instructions, and application;
- Supportive services programs and resources;
- Technical assistance resources; and
- Contact information for each DSBL.

Caltrans also maintains a centralized calendar of events to highlight outreach opportunities throughout the state. DSBLs are responsible for entering event information into the calendar.

c. Advertisements of contract opportunities. In addition to attending meetings, events, and accessing the OCR website, there are several other ways for small businesses, including many minority- and woman-owned businesses, to find out about contract opportunities with Caltrans.

i. Weekly advertisements. Each week, on the Office Engineer website, Caltrans provides a complete list of all projects currently out for bid as well as a list of upcoming projects. All advertisements are refreshed and updated on a weekly basis. Caltrans also provides useful links for contractors that want to view contract documents, order bid books, place prime contractor advertisements, opt in to particular contracts, or see planholders lists.

ii. Project look ahead. Caltrans also provides a “project look ahead” report for information on upcoming projects statewide. Contractors can create an account with Caltrans to receive automated e-mails when projects are added or modified and get customized views of projects in specific areas. DSBLs also provide “look ahead” information at local workshops and events.

iii. Contractor’s Corner. Contractor’s Corner is a special feature on the Office Engineer website that allows contractors to identify projects in which they are interested and for which they are advertising subcontracting opportunities. Contractor’s Corner allows contractors to input basic firm qualifications and contact information. Contractors can modify that information and also download bid documents for e-advertised projects. Contractors are also able to opt in to a feature to communicate they are interested in subcontracting or supplying materials to prime contractors. Planholders lists composed of contractors that have ordered bid books for a particular project are also available on Contractor’s Corner. The lists are updated immediately when a bidder places an order for a bid book online. Caltrans also provides a planholders search that offers an up-to-the-minute view of the businesses bidding on all currently-advertised projects. The planholders search provides options for searching by DBE or small business status to help meet any contract goals. Registration and use of Contractor’s Corner is free.

iv. Cal eProcure. Cal eProcure is an online portal contractors can use to access advertised bid opportunities with the State of California in the California State Contracts Register. Contract opportunities are posted online and distributed to contractors that are registered through Cal eProcure.

d. Other outreach events and workshops. Caltrans participates in a number of outreach events and workshops, some of which are organized by headquarters and others by district offices. The most notable workshops and outreach events Caltrans hosts include the following.

i. Certification workshops. Caltrans provides certification workshops for potential DBEs across the state. The workshops cover topics such as certification requirements and guidelines for completing the certification application. In 2020, 75 business owners attended the workshops.

ii. Procurement fairs. Caltrans holds an annual procurement fairs in each district. During each procurement fair, purchasers from Caltrans divisions and local purchasing partners are invited to have face-to-face discussions with small business owners. Approximately 524 small business owners attended the procurement fairs in 2020.

iii. Mandatory pre-bid (MPB) meetings. Caltrans holds MPB meetings for certain construction contracts at the discretion of DGS. When a project is selected for an MPB meeting, prime contractors are required to be present in order to be eligible to bid on the contract. MPB meetings are also open to other interested businesses—including small businesses, DBEs, and

minority- and woman-owned businesses—to network with prime contractors and express their interest in performing work as subcontractors or suppliers.

iv. A&E contract outreach events. Caltrans may hold outreach events specifically for A&E contracts. Caltrans invites prime consultants as well as small businesses, disabled-veteran business enterprises, DBEs, minority-owned and woman-owned businesses, and other potential subcontractors to the events to network and learn more about the projects. There were 205 attendees at those events in 2020.

v. Pre-proposal conferences. Caltrans may host pre-proposal conferences for engineering contracts on an as-needed basis, either in person or via teleconference. Pre-proposal conferences occur early in the advertisement period of solicitations and attendance is optional. During the conferences, the contract manager discusses the project’s scope of work, and a Department of Procurement and Contracting representative provides tips on how to submit responsive bids.

vi. Contractor’s Bootcamp. In 2018, Caltrans began offering Contractor’s Bootcamps, which are free, two-day events during which Caltrans provides information on topics affecting DBEs, including certification, financial requirements, and networking. The bootcamps are offered on an as-needed basis throughout the state. After the end of the COVID-19 pandemic, Caltrans plans to standardize and consolidate the program and post videos of the events on its website for anytime access.

2. Technical assistance. Caltrans offers various forms of technical assistance through one-on-one consultations and mentoring. In addition, OCR is developing partnerships with outside resource centers based on new relationships the executive management is cultivating.

a. One-on-one consultations. DSBLs and Caltrans staff offer one-on-one technical assistance via telephone or in person to small businesses, including many minority- and woman-owned businesses. Businesses can request assistance related to navigating contracting documents, the DBE certification process, the opt-in process, and other topics.

b. Mentor-protégé program. Caltrans offers the Calmentor program for small engineering and construction businesses. The program provides small businesses with opportunities to participate in mentor-protégé relationships with larger, more successful businesses working in similar industries. Calmentor is a statewide program available in all 12 districts, though it is run at a regional level (i.e., North, South, and Central).

3. Prompt payment. Caltrans provides several references to prevailing wage agreements and prompt payment requirements within its contracting language. Payment-related contracting language is in accordance with prompt payment code sections 10262.5 in the California Public Contract Code, also known as the California Prompt Payment Act. According to the act, invoices to Caltrans must be paid within 30 days of approval, and prime contractors are required to pay subcontractors for their work within seven days of receiving payment. In addition, Caltrans makes efforts to monitor payments for each project to ensure small businesses, including many minority- and woman-owned businesses, are participating in contracts in a manner consistent with commitments prime contractors made to them at the time of project award. For

engineering contracts, the contract manager is responsible for monitoring payments to subcontractors. The ADM-3069 and ADM-3069AE forms request payment information for all subcontractors. If prime contractors do not submit those forms with each invoice, the contract manager withholds 25 percent of payment until the forms are provided. For construction contracts, the resident engineer monitors first-tier subcontractor participation on the job site. Construction contract forms, including Forms 1201 and 2402, capture commitment and payment data when the project is awarded and completed.

C. Race- and Gender-Conscious Measures

The only race- and gender-conscious measure Caltrans uses is using DBE contract goals in awarding many of its Federal Highway Administration (FHWA)-funded contracts. Prime contractors bidding on those contracts must meet the goals by either making subcontracting commitments to certified DBEs or submitting documentation that they made *good faith efforts* (GFEs) to meet the goals but failed to do so. Caltrans reviews GFEs documentation and approves it if prime contractors demonstrate genuine efforts towards compliance with DBE goals.

Examples of GFEs are:

- Identifying elements of the contract to make them available for DBE subcontractors;
- Soliciting bids from DBEs directly, including following up and negotiating when possible;
- Providing DBEs with information about the project, contract requirements, and other elements of the work; and
- Assisting DBEs with obtaining bonding, insurance, or other finance requirements, as well as supplies and materials.

Bidders may also provide other information about the efforts they made in finding DBE subcontractors if they feel they demonstrate genuine efforts to engage with those businesses. If prime contractors do not meet the goals through subcontracting commitments or through approved GFEs documentation, then Caltrans rejects prime contractors' bids.

Caltrans does not use any race- or gender-conscious measures when awarding state-funded contracts because of Proposition 209. Proposition 209, which California voters passed in 1996, amended the California constitution to prohibit discrimination and the use of race- and gender-based preferences in public contracting, public employment, and public education. Thus, Proposition 209 prohibited government agencies in California—including Caltrans—from using race- or gender-conscious measures when awarding state-funded contracts. However, Proposition 209 did not prohibit those actions if an agency is required to take them “to establish or maintain eligibility for any federal program,” which is why Caltrans continues to use race- and gender-conscious measures in awarding FHWA-funded contracts.

CHAPTER 9.

Overall DBE Goal

CHAPTER 9.

Overall DBE Goal

As part of its implementation of the Federal Disadvantaged Business Enterprise (DBE) Program, the California Department of Transportation (Caltrans) is required to set an overall goal for DBE participation in its Federal Highway Administration- (FHWA-) funded contracts. Agencies that implement the Federal DBE Program must develop overall DBE goals every three years. Caltrans last set its overall DBE goal for FHWA-funded contracts—a goal of 17.6 percent—for federal fiscal years (FFYs) 2019 through 2021. Caltrans is required to develop a new goal for FFYs 2022 through 2024. Chapter 9 provides information Caltrans might consider in setting its new overall DBE goal. It is organized in two parts based on the two-step goal-setting process the United States Department of Transportation (USDOT) outlines in 49 Code of Federal Regulations (CFR) Part 26.45:

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

A. Establishing a Base Figure

Establishing a base figure is the first step in calculating an overall goal for DBE participation in Caltrans' FHWA-funded contracts. BBC Research & Consulting (BBC) calculated the base figure using the same availability database and approach described in Chapter 5 except that base-figure calculations only included *potential* DBEs—that is, minority- and woman-owned businesses that are DBE-certified or appear they could be DBE-certified based on revenue requirements described in 49 CFR Part 26—and only included FHWA-funded prime contracts and subcontracts Caltrans and subrecipient local agencies awarded during the study period. BBC's approach to calculating the base figure is consistent with USDOT's "Tips for Goal-Setting in the Disadvantaged Business Enterprise (DBE) Program" and other guidance.

Figure 9-1 presents BBC's base figure calculations by relevant industry and racial/ethnic and gender group. Those results indicate that the availability of potential DBEs for Caltrans' FHWA-funded contracts is 22.2 percent, which Caltrans might consider as the base figure for its overall goal for DBE participation if the agency anticipates the types and sizes of FHWA-funded contracts it awards in the time period the goal will cover are similar to the types of FHWA-funded contracts the agency and subrecipient local agencies awarded during the study period. The overall base figure reflects a weight of 0.80 for construction contracts and 0.20 for professional services contracts based on the volume of FHWA-funded contract dollars Caltrans and subrecipient local agencies awarded during the study period.

Figure 9-1.
Base figure calculations by racial/ethnic and gender group

Potential DBEs	Availability Percentage		
	Construction	Professional Services	Weighted average
Asian Pacific American	2.0 %	5.6 %	2.7 %
Black American	1.2	2.2	1.4
Hispanic American	11.8	2.8	10.0
Native American	1.1	0.7	1.0
Subcontinent Asian American	1.1	2.1	1.3
Non-Hispanic white woman	4.7	9.9	5.7
Total potential DBEs	22.0 %	23.3 %	22.2 %
Industry weight	80 %	20 %	

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

See Figures F-20 and F-21 in Appendix F for corresponding disparity results tables.

Per Caltrans' request, BBC evaluated the potential impact of California Assembly Bill 5 (AB-5) on the base figure. AB-5 places more stringent requirements on how companies classify employees and contractors. Under certain interpretations of AB-5, small trucking firms might be considered employees of prime contractors rather than independent subcontractors. BBC found that considering small trucking firms as employees rather than contractors would result in a minimal change to the overall base figure. The enforcement of AB-5 on trucking firms is currently under a state court stay of implementation pending an appeal of *California Trucking Association v. Bonta, No. 20-55106 (9th Cir. 2021)* to the United States Supreme Court.

Source: BBC Research & Consulting availability analysis.

B. Considering a Step-2 Adjustment

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

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

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

1. Current capacity of DBEs to perform work. USDOT's "Tips for Goal-Setting" suggests that agencies should examine data on DBE participation in their USDOT-funded contracts in recent years as an indicator of their capacity to perform future work. USDOT further suggests

¹ 49 CFR Section 26.45.

agencies should choose the median level of annual DBE participation for those years as the measure of past participation:

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

Figure 9-2 presents past DBE participation based on Caltrans' Uniform Reports of DBE Awards/Commitments and Payments as reported to FHWA. According to Caltrans' Uniform Reports, median DBE participation in FHWA-funded contracts from FFYs 2016 through 2020 was 14.0 percent. If Caltrans were to use the approach USDOT outlines in "Tips for Goals Setting" to account for the current capacity of DBEs to perform work, the overall goal would be the average of the 22.2 percent base figure and the 14.0 percent median past DBE participation, yielding a potential overall DBE goal of 18.1 percent.

BBC also analyzed DBE participation in Caltrans' FHWA-funded contracts during the study period as part of the utilization analysis, and that analysis indicated DBE participation of 12.9 percent. If Caltrans were to adjust its base figure based on BBC's analysis, it would take the average of the 22.2 percent base figure and the 12.9 percent DBE participation, yielding a potential overall DBE goal of 17.6 percent.

Figure 9-2.
Past certified DBE participation in FHWA-funded contracts, FFYs 2016-2020

Source:
Awards/commitments reported on Caltrans' Uniform Reports of DBE Awards/Commitments and Payments.

FFY	DBE Attainment
2016	13.2%
2017	12.1%
2018	14.0%
2019	18.9%
2020	17.5%

2. Information related to employment, self-employment, education, training, and unions. Chapter 3 summarizes information about marketplace conditions in California for minorities, women, and minority- and woman-owned businesses. Additional quantitative and qualitative analyses of marketplace conditions in California are presented in Appendices C and D, respectively. BBC's analyses indicate that there are barriers certain minority groups and women face related to human capital, financial capital, business ownership, and business success throughout the state. Such barriers may decrease the availability of minority- and woman-owned businesses for the FHWA-funded contracts Caltrans and subrecipient local agencies award, which supports an upward adjustment to Caltrans' base figure.

Although it is difficult to quantify the effects of barriers in human capital, financial capital, and business success on the availability of minority- and woman-owned businesses in California, it is possible to quantify the effects of barriers in business ownership. BBC used regression analyses

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

to investigate whether race/ethnicity and gender are related to business ownership among workers in California. The regression analyses allowed BBC to examine those relationships while statistically controlling for various race- and gender-neutral personal characteristics, including familial status, education, and age. (Chapter 3 and Appendix C provide details about BBC's regression analyses.) The regression analyses revealed that, even after accounting for various personal characteristics:

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

BBC analyzed the impact barriers in business ownership would have on the base figure if the groups of minorities and women that exhibited statistically significant barriers in rates of business ownership owned businesses at the same rate as comparable non-Hispanic white men. The results of that analysis—sometimes referred to as a *but for* analysis, because it estimates the availability of minority- and woman-owned businesses *but for* the effects of race- and gender-based discrimination—are presented in Figure 9-3. The analysis included the same contracts BBC analyzed to determine the base figure (i.e., FHWA-funded prime contracts and subcontracts Caltrans and subrecipient local agencies awarded during the study period), and the weights for each industry were based on the proportion of FHWA-funded contract dollars Caltrans awarded in each industry during the study period (i.e., a weight of 0.80 for construction and 0.20 for professional services). The rows and columns of Figure 9-3 present the following information from BBC's *but for* analysis:

a. Current availability. Column (a) presents the current availability of potential DBEs by racial/ethnic and gender group and by industry, as also presented in Figure 9-1. Each row presents the percentage availability for each racial/ethnic and gender group. Combined, the current availability of potential DBEs for Caltrans' FHWA-funded contracts is 22.2 percent, as shown in row (19) of column (a).

b. Disparity indices for business ownership. For each group significantly less likely than similarly-situated non-Hispanic white men to own businesses, BBC simulated business ownership rates if those groups owned businesses at the same rate as non-Hispanic white men who share similar race- and gender-neutral personal characteristics. To simulate business ownership rates for each industry, BBC took the following steps:

1. BBC performed a probit regression analysis predicting business ownership including only workers who were non-Hispanic white men in the dataset; and
2. BBC then used the coefficients from that model and the mean personal characteristics of individual minority groups (and non-Hispanic white women) working in the industry to simulate business ownership for each group.

Figure 9-3.
Availability adjusted for disparities in the rates of business ownership

Industry and group	a. Current availability	b. Disparity index for business ownership	c. Availability after initial adjustment*	d. Availability after scaling to 100%	e. Components of base figure**
Construction					
(1) Asian Pacific American	2.0 %	n/a	2.0 %	1.9 %	
(2) Black American	1.2	62	2.0	1.8	
(3) Hispanic American	11.8	71	16.6	15.1	
(4) Native American	1.1	82	1.3	1.2	
(5) Subcontinent Asian American	1.1	n/a	1.1	1.0	
(6) Non-Hispanic white woman	4.7	55	8.5	7.8	
(7) Potential DBEs	22.0 %	n/a	31.6 %	28.8 %	23.2 %
(8) All other businesses ***	78.0	n/a	78.0	71.2	
(9) Total	100.0 %	n/a	109.7 %	100.0 %	
Professional services					
(10) Asian Pacific American	5.6 %	61	9.1 %	8.1 %	
(11) Black American	2.2	53	4.2	3.8	
(12) Hispanic American	2.8	71	4.0	3.5	
(13) Native American	0.7	n/a	0.7	0.6	
(14) Subcontinent Asian American	2.1	44	4.8	4.3	
(15) Non-Hispanic white woman	9.9	78	12.6	11.3	
(16) Potential DBEs	23.3 %	n/a	35.5 %	31.6 %	6.2 %
(17) All other businesses	76.7	n/a	76.7	68.4	
(18) Total	100.0 %	n/a	112.2 %	100.0 %	
(19) TOTAL	22.2 %	n/a		n/a	29.4 %

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

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

** Components of potential step-2 adjustment were calculated as the value after adjustment and scaling to 100 percent, multiplied by the percentage of total FHWA-funded contract dollars in each industry (construction = 0.80 and professional services = 0.20).

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

Source: BBC Research & Consulting.

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

c. Availability after initial adjustment. Column (c) presents availability estimates by racial/ethnic and gender group and by industry after initially adjusting for statistically significant disparities in business ownership rates. BBC calculated those estimates by dividing the current availability in column (a) by the disparity index for business ownership in column

(b) and then multiplying by 100. BBC only made adjustments for those groups that are significantly less likely than similarly-situated non-Hispanic white men to own businesses.

d. Availability after scaling to 100 percent. Column (d) shows adjusted availability estimates that the study team re-scaled so that the sum of the availability estimates equaled 100 percent for each industry. BBC re-scaled the adjusted availability estimates by taking each group's adjusted availability estimate in column (c) and dividing it by the sum of availability estimates shown under "Total" in column (c)—in row (9) for construction and row (18) for professional services. For example, the scaled availability estimate for non-Hispanic white woman-owned construction businesses shown in row (6) of column (d) was calculated in the following way: $(8.5\% \div 109.7\%) \times 100 = 7.8$ percent.

e. Components of goal. Column (e) shows the component of the total base figure attributed to the adjusted availability of minority- and woman-owned businesses for each relevant industry. BBC calculated each component by taking the total availability estimate shown under "Potential DBEs" in column (d)—in row (7) for construction and row (16) for professional services—and multiplying it by the proportion of total FHWA-funded contract dollars for which each industry accounts (i.e., 0.80 for construction and 0.20 for professional services). For example, BBC used the 28.8 percent shown in row (7) of column (d) for construction and multiplied it by 0.80 for a result of 23.2 percent, as shown in row (7) of column (e). The values in column (e) were then summed to equal the overall base figure adjusted for barriers in business ownership, as shown in the last row of column (e).

Based on information related to business ownership, Caltrans might consider adjusting the base figure upward to 29.4 percent.

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

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

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

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

³ 49 CFR Section 26.45.

barriers to the success of minority- and woman-owned businesses, which is presented in Appendix D. Some of that information suggests that discrimination on the basis of race/ethnicity and gender adversely affects minority- and woman-owned businesses throughout the state. Thus, evidence about business success supports an upward adjustment to Caltrans' base figure.

b. Evidence from disparity studies conducted within the jurisdiction. USDOT suggests that federal aid recipients also examine evidence from disparity studies conducted within their jurisdictions when determining whether to make step-2 adjustments to their base figures. Caltrans should review results from those disparity studies when determining its overall DBE goal. For example, BBC recently conducted disparity studies for the San Diego Association of Governments, the Los Angeles County Metropolitan Transportation Authority, and the City of San Diego. However, results from those studies are tailored specifically to the contracts and policies of each agency. Those contracts may differ in many important respects from those of Caltrans, which might limit their relevance to Caltrans as it determines its next overall DBE goal.

5. Summary. Taken together, quantitative and qualitative evidence may support a step-2 adjustment to Caltrans' base figure as the agency considers setting its next overall DBE goal. Based on information from the disparity study, there are reasons why Caltrans might consider an upward adjustment to its base figure:

- Caltrans might adjust its base figure upward to account for barriers minorities and women face in human capital and owning businesses in the local contracting industry. Such an adjustment would correspond to a “determination of the level of DBE participation you would expect absent the effects of discrimination.”⁴
- Barriers that affect minorities, women, and minority- and woman-owned businesses in obtaining financing, bonding, and insurance and evidence that certain groups of minority- and woman-owned businesses are less successful than comparable businesses owned by non-Hispanic white men also supports an upward adjustment to Caltrans' base figure.

There are also reasons why Caltrans might consider a downward adjustment to its base figure. USDOT's “Tips for Goal-Setting” suggests that an agency can make a step-2 adjustment by averaging the base figure with past median DBE participation. Caltrans' Uniform Reports for FFYs 2016 through 2020 indicated median annual DBE participation of 14.0 percent for those years, which is lower than its base figure. Similarly, BBC's analysis of DBE participation in the FHWA-funded contracts Caltrans and subrecipient local agencies awarded during the study period indicates DBE participation (12.9%) that is lower than the base figure.

⁴ 49 CFR Section 26.45 (b).

CHAPTER 10.

Program Considerations

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Program Considerations

The disparity study provides substantial information the California Department of Transportation (Caltrans) should examine as it considers potential refinements to its implementation of the Federal Disadvantaged Business Enterprise (DBE) Program and ways to further encourage the participation of minority- and woman-owned businesses in its contracts and procurements. BBC Research & Consulting (BBC) presents several key considerations Caltrans should make, organized into the following categories:

- A. DBE contract goals;
- B. Procurement policies;
- C. Contract administration policies; and
- D. Office of Civil Rights (OCR) programs.

A. DBE Contract Goals

The Federal DBE Program requires agencies to use race- and gender-conscious measures—such as DBE contract goals—to meet any portion of their overall DBE goals they do not project being able to meet using race- and gender-neutral measures alone. United States Department of Transportation (USDOT) guidelines on the use of DBE contract goals, which are presented in 49 Code of Federal Regulations (CFR) Part 26.51(e), include the following guidance:

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

Based on information from the disparity study and other available information, Caltrans should assess whether the continued use of DBE contract goals is necessary in the future to meet any portion of its overall DBE goal. Because the use of such goals would be considered a race- and gender-conscious measure, Caltrans must ensure that their use meets the strict scrutiny standard of constitutional review, including showing a compelling governmental interest for their use and ensuring their use is narrowly tailored (for details, see Chapter 2 and Appendix B).

1. Disparity analysis results. During the study period, Caltrans used DBE contract goals in awarding many Federal Highway Administration- (FHWA-) funded contracts and procurements. Prime contractors had to meet those goals by making subcontracting commitments to certified DBEs or submitting documentation that they made sufficient good faith efforts (GFEs) to meet those goals. Despite the use of those goals, disparity analysis results indicated that most individual racial/ethnic and gender groups showed substantial disparities on various sets of Caltrans contracts. In particular, all relevant business groups showed substantial disparities on state-funded contracts, which Caltrans awarded without the use of contract goals or any other race- or gender-conscious measures. Based on those results Caltrans should consider continuing its use of DBE contract goals to award FHWA-funded contracts and procurements in the future.

2. Anecdotal evidence. Some individuals participating in in-depth interviews and public meetings made comments related to the use of race- and gender-conscious measures, including DBE contract goals:

- Several minority- and woman-owned businesses commented that race- and gender-conscious measures help open doors “that are normally shut.” Some minority- and woman-owned businesses indicated that the use of such measures has helped small minority- and woman-owned businesses win contracts they would not have otherwise won.
- Some interviewees supported the use of DBE contract goals but suggested that race- and gender-conscious measures should be limited in scope and monitored closely to ensure the use of such measures is appropriately enforced.
- Some prime contractors did not understand how Caltrans develops goals for individual contracts and procurements and expressed concern that industry information and regional availability were not appropriately factored into the goal-setting process. Those contractors suggested that Caltrans provide more detailed information on goal-setting.
- Some prime contractors suggested that Caltrans provide more information to the public about which DBEs are used to fulfill goals on individual contracts and what proportion of all California DBEs are used for Caltrans work.

B. Procurement Policies

Based on analysis of Caltrans policies and feedback from stakeholders, BBC identified several areas of Caltrans’ procurement processes the agency should consider refining to help increase the participation of minority- and woman-owned businesses in its contracts and procurements:

- Bid opportunities;
- Teaming opportunities;
- Large contracts;
- Bonding and insurance assistance;
- Small business prime program;
- Subcontracting minimums; and
- Vendor registration and electronic bidding.

1. Bid opportunities. As part of the anecdotal evidence process, many participants indicated that they experience difficulties with learning about bid opportunities. Although some noted that Caltrans' online calendar and upcoming projects lists are helpful, they indicated that those tools should be better advertised and Caltrans should increase its advertisement efforts around bid opportunities in general. Caltrans should also consider increasing targeted outreach toward relevant businesses. For example, the City of Redondo Beach attends other organizations' meetings to discuss upcoming bid opportunities, presents to various chambers of commerce, and creates booklets of DBEs organized by North American Industry Classification System (NAICS) codes to help prime contractors connect with relevant potential subcontractors. Finally, Caltrans should better advertise projects below the competitive bid threshold so interested small businesses have opportunities to bid.

2. Teaming opportunities. There are several considerations Caltrans could make to better facilitate meaningful partnerships between prime contractors and subcontractors, which could result in more work opportunities and growth for minority- and woman-owned businesses.

a. Contractors' Corner. Construction contractors that want to bid on Caltrans work can find project information as well as potential partners through Contractor's Corner, an online portal. Both prime contractors and subcontractors can indicate their interest in specific projects and see other businesses that have indicated interest. Contractor's Corner has the potential to be even more effective with stronger advertising and training on how to use it. In addition, Caltrans should consider creating a similar portal (or expanding Contractor's Corner) for architecture and engineering projects.

b. Pre-bid meetings. Caltrans holds pre-bid meetings somewhat irregularly at the discretion of the departments soliciting bids or proposals. Caltrans should provide clearer recommendations on when pre-bid meetings are mandatory and make them mandatory more frequently. In addition, Caltrans should ensure the meetings take place early enough in the bid or proposal process so potential subcontractors have opportunities to meaningfully engage with potential prime contractors.

c. Joint ventures. Caltrans' current implementation of the Federal DBE Program makes it difficult for businesses to grow their capacities. Businesses often work solely as subcontractors, preventing them from gaining the experience or capital to bid on future work as prime contractors. One way Caltrans could better support business growth is by identifying alternative acquisition strategies and structuring procurements to facilitate the ability of consortia or joint ventures that include small businesses—including DBEs—to compete for and perform prime contracts. Encouraging joint ventures would allow businesses to gain experience working as prime contractors while mitigating some of the difficulties and costs of doing so.

d. Exclusive teaming. Sometimes, subcontractors are asked to enter into exclusive partnerships as part of joining project teams, ultimately limiting opportunities available to small businesses. Caltrans should consider prohibiting exclusive subcontracting or teaming requests by integrating such language into its bid, request for proposals (RFP), and contract language. For example, the Dallas/Fort Worth International Airport explicitly prohibits exclusive teaming requirements as part of its RFP language.

3. Large contracts. In general, minority- and woman-owned businesses exhibited reduced availability for relatively large contracts Caltrans and subrecipient local agencies awarded during the study period. In addition, as part of in-depth interviews and public meetings, several business owners reported that the size of government contracts is sometimes a barrier to their success. To further encourage the participation of minority- and woman-owned businesses in its work, Caltrans should consider making efforts to unbundle relatively large prime contracts, and even subcontracts, into several smaller pieces. For example, the City of Charlotte, North Carolina encourages prime contractors to unbundle subcontract opportunities into smaller pieces, making them more accessible to small businesses, and accepts such efforts as good faith efforts as part of its contracting goals program. Such initiatives might increase contracting opportunities for all small businesses, including many minority- and woman-owned businesses.

4. Bonding and insurance assistance. The California Civil Code Section 9550 requires bid deposits and bonding for public works projects worth more than \$25,000. Projects of that size are relatively accessible to small businesses but bid deposit and bonding requirements can present a substantial barrier for small businesses. As part of in-depth interviews and public meetings, several businesses owners reported that bonding requirements were a barrier for small businesses, particularly minority- and woman-owned businesses. Currently, prime contractors are responsible for ensuring their subcontractors are appropriately bonded and assisting them with bonding, as necessary. Caltrans should consider implementing an “owner controlled” bonding program by shifting bonding requirements away from prime contractors and into the hands of Caltrans or third parties that can assist subcontractors as necessary. Similarly, subcontractors should not face additional bonding or insurance requirements if prime contractors’ bonds are sufficient to cover the entire project. In addition, Caltrans could consider breaking up multiyear projects into smaller, annual pieces to help DBEs and other small businesses avoid reaching their bonding limits. For example, a three-year project worth \$6 million could be broken down into three annual pieces each worth \$2 million, which would reduce bonding requirements for each individual piece. Finally, Caltrans could partner with financial institutions to standardize bonding rates at more equitable levels. Currently, small businesses—including DBEs—receive higher bond rates, making it more difficult for them to get bonds relative to larger businesses.

5. Small business prime program. Disparity analysis results indicated substantial disparities for most relevant racial/ethnic and gender groups on prime contracts Caltrans and subrecipient local agencies awarded during the study period. Caltrans might consider reserving select small prime contracts for small business bidding to encourage the participation of minority- and woman-owned businesses as prime contractors. To ensure a small business prime program effectively encourages the participation of small businesses, Caltrans should consider limiting bidding on eligible contracts to certified small businesses, regardless of whether larger business are able to submit lower bids.

6. Subcontracting minimums. Subcontracts often represent accessible opportunities for small businesses, including many minority- and woman-owned businesses, to become involved in an organization’s contracting and procurement. However, subcontracting accounts for a relatively small percentage of the total contract and procurement dollars Caltrans and subrecipient local agencies award. For example, during the study period, subcontracting

represented only 24 percent of the total transportation-related work Caltrans and subrecipient local agencies awarded. To increase subcontract opportunities, Caltrans could consider implementing a program that requires prime contractors to subcontract a minimum amount of project work. For specific types of contracts where subcontracting opportunities might exist, Caltrans could set a minimum percentage of work to be subcontracted. Prime contractors would then have to meet or exceed those minimums in order for their bids or proposals to be considered responsive. If Caltrans were to implement such a program, it should include GFEs provisions that would require prime contractors to document their efforts to identify and include potential subcontractors in their bids or proposals.

7. Vendor registration and electronic bidding. Many in-depth interview respondents shared that they experienced great difficulty registering as vendors with Caltrans as well as engaging in electronic bidding. Most of those difficulties are due to a lack of understanding of the relationship between NAICS codes and Caltrans work codes as well as an inability for businesses to update their NAICS codes if their capabilities change or grow. By clarifying the relationship among different codes and simplifying the process to change or update them, Caltrans could improve the experiences of businesses trying to bid on Caltrans work and could make certain opportunities more accessible to a larger number of businesses.

C. Contract Administration Policies

Based on recommendations from stakeholders and a review of Caltrans policies, BBC recommends Caltrans consider additional measures designed to support minority- and woman-owned businesses as part of administering contracts, including in the areas of:

- Prompt payment;
- Data collection;
- Subcontractor utilization; and
- Working with contracting staff.

1. Prompt payment. As part of in-depth interviews and surveys, several businesses, including many minority- and woman-owned businesses, reported difficulties with receiving payment in a timely manner on government contracts, particularly when they work as subcontractors and suppliers. Many businesses also commented that having capital on hand is crucial to business success and often a challenge for small businesses. Caltrans should consider reviewing and strengthening its prompt payment processes to ensure timely payment to prime contractors and from prime contractors to subcontractors or suppliers, ideally within a specified maximum number of days after accepting invoices. Caltrans should consider making efforts to further enforce those requirements and create electronic systems to track and confirm subcontractor payments. For example, the Los Angeles County Metropolitan Transportation Authority has established procedures for alerting subcontractors of reported prime contractor payments and requiring subcontractors to confirm payment. Caltrans may also consider establishing harsher penalties for prime contractors that receive stop notices due to non-payment of subcontractors.

Subcontractors also noted that if a prime contractor's invoice is in dispute with Caltrans, regardless of whether the disputed elements of the invoice involved subcontractors' work,

subcontractors must wait on payments until the dispute is resolved. Caltrans should consider developing alternative payment options for subcontractors' portions of disputed invoices if the disputes are not related to subcontractors' work. Doing so might help ensure subcontractors receive payments in a timely manner and ensure minority- and woman-owned businesses have enough operating capital to remain competitive and successful.

2. Data collection. Caltrans maintains comprehensive data on the prime contracts it and subrecipient local agencies award, and those data are generally well-organized and accessible. On Caltrans contracts, the agency also collects subcontract data for first-tier subcontracts worth more than \$10,000 or 0.5 percent of total contract amounts. Caltrans collects those data through paper copies of forms prime contractors submit to contract managers or resident engineers. The agency should consider implementing an electronic data collection system for subcontracting data and consider streamlining and simplifying the forms required for reporting subcontractor participation. A contract database would help Caltrans track data more efficiently, identify when contract managers or resident engineers have not submitted subcontract data, and reduce potential mistakes in interpreting hand-written forms.

Caltrans should also consider collecting comprehensive data on all Local Assistance subcontracts, regardless of subcontractors' characteristics or whether they are certified as DBEs for *all* relevant prime contracts (e.g., state- and FHWA-funded contracts). Collecting subcontract data on all relevant contracts will help ensure Caltrans monitors the participation of minority- and woman-owned businesses accurately, identifies additional businesses that could become certified as DBEs, and identifies future subcontracting opportunities for minority- and woman-owned businesses. Collecting the following data on all subcontracts would be appropriate:

- Subcontractor name, address, phone number, and email address;
- Type of associated work;
- Subcontract award amount;
- Subcontract paid-to-date amounts;
- Race/ethnicity and gender of owners; and
- Certification status.

Caltrans should consider collecting those data as part of the Local Assistance grant process and also requiring subrecipient local agencies to submit payment data on prime contracts and subcontracts as part of the reporting process for all projects. Caltrans should train relevant department and subrecipient local agency staff to collect and enter subcontract data accurately and consistently.

3. Subcontractor participation. There are several considerations Caltrans could make regarding subcontractor participation in its contracts and procurements.

a. Subcontract commitments. Anecdotal evidence suggests subcontractors are often not used to the full extent of their subcontracts with prime contractors. Caltrans should consider tracking subcontractor participation electronically on an invoice-by-invoice basis to ensure prime contractors use subcontractors to the full extent of their subcontracts on projects. In addition to

tracking subcontractor payments, establishing points of contact between subcontractors and Caltrans to address any underutilization or subcontractor substitutions may help ensure minority- and woman-owned businesses receive the work they were committed at the time of bid. Interview and public meeting participants made a number of additional suggestions to maximize work on subcontracts, including inviting subcontractors to contract negotiation meetings to discuss their expected portions of contracts, notifying the entire team when contracts have been awarded, establishing stricter regulations around subcontract changes and subcontractor substitutions, and considering prime contractors' past use of subcontractors relative to subcontract commitments a factor during bid evaluations.

b. Using the same businesses. The disparity study indicated that a substantial portion of the contract and procurement dollars Caltrans and subrecipient local agencies awarded to minority- and woman-owned businesses during the study period were largely concentrated with a relatively small number of businesses, particularly subcontractors. Caltrans could consider using bid and contract language to encourage prime contractors to partner with subcontractors and suppliers with which they have never worked. For example, Caltrans might ask prime contractors to submit information about the efforts they made to identify and team with businesses with which they have not worked as part of their bids. Caltrans could award evaluation points or price preferences based on the degree to which prime contractors partner with subcontractors with which they have not previously worked.

4. Working with contracting staff. Businesses with experience working with Caltrans rarely have issues navigating Caltrans' contract requirements. However, businesses with relatively limited experience working with the agency have various difficulties. Anecdotal evidence indicates that when businesses experience challenges during contract performance, finding the appropriate Caltrans employee to contact can be difficult. Many businesses report that they are given the "run around." That is, they are redirected to Caltrans staff who are either unwilling or incapable of resolving their issues. With payment issues, subcontractors are typically redirected to their prime contractors, even if the issues are because of lack of responses from their prime contractors. Caltrans should increase the visibility of appropriate points of contact for contract issues and District Small Business Liaisons (DSBLs) for small business advocacy. Creating additional liaison positions, or expanding the responsibilities of existing staff, to resolve issues between prime contractors and subcontractors about payment, contract specifications, and other issues would help small businesses to perform Caltrans work more successfully.

D. OCR Programs

In addition to program measures surrounding procurement and contracting, OCR should consider implementing or strengthening its programs related to encouraging the participation of minority- and woman-owned businesses in Caltrans contracting, including:

- The Federal DBE program;
- Insurance assistance;
- Small Business Enterprise (SBE) programs; and
- Training and outreach.

1. The Federal DBE program. Anecdotal evidence indicates that Caltrans' implementation of the Federal DBE program is well-regarded and seen as beneficial to disadvantaged businesses. However, Caltrans' could consider certain refinements to its implementation of the program.

a. Project support. Comments from in-depth interviews, public meetings, and focus groups suggest the support Caltrans offers during contract performance is insufficient and additional mentoring opportunities for DBEs are necessary. To improve the efficacy and reach of the Federal DBE program, Caltrans could consider expanding the roles and visibility of existing DSBLs to help mediate contract disputes between DBEs and prime contractors; ensure DBE payment in a timely fashion; facilitate formal complaint or grievance procedures and ensure protection of the aggrieved party; and recruit potential mentors and proteges for mentorship programs Caltrans organizes or promotes.

b. Certification database. Anecdotal evidence suggests that the certification database and procurement sites Caltrans maintains have outdated information and do not contain all of the necessary information to find appropriate DBE-certified businesses. Caltrans should consider requesting additional information during certification and registration processes to allow prime contractors to identify relevant subcontractors more easily and vice versa. For example, Caltrans might ask DBEs to indicate the specific regions in California where they are able to perform work and serve customers. Many businesses noted that they can only perform work cost effectively within a certain radius of their offices, usually 100 miles or less. Eliminating businesses unavailable for work in specific regions can help decrease the burden for prime contractors searching for DBE partners. In addition, including a "Capabilities Narrative" similar to what the Small Business Administration includes on its SBE certification site might be useful so businesses could better describe the types of work they perform.

Anecdotal evidence from both prime contractors and subcontractors indicates that it is exceptionally difficult to update or change NAICS codes in which businesses initially register or certify. Such difficulties might prevent DBEs that expand or change their lines of work from being offered work opportunities in their new lines of work, because their work will only count toward meeting DBE contract goals in the NAICS codes in which they were originally certified. The process to update or change NAICS codes should be streamlined, and Caltrans should provide training on NAICS codes during registration and certification processes to help prevent businesses from inappropriately identifying their areas of work.

c. GFEs. Anecdotal information from interviews, focus groups, public meetings, and written testimony indicate that GFEs are seen as onerous for prime contractors to complete and for subcontractors to respond to, often resulting in insufficient attempts to build project teams. Expanding the use of online platforms such as the "opt-in" feature on Contractor's Corner might improve communication between prime contractors and subcontractors. Allowing for subcontractors to indicate regions of interest through the opt-in feature may also reduce the burden for prime contractors searching for available subcontractors and improve the requests subcontractors receive. Although the opt-in feature can streamline GFEs procedures, it should not replace other requirements.

Anecdotal evidence also indicated that some prime contractors do not make genuine efforts to reach out to subcontractors and meet GFEs requirements or incorrectly report that they have

met such requirements. Subcontractors report that prime contractors will collect bid or proposal information from businesses but will not indicate if their information has been included in their bids or proposals or if they won projects. False reporting of DBE participation and falsification of GFEs reduces the number of businesses willing to work with Caltrans. To ensure prime contractors are adequately meeting GFEs requirements, Caltrans should consider regularly and randomly auditing prime contractors' GFEs submissions to verify their validity. In addition, subcontractors reported that prime contractors claim to offer assistance in the form of bonding, insurance, or obtaining equipment or supplies but provide little detail on the nature of such assistance. Caltrans should consider providing more guidance to prime contractors on the type of assistance they can offer as part of meeting GFEs requirements and encouraging them to provide as much detail as possible around those efforts.

d. DBE contract goals. Small businesses as well as minority- and woman-owned businesses also noted challenges regarding the achievement of DBE contract goals.

i. DBEs at time of submission. Multiple businesses noted that prime contractors are not required to meet DBE contract goals at the time of bid submission. Instead, apparent low bidders are given additional time to collect and submit GFEs documentation or DBE subcontracting plans. However, first-tier subcontractors are required to be named at bid opening. If DBE participation goals are not met by apparent low bidders at the time of bid submission through their use of first-tier subcontractors, then the burden often shifts to first-tier subcontractors to find second-tier DBE subcontractors to help prime contractors meet DBE goals. To ensure the responsibility of meeting DBE contract goals remains with prime contractors, Caltrans could consider requiring prime contractors to meet DBE participation goals at the time of bid submission and exclusively through the use of first-tier subcontractors.

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

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

BBC investigated potential overconcentration in Caltrans contracts. There were five specific subindustries in which certified DBEs accounted for 50 percent or more of total subcontract dollars for contracts awarded between January 1, 2015 and December 31, 2019 based on contract data BBC received from Caltrans:

- Trucking, hauling, and storage (93%);
- Other professional services (62%);
- Construction management (61%);
- Other construction materials (56%); and
- Concrete, asphalt, sand, and gravel products (52%).

Because those figures are based only on subcontract dollars, they do not include work that prime contractors self-performed in those areas. If BBC had included self-performed work in those analyses, the percentages for which DBEs accounted would likely have decreased. In addition, the above figures are based on both FHWA- and state-funded contracts and would likely differ if limited to only FHWA-funded contracts. Caltrans should consider reviewing similar information and continuing to monitor the above types of work for potential overconcentration in the future.

2. Insurance assistance. As part of in-depth interviews and surveys, several businesses, including many minority- and woman-owned businesses, reported difficulties obtaining insurance at fair market rates. In 1999, California passed legislation allowing the establishment and use of the Owner Controlled Insurance Programs (OCIP) in Caltrans contracting for contracts and procurements worth more than \$50 million dollars.¹ Through the OCIP, the owner of the project, either Caltrans or a local agency, purchases certain lines of insurance—such as general liability, excess liability, and workers compensation—to cover most of the contractors on a job site. Evidence obtained from Caltrans’ website indicates that the program was active through 2007. To assist businesses in successfully contracting with Caltrans, the agency should reassess the efficacy of the OCIP and reinstate it if its benefits justify the cost of implementation. Caltrans could consider proposing an amendment to Government Code 4420 to lower the dollar threshold for applicable contracts to increase the expected benefits and impact on disadvantaged businesses.

3. Small business (SB) Program. Caltrans currently operates an SB Program for state-funded contracts to encourage the participation of small businesses in that work. The agency should consider improving advertisement of the program and helping businesses understand the differences between the Federal DBE Program and the SB Program. In addition, some stakeholders suggested that the current size limit for small businesses (\$36 million in annual revenues) should be lowered given the difference in capabilities of businesses with \$36 million in annual revenue and those with lower annual revenue. According to those stakeholders, including such a broad range of businesses in the SB Program dilutes the impact of the program for businesses that are “truly” small. Caltrans should consider whether a tiered approach to its SB Program would better meet its objectives (e.g., tiers of microbusinesses, emerging businesses, and small businesses).

4. Training and outreach. As discussed in Chapter 8, Caltrans devotes substantial resources to business outreach and training. There are several refinements Caltrans could consider regarding its training and outreach efforts.

a. Advertising. Although most stakeholders recognize Caltrans’ training and outreach efforts as valuable, many contractors suggested Caltrans should improve its advertising and communication around those measures to reach more businesses across the state. Caltrans could consider more partnerships with state and local trade organizations and other public organizations and offering events more frequently. Caltrans might consider tailoring some events to specific industries or business groups to further maximize their value and provide

¹ Government code 4420(b)

opportunities to foster more extensive connections among participants. Caltrans could also consider making continued use of online procurement fairs, webinars, conference calls, and other tools to provide outreach and technical assistance.

b. Workforce development. In addition, Caltrans should encourage participation in its programs that help diversify the California workforce. 23 CFR Part 230 require departments of transportation to establish on-the-job training programs to encourage greater participation of minorities and women in highway-related construction projects, because workforce representation is an important prerequisite to business ownership. USDOT has established on-the-job and supportive services programs to support such efforts, and Caltrans has established a Pre-Apprenticeship Program to meet the requirements of 23 CFR Part 230. However, the program is not well-advertised or understood by the contracting community. The agency should consider ways it can increase outreach and engagement around the program.

c. DSBL expansion. Many participants in public forums and focus groups noted the value of Caltrans' DSBLs. They work with small businesses in each district to help them with Caltrans' contracting and procurement processes, networking, and certification programs. Caltrans should consider broadening the DSBL program by adding staff, increasing the number of events, and ensuring state and local business groups are aware of those services.

APPENDIX A.

Definitions of Terms

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Definitions of Terms

Appendix A defines terms useful to understanding the 2021 California Department of Transportation Disparity Study report.

49 Code of Federal Regulations (CFR) Part 26

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

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

Anecdotal Information

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

Availability Analysis

An availability analysis assesses the percentage of dollars one might expect a specific group of businesses to receive on contracts or procurements a particular agency awards. The availability analysis in this study is based on the match between various characteristics of potentially available businesses and prime contracts and subcontracts the California Department of Transportation and subrecipient local agencies awarded during the study period.

Business

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

Business Listing

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

California Department of Transportation (Caltrans)

Caltrans is responsible for the planning, construction, operation, and maintenance of the transportation system throughout California, including highways and bridges, airports, public transit, rail freight, and rail passenger systems. As a United States Department of Transportation fund recipient, Caltrans is required to implement the Federal DBE Program. It also operates the Unified Certification Program and is responsible for DBE certification throughout California.

Compelling Governmental Interest

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

Consultant

A consultant is a business that performs professional services contracts.

Contract

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

Contract Element

A contract element is either a prime contract or subcontract.

Contractor

A contractor is a business that performs construction contracts.

Control

Control means exercising management and executive authority of a business.

Custom Census Availability Analysis

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

Disadvantaged Business Enterprise (DBE)

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

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

A determination of economic disadvantage includes assessing businesses' gross revenues (maximum revenue limits ranging from \$7 million to \$26.29 million depending on work type) and business owners' personal net worth (maximum of \$1.32 million excluding equity in a home and in the business). Some minority- and woman-owned businesses do not qualify as DBEs because of gross revenue or net worth requirements. Businesses owned by non-Hispanic white men can also be certified as DBEs if those businesses meet the economic requirements set forth in 49 CFR Part 26.

Disparity

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

Disparity Analysis

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

Disparity Index

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

Dun & Bradstreet (D&B)

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

Federal DBE Program

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

Federal Highway Administration (FHWA)

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.

FHWA-funded Contract

An FHWA-funded contract is any contract or project funded in whole or in part with FHWA financial assistance, including loans. The study team considered a contract to be FHWA-funded if it included at least \$1 of FHWA funding.

Firm

See *business*.

Industry

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

Majority-owned Business

A majority-owned business is a for-profit business that is at least 51 percent owned and controlled by non-Hispanic white men.

Minority

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

Minority-owned Business

A minority-owned business is a business with at least 51 percent ownership and control by individuals who identify themselves with one of the racial/ethnic groups presumed to be disadvantaged according to the Federal DBE Program: Asian Pacific Americans, Black Americans, Hispanic Americans, Native Americans, or Subcontinent Asian Americans. A business does not have to be certified as a DBE to be considered a minority-owned business. The study team considers businesses owned by minority women as minority-owned businesses.

Narrow Tailoring

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

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

Participation

See utilization.

Potential DBE

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

Prime Consultant

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

Prime Contract

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

Prime Contractor

A prime contractor is a construction business that performs prime contracts directly for an end user, such as Caltrans.

Procurement

See contract.

Project

A project refers to a construction, professional services, or goods and other services endeavor Caltrans or subrecipient local agencies bid out during the study period. A project could include one or more prime contracts and corresponding subcontracts.

Proposition 209

Proposition 209, which California voters passed in 1996 and became effective in 1997, amended Section 31, Article 1 of the California Constitution to prohibit discrimination and the use of race- and gender-based preferences in public contracting, public employment, and public education. Thus, Proposition 209 prohibits government agencies in California—including Caltrans—from using race- or gender-conscious measures when awarding state-funded contracts. Proposition 209 does not prohibit those actions if an agency is required to take them “to establish or maintain eligibility for any federal program, if ineligibility would result in a loss of federal funds to the state,” which is why Caltrans can legally use race- and gender-conscious measures as part of its implementation of the Federal DBE Program.

Race- and Gender-conscious Measures

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

Race- and Gender-neutral Measures

Race- and gender-neutral measures are measures designed to remove potential barriers for businesses attempting to do work with an agency, regardless of the race/ethnicity or gender of the owners. Race- and gender-neutral measures might include assistance in overcoming bonding and financing obstacles, simplifying bidding procedures, providing technical assistance, and establishing programs to assist start-ups.

Rational Basis

Government agencies that implement contracting programs that rely only on race- and gender-neutral measures must show a rational basis for their programs. Showing a rational basis requires agencies to demonstrate their contracting programs are rationally related to a legitimate government interest. It is the lowest threshold for evaluating the legality of government contracting programs. When courts review programs based on a rational basis, only the most egregious violations lead to programs being deemed unconstitutional.

Relevant Geographic Market Area

The relevant geographic market area is the geographic area in which the businesses to which Caltrans awards most of its contracting dollars are located. Case law related to contracting programs and disparity studies requires disparity study analyses to focus on the relevant geographic market area. The relevant geographic market area for the 2021 Caltrans Disparity Study is the state of California.

State-funded Contract

A state-funded contract is any contract or project wholly funded by state or local sources. That is, they do not include any United States Department of Transportation or other federal funds.

Statistically Significant Difference

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

Strict Scrutiny

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

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

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

Study Period

The study period is the time period on which the study team focused for the utilization, availability, and disparity analyses. Caltrans or subrecipient local agencies had to have awarded a contract during the study period for the contract to be included in the study team's analyses. The study period for the disparity study was January 1, 2015 through December 31, 2019.

Subconsultant

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

Subcontract

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

Subcontractor

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

Subindustry

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

Subrecipient Local Agency

A subrecipient local agency is a California agency that receives passthrough FHWA funds from Caltrans via grants or other means for highway and road construction projects. Subrecipient local agencies that receive passthrough FHWA funds must comply with Caltrans' implementation of the Federal DBE Program when awarding associated contracts and procurements.

Utilization

Utilization refers to the percentage of total dollars associated with a particular set of contracts Caltrans or subrecipient local agencies awarded to a specific group of businesses. The study team uses the term *utilization* synonymously with *participation*.

Woman-owned Business

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

APPENDIX B.

Legal Framework and Analysis

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APPENDIX B.

Legal Framework and Analysis

EXECUTIVE SUMMARY

A. Introduction

In this appendix, Holland & Knight LLP analyzes recent cases regarding the Federal Disadvantaged Business Enterprise (“Federal DBE”) Program,¹ reviews instructive guidance and authorities regarding the Federal Airport Concessions Disadvantaged Business Enterprise (Federal ACDBE) Program,² and provides an analysis of the implementation of the Federal DBE and ACDBE Programs by local and state governments. The Federal DBE Program was continued and reauthorized by the 2015 Fixing America’s Surface Transportation Act (FAST Act).³ In October 2018, Congress passed the FAA Reauthorization Act.⁴ The appendix also reviews recent cases involving local and state government minority and women-owned and disadvantaged-owned business enterprise (“MBE/WBE/DBE”) programs, which are instructive to the study and MBE/WBE/DBE programs. The appendix provides a summary of the legal framework for the disparity study as applicable to the California DOT (Caltrans).

Appendix B begins with a review of the landmark United States Supreme Court decision in *City of Richmond v. J.A. Croson*.⁵ *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*,⁶ (“*Adarand I*”), which applied the strict scrutiny analysis set forth in *Croson* to federal programs that provide federal assistance to a recipient of federal funds. The Supreme Court’s decisions in *Adarand I* and *Croson*, and subsequent cases and authorities provide the basis for the legal analysis in connection with the study.

The legal framework analyzes and reviews significant recent court decisions that have followed, interpreted, and applied *Croson* and *Adarand I* to the present and that are applicable to this disparity study, the Federal DBE Program and Federal ACDBE Program and their implementation by state and local governments and recipients of federal funds, MBE/WBE/DBE programs, and the strict scrutiny analysis. In particular, this analysis reviews in Section D below

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

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

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

⁴ Pub L. 115-254, H.R. 302 § 157, October 5, 2018, 132 Stat 3186.

⁵ *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989).

⁶ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

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.*⁷ and *Western States Paving Co. v. Washington State DOT*,⁸ *Orion Insurance Group, Ralph G. Taylor v. Washington Minority & Women’s Business Enterprise, U.S. DOT, et al.*⁹ and the recent non-published decision in *Mountain West Holding Co. v. Montana, Montana DOT, et al.*¹⁰, and the District Court decision in *M.K. Weeden Construction v. Montana, Montana DOT, et al.*¹¹.

In addition, the analysis reviews in Section E below recent federal cases from other jurisdictions 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*,¹² *Northern Contracting, Inc. v. Illinois DOT*,¹³ *Sherbrooke Turf, Inc. v. Minnesota DOT and Gross Seed v. Nebraska Department of Roads*,¹⁴ *Geyer Signal, Inc. v. Minnesota DOT*,¹⁵ *Adarand Constructors, Inc. v. Slater*¹⁶ (“Adarand VII”), *Midwest Fence Corp. v. U.S. DOT, FHWA, Illinois DOT, Illinois State Toll Highway Authority, et al.*,¹⁷ *Geod Corporation v. New Jersey Transit Corporation*,¹⁸ and *South Florida Chapter of the A.G.C. v. Broward County, Florida*.¹⁹

The analysis also reviews recent court decisions that involved challenges to MBE/WBE/DBE programs in other jurisdictions in Section F below, which are instructive to the study and Caltrans.

The appendix points out recent informative Congressional findings as to discrimination regarding MBE/WBE/DBEs, including relating to the Federal Airport Concessions Disadvantaged

⁷ *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, 713 F.3d 1187, (9th Cir. 2013).

⁸ *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983 (9th Cir. 2005), cert. denied, 546 U.S. 1170 (2006).

⁹ *Orion Insurance Group, a Washington Corporation, Ralph G. Taylor, an individual, Plaintiffs v. Washington State Office of Minority & Woman’s Business Enterprises, United States DOT, et al.*, 2018 WL 6695345 (9th Cir. 2018), Memorandum opinion (not for publication), Petition for Rehearing denied, February 2019. Petition for Writ of Certiorari filed with the U.S. Supreme Court on April 22, 2019, which is pending.

¹⁰ *Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.*, 2017 WL 2179120 Memorandum Opinion (Not for Publication) (9th Cir. 2017). The case on remand voluntarily dismissed by stipulation of parties (March 14, 2018).

¹¹ *M. K. Weeden Construction v State of Montana, Montana DOT*, 2013 WL 4774517 (D. Mont. 2013).

¹² *Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al.*, 799 F.3d 676, 2015 WL 4934560 (7th Cir. 2015), cert. denied, 2016 WL 193809 (2016); *Dunnet Bay Construction Co. v. Illinois DOT, et. al.* 2014 WL 552213 (C. D. Ill. 2014), affirmed by *Dunnet Bay*, 2015 WL 4934560 (7th Cir. August 19, 2015).

¹³ *Northern Contracting, Inc. v. Illinois DOT*, 473 F.3d 715 (7th Cir. 2007).

¹⁴ *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).

¹⁵ *Geyer Signal, Inc. v. Minnesota DOT*, 2014 W.L. 1309092 (D. Minn. 2014).

¹⁶ *Adarand Constructors, Inc. v. Slater, Colorado DOT*, 228 F.3d 1147 (10th Cir. 2000) (“Adarand VII”).

¹⁷ *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).

¹⁸ *Geod Corp. v. New Jersey Transit Corp.*, 766 F. Supp.2d. 642 (D. N.J. 2010).

¹⁹ *South Florida Chapter of the A.G.C. v. Broward County, Florida*, 544 F. Supp.2d 1336 (S.D. Fla. 2008).

Business Enterprise (Federal ACDBE) Program,²⁰ and the Federal DBE Program that was continued and reauthorized by the Fixing America's Surface Transportation Act (2015 FAST Act); which set forth Congressional findings as to discrimination against minority-women-owned business enterprises and disadvantaged business enterprises, including from disparity studies and other evidence.²¹ In October 2018, Congress passed the FAA Reauthorization Act, which also provides Congressional findings as to discrimination against MBE/WBE/DBEs, including from disparity studies and other evidence.²² Congress is currently at the time of this report considering legislation (H.R. 2, Section 1101, Moving Forward Act) again to reauthorize the Federal DBE Program and its implementation by local and state governments based on findings of continuing discrimination and related barriers posing significant obstacles for MBE/WBE/DBEs.

The analyses of these and other recent cases summarized below, including the Ninth Circuit decisions in Section D below, *AGC, SDC v. Cal. DOT*, *Western States Paving*, *Mountain West Holding, Inc.*, *M.K. Weeden and Orion Insurance Group*, are instructive to the disparity study because they are the most recent and significant decisions by courts setting forth the legal framework applied to the Federal DBE and ACDBE Programs and their implementation by local and state governments receiving U.S. DOT funds, disparity studies, MBE/WBE/DBE Programs, and construing the validity of government programs involving MBE/WBE/DBE/ACDBEs. They also are pertinent in terms of an analysis and consideration and, if legally appropriate under the strict scrutiny standard, preparation of a narrowly tailored DBE Program by a state DOT implementing the Federal DBE Program and local or state government MBE/WBE/DBE programs submitted in compliance with the case law, and applicable federal regulations, including 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 in the Ninth Circuit Court of Appeals, recommended the use of disparity studies by recipients of federal financial assistance to examine whether or not there is evidence of discrimination and its effects, and how remedies might be narrowly tailored in developing their

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

²¹ Pub. L. 114-94, H.R. 22, § 1101(b), December 4, 2015, 129 Stat. 1312.

²² Pub. L. 115-254, H.R. 302 § 157, October 5, 2018, 132 Stat 3186.

DBE Program to comply with the Federal DBE Program.²³ 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 26.²⁴ The USDOT's Guidance provides that recipients should consider evidence of discrimination and its effects.²⁵

The USDOT's Guidance is recognized by the federal regulations as "valid, and express the official positions and views of the Department of Transportation"²⁶ 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."²⁷ Accordingly, the USDOT advised federal aid recipients that any use of race-conscious measures must be predicated on evidence that the recipient has concerning discrimination or its effects within the local transportation contracting marketplace.²⁸

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.²⁹ 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.³⁰

There are other recent cases in the Ninth Circuit instructive for the study, including as follows:

²³ *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.

²⁴ *USDOT Guidance*, available at http://www.fhwa.dot.gov/civilrights/dbe_memo_a5.htm (January 2006)

²⁵ *Id.*

²⁶ *Id.*, 49 CFR § 26.9; See, 49 CFR § 23.13.

²⁷ *Western States Paving*, 407 F.3d at 996; see, also, *Br. for the United States*, at 28 (April 19, 2004).

²⁸ *DOT Guidance*, available at 71 Fed. Reg. 14,775 and http://www.fhwa.dot.gov/civilrights/dbe_memo_a5.htm (January 2006).

²⁹ *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).

³⁰ *Id.*, *Associated General Contractors of America, San Diego Chapter, Inc. v. California DOT*, Slip Opinion Transcript of U.S. District Court at 42-56.

In *Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.*,³¹ the Ninth Circuit and the district court applied the decision in *Western States*³², and the decision in *AGC, San Diego v. California DOT*,³³ 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.³⁴ 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.”³⁵ 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.”³⁶

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.’”³⁷ 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.”³⁸

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.

The District Court decision in the Ninth Circuit in Montana, *M.K. Weeden*,³⁹ 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.

³¹ 2017 WL 2179120 (9th Cir. 2017), Memorandum opinion, (Not for Publication), dismissing in part, reversing in part and remanding the U.S. District Court decision at 2014 WL 6686734 (D. Mont. 2014).

³² 407 F.3d 983 (9th Cir. 2005)

³³ 713 F.3d 1187 (9th Cir. 2013)

³⁴ 2014 WL 6686734 at *2 (D. Mont. 2014)

³⁵ *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).

³⁶ *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.

³⁷ *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).

³⁸ *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).

³⁹ *M.K. Weeden*, 2013 WL 4774517.

Another recent case in the Ninth Circuit is *Orion Insurance Group; Ralph G. Taylor, Plaintiffs v. Washington State Office of Minority & Women's Business Enterprises, United States DOT, et. al.*⁴⁰ 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.

Plaintiff Taylor received results from a genetic ancestry test that estimated he was 90 percent European, 6 percent Indigenous American, and 4 percent Sub-Saharan African. Taylor submitted an application to OMWBE seeking to have Orion certified as a MBE under Washington State law. Taylor identified himself as Black. His application was initially rejected, but after Taylor appealed, OMWBE voluntarily reversed their decision and certified Orion as an MBE. Plaintiffs submitted to OMWBE Orion’s application for DBE certification under federal law. Taylor identified himself as Black and Native American in the Affidavit of Certification.

Orion’s DBE application was denied because there was insufficient evidence that: he was a member of a racial group recognized under the regulations; was regarded by the relevant community as either Black or Native American; or that he held himself out as being a member of either group. OMWBE found the presumption of disadvantage was rebutted and the evidence was insufficient to show Taylor was socially and economically disadvantaged.

The District court held OMWBE did not act arbitrarily or capriciously when it found the presumption was rebutted that Taylor was socially and economically disadvantaged because there was insufficient evidence he was either Black or Native American. By requiring individualized determinations of social and economic disadvantage, the court found the Federal DBE Program requires states to extend benefits only to those who are actually disadvantaged.

The District court dismissed the claim that, on its face, the Federal DBE Program violates the Equal Protection Clause, and the claim that the Defendants, in applying the Federal DBE Program to him, violated the Equal Protection Clause. The court found no evidence that the application of the federal regulations was done with an intent to discriminate against mixed-race individuals or with racial animus, or creates a disparate impact on mixed-race individuals. The court held Plaintiffs failed to show that either the State or Federal Defendants had no rational basis for the difference in treatment.

The District court dismissed claims that the definitions of “Black American” and “Native American” in the DBE regulations are impermissibly vague. Plaintiffs’ claims were dismissed against the State Defendants for violation of Title VI because Plaintiffs failed to show the State engaged in intentional racial discrimination. The DBE regulations’ requirement that the State make decisions based on race was held constitutional.

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

⁴⁰ 2018 WL 6695345 (9th Cir. December 19, 2018)(Memorandum)(Not for Publication).

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.

Also, in a split in approach with the Ninth Circuit regarding the legal standard, burden and analysis in connection with a state government implementing the Federal DBE Program, the Seventh Circuit Court of Appeals in *Midwest Fence Corp. v. U.S. DOT, FHWA, Illinois DOT, Illinois State Toll Highway Authority, et al.*,⁴¹ and in *Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al.*,⁴² upheld the implementation of the Federal DBE Program by the Illinois DOT (IDOT).⁴³ 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.⁴⁴ The Seventh Circuit most recently in *Midwest Fence* also held the Federal DBE Program is facially constitutional, and upheld the implementation of that federal Program by IDOT in its DBE Program following the *Northern Contracting* decision. These cases are reviewed in detail in Section E below. The Seventh Circuit agreed with the Eighth, Ninth, and Tenth Circuits that the Federal DBE Program is narrowly tailored on its face, and thus survives strict scrutiny.⁴⁵

These decisions regarding a state DOT implementing the Federal DBE Program and MBE/WBE/DBE cases throughout the country will be analyzed in more detail in the Appendix below.

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.⁴⁶ 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

⁴¹ 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016).

⁴² 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016).

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

⁴⁴ *Id.*

⁴⁵ 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016)

⁴⁶ 488 U.S. 469 (1989).

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."⁴⁷ 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.⁴⁸ The Court also found there were only generalized allegations of societal and industry discrimination coupled with positive legislative motives. The Court concluded that this was insufficient evidence to demonstrate a compelling interest in awarding public contracts on the basis of race.

Similarly, the Court held the City failed to demonstrate that the plan was "narrowly tailored" for several reasons, including because there did not appear to have been any consideration of race-neutral means to increase minority business participation in city contracting, and because of the over inclusiveness of certain minorities in the "preference" program (for example, Aleuts) without any evidence they suffered discrimination in Richmond.⁴⁹

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.⁵⁰ 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."⁵¹

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

⁴⁷ 488 U.S. at 500, 510.

⁴⁸ 488 U.S. at 480, 505.

⁴⁹ 488 U.S. at 507-510.

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

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

work in public construction projects.”⁵² “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.”⁵³

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.”⁵⁴ 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.”⁵⁵

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.”⁵⁶ “Under such circumstances, the city could act to dismantle the closed business system by taking appropriate measures against those who discriminate on the basis of race or other illegitimate criteria.” “In the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion.”⁵⁷

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.”⁵⁸

2. Adarand Constructors, Inc. v. Peña (“Adarand I”), 515 U.S. 200 (1995)

In *Adarand I*, the U.S. Supreme Court extended the holding in *Croson* and ruled that all federal government programs that use racial or ethnic criteria as factors in procurement decisions must pass a test of strict scrutiny in order to survive constitutional muster.

The cases interpreting *Croson* and *Adarand I* are the most recent and significant decisions by federal courts setting forth the legal framework for disparity studies as well as the predicate to satisfy the constitutional strict scrutiny standard of review, which applies to the implementation of the Federal DBE Program and ACDBE Program by recipients of federal funds.

⁵² 488 U.S. at 502.

⁵³ *Id.*

⁵⁴ 488 U.S. at 509.

⁵⁵ *Id.*

⁵⁶ 488 U.S. at 509.

⁵⁷ *Id.*

⁵⁸ 488 U.S. at 492.

C. The Legal Framework Applied to State and Local Government MBE/WBE/DBE Programs and Their Implementation of the Federal DBE and ACDBE Programs

The following provides an analysis for the legal framework focusing on recent key cases regarding state DOT DBE programs and state and local government DBE programs implementing the Federal DBE and ACDBE Programs and federal regulations, state and local government MBE/WBE/DBE programs, and their implications for a disparity study. The recent decisions involving these programs, the Federal DBE Program, and its implementation by state DOTs and state and local government DBE programs, are instructive because they concern the strict scrutiny analysis, the legal framework in this area, challenges to the validity of MBE/WBE/DBE programs, and an analysis of disparity studies, and implementation of the Federal DBE and ACDBE Programs by local and state government recipients of federal financial assistance (U.S. DOT funds) based on 49 CFR Part 26 and 49 CFR Part 23.

The Federal DBE Program (and ACDBE Program) Implemented By State of Local Governments

It is instructive to analyze the Federal DBE Program and its implementation by state and local governments because the Program on its face and as applied by state and local governments has survived challenges to its constitutionality, concerned application of the strict scrutiny standard, considered findings as to disparities, discrimination and barriers to MBE/WBE/DBEs, examined narrow tailoring by local and state governments of their DBE program implementing the federal program, and involved consideration of disparity studies. The cases involving the Program and its implementation by state DOTs and state and local governments are informative, recent and applicable to the legal framework regarding state DOT DBE programs and MBE/WBE/DBE state and local government programs, and disparity studies.

After the *Adarand* decision, the U.S. Department of Justice in 1996 conducted a study of evidence on the issue of discrimination in government construction procurement contracts, which Congress relied upon as documenting a compelling governmental interest to have a federal program to remedy the effects of current and past discrimination in the transportation contracting industry for federally-funded contracts.⁵⁹ Subsequently, in 1998, Congress passed the Transportation Equity Act for the 21st Century (“TEA-21”), which authorized the United States Department of Transportation to expend funds for federal highway programs for 1998 - 2003. Pub.L. 105-178, Title I, § 1101(b), 112 Stat. 107, 113 (1998). The USDOT promulgated new regulations in 1999 contained at 49 CFR Part 26 to establish the current Federal DBE Program. The TEA-21 was subsequently extended in 2003, 2005 and 2012. The reauthorization of TEA-21 in 2005 was for a five year period from 2005 to 2009. Pub.L. 109-59, Title I, § 1101(b), August 10, 2005, 119 Stat. 1153-57 (“SAFETEA”). In July 2012, Congress passed the Moving Ahead for Progress in the 21st Century Act (“MAP-21”).⁶⁰ In December 2015, Congress passed the Fixing America’s Surface Transportation Act (“FAST Act”).⁶¹ Most recently, in October 2018, Congress

⁵⁹ *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*.

⁶⁰ *Pub. L. 112-141, H.R. 4348, § 1101(b)*, July 6, 2012, 126 Stat 405.

⁶¹ *Pub. L. 114-94, H.R. 22, § 1101(b)*, December 4, 2015, 129 Stat. 1312.

passed the FAA Reauthorization Act.⁶² At the present time, pending in Congress is legislation (H.R. 2, Section 1101, Moving Forward Act) to reauthorize the Federal DBE Program based on findings of continuing discrimination and related barriers posing significant obstacles for MBE/WBE/DBEs.

The Federal DBE Program 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.⁶³

The Federal DBE and ACDBE Programs established responsibility for implementing the DBE and ACDBE Programs to state and local government recipients of federal funds. A recipient of federal financial assistance must set an annual DBE and/or ACDBE goals specific to conditions in the relevant marketplace. Even though an overall annual 10 percent aspirational goal applies at the federal level, it does not affect the goals established by individual state or local governmental recipients. The Federal DBE and ACDBE Programs outline certain steps a state or local government recipient can follow in establishing a goal, and USDOT considers and must approve the goal and the recipient's DBE and ACDBE programs. The implementation of the Federal DBE and ACDBE Programs are substantially in the hands of the state or local government recipient and is set forth in detail in the federal regulations, including 49 CFR Part 26 and section 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 programs. In summary, the recipient establishes a base figure for relative availability of DBEs.⁶⁴ This is accomplished by determining the relative number of ready, willing, and able DBEs and ACDBEs in the recipient's market.⁶⁵ Second, the recipient must determine an appropriate adjustment, if any, to the base figure to arrive at the overall goal.⁶⁶ 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,

⁶² *Pub L. 115-254, H.R. 302 § 157, October 5, 2018, 132 Stat 3186.*

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

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

⁶⁵ *Id.*

⁶⁶ *Id.* at § 26.45(d); *Id.* at § 23.51(d).

education, and training.⁶⁷ 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.⁶⁸

Further, the Federal DBE and ACDBE Programs require state and local government recipients of federal funds to assess how much of the DBE and ACDBE goals can be met through race- and gender-neutral efforts and what percentage, if any, should be met through race- and gender-based efforts.⁶⁹ A state or local government recipient is responsible for seriously considering and determining race- and gender-neutral measures that can be implemented.⁷⁰

Federal aid recipients are to certify DBEs and ACDBEs according to their race/gender, size, net worth and other factors related to defining an economically and socially disadvantaged business as outlined in 49 CFR §§ 26.61-26.73.⁷¹

F.A.A. Reauthorization Act of 2018, FAST Act and MAP-21. In October 2018, December 2015 and in July 2012, Congress passed the F.A.A. Reauthorization Act, FAST Act and MAP-21, respectively, which made “Findings” that “discrimination and related barriers continue to pose significant obstacles for minority- and women-owned businesses seeking to do business in airport-related markets,” in “federally-assisted surface transportation markets,” and that the continuing barriers “merit the continuation” of the Federal ACDBE Program and the Federal DBE Program.⁷² Congress also found in the F.A.A. Reauthorization Act of 2018, the FAST Act and MAP-21 that it received and reviewed testimony and documentation of race and gender discrimination which “provide a strong basis that there is a compelling need for the continuation of the” Federal ACDBE Program and the Federal DBE Program.⁷³

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

- Extends the FAA DBE and ACDBE programs for five years.
- Contains an additional prompt payment provision.
- Increases in the size cap for highway, street, and bridge construction for construction firms working on airport improvement projects.
- Establishes Congressional findings of discrimination that provides a strong basis there is a compelling need for the continuation of the airport DBE program and the ACDBE program to address race and gender discrimination in airport related business.

⁶⁷ *Id.*

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

⁶⁹ 49 CFR § 26.51; 49 CFR § 23.51(a).

⁷⁰ 49 CFR § 26.51(b); 49 CFR § 23.25.

⁷¹ 49 CFR §§ 26.61-26.73; 49 CFR §§ 23.31-23.39

⁷² Pub L. 115-254, H.R. 302 § 157, October 5, 2018, 132 Stat 3186; Pub L. 114-94, H.R. 22, §1101(b), December 4, 2015, 129 Stat 1312; Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.

⁷³ *Id.* at Pub L. 115-254, H.R. 302 § 157, October 5, 2018, 132 Stat 3186; Pub L. 114-94, H.R. 22, § 1101(b)(1) (2015).

SEC. 150 DEFINITION OF SMALL BUSINESS CONCERN.

- Section 47113(a)(1) of title 49, United States Code, is amended as follows:

(1) 'Small business concern'

A. Has the meaning given the term in section 3 of the Small Business Act (15 U.S.C. 632); but in the case of a concern in the construction industry, a concern shall be considered a small business concern if the concern meets the size standard for the NAICS Code 237310, as adjusted by the SBA

SEC. 157 MINORITY AND DISADVANTAGED BUSINESS PARTICIPATION.

(a) Findings. Congress finds the following:

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

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

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

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

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

On December 3, 2015, the Fixing America's Surface Transportation Act" or the ``FAST Act" was passed by Congress, and it was signed by the President on December 4, 2015, as the new five year surface transportation authorization law. It should be noted that the five year 2015 authorization is set to expire in December 2020, unless it is reauthorized. The FAST Act continues the Federal DBE Program and makes the following "Findings" in Section 1101 (b) of the Act:

SEC. 1101. AUTHORIZATION OF APPROPRIATIONS.

(b) Disadvantaged Business Enterprises-

(1) FINDINGS- Congress finds that—

(A) while significant progress has occurred due to the establishment of the disadvantaged business enterprise program, discrimination and related barriers continue to pose significant obstacles for minority- and women-owned businesses seeking to do business in federally assisted surface transportation markets across the United States;

(B) the continuing barriers described in subparagraph (A) merit the continuation of the disadvantaged business enterprise program;

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

(D) the testimony and documentation described in subparagraph (C) demonstrate that discrimination across the United States poses a barrier to full and fair participation in surface transportation-related businesses of women business owners and minority business owners and has impacted firm development and many aspects of surface transportation-related business in the public and private markets; and

(E) the testimony and documentation described in subparagraph (C) provide a strong basis that there is a compelling need for the continuation of the disadvantaged business enterprise program to address race and gender discrimination in surface transportation-related business.

Therefore, Congress in the FAST Act passed on December 3, 2015, found based on testimony, evidence and documentation updated since MAP-21 was adopted in 2012 as follows: (1) discrimination and related barriers continue to pose significant obstacles for minority- and women-owned businesses seeking to do business in federally assisted surface transportation markets across the United States; (2) the continuing barriers described in § 1101(b), subparagraph (A) above merit the continuation of the disadvantaged business enterprise program; and (3) there is a compelling need for the continuation of the disadvantaged business enterprise program to address race and gender discrimination in surface transportation-related business.⁷⁴

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.⁷⁵ In MAP-21, Congress specifically found as follows:

⁷⁴ *Pub L. 114-94, H.R. 22, § 1101(b)*, December 4, 2015, 129 Stat 1312.

⁷⁵ *Pub L. 112-141, H.R. 4348, § 1101(b)*, July 6, 2012, 126 Stat 405.

“(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.”⁷⁶

Thus, Congress in MAP-21 determined based on testimony and documentation of race and gender discrimination that there was “a compelling need for the continuation of the” Federal DBE Program.⁷⁷

USDOT Final Rule, 76 Fed. Reg. 5083 (January 28, 2011).

The United States Department of Transportation promulgated a Final Rule on January 28, 2011, effective February 28, 2011, 76 Fed. Reg. 5083 (January 28, 2011) (“2011 Final Rule”) amending the Federal DBE Program at 49 CFR Part 26.

The Department stated in the 2011 Final Rule with regard to disparity studies and in calculating goals, that it agrees “it is reasonable, in calculating goals and in doing disparity studies, to consider potential DBEs (*e.g.*, firms apparently owned and controlled by minorities or women

⁷⁶ Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.

⁷⁷ *Id.*

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.”⁷⁸

The United States DOT in the 2011 Final Rule stated that there was a continuing compelling need for the DBE program.⁷⁹ 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.”⁸⁰ 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.”⁸¹ This information, the DOT stated, “confirms the continuing compelling need for race- and gender-conscious programs such as the DOT DBE program.”⁸²

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

1. Strict scrutiny analysis. A race- and ethnicity-based program implemented by a state or local government is subject to the strict scrutiny constitutional analysis.⁸³ 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.⁸⁴

⁷⁸ 76 F.R. at 5092.

⁷⁹ 76 F.R. at 5095.

⁸⁰ 76 F.R. at 5095.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Croson*, 448 U.S. at 492-493; *Adarand Constructors, Inc. v. Peña (Adarand I)*, 515 U.S. 200, 227 (1995); see, e.g., *Fisher v. University of Texas*, 133 S.Ct. 2411 (2013); *Midwest Fence v. Illinois DOT*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d 1187, 1195-1200 (9th Cir. 2013); *H.B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Northern Contracting*, 473 F.3d at 721; *Western States Paving*, 407 F.3d at 991; *Sherbrooke Turf*, 345 F.3d at 969; *Adarand VII*, 228 F.3d at 1176 (10th Cir. 2000); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206 (5th Cir. 1999); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586 (3^d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 990 (3^d Cir. 1993).

⁸⁴ *Adarand I*, 515 U.S. 200, 227 (1995); *Midwest Fence v. Illinois DOT*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d 1187, 1195-1200 (9th Cir. 2013); *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Northern Contracting*, 473 F.3d at 721; *Western States Paving*, 407 F.3d at 991 (9th Cir. 2005); *Sherbrooke Turf*, 345 F.3d at 969; *Adarand VII*, 228 F.3d at 1176 (10th Cir. 2000); *Associated Gen. Contractors of Ohio, Inc. v. Drabik (“Drabik II”)*, 214 F.3d 730 (6th Cir. 2000); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206 (5th Cir. 1999); *Eng’g Contractors*

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.⁸⁵ 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.⁸⁶ 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.⁸⁷

The federal courts have held that, with respect to the Federal DBE Program, recipients of federal funds, such as state DOTs, do not need to independently satisfy this prong because Congress has satisfied the compelling interest test of the strict scrutiny analysis.⁸⁸ 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).⁸⁹

It is instructive to review the type of evidence utilized by Congress and considered by the courts to support the Federal DBE Program, and its implementation by local and state governments and agencies, which is similar to evidence considered by cases ruling on the 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

Ass’n of South Florida, Inc. v. Metro. Dade County, 122 F.3d 895 (11th Cir. 1997); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 990 (3d Cir. 1993).

⁸⁵ *Id.*

⁸⁶ *Id.*; see, e.g., *Concrete Works, Inc. v. City and County of Denver (“Concrete Works I”)*, 36 F.3d 1513, 1520 (10th Cir. 1994).

⁸⁷ See, e.g., *Concrete Works I*, 36 F.3d at 1520.

⁸⁸ *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.

⁸⁹ *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.

of minority-owned construction businesses, and of barriers to entry.”⁹⁰ 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).⁹¹ The evidentiary basis on which Congress relied to support its finding of discrimination includes:

- **Barriers to minority business formation.** Congress found that discrimination by prime contractors, unions, and lenders has woefully impeded the formation of qualified minority business enterprises in the subcontracting market nationwide, noting the existence of “good ol’ boy” networks, from which minority firms have traditionally been excluded, and the race-based denial of access to capital, which affects the formation of minority subcontracting enterprise.⁹²
- **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.⁹³
- **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.⁹⁴
- **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.⁹⁵
- **F.A.A. Reauthorization Act of 2018, FAST Act and MAP-21.** In October 2018, December 2015 and in July 2012, Congress passed the F.A.A. Reauthorization Act, FAST Act and MAP-21, respectively, which made “Findings” that “discrimination and related barriers continue to pose significant obstacles for minority- and women-owned businesses seeking to do business in airport-related markets,” in “federally-assisted surface transportation

⁹⁰ *Sherbrooke Turf*, 345 F.3d at 970, (*citing Adarand VII*, 228 F.3d at 1167 – 76 (10th Cir. 2000); *Western States Paving*, 407 F.3d at 992-93.

⁹¹ *See, e.g., Adarand VII*, 228 F.3d at 1167– 76 (10th Cir. 2000); *see also Western States Paving*, 407 F.3d at 992 (Congress “explicitly relied upon” the Department of Justice study that “documented the discriminatory hurdles that minorities must overcome to secure federally funded contracts”); *Geyer Signal, Inc.*, 2014 WL 1309092.

⁹² *Adarand VII*, 228 F.3d. at 1168-70 (10th Cir. 2000); *Western States Paving*, 407 F.3d at 992; *see Geyer Signal, Inc.*, 2014 WL 1309092; *DynaLantic*, 885 F.Supp.2d 237.

⁹³ *Adarand VII*, at 1170-72 (10th Cir. 2000); *see DynaLantic*, 885 F.Supp.2d 237.

⁹⁴ *Id.* at 1172-74 (10th Cir. 2000); *see DynaLantic*, 885 F.Supp.2d 237; *Geyer Signal, Inc.*, 2014 WL 1309092.

⁹⁵ *Adarand VII*, 228 F.3d at 1174-75 (10th Cir. 2000); *see, H. B. Rowe*, 615 F.3d 233, 247-258 (4th Cir. 2010); *Sherbrooke Turf*, 345 F.3d at 973-4.

markets,” and that the continuing barriers “merit the continuation” of the Federal ACDBE Program and the Federal DBE Program.⁹⁶ Congress also found in the F.A.A. Reauthorization Act of 2018, the FAST Act and MAP-21 that it received and reviewed testimony and documentation of race and gender discrimination which “provide a strong basis that there is a compelling need for the continuation of the” Federal ACDBE Program and the Federal DBE Program.⁹⁷

Burden of proof to establish the strict scrutiny standard. Under the strict scrutiny analysis, and to the extent a state or local governmental entity has implemented a race- and gender-conscious program, the governmental entity has the initial burden of showing a strong basis in evidence (including statistical and anecdotal evidence) to support its remedial action.⁹⁸ If the government makes its initial showing, the burden shifts to the challenger to rebut that showing.⁹⁹ The challenger bears the ultimate burden of showing that the governmental entity’s evidence “did not support an inference of prior discrimination.”¹⁰⁰

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.¹⁰¹ It is well established that “remedying the effects of past or present racial discrimination” is a compelling interest.¹⁰² In addition, the government must also demonstrate “a strong basis in evidence for its conclusion that remedial action [is] necessary.”¹⁰³

⁹⁶ Pub L. 115-254, H.R. 302 § 157, October 5, 2018, 132 Stat 3186; Pub L. 114-94, H.R. 22, §1101(b), December 4, 2015, 129 Stat 1312; Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.

⁹⁷ *Id.* at Pub L. 115-254, H.R. 302 § 157, October 5, 2018, 132 Stat 3186; Pub L. 114-94, H.R. 22, § 1101(b)(1) (2015).

⁹⁸ See *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 241-242, 247-258 (4th Cir. 2010); *Rothe Development Corp. v. Department of Defense*, 545 F.3d 1023, 1036 (Fed. Cir. 2008); *N. Contracting, Inc. Illinois*, 473 F.3d at 715, 721 (7th Cir. 2007) (Federal DBE Program); *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983, 990-991 (9th Cir. 2005) (Federal DBE Program); *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d 964, 969 (8th Cir. 2003) (Federal DBE Program); *Adarand Constructors Inc. v. Slater (“Adarand VII”)*, 228 F.3d 1147, 1166 (10th Cir. 2000) (Federal DBE Program); *Eng’g Contractors Ass’n*, 122 F.3d at 916; *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 713 (9th Cir. 1997); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 996, 1005-1007 (3d Cir. 1993); *Geyer Signal, Inc.*, 2014 WL 1309092; *Dynalantic*, 885 F.Supp.2d 237, 2012 WL 3356813; *Hershell Gill Consulting Engineers, Inc. v. Miami Dade County*, 333 F. Supp.2d 1305, 1316 (S.D. Fla. 2004).

⁹⁹ *Adarand VII*, 228 F.3d at 1166; *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 996, 1005-1007 (3d Cir. 1993); *Eng’g Contractors Ass’n*, 122 F.3d at 916; *Geyer Signal, Inc.*, 2014 WL 1309092.

¹⁰⁰ See, e.g., *Adarand VII*, 228 F.3d at 1166; *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 996, 1005-1007 (3d Cir. 1993); *Eng’g Contractors Ass’n*, 122 F.3d at 916; see also *Sherbrooke Turf*, 345 F.3d at 971; *N. Contracting*, 473 F.3d at 721; *Geyer Signal, Inc.*, 2014 WL 1309092.

¹⁰¹ *Id.*; *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Western States Paving*, 407 F.3d at 990; See also *Majeske v. City of Chicago*, 218 F.3d 816, 820 (7th Cir. 2000); *Geyer Signal, Inc.*, 2014 WL 1309092.

¹⁰² *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, e.g., *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 996, 1005-1007 (3d Cir. 1993).

¹⁰³ *Croson*, 488 U.S. at 500; see, e.g., *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 241-242; *Sherbrooke Turf*, 345 F.3d at 971-972; *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 996, 1005-1007 (3d Cir. 1993); *Geyer Signal, Inc.*, 2014 WL 1309092.

Since the decision by the Supreme Court in *Croson*, “numerous courts have recognized that disparity studies provide probative evidence of discrimination.”¹⁰⁴ “An inference of discrimination may be made with empirical evidence that demonstrates ‘a significant statistical disparity between a number of qualified minority contractors ... and the number of such contractors actually engaged by the locality or the locality’s prime contractors.’”¹⁰⁵ Anecdotal evidence may be used in combination with statistical evidence to establish a compelling governmental interest.¹⁰⁶

In addition to providing “hard proof” to support its compelling interest, the government must also show that the challenged program is narrowly tailored.¹⁰⁷ 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.¹⁰⁸ Therefore, notwithstanding the burden of initial production rests with the government, the ultimate burden remains with the party challenging the application of a DBE or MBE/WBE Program to demonstrate the unconstitutionality of an affirmative-action type program.¹⁰⁹

To successfully rebut the government’s evidence, the courts hold that a challenger must introduce “credible, particularized evidence” of its own that rebuts the government’s showing of a strong basis in evidence for the necessity of remedial action.¹¹⁰ 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

¹⁰⁴ *Midwest Fence*, 2015 W.L. 1396376 at *7 (N.D. Ill. 2015), *affirmed*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016); *see, e.g., Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1195-1200; *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Concrete Works of Colo. Inc. v. City and County of Denver*, 36 F.3d 1513, 1522 (10th Cir. 1994), *Geyer Signal*, 2014 WL 1309092 (D. Minn. 2014); *see also, Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 996, 1005-1007 (3d Cir. 1993).

¹⁰⁵ *See e.g., H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Midwest Fence*, 2015 W.L. 1396376 at *7, *quoting Concrete Works*; 36 F.3d 1513, 1522 (*quoting Croson*, 488 U.S. at 509), *affirmed*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016); *see also, Sherbrooke Turf*, 345 F.3d 233, 241-242 (8th Cir. 2003); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 996, 1005-1007 (3d Cir. 1993).

¹⁰⁶ *Croson*, 488 U.S. at 509; *see, e.g., AGC, SDC v. Caltrans*, 713 F.3d at 1196; *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-242 (4th Cir. 2010); *Midwest Fence*, 84 F.Supp. 3d 705, 2015 WL 1396376 at *7, *affirmed*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 996, 1005-1007 (3d Cir. 1993).

¹⁰⁷ *Adarand Constructors, Inc. v. Peña, (“Adarand III”)*, 515 U.S. 200 at 235 (1995); *see, e.g., Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *Majeske v. City of Chicago*, 218 F.3d at 820; *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586, 596-598 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 996, 1005-1007 (3d Cir. 1993).

¹⁰⁸ *Majeske*, 218 F.3d at 820; *see, e.g., Wygant v. Jackson Bd. Of Educ.*, 476 U.S. 267, 277-78; *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *Midwest Fence*, 2015 WL 1396376 *7, *affirmed*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016); *Geyer Signal, Inc.*, 2014 WL 1309092; *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586, 596-598; 603; (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 996, 1002-1007 (3d Cir. 1993).

¹⁰⁹ *Id.*; *Adarand VII*, 228 F.3d at 1166 (10th Cir. 2000).

¹¹⁰ *See, e.g., H.B. Rowe v. NCDOT*, 615 F.3d 233, at 241-242 (4th Cir. 2010); *Concrete Works*, 321 F.3d 950, 959 (*quoting Adarand Constructors, Inc. vs. Slater*, 228 F.3d 1147, 1175 (10th Cir. 2000)); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993); *Midwest Fence*, 84 F.Supp. 3d 705, 2015 W.L. 1396376 at *7, *affirmed*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016); *see also, Sherbrooke Turf*, 345 F.3d at 971-974; *Geyer Signal, Inc.*, 2014 WL 1309092.

observed disparities are statistically insignificant, or presenting contrasting statistical data.¹¹¹ Conjecture and unsupported criticisms of the government’s methodology are insufficient.¹¹² 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.¹¹³

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.’”¹¹⁴ 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.”¹¹⁵

The courts have noted that “there is no ‘precise mathematical formula to assess the quantum of evidence that rises to the *Croson* ‘strong basis in evidence’ benchmark.”¹¹⁶ The courts hold that a state need not conclusively prove the existence of past or present racial discrimination to establish a strong basis in evidence for concluding that remedial action is necessary.¹¹⁷ Instead, the Supreme Court stated that a government may meet its burden by relying on “a significant statistical disparity” between the availability of qualified, willing, and able minority subcontractors and the utilization of such subcontractors by the governmental entity or its prime contractors.¹¹⁸ It has been further held by the courts that the statistical evidence be

¹¹¹ See, e.g., *H.B. Rowe v. NCDOT*, 615 F.3d 233, at 241-242 (4th Cir. 2010); *Concrete Works*, 321 F.3d 950, 959 (quoting *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1175 (10th Cir. 2000)); *Contractors Ass’n of E. Pa. v. City of Philadelphia* (“CAEP II”), 91 F.3d 586, 596-598; 603; (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia* (“CAEP I”), 6 F.3d 996, 1002-1007 (3d Cir. 1993); *Midwest Fence*, 84 F.Supp. 3d 705, 2015 W.L. 1396376 at *7, affirmed, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016); see also, *Sherbrooke Turf*, 345 F.3d at 971-974; *Geyer Signal, Inc.*, 2014 WL 1309092; see, generally, *Engineering Contractors*, 122 F.3d at 916; *Coral Construction, Co. v. King County*, 941 F.2d 910, 921 (9th Cir. 1991).

¹¹² *Id.*; *H. B. Rowe*, 615 F.3d at 242; see also, *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *Sherbrooke Turf*, 345 F.3d at 971-974; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993); *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016); *Geyer Signal*, 2014 WL 1309092.

¹¹³ *H.B. Rowe*, 615 F.3d at 242; see *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *Concrete Works*, 321 F.3d at 991; see also, *Sherbrooke Turf*, 345 F.3d at 971-974; *Geyer Signal, Inc.*, 2014 WL 1309092; *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

¹¹⁴ *Geyer Signal, Inc.*, 2014 WL 1309092, quoting *Sherbrooke Turf*, 345 F.3d at 970.

¹¹⁵ *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).

¹¹⁶ *H.B. Rowe*, 615 F.3d at 241, quoting *Rothe Dev. Corp. v. Dep’t of Def.*, 545 F.3d 1023, 1049 (Fed. Cir. 2008) (quoting *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206, 218 n. 11 (5th Cir. 1999)); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); see, *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993).

¹¹⁷ *H.B. Rowe Co.*, 615 F.3d at 241; see, e.g., *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *Concrete Works*, 321 F.3d at 958 (10th Cir. 2003);, *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993).

¹¹⁸ *Croson*, 488 U.S. 509, see, e.g., *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *H.B. Rowe*, 615 F.3d at 241; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993).

“corroborated by significant anecdotal evidence of racial discrimination” or bolstered by anecdotal evidence supporting an inference of discrimination.¹¹⁹

The courts have stated the strict scrutiny standard is applicable to justify a race-conscious measure, and that it is a substantial burden but not automatically “fatal in fact.”¹²⁰ In so acting, a governmental entity must demonstrate it had a compelling interest in “remedying the effects of past or present racial discrimination.”¹²¹

Thus, courts have held that to justify a race-conscious measure, a government must identify that discrimination, public or private, with some specificity, and must have a strong basis in evidence for its conclusion that remedial action is necessary.¹²²

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 or local government recipient complying with the Federal DBE Program, to prove narrow tailoring of program implementation at the state or local government recipient level.¹²³ “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.”¹²⁴

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.¹²⁵ The federal

¹¹⁹ *H.B. Rowe*, 615 F.3d at 241, quoting *Maryland Troopers Association, Inc. v. Evans*, 993 F.2d 1072, 1077 (4th Cir. 1993); see, e.g., *Midwest Fence*, 840 F.3d 932, 952-954 (7th Cir. 2016); *AGC, San Diego v. Caltrans*, 713 F.3d at 1196; see also, *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-598, 603 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 996, 1002-1007 (3d Cir. 1993); *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

¹²⁰ See, e.g., *Concrete Works of Colorado v. City and County of Denver*, 321 F.3d at 957-959 (10th Cir. 2003); *Adarand VII*, 228 F.3d 1147 (10th Cir. 2000); see, e.g., *H. B. Rowe*, 615 F.3d at 241; 615 F.3d 233 at 241.

¹²¹ See, e.g., *Concrete Works of Colorado v. City and County of Denver*, 321 F.3d at 957-959 (10th Cir. 2003); *Adarand VII*, 228 F.3d 1147 (10th Cir. 2000); see, e.g., *H. B. Rowe*; quoting *Shaw v. Hunt*, 517 U.S. 899, 909 (1996).

¹²² See, e.g., *Concrete Works of Colorado v. City and County of Denver*, 321 F.3d at 957-959 (10th Cir. 2003); *Adarand VII*, 228 F.3d 1147 (10th Cir. 2000); *H. B. Rowe*; 615 F.3d 233 at 241 quoting, *Croson*, 488 U.S. at 504 and *Wygant v. Jackson Board of Education*, 476 U.S. 267, 277 (1986) (plurality opinion); see, *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-605 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 999, 1002, 1005-1008 (3d Cir. 1993).

¹²³ 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 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 999, 1002, 1005-1008 (3d Cir. 1993); see also, *Concrete Works*, 321 F.3d 950, 959 (10th Cir. 2003); *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016); *Geyer Signal*, 2014 WL 1309092.

¹²⁴ *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 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1196-1197; *N. Contracting*, 473 F.3d at 718-19, 723-24; *Western States Paving*, 407 F.3d at 991; *Sherbrooke Turf*, 345 F.3d at 973-974; *Adarand VII*, 228 F.3d at 1166; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999).

¹²⁵ *Croson*, 488 U.S. at 509; see *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Rothe*, 545 F.3d at 1041-1042; *Concrete Works of Colo., Inc. v. City and County of Denver (“Concrete Works II”)*, 321 F.3d 950, 959 (10th Cir. 2003); *Drabik II*, 214 F.3d 730, 734-736; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-605 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 999, 1002, 1005-1008 (3d Cir. 1993); see also, *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

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.¹²⁶ However, a small statistical disparity, standing alone, may be insufficient to establish discrimination.¹²⁷

Other considerations regarding statistical evidence include:

- **Availability analysis.** A disparity index requires an availability analysis. MBE/WBE and DBE /ACDBE availability measures the relative number of MBE/WBEs/DBEs and ACDBEs among all firms ready, willing and able to perform a certain type of work within a particular geographic market area.¹²⁸ There is authority that measures of availability may be approached with different levels of specificity and the practicality of various approaches must be considered,¹²⁹ “An analysis is not devoid of probative value simply because it may theoretically be possible to adopt a more refined approach.”¹³⁰
- **Utilization analysis.** Courts have accepted measuring utilization based on the proportion of an agency’s contract dollars going to MBE/WBEs and DBEs.¹³¹
- **Disparity index.** An important component of statistical evidence is the “disparity index.”¹³² A disparity index is defined as the ratio of the percent utilization to the percent availability

¹²⁶ 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 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 999, 1002, 1005-1008 (3d Cir. 1993); see also *Western States Paving*, 407 F.3d at 1001; *Kossmann Contracting*, 2016 WL 1104363 (S.D. Tex. 2016).

¹²⁷ *Western States Paving*, 407 F.3d at 1001.

¹²⁸ See, e.g., *Croson*, 488 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).

¹²⁹ *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 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).

¹³⁰ *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 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).

¹³¹ See *Midwest Fence*, 840 F.3d 932, 949-953 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *H.B. Rowe, v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Concrete Works*, 321 F.3d at 958, 963-968, 971-972 (10th Cir. 2003); *Eng’g Contractors Ass’n*, 122 F.3d at 912; *N. Contracting*, 473 F.3d at 717-720; *Sherbrooke Turf*, 345 F.3d at 973.

¹³² *Midwest Fence*, 840 F.3d 932, 949-953 (7th Cir. 2016); *H.B. Rowe, v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Concrete Works*, 321 F.3d at 958, 963-968, 971-972 (10th Cir. 2003); *Eng’g Contractors Ass’n*, 122 F.3d at 914; *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206, 218 (5th Cir. 1999); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 602-603 (3d Cir. 1996); *Contractors Ass’n of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 6 F.3d 990 at 1005 (3rd Cir. 1993).

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.”¹³³

- **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.¹³⁴

In terms of statistical evidence, the courts, including the Ninth Circuit, 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.¹³⁵

Marketplace discrimination and data. The Tenth Circuit in *Concrete Works* held the district court erroneously rejected the evidence the local government presented on marketplace discrimination.¹³⁶ The court rejected the district court’s “erroneous” legal conclusion that a municipality may only remedy its own discrimination. The court stated this conclusion is contrary to the holdings in its 1994 decision in *Concrete Works II* and the plurality opinion in *Croson*.¹³⁷ 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.”¹³⁸ 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.”¹³⁹

The court stated that the local government could meet its burden of demonstrating its compelling interest with evidence of private discrimination in the local construction industry

¹³³ See, e.g., *Ricci v. DeStefano*, 557 U.S. 557, 129 S.Ct. 2658, 2678 (2009); *Midwest Fence*, 840 F.3d 932, 950 (7th Cir. 2016); *H.B. Rowe, v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *AGC, SDC v. Caltrans*, 713 F.3d at 1191; *Rothe*, 545 F.3d at 1041; *Eng’g Contractors Ass’n*, 122 F.3d at 914, 923; *Concrete Works I*, 36 F.3d at 1524.

¹³⁴ See, e.g., *H.B. Rowe, v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Eng’g Contractors Ass’n*, 122 F.3d at 914, 917, 923. The Eleventh Circuit found that a disparity greater than two or three standard deviations has been held to be statistically significant and may create a presumption of discriminatory conduct; *Peightal v. Metropolitan Eng’g Contractors Ass’n*, 26 F.3d 1545, 1556 (11th Cir. 1994). The Seventh Circuit Court of Appeals in *Kadas v. MCI Systemhouse Corp.*, 255 F.3d 359 (7th Cir. 2001), raised questions as to the use of the standard deviation test alone as a controlling factor in determining the admissibility of statistical evidence to show discrimination. Rather, the Court concluded it is for the judge to say, on the basis of the statistical evidence, whether a particular significance level, in the context of a particular study in a particular case, is too low to make the study worth the consideration of judge or jury. 255 F.3d at 363.

¹³⁵ *H. B. Rowe*, 615 F.3d 233 at 241, citing *Croson*, 488 U.S. at 509 (plurality opinion), and citing *Concrete Works*, 321 F.3d at 958; see, e.g.; *Croson*, 488 U.S. at 509; *Midwest Fence*, 840 F.3d 932, 935, 948-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *H. B. Rowe v. NCDOT*, 615 F.3d 233, 241-244 (4th Cir. 2010); *Rothe*, 545 F.3d at 1041; *Concrete Works II*, 321 F.3d at 970; *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206, 217-218 (5th Cir. 1999); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 596-605; *Concrete Works*, 36 F.3d at 1529 (10th Cir. 1994); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 999, 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).

¹³⁶ *Id.* at 973.

¹³⁷ *Id.*

¹³⁸ *Id.*, quoting *Concrete Works II*, 36 F.3d at 1529 (emphasis added).

¹³⁹ *Concrete Works*, 321 F.3d 950, 973 (10th Cir. 2003), quoting *Concrete Works II*, 36 F.3d at 1529 (10th Cir. 1994).

coupled with evidence that it has become a passive participant in that discrimination.¹⁴⁰ Thus, the local government was not required to demonstrate that it is “guilty of prohibited discrimination” to meet its initial burden.¹⁴¹

Additionally, the court had previously concluded that the local government’s statistical studies, which compared utilization of MBE/WBEs to availability, supported the inference that “local prime contractors” are engaged in racial and gender discrimination.¹⁴² Thus, the court held the local government’s disparity studies should not have been discounted because they failed to specifically identify those individuals or firms responsible for the discrimination.¹⁴³

The court held the district court, *inter alia*, erroneously concluded that the disparity studies upon which the local government relied were significantly flawed because they measured discrimination in the overall local government MSA construction industry, not discrimination by the municipality itself.¹⁴⁴ 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.¹⁴⁵

In *Adarand VII*, the Tenth Circuit noted it concluded that evidence of marketplace discrimination can be used to support a compelling interest in remedying past or present discrimination through the use of affirmative action legislation.¹⁴⁶ (“[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.*”¹⁴⁷ Further, the court pointed out that it earlier rejected the argument that marketplace data are irrelevant, and remanded the case to the district court to determine whether the local government could link its public spending to “the Denver MSA evidence of industry-wide discrimination.”¹⁴⁸ The court stated that evidence explaining “the Denver government’s role in contributing to the underutilization of MBEs and WBEs in the *private construction market in the Denver MSA*” was relevant to the local government’s burden of producing strong evidence.¹⁴⁹

Consistent with the court’s mandate in *Concrete Works II*, the local government attempted to show at trial that it “indirectly contributed to private discrimination by awarding public contracts to firms that in turn discriminated against MBE and/or WBE subcontractors in other

¹⁴⁰ *Id.* at 973.

¹⁴¹ *Id.*

¹⁴² *Id.* at 974, quoting *Concrete Works II*, 36 F.3d at 1529.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 974.

¹⁴⁵ *Id.*, citing *Adarand VII*, 228 F.3d at 1166-67.

¹⁴⁶ *Concrete Works*, 321 F.3d at 976, citing *Adarand VII*, 228 F.3d at 1166-67.

¹⁴⁷ *Id.* (emphasis added).

¹⁴⁸ *Id.*, quoting *Concrete Works II*, 36 F.3d at 1529.

¹⁴⁹ *Id.*, quoting *Concrete Works II*, 36 F.3d at 1530 (emphasis added).

private portions of their business.”¹⁵⁰ The Tenth Circuit ruled that the local government can demonstrate that it is a “‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry” by compiling evidence of marketplace discrimination and then linking its spending practices to the private discrimination.¹⁵¹

The court in *Concrete Works* rejected the argument that the lending discrimination studies and business formation studies presented by the local government were irrelevant. In *Adarand VII*, the Tenth Circuit concluded that evidence of discriminatory barriers to the formation of businesses by minorities and women and fair competition between MBE/WBEs and majority-owned construction firms shows a “strong link” between a government’s “disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination.”¹⁵²

The court found that evidence that private discrimination resulted in barriers to business formation is relevant because it demonstrates that MBE/WBEs are precluded *at the outset* from competing for public construction contracts. The court also found that evidence of barriers to fair competition is relevant because it again demonstrates that *existing* MBE/WBEs are precluded from competing for public contracts. Thus, like the studies measuring disparities in the utilization of MBE/WBEs in the local government MSA construction industry, studies showing that discriminatory barriers to business formation exist in the local government construction industry are relevant to the municipality’s showing that it indirectly participates in industry discrimination.¹⁵³

The local government also introduced evidence of discriminatory barriers to competition faced by MBE/WBEs in the form of business formation studies. The court held that the district court’s conclusion that the business formation studies could not be used to justify the ordinances conflicts with its holding in *Adarand VII*. “[T]he existence of evidence indicating that the number of [MBEs] would be significantly (but unquantifiably) higher but for such barriers is nevertheless relevant to the assessment of whether a disparity is sufficiently significant to give rise to an inference of discriminatory exclusion.”¹⁵⁴

In sum, the Tenth Circuit held the district court erred when it refused to consider or give sufficient weight to the lending discrimination study, the business formation studies, and the studies measuring marketplace discrimination. That evidence was legally relevant to the local government’s burden of demonstrating a strong basis in evidence to support its conclusion that remedial legislation was necessary.¹⁵⁵

Anecdotal evidence. Anecdotal evidence includes personal accounts of incidents, including of discrimination, told from the witness’ perspective. Anecdotal evidence of discrimination,

¹⁵⁰ *Id.*

¹⁵¹ *Concrete Works*, 321 F.3d at 976, quoting *Croson*, 488 U.S. at 492.

¹⁵² *Id.* at 977, quoting *Adarand VII*, 228 F.3d at 1167-68.

¹⁵³ *Id.* at 977.

¹⁵⁴ *Id.* at 979, quoting *Adarand VII*, 228 F.3d at 1174.

¹⁵⁵ *Id.* at 979-80.

standing alone, generally is insufficient to show a systematic pattern of discrimination.¹⁵⁶ But personal accounts of actual discrimination may complement empirical evidence and play an important role in bolstering statistical evidence.¹⁵⁷ 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."¹⁵⁸

Examples of anecdotal evidence may include:

- Testimony of MBE/WBE or DBE owners regarding whether they face difficulties or barriers;
- Descriptions of instances in which MBE/WBE or DBE owners believe they were treated unfairly or were discriminated against based on their race, ethnicity, or gender or believe they were treated fairly without regard to race, ethnicity, or gender;
- Statements regarding whether firms solicit, or fail to solicit, bids or price quotes from MBE/WBEs or DBEs on non-goal projects; and
- Statements regarding whether there are instances of discrimination in bidding on specific contracts and in the financing and insurance markets.¹⁵⁹

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.¹⁶⁰

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.

¹⁵⁶ 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).

¹⁵⁷ See, e.g., *Midwest Fence*, 840 F.3d 932, 953 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1192, 1196-1198; *H. B. Rowe*, 615 F.3d 233, 248-249; *Concrete Works*, 321 F.3d 950, 989-990 (10th Cir. 2003); *Eng'g Contractors Ass'n*, 122 F.3d at 925-26; *Concrete Works*, 36 F.3d at 1520 (10th Cir. 1994); *Contractors Ass'n*, 6 F.3d at 1003; *Coral Constr. Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991); see also, *Kossmann Contracting Co., Inc. v. City of Houston*, 2016 WL 1104363 (S.D. Tex. 2016).

¹⁵⁸ *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).

¹⁵⁹ See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1197; *H. B. Rowe*, 615 F.3d 233, 241-242; 249-251; *Northern Contracting*, 2005 WL 2230195, at 13-15 (N.D. Ill. 2005), *affirmed*, 473 F.3d 715 (7th Cir. 2007); see also, *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 1002-1003 (3d Cir. 1993); *Concrete Works*, 321 F.3d at 989; *Adarand VII*, 228 F.3d at 1166-76. For additional examples of anecdotal evidence, see *Eng'g Contractors Ass'n*, 122 F.3d at 924; *Concrete Works*, 36 F.3d at 1520; *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 915 (11th Cir. 1990); *DynaLantic*, 885 F.Supp.2d 237; *Florida A.G.C. Council, Inc. v. State of Florida*, 303 F. Supp.2d 1307, 1325 (N.D. Fla. 2004).

¹⁶⁰ See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1197; *H. B. Rowe*, 615 F.3d 233, 241-242, 248-249; *Concrete Works II*, 321 F.3d at 989; *Eng'g Contractors Ass'n*, 122 F.3d at 924-26; *Cone Corp.*, 908 F.2d at 915; *Northern Contracting, Inc. v. Illinois*, 2005 WL 2230195 at *21, N. 32 (N.D. Ill. Sept. 8, 2005), *aff'd* 473 F.3d 715 (7th Cir. 2007).

The 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.¹⁶¹

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

- Evidence of discrimination or its effects in the state transportation contracting industry;
- Flexibility and duration of a race- or ethnicity-conscious remedy;
- Relationship of any numerical DBE goals to the relevant market;
- Effectiveness of alternative race- and ethnicity-neutral remedies;
- Impact of a race- or ethnicity-conscious remedy on third parties; and
- Application of any race- or ethnicity-conscious program to only those minority groups who have actually suffered discrimination.¹⁶²

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.”¹⁶³ Courts have found that “[w]hile narrow tailoring does not require exhaustion of every conceivable race-neutral

¹⁶¹ See, e.g., *Midwest Fence*, 840 F.3d 932, 942, 953-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1198-1199; *H. B. Rowe*, 615 F.3d 233, 252-255; *Rothe*, 545 F.3d at 1036; *Western States Paving*, 407 F.3d at 993-995; *Sherbrooke Turf*, 345 F.3d at 971; *Adarand VII*, 228 F.3d at 1181 (10th Cir. 2000); *W.H. Scott Constr. Co. v. City of Jackson, Mississippi*, 199 F.3d 206 (5th Cir. 1999); *Eng’g Contractors Ass’n*, 122 F.3d at 927 (internal quotations and citations omitted); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d 586, 605-610 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 1008-1009 (3d Cir. 1993); see also, *Geyer Signal, Inc.*, 2014 WL 1309092.

¹⁶² See, e.g., *Midwest Fence*, 840 F.3d 932, 942, 953-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1198-1199; *H. B. Rowe*, 615 F.3d 233, 243-245, 252-255; *Western States Paving*, 407 F.3d at 998; *Sherbrooke Turf*, 345 F.3d at 971; *Adarand VII*, 228 F.3d at 1181; *Kornhass Construction, Inc. v. State of Oklahoma, Department of Central Services*, 140 F.Supp.2d at 1247-1248; see also *Geyer Signal, Inc.*, 2014 WL 1309092.

¹⁶³ *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).

alternative, it does require serious, good faith consideration of whether such alternatives could serve the governmental interest at stake.”¹⁶⁴

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.’”¹⁶⁵

The Supreme Court in *Parents Involved in Community Schools v. Seattle School District*¹⁶⁶ 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.”¹⁶⁷ The Court found that the District failed to show it seriously considered race-neutral measures.

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

Implementation of the Federal DBE Program: Narrow tailoring. The second prong of the strict scrutiny analysis requires the implementation of the Federal DBE Program by state DOTs and state and local government recipients of federal funds be “narrowly tailored” to remedy identified discrimination in the particular state or local government recipient’s contracting and procurement market.¹⁶⁸ The cases considering challenges to a state government’s implementation of the Federal DBE Program are instructive to the study, as stated above, in connection with establishing a compelling governmental interest and narrow tailoring, which are the two prongs of the strict scrutiny standard. The narrow tailoring requirement has several components.

In *Western States Paving*, the Ninth Circuit held the recipient of federal funds must have independent evidence of discrimination within the recipient’s own transportation contracting and procurement marketplace in order to determine whether or not there is the need for race-

¹⁶⁴ See *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509-10 (1989); *H. B. Rowe*, 615 F.3d 233, 252-255; *Western States Paving*, 407 F.3d at 993; *Sherbrooke Turf*, 345 F.3d at 972; see also *Adarand I*, 515 U.S. at 237-38.

¹⁶⁵ *Associated Gen. Contractors of Ohio, Inc. v. Drabik* (“*Drabik II*”), 214 F.3d 730, 738 (6th Cir. 2000).

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

¹⁶⁷ 551 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).

¹⁶⁸ *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.

ethnicity-, or gender-conscious remedial action.¹⁶⁹ Thus, the Ninth Circuit held in *Western States Paving* that mere compliance with the Federal DBE Program does not satisfy strict scrutiny.¹⁷⁰

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.¹⁷¹

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."¹⁷² 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.¹⁷³ 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.¹⁷⁴ The court held NCI failed to demonstrate that IDOT did not satisfy compliance with the federal regulations (49 CFR Part 26).¹⁷⁵ Accordingly, the Seventh Circuit Court of Appeals affirmed the district court's decision upholding the validity of IDOT's DBE program.¹⁷⁶

The 2015 and 2016 Seventh Circuit Court of Appeals decisions in *Dunnet Bay Construction Company v. Borggren, Illinois DOT, et al* and *Midwest Fence Corp. v. U. S. DOT, Federal Highway Administration, Illinois DOT* followed the ruling in *Northern Contracting* that a state DOT implementing the Federal DBE Program is insulated from a constitutional challenge absent a

¹⁶⁹ *Western States Paving*, 407 F.3d at 997-98, 1002-03; see *AGC, SDC v. Caltrans*, 713 F.3d at 1197-1199.

¹⁷⁰ *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.

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

¹⁷² 473 F.3d at 722.

¹⁷³ *Id.* at 722.

¹⁷⁴ *Id.* at 723-24.

¹⁷⁵ *Id.*

¹⁷⁶ *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).

showing that the state exceeded its federal authority.¹⁷⁷ 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.¹⁷⁸ The court found Dunnet Bay had not established sufficient evidence that IDOT's implementation of the Federal DBE Program constituted unlawful discrimination.¹⁷⁹ 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.¹⁸⁰

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

The courts require that a local or state government seriously consider race-, ethnicity- and gender-neutral efforts to remedy identified discrimination.¹⁸¹ 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.¹⁸²

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.”¹⁸³

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;

¹⁷⁷ *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).

¹⁷⁸ *Dunnet Bay*, 799 F.3d 676, 2015 WL 4934560 at **18-22.

¹⁷⁹ *Id.*

¹⁸⁰ 840 F.3d 932 (7th Cir. 2016).

¹⁸¹ *See, e.g., Midwest Fence*, 840 F.3d 932, 937-938, 953-954 (7th Cir. 2016); *AGC, SDC v. Caltrans*, 713 F.3d at 1199; *H. B. Rowe*, 615 F.3d 233, 252-255; *Western States Paving*, 407 F.3d at 993; *Sherbrooke Turf*, 345 F.3d at 972; *Adarand VII*, 228 F.3d at 1179 (10th Cir. 2000); *Eng’g Contractors Ass’n*, 122 F.3d at 927; *Contractors Ass’n of E. Pa. v. City of Philadelphia* (CAEP II), 91 F.3d at 608-609 (3^d Cir. 1996); *Contractors Ass’n* (CAEP I), 6 F.3d at 1008-1009 (3^d Cir. 1993); *Coral Constr.*, 941 F.2d at 923.

¹⁸² *See, Croson*, 488 U.S. at 507; *Drabik I*, 214 F.3d at 738 (citations and internal quotations omitted); *see also, Eng’g Contractors Ass’n*, 122 F.3d at 927; *Viridi*, 135 Fed. Appx. At 268; *Contractors Ass’n of E. Pa. v. City of Philadelphia* (CAEP II), 91 F.3d at 608-609 (3^d Cir. 1996); *Contractors Ass’n* (CAEP I), 6 F.3d at 1008-1009 (3^d Cir. 1993).

¹⁸³ *Croson*, 488 U.S. at 509-510.

- Providing technical, managerial and financial assistance;
- Establishing programs to assist start-up firms;
- Simplification of bidding procedures;
- Training and financial aid for all disadvantaged entrepreneurs;
- Non-discrimination provisions in contracts and in state law;
- Mentor-protégé programs and mentoring;
- Efforts to address prompt payments to smaller businesses;
- Small contract solicitations to make contracts more accessible to smaller businesses;
- Expansion of advertisement of business opportunities;
- Outreach programs and efforts;
- “How to do business” seminars;
- Sponsoring networking sessions throughout the state acquaint small firms with large firms;
- Creation and distribution of MBE/WBE and DBE directories; and
- Streamlining and improving the accessibility of contracts to increase small business participation.¹⁸⁴

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.”¹⁸⁵

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.¹⁸⁶ For example, to be considered narrowly tailored, courts have held that a MBE/WBE- or DBE-type program should

¹⁸⁴ See, e.g., *Croson*, 488 U.S. at 509-510; *H. B. Rowe*, 615 F.3d 233, 252-255; *N. Contracting*, 473 F.3d at 724; *Adarand VII*, 228 F.3d 1179 (10th Cir. 2000); 49 CFR § 26.51(b); see also, *Eng’g Contractors Ass’n*, 122 F.3d at 927-29; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d at 608-609 (3d. Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1008-1009 (3d. Cir. 1993).

¹⁸⁵ *Parents Involved in Community Schools v. Seattle School District*, 551 U.S. 701, 732-47, 127 S.Ct 2738, 2760-61 (2007); *AGC, SDC v. Caltrans*, 713 F.3d at 1199, citing *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003); *H. B. Rowe*, 615 F.3d 233, 252-255; *Western States Paving*, 407 F.3d at 993; *Sherbrooke Turf*, 345 F.3d at 972; *Eng’g Contractors Ass’n*, 122 F.3d at 927.

¹⁸⁶ 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).

include: (1) built-in flexibility;¹⁸⁷ (2) good faith efforts provisions;¹⁸⁸ (3) waiver provisions;¹⁸⁹ (4) a rational basis for goals;¹⁹⁰ (5) graduation provisions;¹⁹¹ (6) remedies only for groups for which there were findings of discrimination;¹⁹² (7) sunset provisions;¹⁹³ and (8) limitation in its geographical scope to the boundaries of the enacting jurisdiction.¹⁹⁴

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.¹⁹⁵

2. Intermediate scrutiny analysis. Certain Federal Courts of Appeal, including the Ninth Circuit Court of Appeals, apply intermediate scrutiny to gender-conscious programs.¹⁹⁶ The Ninth Circuit has applied “intermediate scrutiny” to classifications based on gender.¹⁹⁷

¹⁸⁷ *Midwest Fence*, 840 F.3d 932, 937-939, 947-954 (7th Cir. 2016); *H. B. Rowe*, 615 F.3d 233, 253; *Sherbrooke Turf*, 345 F.3d at 971-972; *CAEP I*, 6 F.3d at 1009; *Associated Gen. Contractors of Ca., Inc. v. Coalition for Economic Equality (“AGC of Ca.”)*, 950 F.2d 1401, 1417 (9th Cir. 1991); *Coral Constr. Co. v. King County*, 941 F.2d 910, 923 (9th Cir. 1991); *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 917 (11th Cir. 1990).

¹⁸⁸ *Midwest Fence*, 840 F.3d 932, 937-939, 947-954 (7th Cir. 2016); *H. B. Rowe*, 615 F.3d 233, 253; *Sherbrooke Turf*, 345 F.3d at 971-972; *CAEP I*, 6 F.3d at 1019; *Cone Corp.*, 908 F.2d at 917.

¹⁸⁹ *Midwest Fence*, 840 F.3d 932, 937-939, 947-954 (7th Cir. 2016); *H. B. Rowe*, 615 F.3d 233, 253; *AGC of Ca.*, 950 F.2d at 1417; *Cone Corp.*, 908 F.2d at 917; *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 91 F.3d at 606-608 (3d Cir. 1996); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1008-1009 (3d Cir. 1993).

¹⁹⁰ *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).

¹⁹¹ *Id.*

¹⁹² *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.

¹⁹³ *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).

¹⁹⁴ *Coral Constr.*, 941 F.2d at 925.

¹⁹⁵ *See, e.g., Midwest Fence Corp. v. U.S. DOT, Illinois DOT, et al.*, 840 F.3d 932, 2016 WL 6543514 (7th Cir. 2016), *cert. denied*, 2017 WL 497345 (2017); *Dunnet Bay Construction Co. v. Borggren, Illinois DOT, et al.*, 799 F.3d 676, 2015 WL 4934560 (7th Cir. 2015), *cert. denied*, 2016 WL 193809 (2016); *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, 713 F.3d 1187, (9th Cir. 2013); *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983 (9th Cir. 2005), *cert. denied*, 546 U.S. 1170 (2006); *Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.*, 2017 WL 2179120 Memorandum Opinion (Not for Publication) (9th Cir. May 16, 2017); *Northern Contracting, Inc. v. Illinois DOT*, 473 F.3d 715 (7th Cir. 2007); *Sherbrooke Turf, Inc. v. Minnesota DOT and Gross Seed v. Nebraska Department of Roads*, 345 F.3d 964 8th Cir. 2003), *cert. denied*, 541 U.S. 1041 (2004); *Adarand Constructors, Inc. v. Slater, Colorado DOT*, 228 F.3d 1147 (10th Cir. 2000) (“*Adarand VII*”); *Dunnet Bay Construction Co. v. Illinois DOT, et al.* 2014 WL 552213 (C. D. Ill. 2014), *affirmed by Dunnet Bay*, 2015 WL 4934560 (7th Cir. 2015); *Geyer Signal, Inc. v. Minnesota DOT*, 2014 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).

¹⁹⁶ *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *Western States Paving*, 407 F.3d at 990 n. 6; *Concrete Works*, 321 F.3d 950, 960 (10th Cir. 2003); *Concrete Works*, 36 F.3d 1513, 1519 (10th Cir. 1994); *Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore, et al.*, 83 F. Supp. 2d 613, 619-620 (2000); *See generally, Coral Constr. Co.*, 941 F.2d at 931-932 (9th Cir. 1991); *Equal Found. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997); *Eng’g Contractors Ass’n*, 122 F.3d at 905, 908, 910; *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548 (11th Cir. 1994); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1009-1011 (3d Cir. 1993); *see also U.S. v. Virginia*, 518 U.S. 515, 532 and n. 6 (1996) (“exceedingly persuasive justification.”); *Geyer Signal*, 2014 WL 1309092.

¹⁹⁷ *See, e.g., AGC, SDC v. Caltrans*, 713 F.3d at 1195; *Western States Paving*, 407 F.3d at 990 n. 6; *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 242 (4th Cir. 2010); *Concrete Works*, 321 F.3d 950, 960 (10th Cir. 2003); *Concrete Works*, 36 F.3d 1513, 1519 (10th Cir. 1994); *see, generally, Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore, et al.*, 83 F. Supp. 2d 613, 619-620 (2000); *see also, Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1009-1011 (3d Cir. 1993); *Cunningham v. Beavers*, 858 F.2d 269, 273 (5th Cir. 1988), *cert. denied*, 489 U.S. 1067 (1989) (*citing Craig v. Boren*, 429 U.S. 190 (1976), and *Lalli v. Lalli*, 439 U.S. 259(1978)).

Restrictions subject to intermediate scrutiny are permissible so long as they are substantially related to serve an important governmental interest.¹⁹⁸

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.¹⁹⁹

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.²⁰⁰

Intermediate scrutiny, as interpreted by federal circuit courts of appeal, requires a direct, substantial relationship between the objective of the gender preference and the means chosen to accomplish the objective.²⁰¹ 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.²⁰²

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

¹⁹⁸ See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *Western States Paving*, 407 F.3d at 990 n. 6; *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 242 (4th Cir. 2010); *Concrete Works*, 321 F.3d 950, 960 (10th Cir. 2003); *Concrete Works*, 36 F.3d 1513, 1519 (10th Cir. 1994); *Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore, et al.*, 83 F. Supp. 2d 613, 619-620 (2000); see, also *Serv. Emp. Int’l Union, Local 5 v. City of Hous.*, 595 F.3d 588, 596 (5th Cir. 2010); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1009-1011 (3d Cir. 1993).

¹⁹⁹ *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *H. B. Rowe Co., Inc. v. NCDOT*, 615 F.3d 233, 242 (4th Cir. 2010); *Western States Paving*, 407 F.3d at 990 n. 6; *Coral Constr. Co.*, 941 F.2d at 931-932 (9th Cir. 1991); *Concrete Works*, 321 F.3d 950, 960 (10th Cir. 2003); *Concrete Works*, 36 F.3d 1513, 1519 (10th Cir. 1994); see, e.g., *Equal Found. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997); *Eng’g Contractors Ass’n*, 122 F.3d at 905, 908, 910; *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548 (11th Cir. 1994); *Contractors Ass’n of E. Pa. v. City of Philadelphia*, 6 F.3d at 1009-1011 (3d Cir. 1993); *Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore, et al.*, 83 F. Supp. 2d 613, 619-620 (2000); see also *U.S. v. Virginia*, 518 U.S. 515, 532 and n. 6 (1996) (“exceedingly persuasive justification.”).

²⁰⁰ *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*.

²⁰¹ 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); *Assoc. Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore, et al.*, 83 F. Supp. 2d 613, 619-620 (2000); see, also, *U.S. v. Virginia*, 518 U.S. 515, 532 and n. 6 (1996) (“exceedingly persuasive justification.”)

²⁰² *Coral Constr. Co.*, 941 F.2d at 931-932; see *Eng’g Contractors Ass’n*, 122 F.3d at 910.

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

The Fourth Circuit cites with approval the guidance from the Eleventh Circuit that has held “[w]hen a gender-conscious affirmative action program rests on sufficient evidentiary foundation, the government is not required to implement the program only as a last resort Additionally, under intermediate scrutiny, a gender-conscious program need not closely tie its numerical goals to the proportion of qualified women in the market.”²⁰³

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.”²⁰⁴ The Third Circuit found this standard required the City of Philadelphia to present probative evidence in support of its stated rationale for the gender preference, discrimination against women-owned contractors.²⁰⁵ The Court in *Contractors Ass’n of E. Pa. (CAEP I)* held the City had not produced enough evidence of discrimination, noting that in its brief, the City relied on statistics in the City Council Finance Committee Report and one affidavit from a woman engaged in the catering business, but the Court found this evidence only reflected the participation of women in City contracting generally, rather than in the construction industry, which was the only cognizable issue in that case.²⁰⁶

The Third Circuit in *CAEP I* held the evidence offered by the City of Philadelphia regarding women-owned construction businesses was insufficient to create an issue of fact. The study in *CAEP I* contained no disparity index for women-owned construction businesses in City contracting, such as that presented for minority-owned businesses.²⁰⁷ 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.²⁰⁸ But the record contained only one three-page affidavit alleging gender discrimination in the construction industry.²⁰⁹ The only other testimony on this subject, the Court found in *CAEP I*,

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

²⁰⁴ *Contractors Ass’n of E. Pa. (CAEP I)*, 6 F.3d at 1010 (3d. Cir. 1993).

²⁰⁵ *Contractors Ass’n of E. Pa. (CAEP I)*, 6 F.3d at 1010 (3d. Cir. 1993).

²⁰⁶ *Contractors Ass’n of E. Pa. (CAEP I)*, 6 F.3d at 1011 (3d. Cir. 1993).

²⁰⁷ *Contractors Ass’n of E. Pa. (CAEP I)*, 6 F.3d at 1011 (3d. Cir. 1993).

²⁰⁸ *Id.*

²⁰⁹ *Id.*

consisted of a single, conclusory sentence of one witness who appeared at a City Council hearing.²¹⁰ This evidence the Court held was not enough to create a triable issue of fact regarding gender discrimination under the intermediate scrutiny standard.

3. Rational basis analysis. Where a challenge to the constitutionality of a statute or a regulation does not involve a fundamental right or a suspect class, the appropriate level of scrutiny to apply is the rational basis standard.²¹¹ 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.²¹²

Courts in applying the rational basis test generally find that a challenged law is upheld “as long as there could be some rational basis for enacting [it],” that is, that “the law in question is rationally related to a legitimate government purpose.”²¹³ So long as a government legislature had a reasonable basis for adopting the classification the law will pass constitutional muster.²¹⁴

“[T]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record.”²¹⁵

²¹⁰ *Id.*

²¹¹ See, e.g., *Heller v. Doe*, 509 U.S. 312, 320 (1993); *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1096 (9th Cir. 2019); *Hettinga v. United States*, 677 F.3d 471, 478 (D.C. Cir. 2012); *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1110 (10th Cir. 1996); *White v. Colorado*, 157 F.3d 1226, (10th Cir. 1998); *Cunningham v. Beavers* 858 F.2d 269, 273 (5th Cir. 1988); see also *Lundeen v. Canadian Pac. R. Co.*, 532 F.3d 682, 689 (8th Cir. 2008) (stating that federal courts review legislation regulating economic and business affairs under a ‘highly deferential rational basis’ standard of review.”); *H. B. Rowe, Inc. v. NCDOT*, 615 F.3d 233 at 254; *People v. Chatman*, 4 Cal. 5th 277, 410 P.3d 9, 228 Cal.Rptr. 3d 379 (Cal. 2018); *Chorn w.Workers’Comp. Appeals Bd.*, 245 Cal.App. 4th 1370, 200 Cal.Rptr. 3d 74, 2016 WL 1183157 (Cal. App. 2016); *Chan v. Curran*, 237 Cal. App 4th 601, 188 Cal.Rptr 3d 59, 2015 WL 3561553 (Cal. App. 2015).

²¹² See, *Heller v. Doe*, 509 U.S. 312, 320 (1993); *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1096 (9th Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9th Cir. 2018); *Hettinga v. United States*, 677 F.3d 471, 478 (D.C. Cir. 2012); *Cunningham v. Beavers*, 858 F.2d 269, 273 (5th Cir. 1988); see also *Lundeen v. Canadian Pac. R. Co.*, 532 F.3d 682, 689 (8th Cir. 2008) (stating that federal courts review legislation regulating economic and business affairs under a ‘highly deferential rational basis’ standard of review.”); *H. B. Rowe, Inc. v. NCDOT*, 615 F.3d 233 at 254; *Contractors Ass’n of E. Pa.*, 6 F.3d at 1011 (3d Cir. 1993); *People v. Chatman*, 4 Cal. 5th 277, 410 P.3d 9, 228 Cal.Rptr. 3d 379 (Cal. 2018); *Chorn w.Workers’Comp. Appeals Bd.*, 245 Cal.App. 4th 1370, 200 Cal.Rptr. 3d 74, 2016 WL 1183157 (Cal. App. 2016); *Chan v. Curran*, 237 Cal. App 4th 601, 188 Cal.Rptr 3d 59, 2015 WL 3561553 (Cal. App. 2015).

²¹³ See, e.g., *Kadmas v. Dickinson Public Schools*, 487 U.S. 450, 457-58 (1998); *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9th Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9th Cir. 2018); *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1110 (10th Cir. 1996); *White v. Colorado*, 157 F.3d 1226, (10th Cir. 1998)see also *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440, (1985) (citations omitted); *Heller v. Doe*, 509 U.S. 312, 318-321 (1993) (Under rational basis standard, a legislative classification is accorded a strong presumption of validity); *People v. Chatman*, 4 Cal. 5th 277, 410 P.3d 9, 228 Cal.Rptr. 3d 379 (Cal. 2018); *Chorn w.Workers’Comp. Appeals Bd.*, 245 Cal.App. 4th 1370, 200 Cal.Rptr. 3d 74, 2016 WL 1183157 (Cal. App. 2016); *Chan v. Curran*, 237 Cal. App 4th 601, 188 Cal.Rptr 3d 59, 2015 WL 3561553 (Cal. App. 2015).

²¹⁴ *Id.*; *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9th Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9th Cir. 2018); *Wilkins v. Gaddy*, 734 F.3d 344, 347 (4th Cir. 2013), (citing *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315 (1993)); *People v. Chatman*, 4 Cal. 5th 277, 410 P.3d 9, 228 Cal.Rptr. 3d 379 (Cal. 2018); *Chorn w.Workers’Comp. Appeals Bd.*, 245 Cal.App. 4th 1370, 200 Cal.Rptr. 3d 74, 2016 WL 1183157 (Cal. App. 2016); *Chan v. Curran*, 237 Cal. App 4th 601, 188 Cal.Rptr 3d 59, 2015 WL 3561553 (Cal. App. 2015).

²¹⁵ *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9th Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9th Cir. 2018); *United States v. Timms*, 664 F.3d 436, 448-49 (4th Cir. 2012), cert. denied, 133 S. Ct. 189 (2012) (citing *Heller v. Doe*, 509 U.S. 312, 320-21 (1993)) (quotation marks and citation omitted); *People v. Chatman*, 4 Cal. 5th 277, 410 P.3d 9, 228 Cal.Rptr. 3d 379 (Cal. 2018); *Chorn w.Workers’Comp. Appeals Bd.*, 245 Cal.App. 4th

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.”²¹⁶

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.”²¹⁷ Because all legislation classifies its objects, differential treatment is justified by “any reasonably conceivable state of facts.”²¹⁸

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.”²¹⁹

A federal court decision, which is instructive to the study, involved a challenge to and the application of a small business goal in a pre-bid process for a federal procurement. *Firstline Transportation Security, Inc. v. United States*, is instructive and analogous to some of the issues in a small business program. The case is informative as to the use, estimation and determination of goals (small business goals, including veteran preference goals) in a procurement under the Federal Acquisition Regulations (“FAR”).²²⁰

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

1370, 200 Cal.Rptr. 3d 74, 2016 WL 1183157 (Cal. App. 2016); *Chan v. Curran*, 237 Cal. App 4th 601, 188 Cal.Rptr 3d 59, 2015 WL 3561553 (Cal. App. 2015).

²¹⁶ *Heller v. Doe*, 509 U.S. 312, 321 (1993); *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9th Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9th Cir. 2018); *People v. Chatman*, 4 Cal. 5th 277, 410 P.3d 9, 228 Cal.Rptr. 3d 379 (Cal. 2018); *Chorn w. Workers’Comp. Appeals Bd.*, 245 Cal.App. 4th 1370, 200 Cal.Rptr. 3d 74, 2016 WL 1183157 (Cal. App. 2016); *Chan v. Curran*, 237 Cal. App 4th 601, 188 Cal.Rptr 3d 59, 2015 WL 3561553 (Cal. App. 2015).

²¹⁷ *Heller v. Doe*, 509 U.S. 312, 320 (1993); see, e.g., *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9th Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9th Cir. 2018); *Hettinga v. United States*, 677 F.3d 471, 478 (D.C. Cir 2012); *People v. Chatman*, 4 Cal. 5th 277, 410 P.3d 9, 228 Cal.Rptr. 3d 379 (Cal. 2018); *Chorn w. Workers’Comp. Appeals Bd.*, 245 Cal.App. 4th 1370, 200 Cal.Rptr. 3d 74, 2016 WL 1183157 (Cal. App. 2016); *Chan v. Curran*, 237 Cal. App 4th 601, 188 Cal.Rptr 3d 59, 2015 WL 3561553 (Cal. App. 2015).

²¹⁸ *Id.*

²¹⁹ *Heller v. Doe*, 509 U.S. 312, 320 (1993); *Chance Mgmt., Inc. v. S. Dakota*, 97 F.3d 1107, 1114 (8th Cir. 1996); *Crawford v. Antonio B. Won Pat International Airport Authority*, 917 F.3d 1081, 1095-1096 (9th Cir. 2019); *Gallinger v. Becerra*, 898 F.3d 1012, 1016-1018 (9th Cir. 2018); see also *Lawrence v. Texas*, 539 U.S. 558, 580, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003) (“Under our rational basis standard of review, legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. . . . Laws such as economic or tax legislation that are scrutinized under rational basis review normally pass constitutional muster.” (internal citations and quotations omitted)) (*O’Connor, J., concurring*); *Gallagher v. City of Clayton*, 699 F.3d 1013, 1019 (8th Cir. 2012) (“Under rational basis review, the classification must only be rationally related to a legitimate government interest.”); *People v. Chatman*, 4 Cal. 5th 277, 410 P.3d 9, 228 Cal.Rptr. 3d 379 (Cal. 2018); *Chorn w. Workers’Comp. Appeals Bd.*, 245 Cal.App. 4th 1370, 200 Cal.Rptr. 3d 74, 2016 WL 1183157 (Cal. App. 2016); *Chan v. Curran*, 237 Cal. App 4th 601, 188 Cal.Rptr 3d 59, 2015 WL 3561553 (Cal. App. 2015).

²²⁰ 2012 WL 5939228 (Fed. Cl. 2012).

business[:] 14.5 percent; Woman Owned[:] 5 percent; HUBZone[:] 3 percent; Service Disabled, Veteran Owned[:] 3 percent.”²²¹

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.²²² The court stated it “cannot say that the agency’s approach is clearly unlawful, or that the approach lacks a rational basis.”²²³

The court found that “an agency may rationally establish aspirational small business subcontracting goals for prospective offerors....” Consequently, the court held one rational method by which the Government may attempt to maximize small business participation (including veteran preference goals) is to establish a rough subcontracting goal for a given contract, and then allow potential contractors to compete in designing innovative ways to structure and maximize small business subcontracting within their proposals.²²⁴ 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....”²²⁵

4. Pending cases (at the time of this report) and Informative Recent Orders. There are recent pending cases in the federal courts at the time of this report involving challenges to MBE/WBE/DBE Programs and federal programs with minority and woman-owned business preferences that may potentially impact and are informative and instructive to the study, including the following:

- **Antonio Vitolo, et al. v. Isabella Guzman, Administrator of the Small Business Administration** 2021 WL 2172181 (6th Cir. May 27, 2021).
- **Greer’s Ranch Café v. Guzman**, ___ F.Supp.3d ___, 2021 WL 2092995 (N.D. Tex. 5/18/21), U.S. District Court for the Northern District of Texas.
- **Faust v. Vilsack**, ___ F.Supp.3d, ___ 2021 WL 2409729, US District Court, E.D. Wisconsin (June 10, 2021).
- **Wynn v. Vilsack** 2021 WL 2580678, (M.D. Fla. June 23, 2021), Case No. 3:21-cv-514-MMH-JRK, U.S. District Court for the Middle District of Florida.
- **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 the Western District of Tennessee, Western Division, Case 2:19-cv-02407-SHL-tmp, filed on January 17, 2019.

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *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.
- **CCI Environmental, Inc., D.W. Mertzke Excavating & Trucking, Inc., Global Environmental, Inc., Premier Demolition, Inc., v. City of St. Louis, St. Louis Airport Authority, et al.**; U.S. District Court for the Eastern District of Missouri, Eastern Division; Case No: 4:19-cv-03099.
- **Ultima Services Corp. v. U.S. Department of Agriculture, U.S. Small Business Administration, et. al.**, U.S. District Court for the Eastern District of Tennessee, 2:20-cv-00041-DCLC-CRW.
- **Pharmacann Ohio, LLC v. Ohio Dept. Commerce Director Jacqueline T. Williams**, In the Court of Common Pleas, Franklin County, Ohio, Case No. 17-CV-10962, November 15, 2018, appealed to the Court of Appeals of Ohio, Tenth Appellate District, Case No. 18-AP-000954.
- **Circle City Broadcasting I, LLC (“Circle City”) and National Association of Black Owned Broadcasters (“NABOB”) (Plaintiffs) v. DISH Network, LLC (“DISH” or “Defendant”)**, U.S. District Court for the Southern District of Indiana, Indianapolis Division, Case NO. 1:20-cv-00750-TWP-TAB.
- **Etienne Hardre, and SDG Murray, LTD et al v. Colorado Minority Business Office, Governor of Colorado et al.**, U.S. District Court for the District of Colorado, Case 1:20-cv-03594. Complaint filed in December 2020.
- **Infinity Consulting Group, LLC, et al. V. United States Department of the Treasury, et al.**, Case No.: Gjh-20-981, In The United States District Court for the District Of Maryland, Southern Division. Complaint filed in April 2020.

The following summarizes the above listed pending cases and informative recent decisions:

- **Antonio Vitolo, et al. v. Isabella Guzman, Administrator of the Small Business Administration**, 2021 WL 2172181 (6th Cir. May 27, 2021), on appeal to Sixth Circuit Court of Appeals from decision by United States District Court, E.D. Tennessee, Northern Division, 2021 WL 2003552, which District Court issued an Order denying plaintiffs’ motion for temporary restraining order on 5/19/21, and Order denying plaintiffs’ motion for preliminary injunction on 5/25/21. The appeal was filed in Sixth Circuit Court of Appeals on May 20, 2021. The Plaintiffs applied to the Sixth Circuit for an Emergency Motion for Injunction Pending Appeal and to Expedite Appeal. The Sixth Circuit, two of the three Judges on the three Judge panel, granted the motion to expedite the appeal and then decided and filed its Opinion on May 27, 2021. *Vitolo v. Guzman*, 2021 WL 2172181 (6th Cir. May 27, 2021).

Background and District Court Memorandum Opinion and Order. On March 27, 2020, § 1102 of the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”) created the Paycheck Protection Program (“PPP”), a \$349 billion federally guaranteed loan program for businesses distressed by the pandemic. On April 24, 2020, the Paycheck Protection

Program and Health Care Enhancement Act appropriated an additional \$310 billion to the fund.

The district court in this case said that PPP loans were not administered equally to all kinds of businesses, however. Congressional investigation revealed that minority-owned and women-owned businesses had more difficulty accessing PPP funds relative to other kinds of business (analysis noting that black-owned businesses were more likely to be denied PPP loans than white-owned businesses with similar application profiles due to outright lending discrimination, and that funds were more quickly disbursed to businesses in predominantly white neighborhoods). The court stated from the testimony to Congress that this was due in significant part to the lack of historical relationships between commercial lenders and minority-owned and women-owned businesses. The historical lack of access to credit, the court noted from the testimony, also meant that minority-owned and women-owned businesses tended to be in more financially precarious situations entering the pandemic, rendering them less able to weather an extended economic contraction of the sort COVID-19 unleashed.

Against this backdrop, on March 11, 2021, the President signed the American Rescue Plan Act of 2021 (the “ARPA”). H.R. 1319, 117th Cong. (2021). As part of the ARPA, Congress appropriated \$28,600,000,000 to a “Restaurant Revitalization Fund” and tasked the Administrator of the Small Business Administration with disbursing funds to restaurants and other eligible entities that suffered COVID-19 pandemic-related revenue losses. See *Id.* § 5003. Under the ARPA, the Administrator “shall award grants to eligible entities in the order in which applications are received by the Administrator,” except that during the initial 21-day period in which the grants are awarded, the Administrator shall prioritize awarding grants to eligible entities that are small business concerns owned and controlled by women, veterans, or socially and economically disadvantaged small business concerns.

On April 27, 2021, the Small Business Administration announced that it would open the application period for the Restaurant Revitalization Fund on May 3, 2021. The Small Business Administration announcement also stated, consistent with the ARPA, that “[f]or the first 21 days that the program is open, the SBA will prioritize funding applications from businesses owned and controlled by women, veterans, and socially and economically disadvantaged individuals.”

Antonio Vitolo is a white male who owns and operates Jake's Bar and Grill, LLC in Harriman, Tennessee. Vitolo applied for a grant from the Restaurant Revitalization Fund through the Small Business Administration on May 3, 2021, the first day of the application period. The Small Business Administration emailed Vitolo and notified him that “[a]pplicants who have submitted a non-priority application will find their application remain in a Review status while priority applications are processed during the first 21 days.”

On May 12, 2021, Vitolo and Jake's Bar and Grill, LLC initiated the present action against Defendant Isabella Casillas Guzman, the Administrator of the Small Business Administration. In their complaint, Vitolo and Jake's Bar and Grill assert that the ARPA's twenty-one-day priority period violates the United States Constitution's equal protection

clause and due process clause because it impermissibly grants benefits and priority consideration based on race and gender classifications.

Based on allegations in the complaint and averments made in Vitolo's sworn declaration dated May 11, 2021, Vitolo and Jake's Bar and Grill request that the Court enter: (1) a temporary restraining order prohibiting the Small Business Administration from paying out grants from the Restaurant Revitalization Fund, unless it processes applications in the order they were received without regard to the race or gender of the applicant; (2) a temporary injunction requiring the Small Business Administration to process applications and pay grants in the order received regardless of race or gender; (3) a declaratory judgment that race-and gender-based classifications under § 5003 of the ARPA are unconstitutional; and (4) an order permanently enjoining the Small Business Administration from applying race- and gender-based classifications in determining eligibility and priority for grants under § 5003 of the ARPA.

Strict Scrutiny. The parties agreed that this system is subject to strict scrutiny. Accordingly, the district court found that whether Plaintiffs are likely to succeed on the merits of their race-based equal-protection claims turns on whether Defendant has a compelling government interest in using a race-based classification, and whether that classification is narrowly tailored to that interest. Here, the Government asserts that it has a compelling interest in “remedying the effect of past or present racial discrimination” as related to the formation and stability of minority-owned businesses.

Compelling Interest found by District Court. The court found that over the past year, Congress has gathered myriad evidence suggesting that small businesses owned by minorities (including restaurants, which have a disproportionately high rate of minority ownership) have suffered more severely than other kinds of businesses during the COVID-19 pandemic, and that the Government's early attempts at general economic stimulus—i.e., the Paycheck Protection Program (“PPP”)—disproportionately failed to help those businesses directly because of historical discrimination patterns. To the extent that Plaintiffs argue that evidence racial disparity or disparate impact alone is not enough to support a compelling government interest, the court noted Congress also heard evidence that racial bias plays a direct role in these disparities.

At this preliminary stage, the court found that the Government has a compelling interest in remediating past racial discrimination against minority-owned restaurants through § 5003 of the ARPA and in ensuring public relief funds are not perpetuating the legacy of that discrimination. At the very least, the court stated Congress had evidence before it suggesting that its initial COVID-relief program, the PPP, disproportionately failed to reach minority-owned businesses due (at least in part) to historical lack of relationships between banks and minority-owned businesses, itself a symptom of historical lending discrimination.

The court cited the Supreme Court decision in *Croson*, 488 U.S. at 492 (“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.”); and *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1169 (10th Cir. 2000) (“The government’s evidence is particularly striking in the area of the race-based denial of access to capital, without which the formation of minority subcontracting enterprises is stymied.”); *DynaLantic Corp v. U.S. Dep’t of Def.*, 885 F. Supp. 2d 237, 258–262 (D.D.C. 2012) (rejecting facial challenge to the Small Business Administration’s 8(a) program in part because “the government [had] presented significant evidence on race-based denial of access to capital and credit”).

The court said that the PPP—a government-sponsored COVID-19 relief program—was stymied in reaching minority-owned businesses because historical patterns of discrimination are reflected in the present lack of relationships between minority-owned businesses and banks. This, according to the court, caused minority-owned businesses to enter the pandemic with more financial precarity, and therefore to falter at disproportionately higher rates as the pandemic has unfolded. The court found that Congress has a compelling interest in remediating the present effects of historical discrimination on these minority-owned businesses, especially to the extent that the PPP disproportionately failed those businesses because of factors clearly related to that history. Plaintiff, the court held, has not rebutted this initial showing of a compelling interest, and therefore has not shown a likelihood of success on the merits in this respect.

Narrow Tailoring found by District Court. The court then addressed the “narrow tailoring” requirement under the strict scrutiny analysis, concluding that: “Even in the limited circumstance when drawing racial distinctions is permissible to further a compelling state interest, government is still ‘constrained in how it may pursue that end: [T]he means chosen to accomplish the [government’s] asserted purpose must be specifically and narrowly framed to accomplish that purpose.’ “

Section 5003 of the ARPA is a one-time grant program with a finite amount of money that prioritizes small restaurants owned by women and socially and economically disadvantaged individuals because Congress, the court concluded, had evidence before it showing that those businesses were inadequately protected by earlier COVID-19 financial relief programs. While individuals from certain racial minorities are rebuttably presumed to be “socially and economically disadvantaged” for purposes of § 5003, the court found Defendant correctly points out that the presumption does not exclude individuals like Vitolo from being prioritized, and that the prioritization does not mean individuals like Vitolo cannot receive relief under this program. Section 5003 is therefore time-limited, fund-limited, not absolutely constrained by race during the priority period, and not constrained to the priority period.

And while Plaintiffs asserted during the TRO hearing that the SBA is using race as an absolute basis for identifying “socially and economically disadvantaged” individuals, the court pointed out that assertion relies essentially on speculation rather than competent evidence about the SBA’s processing system. The court therefore held it cannot conclude on the record before it that Plaintiffs are likely to show that Defendant’s implementation of § 5003 is not narrowly tailored to the compelling interest at hand.

In support of Plaintiffs' motion, they argue that the priority period is not narrowly tailored to achieving a compelling interest because it does not address "any alleged inequities or past discrimination." However, the court said it has already addressed the inequities that were present in the past relief programs. At the hearing, Plaintiffs argued that a better alternative would have been to prioritize applicants who did not receive PPP funds or applicants who had "a weaker income statement" or "a weaker balance sheet." But, the court noted, "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative," only "serious, good faith consideration of workable race-neutral alternatives" to promote the stated interest. The Government received evidence that the race-neutral PPP was tainted by lingering effects of past discrimination and current racial bias.

Accordingly, the court stated the race-neutral approach that the Government found to be tainted did not further its compelling interest in ensuring that public funds were not disbursed in a manner that perpetuated racial discrimination. The court found the Government not only considered but actually used race-neutral alternatives during prior COVID-19 relief attempts. It was precisely the failure of those race-neutral programs to reach all small businesses equitably, that the court said appears to have motivated the priority period at issue here.

Plaintiffs argued that the priority period is simultaneously overinclusive and underinclusive based on the racial, ethnic, and cultural groups that are presumed to be "socially disadvantaged." However, the court stated the race-based presumption is just that: a presumption. Counsel for the Government explained at the hearing, consistent with other evidence before the court, that any individual who felt they met § 5003's broader definition of "socially and economically disadvantaged" was free to check that box on the application. ("[E]ssentially all that needs to be done is that you need to self-certify that you fit within that standard on the application, ... you check that box".) For the sake of prioritization, the court noted there is no distinction between those who were presumptively disadvantaged and those who self-certified as such. Accordingly, the court found the priority period is not underinclusive in a way that defeats narrow tailoring.

Further, according to the court, the priority period is not overinclusive. Prior to enacting the priority period, the Government considered evidence relative to minority-business owners generally as well as data pertaining to specific groups. It is also important to note, the court stated, that the Restaurant Revitalization Fund is a national relief program. As such, the court found it is distinguishable from other regional programs that the Supreme Court found to be overinclusive.

The inclusion in the presumption, the court pointed out for example, of Alaskan and Hawaiian natives is quite logical for a program that offers relief funds to restaurants in Alaska and Hawaii. This is not like the racial classification in *Croson*, the court said, which was premised on the interest of compensating Black contractors for past discrimination in Richmond, Virginia, but would have extended remedial relief to "an Aleut citizen who moves to Richmond tomorrow." Here, the court found any narrowly tailored racial

classification must necessarily account for the national scale of prior and present COVID-19 programs.

The district court noted that the Supreme Court has historically declined to review sex-or gender-based classifications under strict scrutiny. The district court pointed out the Supreme Court held, “[t]o withstand constitutional challenge, ... classifications by gender must serve important governmental objective and must be substantially related to achievement of those “[A] gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened.” However, remedying past discrimination cannot serve as an important governmental interest when there is no empirical evidence of discrimination within the field being legislated.

Intermediate Scrutiny applied to women-owned businesses found by District Court. As with the strict-scrutiny analysis, the court found that Congress had before it evidence showing that woman-owned businesses suffered historical discrimination that exposed them to greater risks from an economic shock like COVID-19, and that they received less benefit from earlier federal COVID-19 relief programs. Accordingly, the court held that Defendant has identified an important governmental interest in protecting women-owned businesses from the disproportionately adverse effects of the pandemic and failure of earlier federal relief programs. The district court therefore stated it cannot conclude that Plaintiffs are likely to succeed on their gender-based equal-protection challenge in this respect.

To be constitutional, the court concluded, a particular measure including a gender distinction must also be substantially related to the important interest it purports to advance. “The purpose of requiring that close relationship is to assure that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women.”

Here, as above, the court found § 5003 of the ARPA is a one-time grant program with a finite amount of money that prioritizes small restaurants owned by veterans, women, and socially and economically disadvantaged individuals because Congress had evidence before it showing that those businesses were disproportionately exposed to harm from the COVID-19 pandemic and inadequately protected by earlier COVID-19 financial relief programs. The prioritization of women-owned businesses under § 5003, the court found, is substantially related to the problem Congress sought to remedy because it is directly aimed at ameliorating the funding gap between women-owned and man-owned businesses that has caused the former to suffer from the COVID-19 pandemic at disproportionately higher rates. Accordingly, on the record before it, the district court held it cannot conclude that Plaintiffs are likely to succeed on the merits of their gender-based equal-protection claim.

The court stated: [W]hen reviewing a motion for a preliminary injunction, if it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated.” However, the district court did not conclude that Plaintiffs' constitutional rights

are likely being violated. Therefore, the court held Plaintiffs are likely not suffering any legally impermissible irreparable harm.

The district court said that if it were to enjoin distributions under § 5003 of the ARPA, others would certainly suffer harm, as these COVID-19 relief grants—which are intended to benefit businesses that have suffered disproportionate harm—would be even further delayed. In the constitutional context, the court found that whether an injunction serves the public interest is inextricably intertwined with whether the plaintiff has shown a likelihood of success on the merits. Plaintiff, the court held, has not demonstrated a likelihood of success on the merits. The district court found that therefore it cannot conclude the public interest would be served by enjoining disbursement of funds under § 5003 of the ARPA.

Denial by District Court of Plaintiffs’ Motion for Preliminary Injunction. Subsequently, the court addressed the Plaintiffs’ motion for a preliminary injunction. The court found its denial of Plaintiffs’ motion for a TRO addresses the same factors that control the preliminary-injunction analysis, and the court incorporated that reasoning by reference to this motion.

The court received from the Defendant additional materials from the Congressional record that bear upon whether a compelling interest justifies the race-based priority period at issue and an important interest justifies the gender-based priority period at issue. Defendant’s additional materials from the Congressional record the court found strengthen the prior conclusion that Plaintiffs are unlikely to succeed on the merits.

For example, a Congressional committee received the following testimony, which linked historical race and gender discrimination to the early failures of the Paycheck Protection Program (the “PPP”): “As noted by my fellow witnesses, closed financial networks, longstanding financial institutional biases, and underserved markets work against the efforts of women and minority entrepreneurs who need capital to start up, operate, and grow their businesses. While the bipartisan CARES Act got money out the door quickly [through the PPP] and helped many small businesses, the distribution channels of the first tranche of the funding underscored how the traditional financial system leaves many small businesses behind, particularly women- and minority-owned businesses.”

There was a written statement noting that “[m]inority and women-owned business owners who lack relationships with banks or other financial institutions participating in PPP lacked early access to the program”; testimony observing that historical lack of access to capital among minority- and women-owned businesses contributed to significantly higher closure rates among those businesses during the COVID-19 pandemic, and that the PPP disproportionately failed to reach those businesses; and evidence that lending discrimination against people of color continues to the present and contemporary wealth distribution is linked to the intergenerational impact of historical disparities in credit access.

The court stated it could not conclude Plaintiffs are likely to succeed on the merits. The court held that the points raised in the parties’ briefing on Plaintiff’s motion for preliminary

injunction have not impacted the court's analysis with respect to the remaining preliminary injunction factors. Accordingly, for the reasons stated in the court's memorandum opinion denying Plaintiff's motion for a temporary restraining order, a preliminary injunction the court held is not warranted and is denied.

Appeal by Plaintiff to Sixth Circuit Court of Appeals. The Plaintiffs appealed the court's decision to the Sixth Circuit Court of Appeals. Vitolo had asked for a temporary restraining order and ultimately a preliminary injunction that would prohibit the government from handing out grants based on the applicants' race or sex. Vitolo asked the district court to enjoin the race and sex preferences until his appeal was decided. The district court denied that motion too. Finally, the district court denied the motion for a preliminary injunction. Vitolo also appealed that order.

Emergency Motion for Injunction Pending Appeal and to Expedite Appeal Granted by Sixth Circuit. The Plaintiffs applied to the Sixth Circuit for an Emergency Motion for Injunction Pending Appeal and to Expedite Appeal. The Sixth Circuit, two of the three Judges on the three Judge panel, granted the motion to expedite the appeal and then decided and filed its Opinion on May 27, 2021. *Vitolo v. Guzman*, 2021 WL 2172181 (6th Cir. May 27, 2021). The Sixth Circuit stated that this case is about whether the government can allocate limited coronavirus relief funds based on the race and sex of the applicants. The Court held that it cannot, and thus enjoined the government from using "these unconstitutional criteria when processing" Vitolo's application.

Standing and Mootness. The Sixth Circuit agreed with the district court that Plaintiffs had standing. The Court rejected the Defendant Government's argument that the Plaintiffs' claims were moot because the 21-day priority phase of the grant program ended.

Preliminary Injunction. Application of Strict Scrutiny by Sixth Circuit. Vitolo challenges the Small Business Administration's use of race and sex preferences when distributing Restaurant Revitalization Funds. The government concedes that it uses race and sex to prioritize applications, but it contends that its policy is still constitutional. The Court focused its strict scrutiny analysis under the factors in determining whether a preliminary injunction should issue on the first factor the is typically dispositive: the factor of Plaintiffs' likelihood of success on the merits.

Compelling Interest rejected by Sixth Circuit. The Court states that government has a compelling interest in remedying past discrimination only when three criteria are met: First, the policy must target a specific episode of past discrimination. It cannot rest on a "generalized assertion that there has been past discrimination in an entire industry." Second, there must be evidence of intentional discrimination in the past. Third, the government must have had a hand in the past discrimination it now seeks to remedy. The Court said that if the government "show[s] that it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of [a] local ... industry," then the government can act to undo the discrimination. But, the Court notes, if the government cannot show that it actively or passively participated in this past discrimination, race-based remedial measures violate equal-protection principles.

The government's asserted compelling interest, the Court found, meets none of these requirements. First, the government points generally to societal discrimination against minority business owners. But it does not identify specific incidents of past discrimination. And, the Court said, since "an effort to alleviate the effects of societal discrimination is not a compelling interest," the government's policy is not permissible.

Second, the government offers little evidence of past intentional discrimination against the many groups to whom it grants preferences. Indeed, the schedule of racial preferences detailed in the government's regulation—preferences for Pakistanis but not Afghans; Japanese but not Iraqis; Hispanics but not Middle Easterners—is not supported by any record evidence at all.

When the government promulgates race-based policies, it must operate with a scalpel. And its cuts must be informed by data that suggest intentional discrimination. The broad statistical disparities cited by the government, according to the Court, are not nearly enough. But when it comes to general social disparities, the Court stated, there are too many variables to support inferences of intentional discrimination.

Third, the Court found the government has not shown that it participated in the discrimination it seeks to remedy. When opposing the plaintiffs' motions at the district court, the government identified statements by members of Congress as evidence that race- and sex-based grant funding would remedy past discrimination. But rather than telling the court what Congress learned and how that supports its remedial policy, the Court stated it said only that Congress identified a "theme" that "minority- and women-owned businesses" needed targeted relief from the pandemic because Congress's "prior relief programs had failed to reach" them. A vague reference to a "theme" of governmental discrimination, the Court said is not enough.

To satisfy equal protection, the Court said, government must identify "prior discrimination by the governmental unit involved" or "passive participa[tion] in a system of racial exclusion." An observation that prior, race-neutral relief efforts failed to reach minorities, the Court pointed out is no evidence at all that the government enacted or administered those policies in a discriminatory way. For these reasons, the Court concluded that the government lacks a compelling interest in awarding Restaurant Revitalization Funds based on the race of the applicants. And as a result, the policy's use of race violates equal protection.

Narrow Tailoring rejected by Sixth Circuit. Even if the government had shown a compelling state interest in remedying some specific episode of discrimination, the discriminatory disbursement of Restaurant Revitalization Funds is not narrowly tailored to further that interest. For a policy to survive narrow-tailoring analysis, the government must show "serious, good faith consideration of workable race-neutral alternatives." This requires the government to engage in a genuine effort to determine whether alternative policies could address the alleged harm. And, in turn, a court must not uphold a race-conscious policy unless it is "satisfied that no workable race-neutral alternative" would achieve the

compelling interest. In addition, a policy is not narrowly tailored if it is either overbroad or underinclusive in its use of racial classifications.

Here, the Court found that the government could have used any number of alternative, nondiscriminatory policies, but it failed to do so. For example, the court noted the government contends that minority-owned businesses disproportionately struggled to obtain capital and credit during the pandemic. But, the Court stated an “obvious” race-neutral alternative exists: The government could grant priority consideration to all business owners who were unable to obtain needed capital or credit during the pandemic.

Or, the Court said, consider another of the government's arguments. It contends that earlier coronavirus relief programs “disproportionately failed to reach minority-owned businesses.” But, the Court found a simple race-neutral alternative exists again: The government could simply grant priority consideration to all small business owners who have not yet received coronavirus relief funds.

Because these race-neutral alternatives exist, the Court held the government's use of race is unconstitutional. Aside from the existence of race-neutral alternatives, the government's use of racial preferences, according to the Court, is both overbroad and underinclusive. The Court held this is also fatal to the policy.

The government argues its program is not underinclusive because people of all colors can count as suffering “social disadvantage.” But, the Court pointed out, there is a critical difference between the designated races and the non-designated races. The designated races get a presumption that others do not. The government argues its program is not underinclusive because people of all colors can count as suffering “social disadvantage.” But, the Court said, there is a critical difference between the designated races and the non-designated races. The designated races get a presumption that others do not.

The government's policy, the Court found, is “plagued” with other forms of underinclusivity. The Court considered the requirement that a business must be at least 51 percent owned by women or minorities. How, the Court asked, does that help remedy past discrimination? Black investors may have small shares in lots of restaurants, none greater than 51 percent. But does that mean those owners did not suffer economic harms from racial discrimination? The Court noted that the restaurant at issue, Jake's Bar, is 50 percent owned by a Hispanic female. It is far from obvious, the Court stated, why that 1 percent difference in ownership is relevant, and the government failed to explain why that cutoff relates to its stated remedial purpose.

The dispositive presumption enjoyed by designated minorities, the Court found, bears strikingly little relation to the asserted problem the government is trying to fix. For example, the Court pointed out the government attempts to defend its policy by citing a study showing it was harder for black business owners to obtain loans from Washington, D.C., banks. Rather than designating those owners as the harmed group, the Court noted, the government relied on the Small Business Administration's 2016 regulation granting racial preferences to vast swaths of the population. For example, individuals who trace

their ancestry to Pakistan and India qualify for special treatment. But those from Afghanistan, Iran, and Iraq do not. Those from China, Japan, and Hong Kong all qualify. But those from Tunisia, Libya, and Morocco do not. The Court held this “scattershot approach” does not conform to the narrow tailoring strict scrutiny requires.

Women-Owned Businesses. Intermediate Scrutiny applied by Sixth Circuit. The plaintiffs also challenge the government's prioritization of women-owned restaurants. Like racial classifications, sex-based discrimination is presumptively invalid. Government policies that discriminate based on sex cannot stand unless the government provides an “exceedingly persuasive justification.” Government policies that discriminate based on sex cannot stand unless the government provides an “exceedingly persuasive justification.” To meet this burden, the government must prove that (1) a sex-based classification serves “important governmental objectives,” and (2) the classification is “substantially and directly related” to the government's objectives. The government, the Court held, fails to satisfy either prong. The Court found it failed to show that prioritizing women-owned restaurants serves an important governmental interest. The government claims an interest in “assisting with the economic recovery of women-owned businesses, which were ‘disproportionately affected’ by the COVID-19 pandemic.” But, the Court stated, while remedying specific instances of past sex discrimination can serve as a valid governmental objective, general claims of societal discrimination are not enough.

Instead, the Court said, to have a legitimate interest in remedying sex discrimination, the government first needs proof that discrimination occurred. Thus, the government must show that the sex being favored “actually suffer[ed] a disadvantage” as a result of discrimination in a specific industry or field. Without proof of intentional discrimination against women, the Court held, a policy that discriminates on the basis of sex cannot serve a valid governmental objective.

Additionally, the Court found, the government's prioritization system is not “substantially related to” its purported remedial objective. The priority system is designed to fast-track applicants hardest hit by the pandemic. Yet under the Act, the Court said, all women-owned restaurants are prioritized—even if they are not “economically disadvantaged.” For example, the Court noted, that whether a given restaurant did better or worse than a male-owned restaurant next door is of no matter—as long as the restaurant is at least 51 percent women-owned and otherwise meets the statutory criteria, it receives priority status. Because the government made no effort to tailor its priority system, the Court concluded it cannot find that the sex-based distinction is “substantially related” to the objective of helping restaurants disproportionately affected by the pandemic.

Ruling by Sixth Circuit. The Court held that plaintiffs are entitled to an injunction pending appeal, thus reversing the district court decision. Since the government failed to justify its discriminatory policy, the Court found that plaintiffs likely will win on the merits of their constitutional claim. And, the Court stated, similar to most constitutional cases, that is dispositive here.

The Court ordered the government to fund the Plaintiffs' grant application, if approved, before all later-filed applications, without regard to processing time or the applicants' race or sex. The government, however, may continue to give veteran-owned restaurants priority in accordance with the law. The Court held the preliminary injunction shall remain in place until this case is resolved on the merits and all appeals are exhausted.

Dissenting Opinion. One of the three Judges filed a dissenting opinion.

Amended Complaint and Second Emergency Motion for a Temporary Restraining Order and Preliminary Injunction. The Plaintiffs on June 1, 2021, filed an Amended Complaint in the district court adding Additional Plaintiffs. Additional Plaintiffs' who were not involved in the initial Motion for Temporary Restraining Order, on June 2, 2021, filed a Second Emergency Motion For a Temporary Restraining Order and Preliminary Injunction. The court in its Order issued on June 10, 2021, found based on evidence submitted by Defendants that the allegedly wrongful behavior harming the Additional Plaintiffs cannot reasonably be expected to recur, and therefore the Additional Plaintiffs' claims are moot.

The court thus denied the Additional Plaintiffs' motion for temporary restraining order and preliminary injunction. The court also ordered the Defendant Government to file a notice with the court if and/or when Additional Plaintiffs' applications have been funded, and SBA decides to resume processing of priority applications.

The Sixth Circuit issued a briefing schedule on June 4, 2021 to the parties that requires briefs on the merits of the appeal to be filed in July and August 2021. Subsequently on July 14, 2021, the Plaintiffs-Appellants filed a Motion to Dismiss the appeal voluntarily that was supported and jointly agreed to by the Defendant-Appellee stating that Plaintiffs-Appellants have received their grant from Defendant-Appellee. The Court granted the Motion and dismissed the appeal terminating the case.

- **Greer's Ranch Café v. Guzman, F.Supp.3d (2021), 2021 WL 2092995 (N.D. Tex. 5/18/21).** Plaintiff Philip Greer ("Greer") owns and operates Plaintiff Greer's Ranch Café—a restaurant which lost nearly \$100,000 in gross revenue during the COVID-19 pandemic (collectively, "Plaintiffs"). Greer sought monetary relief under the \$28.6-billion Restaurant Revitalization Fund ("RRF") created by the American Rescue Plan Act of 2021 ("ARPA") and administered by the Small Business Administration ("SBA"). See American Rescue Plan Act of 2021, Pub. L. No. 117-2 § 5003. Greer prepared an application on behalf of his restaurant, is eligible for a grant from the RRF, but has not applied because he is barred from consideration altogether during the program's first twenty-one days from May 3 to May 24, 2021.

During that window, ARPA directed SBA to "take such steps as necessary" to prioritize eligible restaurants "owned and controlled" by "women," by "veterans," and by those "socially and economically disadvantaged." ARPA incorporates the definitions for these prioritized small business concerns from prior-issued statutes and SBA regulations.

To effectuate the prioritization scheme, SBA announced that, during the program's first twenty-one days, it “will accept applications from all eligible applicants, but only process and fund priority group applications”—namely, applications from those priority-group applicants listed in ARPA. Priority-group “[a]pplicants must self-certify on the application that they meet [priority-group] eligibility requirements” as “an eligible small business concern owned and controlled by one or more women, veterans, and/or socially and economically disadvantaged individuals.

Plaintiffs sued Defendants SBA and Isabella Casillas Guzman, in her official capacity as administrator of SBA. Shortly thereafter, Plaintiffs moved for a TRO, enjoining the use of race and sex preferences in the distribution of the Fund.

Substantial Likelihood of Success on the Merits. Standing. Equal Protection Claims. The court first held that the Plaintiffs had standing to proceed, and then addressed the likelihood of success on the merits of their equal protection claims. As to race-based classifications, Plaintiffs challenged SBA's implementation of the “socially disadvantaged group” and “socially disadvantaged individual” race-based presumption and definition from SBA's Section 8(a) government-contract-procurement scheme into the RRF-distribution-priority scheme as violative of the Equal Protection Clause. Defendants argued the race-conscious rules serve a compelling interest and are narrowly tailored, satisfying strict scrutiny.

The parties agreed strict scrutiny applies where government imposes racial classifications, like here where the RRF prioritization scheme incorporates explicit racial categories from Section 8(a). Under strict scrutiny, the court stated, government must prove a racial classification is “narrowly tailored” and “furthers compelling governmental interests.”

Defendants propose as the government's compelling interest “remedying the effects of past and present discrimination” by “supporting small businesses owned by socially and economically disadvantaged small business owners ... who have borne an outsized burden of economic harms of [the] COVID-19 pandemic.” To proceed based on this interest, the court said, Defendants must provide a “strong basis in evidence for its conclusion that remedial action was necessary.”

As its strong basis in evidence, Defendants point to the factual findings supporting the implementation of Section 8(a) itself in removing obstacles to government contract procurement for minority-owned businesses, including House Reports in the 1970s and 1980s and a D.C. District Court case discussing barriers for minority business formation in the 1990s and 2000s. The court recognized the “well-established principle about the industry-specific inquiry required to effectuate Section 8(a)'s standards.” Thus, the court looked to Defendants' industry specific evidence to determine whether the government has a “strong basis in evidence to support its conclusion that remedial action was necessary.”

According to Defendants, “Congress has heard a parade of evidence offering support for the priority period prescribed by ARPA.” The Defendants evidence was summarized by the court as follows:

- A House Report specifically recognized that “underlying racial, wealth, social, and gender disparities are exacerbated by the pandemic,” that “[w]omen –especially mothers and women of color – are exiting the workforce at alarming rates,” and that “eight out of ten minority-owned businesses are on the brink of closure.”
- Expert testimony describing how “[b]usinesses headed by people of color are less likely to have employees, have fewer employees when they do, and have less revenue compared to white-owned businesses” because of “structural inequities resulting from less wealth compared to whites who were able to accumulate wealth with the support of public policies,” and that having fewer employees or lower revenue made COVID-related loans to those businesses less lucrative for lenders.
- Expert testimony explaining that “businesses with existing conventional lending relationships were more likely to access PPP funds quickly and efficiently,” and that minorities are less likely to have such relationships with lenders due to “pre-existing disparities in access to capital.”
- House Committee on Small Business Chairwoman Velázquez's evidence offered into the record showing that “[t]he COVID-19 public health and economic crisis has disproportionately affected Black, Hispanic, and Asian-owned businesses, in addition to women-owned businesses” and that “minority-owned and women-owned businesses were particularly vulnerable to COVID-19, given their concentration in personal services firms, lower cash reserves, and less access to credit.”
- Witness testimony that emphasized the “[u]nderrepresentation by women and minorities in both funds and in small businesses accessing capital” and noted that “[t]he amount of startup capital that a Black entrepreneur has versus a White entrepreneur is about 1/36th.”
- Other expert testimony noting that in many cases, minority-owned businesses struggled to access earlier COVID relief funding, such as PPP loans, “due to the heavy reliance on large banks, with whom they have had historically poor relationships.”
- Evidence presented at other hearing showing that minority and women-owned business lack access to capital and credit generally, and specifically suffered from inability to access earlier COVID-19 relief funds and also describing “long-standing structural racial disparities in small business ownership and performance.”
- A statement of the Center for Responsible Lending describing present-day “overtly discriminatory practices by lenders” and “facially neutral practices with disparate effects” that deprive minority-owned businesses of access to capital.

This evidence, the court found, “largely falters for the same reasoning outlined above—it lacks the industry-specific inquiry needed to support a compelling interest for a government-imposed racial classification.” The court, quoting the *Croson* decision, stated that while it is mindful of these statistical disparities and expert conclusions based on those disparities, “[d]efining these sorts of injuries as ‘identified discrimination’ would give ... governments license to create a patchwork of racial preferences based on statistical generalizations about any particular field of endeavor.”

Thus, the court concluded that the government failed to prove that it likely has a compelling interest in “remedying the effects of past and present discrimination” in the restaurant industry during the COVID-19 pandemic. For the same reason, the court found that Defendants have failed to show an “important governmental objective” or exceedingly persuasive justification necessary to support a sex-based classification.

Having concluded Defendants lack a compelling interest or persuasive justification for their racial and gender preferences, the court stated it need not address whether the RRF is related to those particular interests. Accordingly, the Court held that Plaintiffs are likely to succeed on the merits of their claim that Defendants’ use of race-based and sex-based preferences in the administration of the RRF violates the Equal Protection Clause of the Constitution.

Conclusion. The court granted Plaintiffs’ motion for temporary restraining order, and enjoins Defendants to process Plaintiffs’ application for an RRF grant.

Subsequently, the Plaintiffs filed a Notice of Dismissal without prejudice on May 19, 2021.

- **Faust v. Vilsack, F.Supp.3d, 2021 WL 2409729, US District Court, E.D. Wisconsin (June 10, 2021).** This is a federal district court decision that on June 10, 2021 granted Plaintiffs’ motion for a temporary restraining order holding the federal government’s use of racial classifications in awarding funds under the loan-forgiveness program violated the Equal Protection Clause of the US Constitution.

Background. Twelve white farmers, who resided in nine different states, including Wisconsin, brought this action against Secretary of Agriculture and Administrator of Farm Service Agency (FSA) seeking to enjoin United States Department of Agriculture (USDA) officials from implementing loan-forgiveness program for farmers and ranchers under Section 1005 of the American Rescue Plan Act of 2021 (ARPA) by asserting eligibility to participate in program based solely on racial classifications violated equal protection. Plaintiffs/Farmers filed a motion for temporary restraining order.

The district court granted the motion for a temporary restraining order.

The USDA describes how the loan-forgiveness plan will be administered on its website. It explains, “Eligible Direct Loan borrowers will begin receiving debt relief letters from FSA in the mail on a rolling basis, beginning the week of May 24. After reviewing closely, eligible borrowers should sign the letter when they receive it and return to FSA.” It advises that, in June 2021, the FSA will begin to process signed letters for payments, and “about three weeks after a signed letter is received, socially disadvantaged borrowers who qualify will have their eligible loan balances paid and receive a payment of 20 percent of their total qualified debt by direct deposit, which may be used for tax liabilities and other fees associated with payment of the debt.”

Application of strict scrutiny standard. The court noted Defendants assert that the government has a compelling interest in remedying its own past and present

discrimination and in assuring that public dollars drawn from the tax contributions of all citizens do not serve to finance the evil of private prejudice. “The government has a compelling interest in remedying past discrimination only when three criteria are met.” (*Citing, Vitolo*, F.3d at, 2021 WL 2172181, at *4; *see also City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (plurality opinion).

The court stated the Sixth Circuit recently summarized the three requirements as follows:

“First, the policy must target a specific episode of past discrimination. It cannot rest on a “generalized assertion that there has been past discrimination in an entire industry.” *J.A. Croson Co.*, 488 U.S. at 498, 109.”

“Second, there must be evidence of intentional discrimination in the past. *J.A. Croson Co.*, 488 U.S. at 503, 109 S.Ct. 706. Statistical disparities don’t cut it, although they may be used as evidence to establish intentional discrimination.... “

“Third, the government must have had a hand in the past discrimination it now seeks to remedy. So if the government “shows that it had essentially become a ‘passive participant’ in a system of racial exclusion practiced by elements of a local industry,” then the government can act to undo the discrimination. *J.A. Croson Co.*, 488 U.S. at 492, 109 S.Ct. 706. But if the government cannot show that it actively or passively participated in this past discrimination, race-based remedial measures violate equal protection principles.”

The court found that “Defendants have not established that the loan-forgiveness program targets a specific episode of past or present discrimination. Defendants point to statistical and anecdotal evidence of a history of discrimination within the agricultural industry.... But Defendants cannot rely on a ‘generalized assertion that there has been past discrimination in an entire industry’ to establish a compelling interest.” *Citing, J.A. Croson Co.*, 488 U.S. at 498, ; *see also Parents Involved*, 551 U.S. at 731, (plurality opinion) (“remedying past societal discrimination does not justify race-conscious government action”). The court pointed out “Defendants’ evidence of more recent discrimination includes assertions that the vast majority of funding from more recent agriculture subsidies and pandemic relief efforts did not reach minority farmers and statistical disparities.”

The court concluded that: “Aside from a summary of statistical disparities, Defendants have no evidence of intentional discrimination by the USDA in the implementation of the recent agriculture subsidies and pandemic relief efforts.” “An observation that prior, race-neutral relief efforts failed to reach minorities is no evidence at all that the government enacted or administered those policies in a discriminatory way.” *Citing, Vitolo*, F.3d at, 2021 WL 2172181, at *5. The court held “Defendants have failed to establish that it has a compelling interest in remedying the effects of past and present discrimination through the distribution of benefits on the basis of racial classifications.”

In addition, the court found “Defendants have not established that the remedy is narrowly tailored. To do so, the government must show “serious, good faith consideration of workable race-neutral alternatives.” *Citing, Grutter v. Bollinger*, 539 U.S. 306, 339, (2003).

Defendants contend that Congress has unsuccessfully implemented race-neutral alternatives for decades, but the court concluded, “they have not shown that Congress engaged “in a genuine effort to determine whether alternative policies could address the alleged harm” here. *Citing, Vitolo*, ____ F.3d at ____, 2021 WL 2172181, at *6.

The court stated: “The obvious response to a government agency that claims it continues to discriminate against farmers because of their race or national origin is to direct it to stop: it is not to direct it to intentionally discriminate against others on the basis of their race and national origin.”

The court found “Congress can implement race-neutral programs to help farmers and ranchers in need of financial assistance, such as requiring individual determinations of disadvantaged status or giving priority to loans of farmers and ranchers that were left out of the previous pandemic relief funding. It can also provide better outreach, education, and other resources. But it cannot discriminate on the basis of race.” On this record, the court held, “Defendants have not established that the loan forgiveness program under Section 1005 is narrowly tailored and furthers compelling government interests.”

Conclusion. The court found a nationwide injunction is appropriate in this case. “To ensure that Plaintiffs receive complete relief and that similarly-situated nonparties are protected, a universal temporary restraining order in this case is proper.”

This case remains pending at the time of this report. The court on July 6, 2021, issued an Order that stayed the Plaintiffs’ motion for a preliminary injunction, holding that the District Court in *Wynn v. Vilsack* (M.D. Fla. June 23, 2021), Case No. 3:21-cv-514-MMH-JRK, U.S. District Court, Middle District of Fla. (*see below*), granted the Plaintiffs a nationwide injunction, which thus rendered the need for an injunction in this case as not necessary; but the court left open the possibility of reconsidering the motion depending on the results of the *Wynn* case. For the same reason, the court dissolved the temporary restraining order.

- **Wynn v. Vilsack (M.D. Fla. June 23, 2021), 2021 WL 2580678, Case No. 3:21-cv-514-MMH-JRK, U.S. District Court, Middle District of Fla.** In *Wynn v. Vilsack* (M.D. Fla. June 23, 2021), 2021 WL 2580678, Case No. 3:21-cv-514-MMH-JRK, U.S. District Court, Middle District of Fla., which is virtually the same case as the *Faust v. Vilsack*, 2021 WL 2409729 (June 10, (2021) case in district court in Wisconsin, the court granted the Plaintiffs’ Motion for Preliminary Injunction holding: “Defendants Thomas J. Vilsack, in his official capacity as U.S. Secretary of Agriculture and Zach Ducheneaux, in his official capacity as Administrator, Farm Service Agency ... are immediately enjoined from issuing any payments, loan assistance, or debt relief pursuant to Section 1005(a)(2) of the American Rescue Plan Act of 2021 until further order from the Court.”

The court in *Faust* granted the Plaintiffs’ Motion for Temporary Restraining Order for similar reasons and as discussed below in an Order issued on July 6, 2021, stayed a Motion for Preliminary Injunction and dissolved the Temporary Restraining Order as not necessary based on the *Wynn* holding imposing a nationwide injunction.

Background. In *Wynn*, Plaintiff challenges Section 1005 of the American Rescue Plan Act of 2021 (ARPA), 2 which provides debt relief 3 to “socially disadvantaged farmers and ranchers” (SDFRs). (Doc 1; Complaint). Specifically, Section 1005(a)(2) authorizes the Secretary of Agriculture to pay up to 120 percent of the indebtedness, as of January 1, 2021, of an SDFR’s direct Farm Service Agency (FSA) loans and any farm loan guaranteed by the Secretary (collectively, farm loans). Section 1005 incorporates 7 U.S.C. § 2279’s definition of an SDFR as “a farmer or rancher who is a member of a socially disadvantaged group.” 7 U.S.C. § 2279(a)(5). A “socially disadvantaged group” is defined as “a group whose members have been subjected to racial or ethnic prejudice because of their identity as members of a group without regard to their individual qualities.” 7 U.S.C. § 2279(a)(6). Racial or ethnic groups that categorically qualify as socially disadvantaged are “Black, American Indian/Alaskan Native, Hispanic, Asian, and Pacific Islander.” see also U.S. Dep’t of Agric., American Rescue Plan Debt Payments, <https://www.farmers.gov/americanrescueplan> (last visited June 22, 2021). White or Caucasian farmers and ranchers do not.

Plaintiff is a white farmer in Jennings, Florida who has qualifying farm loans but is ineligible for debt relief under Section 1005 solely because of his race. He sues Thomas J. Vilsack, the current Secretary of Agriculture, and Zach Ducheneaux, the administrator of the United States Department of Agriculture (USDA) and head of the FSA, in their official capacities. In his two-count Complaint, Plaintiff alleges Section 1005 violates the equal protection component of the Fifth Amendment’s Due Process Clause (Count I) and, by extension, is not in accordance with the law such that its implementation should be prohibited by the Administrative Procedure Act (APA) (Count II). Plaintiff seeks (1) a declaratory judgment that Section 1005’s provision limiting debt relief to SDFRs violates the law, (2) a preliminary and permanent injunction prohibiting the enforcement of Section 1005, either in whole or in part, (3) nominal damages, and (4) attorneys’ fees and costs.

Strict Scrutiny. The court, similar to the court in *Faust*, applied the strict scrutiny test and held that on the record presented, the court expresses serious concerns over whether the Government will be able to establish a strong basis in evidence warranting the implementation of Section 1005’s race-based remedial action. The statistical and anecdotal evidence presented, the court stated, appears insufficient.

Compelling Governmental Interest. The Government stated that its “compelling interest in relieving debt of [SDFRs] is two-fold: to remedy the well-documented history of discrimination against minority farmers in USDA loan (and other) programs and prevent public funds from being allocated in a way that perpetuates the effects of discrimination. In cases applying strict scrutiny, the court said the Eleventh Circuit has instructed:

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.

Ensley Branch, N.A.A.C.P. v. Seibels, 31 F.3d 1548, 1564 (11th Cir. 1994) (citations omitted). Thus, the court found that to survive strict scrutiny, the Government must show a strong basis in evidence for its conclusion that past racial discrimination warrants a race-based remedy. *Id.* at 1565. The law on how a governmental entity can establish the requisite need for a race-based remedial program has evolved over time. In *Eng’g Contractors Ass’n of S. Fla. v. Metro. Dade Cnty.*, the court noted the Eleventh Circuit summarized the kinds of evidence that would and would not be indicative of a need for remedial action in the local construction industry. 122 F.3d 895, 906-07 (11th Cir. 1997). The court explained:

A 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. However, 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.

Here, to establish the requisite evidence of discrimination, the court stated the Government relies on substantial legislative history, testimony given by experts at various congressional committee meetings, reports prepared at Congress’ request regarding discrimination in USDA programs, and floor statements made by supporters of Section 1005 in Congress. Based on the historical evidence of discrimination, Congress took remedial measures to correct USDA’s past discrimination against SDFRs.

Due to the significant remedial measures previously taken by Congress, for purposes of this case, the court pointed out that historical evidence does little to address the need for continued remediation through Section 1005. Rather, for the Government to show that additional remedial action is warranted, it must present evidence either that the prior remedial measures failed to adequately remedy the harm caused by USDA’s past discrimination or that the Government remains a “passive participant” in discrimination in USDA loans and programs. See *Eng’g Contractors*, 122 F.3d at 911. The court found that this is where the evidence of continued discrimination becomes crucial, and may be inadequate.

The Government contends its prior measures were insufficient to remedy the effects of past discrimination, but the court found the actual evidentiary support for the inadequacy of past remedial measures is limited and largely conclusory. Where a race-neutral basis for a statistical disparity can be shown, the court concluded it can give that statistical evidence less weight. *Eng’g Contractors*, 122 F.3d at 923. Here, the statistical discrepancies presented by the Government, the court found, can be explained by non-race related factors—farm size and crops grown—and the Court finds it unlikely that this evidence, standing alone, would constitute a strong basis for the need for a race-based remedial program.

On the record presented here, the court expressed “serious concerns over whether the Government will be able to establish a strong basis in evidence warranting the implementation of Section 1005’s race-based remedial action. The statistical and anecdotal

evidence presented appears less substantial than that deemed insufficient in *Eng'g Contractors*, which included detailed statistics regarding the governmental entity's hiring of minority-owned businesses for government construction projects; marketplace data on the financial performance of minority and nonminority contractors; and two studies by experts. *Id.* at 912.”

The court said to the extent remedial action is warranted based on the current evidentiary showing, it would likely be directed to the need to address the barriers identified in the GAO Reports such as providing incentives or guarantees to commercial lenders to make loans to SDFRs, increasing outreach to SDFRs regarding the availability of USDA programs, ensuring SDFRs have equal access to the same financial tools as nonminority farmers, and efforts to standardize the way USDA services SDFR loans so that it comports with the level of service provided to white farmers.

The court held that nevertheless, at this stage of the proceedings, it need not determine whether the Government ultimately will be able to establish a compelling need for this broad, race-based remedial legislation. This is because, assuming the Government's evidence establishes the existence of a compelling governmental interest warranting some form of race-based relief, the court found Plaintiff has convincingly shown that the relief provided by Section 1005 is not narrowly tailored to serve that interest.

Narrowly Tailoring. Even if the Government establishes a compelling governmental interest to enact Section 1005, the court stated Plaintiff has shown a substantial likelihood of success on his claim that, as written, the law violates his right to equal protection because it is not narrowly tailored to serve that interest. “The essence of the ‘narrowly tailored’ inquiry is the notion that explicitly racial preferences ... must be only a ‘last resort’ option.” *Eng'g Contractors*, 122 F.3d at 926.

In determining whether a race-conscious remedy is appropriate, the court noted the Supreme Court instructs courts to examine several factors, including the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties.” *U.S. v. Paradise*, 480 U.S. 149, 171 (1987).

The court found that the necessity of debt relief to the group targeted by Section 1005, as opposed to a remedial program that more narrowly addresses the discrimination that has been documented by the Government, is anything but evident. More importantly, the court stated Section 1005's rigid, categorical, race-based qualification for relief is the antithesis of flexibility. The debt relief provision applies strictly on racial grounds irrespective of any other factor. Every person who identifies him or herself as falling within a socially disadvantaged group 11 who has a qualifying farm loan with an outstanding balance as of January 1, 2021, receives up to 120 percent debt relief—and no one else receives any debt relief.

Regardless of farm size, an SDFR receives up to 120 percent debt relief. And regardless of whether an SDFR is having the most profitable year ever and not remotely in danger of foreclosure, that SDFR receives up to 120 percent debt relief. Yet, the court said, a small White farmer who is on the brink of foreclosure can do nothing to qualify for debt relief. Race or ethnicity is the sole, inflexible factor that determines the availability of relief provided by the Government under Section 1005.

The Government cited the Eleventh Circuit decision in *Cone Corp. v. Hillsborough Cnty.*, 908 F.2d 908, 910 (11th Cir. 1990). The court in *Cone Corp* pointed to several critical factors that distinguished the county's MBE program in that case from that rejected in Croson:

“(1) the county had tried to implement a less restrictive MBE program for six years without success; (2) the MBE participation goals were flexible in part because they took into account project-specific data when setting goals; (3) the program was also flexible because it provided race-neutral means by which a low bidder who failed to meet a program goal could obtain a waiver; and (4) unlike the program rejected in Croson, the county's program did not benefit “groups against whom there may have been no discrimination,” instead its MBE program “target[ed] its benefits to those MBEs most likely to have been discriminated against . . .” *Id.* at 916-17.

The court found that “Section 1005's inflexible, automatic award of up to 120 percent debt relief only to SDFRs stands in stark contrast to the flexible, project by project Cone Corp. MBE program.”

The court noted that in *Cone Corp.*, although the MBE program included a minority participation goal, the county “would grant a waiver if qualified minority businesses were uninterested, unavailable, or significantly more expensive than non-minority businesses.” In this way the Court in *Cone Corp.* observed the county's MBE program “had been carefully crafted to minimize the burden on innocent third parties.” (*citing Cone Corp.*, 908 F.2d at 911).

The court concluded the “120 percent debt relief program is untethered to an attempt to remedy any specific instance of past discrimination. And unlike the *Cone Corp.* MBE program, Section 1005 is absolutely rigid in the relief it awards and the recipients of that relief and provides no waiver or exception by which an individual who is not a member of a socially disadvantaged group can qualify. In this way, Section 1005 is far more similar to the remedial schemes found not to be narrowly tailored in *Croson* and other similar cases.”

Additionally, on this record, the court found it appears that Section 1005 simultaneously manages to be both overinclusive and underinclusive. “It appears to be overinclusive in that it will provide debt relief to SDFRs who may never have been discriminated against or faced any pandemic-related hardship.” The court found “Section 1005 also appears to be underinclusive in that, as mentioned above, it fails to provide any relief to those who suffered the brunt of the discrimination identified by the Government. It provides no

remedy at all for an SDFR who was unable to obtain a farm loan due to discriminatory practices or who no longer has qualifying farm loans as a result of prior discrimination.”

Finally, the Court concluded there is little evidence that the Government gave serious consideration to, or tried, race-neutral alternatives to Section 1005. “The Government recounts the remedial programs Congress previously implemented that allegedly have failed to remedy USDA’s discrimination against SDFRs.... However, almost all of the programs identified by the Government were not race-neutral programs; they were race-based programs that targeted things like SDFR outreach efforts, improving SDFR representation on local USDA committees, and providing class-wide relief to SDFRs who were victims of discrimination. The main relevant race-neutral program the Government referenced was the first round of pandemic relief, which did go disproportionately to White farmers.” However, the court stated, “the underlying cause of the statistical discrepancy may be disparities in farm size or crops grown, rather than race.”

Thus, on the current record, in addition to showing that Section 1005 is inflexible and both overinclusive and underinclusive, the court held Plaintiff is likely to show that Congress “failed to give serious good faith consideration to the use of race and ethnicity-neutral measures” to achieve the compelling interest supporting Section 1005. *Ensley Branch*, 122 F.3d at 927. Congress does not appear to have turned to the race-based remedy in Section 1005 as a “last resort,” but instead appears to have chosen it as an expedient and overly simplistic, but not narrowly tailored, approach to addressing prior and ongoing discrimination at USDA.

Having considered all of the pertinent factors associated with the narrow tailoring analysis and the record presented by the parties, the court is not persuaded that the Government will be able to establish that Section 1005 is narrowly tailored to serve its compelling governmental interest. The court holds “it appears to create an inflexible, race-based discriminatory program that is not tailored to make the individuals who experienced discrimination whole, increase participation among SDFRs in USDA programs, or irradiate the evils of discrimination that remain following Congress’ prior efforts to remedy the same.” Therefore, the court holds that Plaintiff has established a strong likelihood of showing that Section 1005 violates his right to equal protection under the law because it is not narrowly tailored to remedy a compelling governmental interest.

Conclusion. Defendants Thomas J. Vilsack, in his official capacity as U.S. Secretary of Agriculture and Zach Ducheneaux, in his official capacity as Administrator, Farm Service Agency, their agents, employees and all others acting in concert with them, who receive actual notice of this Order by personal service or otherwise, are immediately enjoined from issuing any payments, loan assistance, or debt relief pursuant to Section 1005(a)(2) of the American Rescue Plan Act of 2021 until further order from the Court. The court also ordered that the parties confer and submit a proposed expedited schedule to resolve the merits of the action.

- **Mechanical Contractors Association of Memphis, Inc., White Plumbing & Mechanical Contractors, Inc. and Morgan & Thornburg, Inc. v. Shelby County, Tennessee, et al.**, U.S. District Court for Western District of Tennessee, Western Division, Case 2:19-cv-02407-SHL-tmp, filed on January 17, 2019.

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

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

The case at the time of this report is in the middle of discovery. The court has ruled on certain motions to dismiss filed by the Defendants, including granting dismissal as to individual Defendants sued in their official capacity and denied the motions to dismiss as to the individual Defendants sued in their individual capacity.

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

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

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

The parties filed on September 25, 2020 with the federal court in Tennessee a Notice of Pending Settlement, subject to the final approval of the Shelby County Commission, which was provided in October, 2020.

The parties filed a Stipulation of Dismissal with Prejudice with the court on January 4, 2021. The federal court in Tennessee on January 4, 2021 issued an order and Judgment approving the settlement and dismissing the case.

- **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.

MTA filed a Motion to Dismiss. The Court issued an order to defer the Motion to Dismiss and directing MTA to deliver the records to the court for in-camera inspection. The Court also denied a motion by AGC to be elevated to party status and to conduct discovery. The court held a Case Management Conference on August 17, 2020, and ordered that MTA's Motion to Dismiss be scheduled for a hearing at a date mutually agreeable to the parties.

The court on September 10, 2020, issued an Order denying the Motion to Dismiss, ordering MTA to file its answer and defenses to Palm Beach County within 10 days, and that the court will hold a hearing and make preliminary findings as to whether the documents at issue that have been provided by MTA to the court for in-camera inspection are exempted from the Public Records Act.

On February 1, 2021, the court issued a final order finding that the records of MTA sought by the County fell within the trade secret exemption of the state of Florida Public Records Act. The court thus held the County's Complaint for breach of contract and specific performance were dismissed as moot.

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

Plaintiffs allege that this cause of action arises from Defendant's Minority and Women's Business Enterprise Program Certification and Compliance Rules that require Native Americans to show at least one-quarter descent from a tribe recognized by the Federal Bureau of Indian Affairs. Plaintiffs claim that African Americans, Hispanic Americans, and Asian Americans are only required to "have origins" in any groups or peoples from certain parts of the world. This action alleges violations of Title VI of the Civil Rights Act of 1964, and the denial of equal protection of the laws under the Fourteenth Amendment to the U.S. Constitution based on these definitions constituting per se discrimination. Plaintiffs seek injunctive relief and damages.

Plaintiffs are businesses that are certified as MBEs through the City of St. Louis.

Plaintiffs allege they are a Minority Group Members because their owners are members of the American Indian tribe known as Northern Cherokee Nation. Plaintiffs claim the Northern Cherokee Nation is an American Indian Tribe with contacts in what is now known as the State of Missouri since 1721.

Plaintiff alleges the City defines Minority Group Members differently depending on one's racial classification. The City's rules allow African Americans, Hispanic Americans and Asian Americans to meet the definition of a Minority Group Member by simply having "origins" within a group of peoples, whereas Native Americans are restricted to those persons who have cultural identification and can demonstrate membership in a tribe recognized by the Federal Bureau of Indian Affairs.

In 2019 Plaintiffs sought to renew their MBE certification with the City, which was denied. Plaintiff alleges the City decided to decertify the MBE status for each Plaintiff because their membership in the Northern Cherokee Nation disqualifies each company from Minority Group Membership because the Northern Cherokee Nation is not a federally recognized tribe by the Bureau of Indian Affairs.

The Plaintiffs filed an administrative appeal, and the Administrative Review Officer upheld the decision to decertify Plaintiffs firms.

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

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

As a result of the City's deliberate indifference to their rights under the Fourteenth Amendment, Plaintiffs claim they have suffered loss of business, loss of standing in their community, and damage to their reputation by the City's decision to decertify the MBE status of these companies, and incurred attorney's fees and costs.

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

The Complaint was filed on November 14, 2019, followed by a First Amended Complaint. Plaintiffs filed on February 11, 2020, a Motion for Preliminary Injunction seeking to have a hearing on their Complaint, and to order the City to reinstate the application or MBE certification of the Plaintiffs.

The court issued a Memorandum and Order, dated July 27, 2020, which provided the Motion for Preliminary Injunction is denied as withdrawn by the Plaintiff and the Joint Motion to Amend a Case Management Order is Granted.

The parties filed cross-motions for summary judgment in August. The court on September 14, 2020 issued an order over the opposition of the parties referring the case to mediation "immediately," with mediation to be concluded by January 11, 2021. The court also held that the pending cross-motions for summary judgment will be denied without prejudice to being refiled only upon conclusion of mediation if the case has not settled.

The court in April 2021 issued an Order dismissing this case based on a settlement and consent judgment. The City adopted new rules pertaining to MBE/WBE certification. The City also agreed for this case only to a rebuttable presumption that the plaintiffs in the case are members of a tribe that are Native Americans and socially and economically disadvantaged subject to the City reserving the right to rebut the presumption.

In addition, the City agreed that it will pay plaintiffs \$15000 in attorney's fees, and related orders. The City agreed that it will use best efforts to process Plaintiffs' certification applications and will provide a decision on each application by August 2, 2021. If the Plaintiffs are not certified as an MBE under the revised October 2020 rules, Plaintiffs reserve their right to pursue all claims relating to the decision.

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

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

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

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

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

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

The defendants filed a Motion to Dismiss asserting inter alia that the court does not have jurisdiction. Plaintiff has filed written discovery, which was stayed pending the outcome of the Motion to Dismiss.

The court on March 31, 2021 issued a Memorandum Opinion and Order granting in part and denying in part the Motion to Dismiss. The court held that plaintiffs had standing to challenge the constitutionality of the Section 8(a) Program as violating the Fifth Amendment, and held plaintiff's claim that the Section 8(a) Program is unconstitutional because it discriminates on the basis of race is sufficient to state a claim. The court also granted in part defendants' Motion to Dismiss holding that plaintiff's 42 U.S.C. Section 1981 claims are dismissed as that section does not apply to federal agencies. Thus, the case proceeds on the merits of the constitutionality of the Section 8 (a) Program.

The court on April 9, 2021 entered a Scheduling Order providing that defendants shall file an Answer by April 28, 2021 and set a Bench Trial for 10/11/2022 with Dispositive Motions

due by 6/6/2022. Defendants filed their Answer to the Complaint on April 28, 2021. Plaintiffs on May 20, 2021 filed a Motion to Amend/Revise Complaint, Defendants filed their Response to Motion to Amend on June 4, 2021 and Plaintiffs filed on June 8, 2021 their Reply to the Response. The Motion is pending at this time.

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

In 2016, the Ohio legislature codified R.C. Chapter 3796, legalizing medical marijuana. The legislature instructed Defendant Ohio Department of Commerce to issue certain licenses to medical marijuana cultivators, processors, and testing laboratories. The Department was instructed to award 15 percent of said licenses to economically disadvantaged groups, defined as African Americans, American Indians, Hispanics, and Asians.

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

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

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

Defendants assert the State had a compelling government interest in redressing past and present effects of racial discrimination within its jurisdiction where the State itself was involved. In support, Defendants put forth evidence of prior discrimination in bidding for Ohio government contracts, other states' marijuana licensing related programs, marijuana related arrests, and evidence of the legislature's desire to include a provision in R.C. §3796.09 similar to Ohio's MBE program.

Some of the evidence Defendants provide, the court found may not have been considered by the legislature during their discussion of R.C. §3796.09. In support of its inclusion, Defendants cite law upholding the use of "post-enactment" evidence. Courts have reached differing conclusions as to whether post-enactment evidence may be used in a court's

analysis; but the court found persuasive courts that have held “post-enactment evidence may not be used to demonstrate that the government’s interest in remedying prior discrimination was compelling.”

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

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

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

The only evidence referenced in the materials provided by the Defendants to show the General Assembly considered Ohio’s MBE and EDGE history are three emails between a congressional staff member and an employee of the Legislative Service Commission requesting a set aside like the one included in R.C. §125.081 and R.C. §123.125. There is no reference to the legislative history and evidence from the original review in between 1978 and 1980. The legislators who reviewed the evidence in 1980 clearly were not members of the legislature in 2016 when R.C. §2796.09(C) passed. Even if a few legislators might have seen the MBE evidence, the court stated it cannot find it was considered by the General Assembly as evidence supporting remedial action.

Additionally, even if the court could find this evidence was considered by the legislature in support of R.C. §3796.09(C), the materials from R.C. §125.081 pertain to government procurement contracts only. The court held the law requires that evidence considered by the legislature must be directly related to discrimination in that particular industry. Defendants argued the fact that the medical marijuana industry is new, but the court said

such newness necessarily demonstrates there is no history of discrimination in this particular industry, i.e. legal cultivation of medical marijuana.

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

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

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

R.C. §3796.09(C) appears to be somewhat flexible, the court stated, in that it includes a waiver provision. The court found the entire statute itself is not flexible, being that it is a strict percentage, unrelated to the particular industry it is intended for, medical marijuana. R.C. §3796.09(C) requires 15 percent of cultivator licenses are issued to economically disadvantaged group members. This is not an estimated goal, but a specific requirement. Additionally, R.C. §3796.09(C) does not include a proposed duration. Accordingly, the court found R.C. §3796.09(C) is not flexible.

Defendants admitted that the 15 percent stated within R.C. §3796.09(C) was lifted from R.C. §125.081 without any additional research or review by the legislature regarding the relevant labor market described in R.C. §3796.09(C), the medical marijuana industry. Defendants argued that the numbers as associated with the contracting market are directly applicable to the newly created medical marijuana industry because of a disparity study conducted by Maryland. The Maryland study was not reviewed by the legislature before enacting R.C. §3796.09(C), and is a review of markets and disparity in Maryland, not Ohio. Accordingly, the court found this one study the Defendants use to try to connect two very different industries (government contracting market and a newly created medical marijuana industry) has little weight, if any.

Regarding the statistics the legislature did not review prior to enacting R.C. §3796.09(C), the cited statistics pertaining to the arrest rates of minorities, the court found, are not directly related to the values listed within the statute. Much of the statistics referenced are based on general rates throughout the United States, or findings on discrimination pertaining to all drug related arrests. But these other statistics do not demonstrate the racial disparities pertaining to specifically marijuana throughout the state of Ohio. The statistics cited in the materials, the court said, is not reflected in the amount chosen to remediate the discrimination R.C. §3796.09(C), 15 percent. This percentage is not based on the evidence demonstrating racial discrimination in marijuana related arrest in Ohio. Therefore, the court concluded the numerical value was selected at random by the legislature, and not based on the evidence provided.

Defendants argued third parties are minimally impacted. R.C. §3796:2-1-01 allots twelve licenses to be issued to the most qualified applicants. By allowing a 15 percent set aside, the court concluded licenses are given to lower qualified applicants solely on the basis of race. The court found the 15 percent set aside is not insignificant and the burden is excessive for a newly created industry with limited participants.

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

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

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

The case was appealed in the Court of Appeals of the Ohio Tenth Appellate District, Case No. 18-AP-000954. The appeal was voluntarily dismissed in March, 2021.

In the Court of Common Pleas, on March 11, 2021 the parties filed a Joint Motion to Dismiss Remaining Claims and Counterclaims Without Prejudice, and the Court of Common Pleas Ordered the dismissal of the remaining Counts of the Complaint and Counterclaim without prejudice.

- **Circle City Broadcasting I, LLC (“Circle City”) and National Association of Black Owned Broadcasters (“NABOB”) (Plaintiffs) v. DISH Network, LLC (“DISH” or “Defendant”), U.S. District Court, Southern District of Indiana, Indianapolis Division, Case NO. 1:20-cv-00750-TWP-TAB.**

This case involves allegations of racial discrimination in contracting by DISH against Plaintiff Circle City. Plaintiffs allege DISH refuses to contract in a nondiscriminatory manner with Circle City in violation of 42 U.S.C. § 1981. Circle City is a small, minority-owned and historically disadvantaged business providing local television broadcasting with television stations located in and serving Indianapolis, Indiana and the surrounding areas.

NABOB is a nonprofit corporation. The Amended Complaint alleges that NABOB represents 167 radio stations owned by 59 different radio broadcasting companies and 21 television stations owned by 10 different television broadcasting companies. The Amended Complaint alleges NABOB is a trade association representing the interests of the African American owned commercial radio and television stations across the country. Plaintiffs allege that as the voice of the African American broadcast industry for the past 42 years, NABOB has been instrumental in shaping national government and industry policies to improve the opportunities for success in broadcasting for African Americans and other minorities.

Plaintiffs claim that DISH insists on maintaining the industry’s policies and practices of discriminating against minority-owned broadcasters and disadvantaged business by paying the non-minority broadcasters significant fees to rebroadcast their stations and channels while offering practically no fees to the historically disadvantaged broadcaster or programmer for the same or superior programming.

Plaintiffs assert that DISH’s policies discount the contribution minorities can make in a market by refusing to contract with them on a fair and equal basis, and this policy highlights discrimination against minority businesses.

Plaintiffs allege that DISH refuses to negotiate a television retransmission contract in good faith with a minority owned business, Circle City.

Circle City sues for retransmission fees at a fair market rate, actual and punitive damages, interest, attorneys’ fees and costs resulting from allegations of intentional misconduct by DISH in its alleged disingenuous “negotiations” with Circle City. NABOB also seeks injunctive relief to enjoin the alleged unlawful acts.

The court issued an Order on May 18, 2021, regarding discovery and noted that it does not appear that settlement would be productive at this time; thus, the case will proceed with discovery. The court set a pretrial conference in February 2022, and the case is pending at the time of this report.

- **Etienne Hardre, and SDG Murray, LTD et al v. Colorado Minority Business Office, Governor of Colorado et al., U.S. District Court for District, District of Colorado, Case 1:20-cv-03594. Complaint filed in December 2020.**

This Complaint concerns Senate Bill 20B-001 (“SB1”) signed into law by the Governor of Colorado on December 7, 2020. The Complaint claims unconstitutional race-based classifications in SB1, including those in Section 8 providing economic relief and stimulus only to minority-owned businesses; provisions will be codified at Colo. Rev. Stat. §24-49.5-106. SB1 appropriates \$4 million for COVID-19 relief payments for “minority-owned businesses.”

Plaintiffs allege Caucasian businesses are excluded from participating in these relief payments based on the racial identities of the business owners. The appropriation of \$4 million for use by the Colorado Minority Business Office is to provide “relief payments, grants and loans to minority-owned businesses.”

SB1 directs the Colorado Minority Business Office to use a portion of the funds “to provide technical assistance and consulting support to minority-owned businesses across the state.” SB1 provides three primary forms of economic relief exclusively to minority-owned businesses: direct relief payments, grants and loans for startup capital, and funds to provide minority-owned business leaders with professional development and networking opportunities.

SBE directs Director of CMBO to establish a process for minority-owned businesses to apply for economic stimulus benefits, with a threshold requirement to applying is that the business be “minority owned” as defined by SB1.

Plaintiffs allege SB1’s provision limiting certain economic stimulus payments to minority-owned businesses violates the Equal Protection Clause of the Fourteenth Amendment by unconstitutionally making facial racial classifications.

The Plaintiffs filed a Motion for Preliminary Injunction and Defendants filed a Motion to Dismiss. The court held a hearing on the preliminary injunction on April 6, 2021. Based on the status of the case, the court found the record is undeveloped or the future uncertain, the case is unripe, and the Plaintiffs brought the case before any implementing regulations had been adopted and without information regarding their own eligibility for economic assistance.

Given that the issue is not ripe for review, and it is unclear whether Plaintiffs have standing as a result, the court found that it is inappropriate to address the preliminary injunction factors. Although a preliminary injunction is, by definition, preliminary relief, a litigant still must have standing and the claim must be ripe. Without these two prerequisites, the court stated, it is inappropriate to exercise jurisdiction, whether preliminary or final. Accordingly, the motion for preliminary injunction will be denied. And, the court based on this status of the case, took the further step and dismissed the case in its entirety.

The court thus held on April 19, 2021 that the Plaintiffs’ claims were dismissed without prejudice and granted the Defendants’ Motion to Dismiss, and held that the Plaintiffs’ Motion for Preliminary Injunction is denied.

- **Infinity Consulting Group, LLC, et al. V. United States Department of the Treasury, et al.**, Case No.: Gjh-20-981, In The United States District Court For The District Of Maryland, Southern Division. Complaint filed in April 2020.

This case involved a complaint filed in response to the distribution of PPP funds that “resulted in a disproportionate number of minority-owned and female-owned business owners unfairly left without relief.”

Plaintiffs, two owners of Maryland small businesses, sued Defendants U.S. Department of the Treasury, the U.S. Small Business Administration (“SBA”) regarding the guidelines governing the first round of funding for the Paycheck Protection Program (“PPP”) in April 2020.

Plaintiffs alleged Defendants knowingly and intentionally discriminated against MBE/WBEs by prohibiting businesses without employees from applying for funding until a week after businesses with employees could apply, leaving only a short period before the funds were depleted. In anticipation of legislation authorizing a second round of funding for the PPP, Plaintiffs moved for a temporary restraining order and preliminary injunction halting the entire PPP from proceeding until Defendants took steps to guarantee more equitable distribution of PPP funds before they were exhausted a second time.

Plaintiffs’ asserted claims under the Fifth Amendment of the U.S. Constitution and the Administrative Procedure Act, 5 U.S.C. §706(2). Court on April 26, 2020 held Plaintiffs’ Emergency Motion for a Temporary Restraining Order and Preliminary Injunction was denied.

Court found Plaintiffs did not demonstrate a likelihood of success on their claims or that their remedy would be in the overall interest of the greater public. Court held Plaintiffs did not show Defendants’ knowingly and intentionally discriminated against MBE/WBEs with no employees, and thus did not prove violation of the equal protection component of the Fifth Amendment’s Due Process Clause. Plaintiffs did not show that an “invidious discriminatory purpose was a motivating factor” behind the Defendants’ decision making in administering the PPP.

Court pointed out that while “a showing of disparate impact on a protected group and the foreseeability of this impact is relevant to prove that the decision maker acted with a forbidden purpose, ‘impact alone is not determinative, and the Court must look to other evidence.”

After the denial of the Temporary Restraining Order and Preliminary Injunction, Motions to Dismiss were filed by Defendants mainly asserting lack of jurisdiction and failure to state a claim. Plaintiffs and Defendants subsequently entered into a Stipulation of Dismissal with prejudice on October 27, 2020.

This list of recent pending and informative cases is not exhaustive, but in addition to the cases cited previously, may potentially have an impact on the study and implementation by state DOTs and state and local governments regarding the implementation of the Federal DBE/ACDBE Programs and MBE/WBE/DBE programs, and related legislation.

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 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.

SUMMARIES OF RECENT DECISIONS

D. Recent Decisions Involving State and Local Government MBE/WBE/DBE Programs and Their Implementation of the Federal DBE Program in the Ninth Circuit Court of Appeals

1. Orion Insurance Group, a Washington Corporation; Ralph G. Taylor, an individual, Plaintiffs, v. Washington State Office Of Minority & Women's Business Enterprises, United States DOT, et. al., 2018 WL 6695345 (9th Cir. December 19, 2018), Memorandum opinion (not for publication), Petition for Rehearing denied, February 2019. Petition for Writ of Certiorari filed with the U.S. Supreme Court denied (June 24, 2019).

Plaintiffs, Orion Insurance Group (“Orion”) and its owner Ralph Taylor, filed this case alleging violations of federal and state law due to the denial of their application for Orion to be considered a DBE under federal law. The USDOT and Washington State Office of Minority & Women’s Business Enterprises (“OMWBE”), moved for a summary dismissal of all the claims.

Plaintiff Taylor received results from a genetic ancestry test that estimated he was 90 percent European, 6 percent Indigenous American, and 4 percent Sub-Saharan African. Taylor submitted an application to OMWBE seeking to have Orion certified as a MBE under Washington State law. Taylor identified himself as Black. His application was initially rejected, but after Taylor appealed, OMWBE voluntarily reversed their decision and certified Orion as an MBE.

Plaintiffs submitted to OMWBE Orion’s application for DBE certification under federal law. Taylor identified himself as Black American and Native American in the Affidavit of Certification. Orion’s DBE application was denied because there was insufficient evidence that he was a member of a racial group recognized under the regulations, was regarded by the relevant community as either Black or Native American, or that he held himself out as being a member of either group.

OMWBE found the presumption of disadvantage was rebutted and the evidence was insufficient to show Taylor was socially and economically disadvantaged.

District Court decision. The district court held OMWBE did not act arbitrarily or capriciously when it found the presumption that Taylor was socially and economically disadvantaged was rebutted because of insufficient evidence he was either Black or Native American. By requiring individualized determinations of social and economic disadvantage, the court held the Federal DBE Program requires states to extend benefits only to those who are actually disadvantaged.

Therefore, the district court dismissed the claim that, on its face, the Federal DBE Program violates the Equal Protection Clause. The district court also dismissed the claim that the Defendants, in applying the Federal DBE Program to him, violated the Equal Protection Clause.

The district court found there was no evidence that the application of the federal regulations was done with an intent to discriminate against mixed-race individuals or with racial animus, or creates a disparate impact on mixed-race individuals. The district court held the Plaintiffs failed to show that either the State or Federal Defendants had no rational basis for the difference in treatment.

Void for vagueness claim. Plaintiffs asserted that the regulatory definitions of “Black American” and “Native American” are void for vagueness. The district court dismissed the claims that the definitions of “Black American” and “Native American” in the DBE regulations are impermissibly vague.

Claims for violations of 42 U.S.C. § 2000d (Title VI) against the State. Plaintiffs’ claims were dismissed against the State Defendants for violation of Title VI. The district court found plaintiffs failed to show the state engaged in intentional racial discrimination. The DBE regulations’ requirement that the state make decisions based on race, the district court held were constitutional.

The Ninth Circuit on appeal affirmed the District Court. The Ninth Circuit held the district court correctly dismissed Taylor’s claims against Acting Director of the USDOT’s Office of Civil Rights, in her individual capacity. The Ninth Circuit also held the district court correctly dismissed Taylor’s discrimination claims under 42 U.S.C. § 1983 because the federal defendants did not act “under color or state law” as required by the statute.

In addition, the Ninth Circuit concluded the district court correctly dismissed Taylor’s claims for damages because the United States has not waived its sovereign immunity on those claims. The Ninth Circuit found the district court correctly dismissed Taylor’s claims for equitable relief refund under 42 U.S.C. § 2000d because the Federal DBE Program does not qualify as a “program or activity” within the meaning of the statute.

Claims under the Administrative Procedure Act. The Ninth Circuit stated the OMWBE did not act in an arbitrary and capricious manner when it determined it had a “well founded reason” to question Taylor’s membership claims, and that Taylor did not qualify as a “socially and economically disadvantaged individual.” Also, the court found OMWBE did not act in an arbitrary and capricious manner when it did not provide an in-person hearing under 49 C.F.R. §§ 26.67(b)(2) and 26.87(d) because Taylor was not entitled to a hearing under the regulations.

The Ninth Circuit held the USDOT did not act in an arbitrary and capricious manner when it affirmed the state's decision because the decision was supported by substantial evidence and consistent with federal regulations. The USDOT "articulated a rational connection" between the evidence and the decision to deny Taylor's application for certification.

Claims under the Equal Protection Clause and 42 U.S.C. §§ 1983 and 2000d. The Ninth Circuit held the district court correctly granted summary judgment to the federal and state Defendants on Taylor's equal protection claims because Defendants did not discriminate against Taylor, and did not treat Taylor differently from others similarly situated. In addition, the court found the district court properly granted summary judgment to the state defendants on Taylor's discrimination claims under 42 U.S.C. §§ 1983 and 2000d because neither statute applies to Taylor's claims.

Having granted summary judgment on Taylor's claims under federal law, the Ninth Circuit concluded the district court properly declined to exercise jurisdiction over Taylor's state law claims.

Petition for Writ of Certiorari. Plaintiffs/Appellants filed a Petition for Writ of Certiorari with the U.S. Supreme Court on April 22, 2019, which was denied on June 24, 2019.

2. Orion Insurance Group, a Washington Corporation; Ralph G. Taylor, an individual, Plaintiffs, v. Washington State Office Of Minority & Women's Business Enterprises, United States DOT, et. al., 2017 WL 3387344 (W.D. Wash. 2017).

Plaintiffs, Orion Insurance Group ("Orion"), a Washington corporation, and its owner, Ralph Taylor, filed this case alleging violations of federal and state law due to the denial of their application for Orion to be considered a disadvantaged business enterprise ("DBE") under federal law. 2017 WL 3387344. Plaintiffs moved the Court for an order that summarily declared that the Defendants violated the Administrative Procedure Act (APA), declared that the denial of the DBE certification for Orion was unlawful, and reversed the decision that Orion is not a DBE. *Id.* at *1. The United States Department of Transportation ("USDOT") and the Acting Director of USDOT, (collectively the "Federal Defendants") move for a summary dismissal of all the claims asserted against them. *Id.* The Washington State Office of Minority & Women's Business Enterprises ("OMWBE"), (collectively the "State Defendants") moved for summary dismissal of all claims asserted against them. *Id.*

The court held Plaintiffs' motion for partial summary judgment was denied, in part, and stricken, in part, the Federal Defendants' motion for summary judgment was granted, and the State Defendants' motion for summary judgment was granted, in part, and stricken, in part. *Id.*

Factual and procedural history. In 2010, Plaintiff Ralph Taylor received results from a genetic ancestry test that estimated that he was 90 percent European, 6 percent Indigenous American, and 4 percent Sub-Saharan African. Mr. Taylor acknowledged that he grew up thinking of himself as Caucasian, but asserted that in his late 40s, when he realized he had Black ancestry, he "embraced his Black culture." *Id.* at *2.

In 2013, Mr. Taylor submitted an application to OMWBE, seeking to have Orion, his insurance business, certified as a MBE under Washington State law. *Id.* at *2. In the application, Mr. Taylor identified himself as Black, but not Native American. *Id.* His application was initially rejected, but after Mr. Taylor appealed the decision, OMWBE voluntarily reversed their decision and certified Orion as an MBE under the Washington Administrative Code and other Washington law. *Id.* at *2.

In 2014, Plaintiffs submitted, to OMWBE, Orion's application for DBE certification under federal law. *Id.* at *2. His application indicated that Mr. Taylor identified himself as Black American and Native American in the Affidavit of Certification submitted with the federal application. *Id.* Considered with his initial submittal were the results from the 2010 genetic ancestry test that estimated that he was 90 percent European, 6 percent Indigenous American, and 4 percent Sub-Saharan African. *Id.* Mr. Taylor submitted the results of his father's genetic results, which estimated that he was 44 percent European, 44 percent Sub-Saharan African, and 12 percent East Asian. *Id.* Mr. Taylor included a 1916 death certificate for a woman from Virginia, Eliza Ray, identified as a "Negro," who was around 86 years old, with no other supporting documentation to indicate she was an ancestor of Mr. Taylor. *Id.* at *2.

In 2014, Orion's DBE application was denied because there was insufficient evidence that he was a member of a racial group recognized under the regulations, was regarded by the relevant community as either Black or Native American, or that he held himself out as being a member of either group over a long period of time prior to his application. *Id.* at *3. OMWBE also found that even if there was sufficient evidence to find that Mr. Taylor was a member of either of these racial groups, "the presumption of disadvantage has been rebutted," and the evidence Mr. Taylor submitted was insufficient to show that he was socially and economically disadvantaged. *Id.*

Mr. Taylor appealed the denial of the DBE certification to the USDOT. Plaintiffs voluntarily dismissed this case after the USDOT issued its decision. *Id.* at **3-4. *Orion Insurance Group v. Washington State Office of Minority & Women's Business Enterprises, et al.*, U.S. District Court for the Western District of Washington case number 15-5267 BHS. In 2015, the USDOT affirmed the denial of Orion's DBE certification, concluding that there was substantial evidence in the administrative record to support OMWBE's decision. *Id.* at *4.

This case was filed in 2016. *Id.* at *4. Plaintiffs assert claims for (A) violation of the Administrative Procedures Act, 5 U.S.C. § 706, (B) "Discrimination under 42 U.S.C. § 1983" (reference is made to Equal Protection), (C) "Discrimination under 42 U.S.C. § 2000d," (D) violation of Equal Protection under the United States Constitution, (E) violation of the Washington Law Against Discrimination and Article 1, Sec. 12 of the Washington State Constitution, and (F) assert that the definitions in 49 C.F.R. § 26.5 are void for vagueness. *Id.* Plaintiffs seek damages, injunctive relief: ("[r]eversing the decisions of the USDOT, Ms. Jones and OMWBE, and OMWBE's representatives ... and issuing an injunction and/or declaratory relief requiring Orion to be certified as a DBE," and a declaration the "definitions of 'Black American' and 'Native American' in 49 C.F.R. § 26.5 to be void as impermissibly vague,") and attorneys' fees, and costs. *Id.*

OMWBE did not act arbitrarily or capriciously in denying certification. The court examined the evidence submitted by Mr. Taylor and by the State Defendants. *Id.* at **7-12. The court held that

OMWBE did not act arbitrarily or capriciously when it found that the presumption that Mr. Taylor was socially and economically disadvantaged was rebutted because there was insufficient evidence that he was a member of either the Black or Native American groups. *Id.* at *8. Nor did it act arbitrarily and capriciously when it found that Mr. Taylor failed to demonstrate, by a preponderance of the evidence, that Mr. Taylor was socially and economically disadvantaged. *Id.* at *9. Under 49 C.F.R. § 26.63(b)(1), after OMWBE determined that Mr. Taylor was not a “member of a designated disadvantaged group,” the court stated Mr. Taylor “must demonstrate social and economic disadvantage on an individual basis.” *Id.* Accordingly, pursuant to 49 C.F.R. § 26.61(d), Plaintiffs had the burden to prove, by a preponderance of the evidence, that Mr. Taylor was socially and economically disadvantaged. *Id.*

In making these decisions, the court found OMWBE considered the relevant evidence and “articulated a rational connection between the facts found and the choices made.” *Id.* at *10. By requiring individualized determinations of social and economic disadvantage, the Federal DBE “program requires states to extend benefits only to those who are actually disadvantaged.” *Id.*, citing, *Midwest Fence Corp. v. United States Dep’t of Transp.*, 840 F.3d 932, 946 (7th Cir. 2016). OMWBE did not act arbitrary or capriciously when it found that Mr. Taylor failed to show he was “actually disadvantaged” or when it denied Plaintiff’s application. *Id.*

The U.S. DOT affirmed the decision of the state OMWBE to deny DBE status to Orion. *Id.* at **10-11.

Claims for violation of equal protection. To the extent that Plaintiffs assert a claim that, on its face, the Federal DBE Program violates the Equal Protection Clause of the U.S. Constitution, the court held the claim should be dismissed. *Id.* at **12-13. The Ninth Circuit has held that the Federal DBE Program, including its implementing regulations, does not, on its face, violate the Equal Protection Clause of the U.S. Constitution. *Western States Paving Co. v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005). *Id.* The Western States Court held that Congress had evidence of discrimination against women and minorities in the national transportation contracting industry and the Federal DBE Program was a narrowly tailored means of remedying that sex and raced based discrimination. *Id.* Accordingly, the court found race-based determinations under the program have been determined to be constitutional. *Id.* The court noted that several other circuits, including the Seventh, Eighth, and Tenth have held the same. *Id.* at *12, citing, *Midwest Fence Corp. v. United States Dep’t of Transp.*, 840 F.3d 932, 936 (7th Cir. 2016); *Sherbrooke Turf, Inc. v. Minnesota Dep’t of Transportation*, 345 F.3d 964, 973 (8th Cir. 2003); *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1155 (10th Cir. 2000).

To the extent that Plaintiffs assert that the Defendants, in applying the Federal DBE Program to him, violated the Equal Protection Clause of the U.S. Constitution, the court held the claim should be dismissed. *Id.* at *12. Plaintiffs argue that, as applied to them, the regulations “weigh adversely and disproportionately upon” mixed-race individuals, like Mr. Taylor. *Id.* This claim should be dismissed, according to the court, as the Equal Protection Clause prohibits only intentional discrimination. *Id.* Even considering materials filed outside the administrative record, the court found Plaintiffs point to no evidence that the application of the regulations here was done with an intent to discriminate against mixed-race individuals, or that it was done with racial animus. *Id.* Further, the court said Plaintiffs offer no evidence that application of the

regulations creates a disparate impact on mixed-race individuals. *Id.* Plaintiffs' remaining arguments relate to the facial validity of the DBE program, and the court held they also should be dismissed. *Id.*

The court concluded that to the extent that Plaintiffs base their equal protection claim on an assertion that they were treated differently than others similarly situated, their "class of one" equal protection claim should be dismissed. *Id.* at *13. For a class of one equal protection claim, the court stated Plaintiffs must show they have been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. *Id.*

Plaintiffs, the court found, have failed to show that Mr. Taylor was intentionally treated differently than others similarly situated. *Id.* at *13. Plaintiffs pointed to no evidence of intentional differential treatment by the Defendants. *Id.* Plaintiffs failed to show that others that were similarly situated were treated differently. *Id.*

Further, the court held Plaintiffs failed to show that either the State or Federal Defendants had no rational basis for the difference in treatment. *Id.* at *13. Both the State and Federal Defendants according to the court, offered rational explanations for the denial of the application. *Id.* Plaintiffs' Equal Protection claims, asserted against all Defendants, the court held, should be denied. *Id.*

Void for vagueness claim. Plaintiffs assert that the regulatory definitions of "Black American" and both the definition of "Native American" that was applied to Plaintiffs and a new definition of "Native American" are void for vagueness, presumably contrary to the Fifth and Fourteenth Amendments' due process clauses. *Id.* at *13.

The court pointed out that although it can be applied in the civil context, the Seventh Circuit Court of Appeals has noted that in relation to the DBE regulations, the void for vagueness "doctrine is a poor fit." *Id.* at *14, citing, *Midwest Fence Corp. v. United States Dep't of Transp.*, 840 F.3d 932, 947–48 (7th Cir. 2016). Unlike criminal or civil statutes that prohibit certain conduct, the Seventh Circuit noted that the DBE regulations do not threaten parties with punishment, but, at worst, cause lost opportunities for contracts. *Id.* In any event, the court held Plaintiffs' claims that the definitions of "Black American" and of "Native American" in the DBE regulations are impermissibly vague should be dismissed. *Id.*

The court found the regulations require that to show membership, an applicant must submit a statement, and then if the reviewer has a "well founded" question regarding group membership, the reviewer must ask for additional evidence. 49 C.F.R. § 26.63 (a)(1). *Id.* at *14. Considering the purpose of the law, the court stated the regulations clearly explain to a person of ordinary intelligence what is required to qualify for this governmental benefit. *Id.*

The definition of "socially and economically disadvantaged individual" as a "citizen ... who has been subjected to racial or ethnic prejudice or cultural bias within American society because of his or her identity as a members of groups and without regard to their individual qualities," the court determined, gives further meaning to the definitions of "Black American" and "Native American" here. *Id.* at *14. "Otherwise imprecise terms may avoid vagueness problems when

used in combination with terms that provide sufficient clarity.” *Id.* at *14, quoting, *Gammoh v. City of La Habra*, 395 F.3d 1114, 1120 (9th Cir. 2005).

The court held plaintiffs also fail to show that these terms, when considered within the statutory framework, are so vague that they lend themselves to “arbitrary” decisions. *Id.* at *14. Moreover, even if the court did have jurisdiction to consider whether the revised definition of “Native American” was void for vagueness, the court found a simple review of the statutory language leads to the conclusion that it is not. *Id.* The revised definition of “Native Americans” now “includes persons who are enrolled members of a federally or State recognized Indian tribe, Alaska Natives, or Native Hawaiian.” *Id.*, citing, 49 C.F.R. § 26.5. This definition, the court said, provides an objective criteria based on the decisions of the tribes, and does not leave the reviewer with any discretion. *Id.* The court thus held that Plaintiffs' void for vagueness challenges were dismissed. *Id.*

Claims for violations of 42 U.S.C. §2000d against the State Defendants. Plaintiffs' claims against the State Defendants for violation of Title VI (42 U.S.C. § 2000d), the court also held, should be dismissed. *Id.* at *16. Plaintiffs failed to show that the State Defendants engaged in intentional impermissible racial discrimination. *Id.* The court stated that “Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment.” *Id.* The court pointed out the DBE regulations' requirement that the State make decisions based on race has already been held to pass constitutional muster in the Ninth Circuit. *Id.* at *16, citing, *Western States Paving Co. v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005). Plaintiffs made no showing that the State Defendants violated their Equal Protection or other constitutional rights. *Id.* Moreover, Plaintiffs, the court found, failed to show that the State Defendants intentionally acted with discriminatory animus. *Id.*

The court held to the extent the Plaintiffs assert claims that are based on disparate impact, those claims are unavailable because “Title VI itself prohibits only intentional discrimination.” *Id.* at *17, quoting, *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 178 (2005). The court therefore held this claim should be dismissed. *Id.* at *17.

Holding. Therefore, the court ordered that Plaintiffs' Motion for Partial Summary Judgment was: Denied as to the federal claims; and Stricken as to the state law claims asserted against the State Defendants for violations of the Washington Constitution and WLAD.

In addition, the Federal Defendants' Motion for Summary Judgment on the Administrative Procedure Act, Equal Protection, and Void for Vagueness Claims was Granted; and the claims asserted against the Federal Defendants were Dismissed.

The State Defendants' Cross Motion for Summary Judgment was Granted as to Plaintiffs claims against the State Defendants for violations of the APA, Equal Protection, Void for Vagueness, 42 U.S.C. § 1983, and 42 U.S.C. § 2000d, and those claims were Dismissed. *Id.* Also, the court held the State Defendants' Cross Motion for Summary Judgment was Stricken as to the state law claims asserted against the State Defendants for violations of the Washington Constitution and WLAD. *Id.*

3. Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al., 2017 WL 2179120 (9th Cir. May 16, 2017), Memorandum opinion, (not for publication) United States Court of Appeals for the Ninth Circuit, May 16, 2017, Docket Nos. 14-26097 and 15-35003, dismissing in part, reversing in part and remanding the U. S. District Court decision at 2014 WL 6686734 (D. Mont. Nov. 26, 2014). The case on remand voluntarily dismissed by stipulation of parties (March 14, 2018).

Note: The Ninth Circuit Court of Appeals Memorandum provides: “This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.”

Introduction. Mountain West Holding Company installs signs, guardrails, and concrete barriers on highways in Montana. It competes to win subcontracts from prime contractors who have contracted with the State. It is not owned and controlled by women or minorities. Some of its competitors are disadvantaged business enterprises (DBEs) owned by women or minorities. In this case it claims that Montana’s DBE goal-setting program unconstitutionally required prime contractors to give preference to these minority or female-owned competitors, which Mountain West Holdings Company argues is a violation of the Equal Protection Clause, 42 U.S.C. § 1983 and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.*

Factual and procedural background. *In Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.*, 2014 WL 6686734 (D. Mont. Nov. 26, 2014); Case No. 1:13-CV-00049-DLC, United States District Court for the District of Montana, Billings Division, plaintiff Mountain West Holding Co., Inc. (“Mountain West”), alleged it is a contractor that provides construction-specific traffic planning and staffing for construction projects as well as the installation of signs, guardrails, and concrete barriers. Mountain West sued the Montana Department of Transportation (“MDT”) and the State of Montana, challenging their implementation of the Federal DBE Program. Mountain West brought this action alleging violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, Title VI of the Civil Rights Act, 42 USC § 2000(d)(7), and 42 USC § 1983.

Following the Ninth Circuit’s 2005 decision in *Western States Paving v. Washington DOT, et al.*, MDT commissioned a disparity study which was completed in 2009. MDT utilized the results of the disparity study to establish its overall DBE goal. MDT determined that to meet its overall goal, it would need to implement race-conscious contract specific goals. Based upon the disparity study, Mountain West alleges the State of Montana utilized race, national origin, and gender-conscious goals in highway construction contracts. Mountain West claims the State did not have a strong basis in evidence to show there was past discrimination in the highway construction industry in Montana and that the implementation of race, gender, and national origin preferences were necessary or appropriate. Mountain West also alleges that Montana has instituted policies and practices which exceed the United States Department of Transportation DBE requirements.

Mountain West asserts that the 2009 study concluded all “relevant” minority groups were underutilized in “professional services” and Asian Pacific Americans and Hispanic Americans were underutilized in “business categories combined,” but it also concluded that all “relevant”

minority groups were significantly overutilized in construction. Mountain West thus alleges that although the disparity study demonstrates that DBE groups are “significantly overrepresented” in the highway construction field, MDT has established preferences for DBE construction subcontractor firms over non-DBE construction subcontractor firms in the award of contracts.

Mountain West also asserts that the Montana DBE Program does not have a valid statistical basis for the establishment or inclusion of race, national origin, and gender conscious goals, that MDT inappropriately relies upon the 2009 study as the basis for its DBE Program, and that the study is flawed. Mountain West claims the Montana DBE Program is not narrowly tailored because it disregards large differences in DBE firm utilization in MDT contracts as among three different categories of subcontractors: business categories combined, construction, and professional services; the MDT DBE certification process does not require the applicant to specify any specific racial or ethnic prejudice or cultural bias that had a negative impact upon his or her business success; and the certification process does not require the applicant to certify that he or she was discriminated against in the State of Montana in highway construction.

Mountain West and the State of Montana and the MDT filed cross Motions for Summary Judgment. Mountain West asserts that there was no evidence that all relevant minority groups had suffered discrimination in Montana’s transportation contracting industry because, while the study had determined there were substantial disparities in the utilization of all minority groups in professional services contracts, there was no disparity in the utilization of minority groups in construction contracts.

AGC, San Diego v. California DOT and Western States Paving Co. v. Washington DOT. The Ninth Circuit and the district court in *Mountain West* applied the decision in *Western States*, 407 F.3d 983 (9th Cir. 2005), and the decision in *AGC, San Diego v. California DOT*, 713 F.3d 1187 (9th Cir. 2013) as establishing the law to be followed in this case. The district court noted that in *Western States*, the Ninth Circuit held that a state’s implementation of the Federal DBE Program can be subject to an as-applied constitutional challenge, despite the facial validity of the Federal DBE Program. 2014 WL 6686734 at *2 (D. Mont. November 26, 2014). The Ninth Circuit and the district court stated the Ninth Circuit has held that whether a state’s implementation of the DBE Program “is narrowly tailored to further Congress’s remedial objective depends upon the presence or absence of discrimination in the State’s transportation contracting industry.” *Mountain West*, 2014 WL 6686734 at *2, quoting *Western States*, at 997-998, and *Mountain West*, 2017 WL 2179120 at *2 (9th Cir. May 16, 2017) Memorandum, May 16, 2017, at 5-6, quoting *AGC, San Diego v. California DOT*, 713 F.3d 1187, 1196. The Ninth Circuit in *Mountain West* also pointed out it had held that “even when discrimination is present within a State, a remedial program is only narrowly tailored if its application is limited to those minority groups that have actually suffered discrimination.” *Mountain West*, 2017 WL 2179120 at *2, Memorandum, May 16, 2017, at 6, and 2014 WL 6686734 at *2, quoting *Western States*, 407 F.3d at 997-999.

MDT study. MDT obtained a firm to conduct a disparity study that was completed in 2009. The district court in *Mountain West* stated that the results of the study indicated significant underutilization of DBEs in all minority groups in “professional services” contracts, significant underutilization of Asian Pacific Americans and Hispanic Americans in “business categories combined,” slight underutilization of nonminority women in “business categories combined,”

and overutilization of all groups in subcontractor “construction” contracts. *Mountain West*, 2014 WL 6686734 at *2.

In addition to the statistical evidence, the 2009 disparity study gathered anecdotal evidence through surveys and other means. The district court stated the anecdotal evidence suggested various forms of discrimination existed within Montana’s transportation contracting industry, including evidence of an exclusive “good ole boy network” that made it difficult for DBEs to break into the market. *Id.* at *3. The district court said that despite these findings, the consulting firm recommended that MDT continue to monitor DBE utilization while employing only race-neutral means to meet its overall goal. *Id.* The consulting firm recommended that MDT consider the use of race-conscious measures if DBE utilization decreased or did not improve.

Montana followed the recommendations provided in the study, and continued using only race-neutral means in its effort to accomplish its overall goal for DBE utilization. *Id.* Based on the statistical analysis provided in the study, Montana established an overall DBE utilization goal of 5.83 percent. *Id.*

Montana’s DBE utilization after ceasing the use of contract goals. The district court found that in 2006, Montana achieved a DBE utilization rate of 13.1 percent, however, after Montana ceased using contract goals to achieve its overall goal, the rate of DBE utilization declined sharply. 2014 WL 6686734 at *3. The utilization rate dropped, according to the district court, to 5 percent in 2007, 3 percent in 2008, 2.5 percent in 2009, 0.8 percent in 2010, and in 2011, it was 2.8 percent. *Id.* In response to this decline, for fiscal years 2011-2014, the district court said MDT employed contract goals on certain USDOT contracts in order to achieve 3.27 percentage points of Montana’s overall goal of 5.83 percent DBE utilization.

MDT then conducted and prepared a new Goal Methodology for DBE utilization for federal fiscal years 2014-2016. *Id.* US DOT approved the new and current goal methodology for MDT, which does not provide for the use of contract goals to meet the overall goal. *Id.* Thus, the new overall goal is to be made entirely through the use of race-neutral means. *Id.*

Mountain West’s claims for relief. Mountain West sought declaratory and injunctive relief, including prospective relief, against the individual defendants, and sought monetary damages against the State of Montana and the MDT for alleged violation of Title VI. 2014 WL 6686734 at *3. Mountain West’s claim for monetary damages is based on its claim that on three occasions it was a low-quoting subcontractor to a prime contractor submitting a bid to the MDT on a project that utilized contract goals, and that despite being a low-quoting bidder, Mountain West was not awarded the contract. *Id.* Mountain West brings an as-applied challenge to Montana’s DBE program. *Id.*

The two-prong test to demonstrate that a DBE program is narrowly tailored. The Court, *citing* AGC, *San Diego v. California DOT*, 713 F.3d 1187, 1196, stated that under the two-prong test established in *Western States*, in order to demonstrate that its DBE program is narrowly tailored, (1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be limited to those minority groups that have

actually suffered discrimination. *Mountain West*, 2017 WL 2179120 at *2, Memorandum, May 16, 2017, at 6-7.

District Court Holding in 2014 and the Appeal. The district court granted summary judgment to the State, and Mountain West appealed. *See Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.* 2014 WL 6686734 (D. Mont. Nov. 26, 2014) , *dismissed in part, reversed in part, and remanded*, U.S. Court of Appeals, Ninth Circuit, Docket Nos. 14-36097 and 15-35003, Memorandum 2017 WL 2179120 at **1-4 (9th Cir. May 16, 2017). Montana also appealed the district court’s threshold determination that Mountain West had a private right of action under Title VI, and it appealed the district court’s denial of the State’s motion to strike an expert report submitted in support of Mountain West’s motion.

Ninth Circuit Holding. The Ninth Circuit Court of Appeals in its Memorandum opinion dismissed Mountain West’s appeal as moot to the extent Mountain West pursues equitable remedies, affirmed the district court’s determination that Mountain West has a private right to enforce Title VI, affirmed the district court’s decision to consider the disputed expert report by Mountain West’s expert witness, and reversed the order granting summary judgment to the State. 2017 WL 2179120 at **1-4 (9th Cir. May 16, 2017), U.S. Court of Appeals, Ninth Circuit, Docket Nos. 14-36097 and 15-35003, Memorandum, at 3, 5, 11.

Mootness. The Ninth Circuit found that Montana does not currently employ gender- or race-conscious goals, and the data it relied upon as justification for its previous goals are now several years old. The Court thus held that Mountain West’s claims for injunctive and declaratory relief are therefore moot. *Mountain West*, 2017 WL 2179120 at *2 (9th Cir.), Memorandum, May 16, 2017, at 4.

The Court also held, however, that Mountain West’s Title VI claim for damages is not moot. 2017 WL 2179120 at **1-2. The Court stated that a plaintiff may seek damages to remedy violations of Title VI, *see* 42 U.S.C. § 2000d-7(a)(1)-(2); and Mountain West has sought damages. Claims for damages, according to the Court, do not become moot even if changes to a challenged program make claims for prospective relief moot. *Id.*

The appeal, the Ninth Circuit held, is therefore dismissed with respect to Mountain West’s claims for injunctive and declaratory relief; and only the claim for damages under Title VI remains in the case. *Mountain West*, 2017 WL 2179120 at **1 (9th Cir.), Memorandum, May 16, 2017, at 4.

Private Right of Action and Discrimination under Title VI. The Court concluded for the reasons found in the district court’s order that Mountain West may state a private claim for damages against Montana under Title VI. *Id.* at *2. The district court had granted summary judgment to Montana on Mountain West’s claims for discrimination under Title VI.

Montana does not dispute that its program took race into account. The Ninth Circuit held that classifications based on race are permissible “only if they are narrowly tailored measures that further compelling governmental interests.” *Mountain West*, 2017 WL 2179120 (9th Cir.) at *2, Memorandum, May 16, 2017, at 6-7. *W. States Paving*, 407 F.3d at 990 (*quoting Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995)). As in *Western States Paving*, the Court

applied the same test to claims of unconstitutional discrimination and discrimination in violation of Title VI. *Mountain West*, 2017 WL 2179120 at *2, n.2, Memorandum, May 16, 2017, at 6, n. 2; *see*, 407 F.3d at 987.

Montana, the Court found bears the burden to justify any racial classifications. *Id.* In an as-applied challenge to a state's DBE contracting program, "(1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be 'limited to those minority groups that have actually suffered discrimination.'" *Mountain West*, 2017 WL 2179120 at *2 (9th Cir.), Memorandum, May 16, 2017, at 6-7, *quoting*, *Assoc. Gen. Contractors of Am. v. Cal. Dep't of Transp.*, 713 F.3d 1187, 1196 (9th Cir. 2013) (*quoting* *W. States Paving*, 407 F.3d at 997-99). Discrimination may be inferred from "a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors." *Mountain West*, 2017 WL 2179120 at *2 (9th Cir.), Memorandum, May 16, 2017, at 6-7, *quoting*, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989).

Here, the district court held that Montana had satisfied its burden. In reaching this conclusion, the district court relied on three types of evidence offered by Montana. First, it cited a study, which reported disparities in professional services contract awards in Montana. Second, the district court noted that participation by DBEs declined after Montana abandoned race-conscious goals in the years following the decision in *Western States Paving*, 407 F.3d 983. Third, the district court cited anecdotes of a "good ol' boys" network within the State's contracting industry. *Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 7.

The Ninth Circuit reversed the district court and held that summary judgment was improper in light of genuine disputes of material fact as to the study's analysis, and because the second two categories of evidence were insufficient to prove a history of discrimination. *Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 7.

Disputes of fact as to study. *Mountain West's* expert testified that the study relied on several questionable assumptions and an opaque methodology to conclude that professional services contracts were awarded on a discriminatory basis. *Id.* at *3. The Ninth Circuit pointed out a few examples that it found illustrated the areas in which there are disputes of fact as to whether the study sufficiently supported Montana's actions:

1. Ninth Circuit stated that its cases require states to ascertain whether lower-than-expected DBE participation is attributable to factors other than race or gender. *W. States Paving*, 407 F.3d at 1000-01. *Mountain West* argues that the study did not explain whether or how it accounted for a given firm's size, age, geography, or other similar factors. The report's authors were unable to explain their analysis in depositions for this case. Indeed, the Court noted, even Montana appears to have questioned the validity of the study's statistical results *Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 8.
2. The study relied on a telephone survey of a sample of Montana contractors. *Mountain West* argued that (a) it is unclear how the study selected that sample, (b) only a small percentage

of surveyed contractors responded to questions, and (c) it is unclear whether responsive contractors were representative of nonresponsive contractors. 2017 WL 2179120 at *3 (9th Cir. May 16, 2017), Memorandum at 8-9.

3. The study relied on very small sample sizes but did no tests for statistical significance, and the study consultant admitted that “some of the population samples were very small and the result may not be significant statistically.” 2017 WL 2179120 at *3 (9th Cir. May 16, 2017), Memorandum at 8-9.
4. Mountain West argued that the study gave equal weight to professional services contracts and construction contracts, but professional services contracts composed less than ten percent of total contract volume in the State’s transportation contracting industry. 2017 WL 2179120 at *3 (9th Cir. May 16, 2017), Memorandum at 9.
5. Mountain West argued that Montana incorrectly compared the proportion of available subcontractors to the proportion of prime contract dollars awarded. The district court did not address this criticism or explain why the study’s comparison was appropriate. 2017 WL 2179120 at *3 (9th Cir. May 16, 2017), Memorandum at 9.

The post-2005 decline in participation by DBEs. The Ninth Circuit was unable to affirm the district court’s order in reliance on the decrease in DBE participation after 2005. In *Western States Paving*, it was held that a decline in DBE participation after race- and gender- based preferences are halted is not necessarily evidence of discrimination against DBEs. *Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 9, *quoting Western States*, 407 F.3d at 999 (“If [minority groups have not suffered from discrimination], then the DBE program provides minorities who have not encountered discriminatory barriers with an unconstitutional competitive advantage at the expense of both non-minorities and any minority groups that have actually been targeted for discrimination.”); *id.* at 1001 (“The disparity between the proportion of DBE performance on contracts that include affirmative action components and on those without such provisions does not provide any evidence of discrimination against DBEs.”). *Id.*

The Ninth Circuit also cited to the U.S. DOT statement made to the Court in *Western States. Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 10, *quoting*, U.S. Dep’t of Transp., *Western States Paving Co. Case Q&A* (Dec. 16, 2014) (“In calculating availability of DBEs, [a state’s] study should not rely on numbers that may have been inflated by race-conscious programs that may not have been narrowly tailored.”).

Anecdotal evidence of discrimination. The Ninth Circuit said that without a statistical basis, the State cannot rely on anecdotal evidence alone. *Mountain West*, 2017 WL 2179120 at *3 (9th Cir.), Memorandum, May 16, 2017, at 10, *quoting Coral Const. Co. v. King Cty.*, 941 F.2d 910, 919 (9th Cir. 1991) (“While anecdotal evidence may suffice to prove individual claims of discrimination, rarely, if ever, can such evidence show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan.”); and *quoting Croson*, 488 U.S. at 509 (“[E]vidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government’s determination that broader remedial relief is justified.”). *Id.*

In sum, the Ninth Circuit found that because it must view the record in the light most favorable to Mountain West's case, it concluded that the record provides an inadequate basis for summary judgment in Montana's favor. 2017 WL 2179120 at *3.

Conclusion. The Ninth Circuit thus reversed and remanded for the district court to conduct whatever further proceedings it considers most appropriate, including trial or the resumption of pretrial litigation. Thus, the case was dismissed in part, reversed in part, and remanded to the district court. *Mountain West*, 2017 WL 2179120 at *4 (9th Cir.), Memorandum, May 16, 2017, at 11. The case on remand was voluntarily dismissed by stipulation of parties (March 14, 2018).

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

The Associated General Contractors of America, Inc., San Diego Chapter, Inc., ("AGC") sought declaratory and injunctive relief against the California Department of Transportation ("Caltrans") and its officers on the grounds that Caltrans' Disadvantaged Business Enterprise ("DBE") program unconstitutionally provided race -and sex-based preferences to African American, Native American-, Asian-Pacific American-, and women-owned firms on certain transportation contracts. The federal district court upheld the constitutionality of Caltrans' DBE program implementing the Federal DBE Program and granted summary judgment to Caltrans. The district court held that Caltrans' DBE program implementing the Federal DBE Program satisfied strict scrutiny because Caltrans had a strong basis in evidence of discrimination in the California transportation contracting industry, and the program was narrowly tailored to those groups that actually suffered discrimination. The district court held that Caltrans' substantial statistical and anecdotal evidence from a disparity study conducted by BBC Research and Consulting, provided a strong basis in evidence of discrimination against the four named groups, and that the program was narrowly tailored to benefit only those groups. 713 F.3d at 1190.

The AGC appealed the decision to the Ninth Circuit Court of Appeals. The Ninth Circuit initially held that because the AGC did not identify any of the members who have suffered or will suffer harm as a result of Caltrans' program, the AGC did not establish that it had associational standing to bring the lawsuit. *Id.* Most significantly, the Ninth Circuit held that even if the AGC could establish standing, its appeal failed because the Court found Caltrans' DBE program implementing the Federal DBE Program is constitutional and satisfied the applicable level of strict scrutiny required by the Equal Protection Clause of the United States Constitution. *Id.* at 1194-1200.

Court Applies *Western States Paving Co. v. Washington State DOT* decision. In 2005 the Ninth Circuit Court of Appeal decided *Western States Paving Co. v. Washington State Department of Transportation*, 407 F.3d. 983 (9th Cir. 2005), which involved a facial challenge to the constitutional validity of the federal law authorizing the United States Department of Transportation to distribute funds to States for transportation-related projects. *Id.* at 1191. The challenge in the *Western States Paving* case also included an as-applied challenge to the Washington DOT program implementing the federal mandate. *Id.* Applying strict scrutiny, the Ninth Circuit upheld the constitutionality of the federal statute and the federal regulations (the

Federal DBE Program), but struck down Washington DOT's program because it was not narrowly tailored. *Id.*, citing *Western States Paving Co.*, 407 F.3d at 990-995, 999-1002.

In *Western States Paving*, the Ninth Circuit announced a two-pronged test for "narrow tailoring":

"(1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be limited to those minority groups that have actually suffered discrimination." *Id.* 1191, citing *Western States Paving Co.*, 407 F.3d at 997-998.

Evidence gathering and the 2007 Disparity Study. On May 1, 2006, Caltrans ceased to use race- and gender-conscious measures in implementing their DBE program on federally assisted contracts while it gathered evidence in an effort to comply with the *Western States Paving* decision. *Id.* at 1191. Caltrans commissioned a disparity study by BBC Research and Consulting to determine whether there was evidence of discrimination in California's transportation contracting industry. *Id.* The Court noted that disparity analysis involves making a comparison between the availability of minority- and women-owned businesses and their actual utilization, producing a number called a "disparity index." *Id.* An index of 100 represents statistical parity between availability and utilization, and a number below 100 indicates underutilization. *Id.* An index below 80 is considered a substantial disparity that supports an inference of discrimination. *Id.*

The Court found the research firm and the disparity study gathered extensive data to calculate disadvantaged business availability in the California transportation contracting industry. *Id.* at 1191. The Court stated: "Based on review of public records, interviews, assessments as to whether a firm could be considered available, for Caltrans contracts, as well as numerous other adjustments, the firm concluded that minority- and women-owned businesses should be expected to receive 13.5 percent of contact dollars from Caltrans administered federally assisted contracts." *Id.* at 1191-1192.

The Court said the research firm "examined over 10,000 transportation-related contracts administered by Caltrans between 2002 and 2006 to determine actual DBE utilization. The firm assessed disparities across a variety of contracts, separately assessing contracts based on funding source (state or federal), type of contract (prime or subcontract), and type of project (engineering or construction)." *Id.* at 1192.

The Court pointed out a key difference between federally funded and state funded contracts is that race-conscious goals were in place for the federally funded contracts during the 2002-2006 period, but not for the state funded contracts. *Id.* at 1192. Thus, the Court stated: "state funded contracts functioned as a control group to help determine whether previous affirmative action programs skewed the data." *Id.*

Moreover, the Court found the research firm measured disparities in all twelve of Caltrans' administrative districts, and computed aggregate disparities based on statewide data. *Id.* at 1192. The firm evaluated statistical disparities by race and gender. The Court stated that within and across many categories of contracts, the research firm found substantial statistical disparities for African American, Asian-Pacific, and Native American firms. *Id.* However, the

research firm found that there were not substantial disparities for these minorities in *every* subcategory of contract. *Id.* The Court noted that the disparity study also found substantial disparities in utilization of women-owned firms for some categories of contracts. *Id.* After publication of the disparity study, the Court pointed out the research firm calculated disparity indices for all women-owned firms, including female minorities, showing substantial disparities in the utilization of all women-owned firms similar to those measured for white women. *Id.*

The Court found that the disparity study and Caltrans also developed extensive anecdotal evidence, by (1) conducting twelve public hearings to receive comments on the firm's findings; (2) receiving letters from business owners and trade associations; and (3) interviewing representatives from twelve trade associations and 79 owners/managers of transportation firms. *Id.* at 1192. The Court stated that some of the anecdotal evidence indicated discrimination based on race or gender. *Id.*

Caltrans' DBE Program. Caltrans concluded that the evidence from the disparity study supported an inference of discrimination in the California transportation contracting industry. *Id.* at 1192-1193. Caltrans concluded that it had sufficient evidence to make race- and gender-conscious goals for African American-, Asian-Pacific American-, Native American-, and women-owned firms. *Id.* The Court stated that Caltrans adopted the recommendations of the disparity report and set an overall goal of 13.5 percent for disadvantaged business participation. Caltrans expected to meet one-half of the 13.5 percent goal using race-neutral measures. *Id.*

Caltrans submitted its proposed DBE program to the USDOT for approval, including a request for a waiver to implement the program only for the four identified groups. *Id.* at 1193. The Caltrans' DBE program included 66 race-neutral measures that Caltrans already operated or planned to implement, and subsequent proposals increased the number of race-neutral measures to 150. *Id.* The USDOT granted the waiver, but initially did not approve Caltrans' DBE program until in 2009, the DOT approved Caltrans' DBE program for fiscal year 2009.

District Court proceedings. AGC then filed a complaint alleging that Caltrans' implementation of the Federal DBE Program violated the Fourteenth Amendment of the U.S. Constitution, Title VI of the Civil Rights Act, and other laws. Ultimately, the AGC only argued an as-applied challenge to Caltrans' DBE program. The district court on motions of summary judgment held that Caltrans' program was "clearly constitutional," as it "was supported by a strong basis in evidence of discrimination in the California contracting industry and was narrowly tailored to those groups which had actually suffered discrimination. *Id.* at 1193.

Subsequent Caltrans study and program. While the appeal by the AGC was pending, Caltrans commissioned a new disparity study from BBC to update its DBE program as required by the federal regulations. *Id.* at 1193. In August 2012, BBC published its second disparity report, and Caltrans concluded that the updated study provided evidence of continuing discrimination in the California transportation contracting industry against the same four groups and Hispanic Americans. *Id.* Caltrans submitted a modified DBE program that is nearly identical to the program approved in 2009, except that it now includes Hispanic Americans and sets an overall goal of 12.5 percent, of which 9.5 percent will be achieved through race- and gender-conscious measures. *Id.* The USDOT approved Caltrans' updated program in November 2012. *Id.*

Jurisdiction issue. Initially, the Ninth Circuit Court of Appeals considered whether it had jurisdiction over the AGC's appeal based on the doctrines of mootness and standing. The Court held that the appeal is not moot because Caltrans' new DBE program is substantially similar to the prior program and is alleged to disadvantage AGC's members "in the same fundamental way" as the previous program. *Id.* at 1194.

The Court, however, held that the AGC did not establish associational standing. *Id.* at 1194-1195: The Court found that the AGC did not identify any affected members by name nor has it submitted declarations by any of its members attesting to harm they have suffered or will suffer under Caltrans' program. *Id.* at 1194-1195. Because AGC failed to establish standing, the Court held it must dismiss the appeal due to lack of jurisdiction. *Id.* at 1195.

Caltrans' DBE Program held constitutional on the merits. The Court then held that even if AGC could establish standing, its appeal would fail. *Id.* at 1194-1195. The Court held that Caltrans' DBE program is constitutional because it survives the applicable level of scrutiny required by the Equal Protection Clause and jurisprudence. *Id.* at 1195-1200.

The Court stated that race-conscious remedial programs must satisfy strict scrutiny and that although strict scrutiny is stringent, it is not "fatal in fact." *Id.* at 1194-1195 (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 237 (1995) (*Adarand III*)). The Court quoted *Adarand III*: "The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." *Id.* (quoting *Adarand III*, 515 U.S. at 237.)

The Court pointed out that gender-conscious programs must satisfy intermediate scrutiny which requires that gender-conscious programs be supported by an 'exceedingly persuasive justification' and be substantially related to the achievement of that underlying objective. *Id.* at 1195 (citing *Western States Paving*, 407 F.3d at 990 n. 6.).

The Court held that Caltrans' DBE program contains both race- and gender-conscious measures, and that the "entire program passes strict scrutiny." *Id.* at 1195.

Application of strict scrutiny standard articulated in *Western States Paving*. The Court held that the framework for AGC's as-applied challenge to Caltrans' DBE program is governed by *Western States Paving*. The Ninth Circuit in *Western States Paving* devised a two-pronged test for narrow tailoring: (1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be "limited to those minority groups that have actually suffered discrimination." *Id.* at 1195-1196 (quoting *Western States Paving*, 407 F.3d at 997-99).

Evidence of discrimination in California contracting industry. The Court held that in Equal Protection cases, courts consider statistical and anecdotal evidence to identify the existence of discrimination. *Id.* at 1196. The U.S. Supreme Court has suggested that a "significant statistical disparity" could be sufficient to justify race-conscious remedial programs. *Id.* at *7 (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989)). The Court stated that although generally not sufficient, anecdotal evidence complements statistical evidence because of its ability to bring

“the cold numbers convincingly to life.” *Id.* (quoting *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977)).

The Court pointed out that Washington DOT’s DBE program in the *Western States Paving* case was held invalid because Washington DOT had performed no statistical studies and it offered no anecdotal evidence. *Id.* at 1196. The Court also stated that the Washington DOT used an oversimplified methodology resulting in little weight being given by the Court to the purported disparity because Washington’s data “did not account for the relative capacity of disadvantaged businesses to perform work, nor did it control for the fact that existing affirmative action programs skewed the prior utilization of minority businesses in the state.” *Id.* (quoting *Western States Paving*, 407 F.3d at 999-1001). The Court said that it struck down Washington’s program after determining that the record was devoid of any evidence suggesting that minorities currently suffer – or have ever suffered – discrimination in the Washington transportation contracting industry.” *Id.*

Significantly, the Court held in this case as follows: “In contrast, Caltrans’ affirmative action program is supported by substantial statistical and anecdotal evidence of discrimination in the California transportation contracting industry.” *Id.* at 1196. The Court noted that the disparity study documented disparities in many categories of transportation firms and the utilization of certain minority- and women-owned firms. *Id.* The Court found the disparity study “accounted for the factors mentioned in *Western States Paving* as well as others, adjusting availability data based on capacity to perform work and controlling for previously administered affirmative action programs.” *Id.* (citing *Western States*, 407 F.3d at 1000).

The Court also held: “Moreover, the statistical evidence from the disparity study is bolstered by anecdotal evidence supporting an inference of discrimination. The substantial statistical disparities alone would give rise to an inference of discrimination, *see Croson*, 488 U.S. at 509, and certainly Caltrans’ statistical evidence combined with anecdotal evidence passes constitutional muster.” *Id.* at 1196.

The Court specifically rejected the argument by AGC that strict scrutiny requires Caltrans to provide evidence of “specific acts” of “deliberate” discrimination by Caltrans employees or prime contractors. *Id.* at 1196-1197. The Court found that the Supreme Court in *Croson* explicitly states that “[t]he degree of specificity required in the findings of discrimination ... may vary.” *Id.* at 1197 (quoting *Croson*, 488 U.S. at 489). The Court concluded that a rule requiring a state to show specific acts of deliberate discrimination by identified individuals would run contrary to the statement in *Croson* that statistical disparities alone could be sufficient to support race-conscious remedial programs. *Id.* (citing *Croson*, 488 U.S. at 509). The Court rejected AGC’s argument that Caltrans’ program does not survive strict scrutiny because the disparity study does not identify individual acts of deliberate discrimination. *Id.*

The Court rejected a second argument by AGC that this study showed inconsistent results for utilization of minority businesses depending on the type and nature of the contract, and thus cannot support an inference of discrimination in the entire transportation contracting industry. *Id.* at 1197. AGC argued that each of these subcategories of contracts must be viewed in isolation when considering whether an inference of discrimination arises, which the Court rejected. *Id.*

The Court found that AGC's argument overlooks the rationale underpinning the constitutional justification for remedial race-conscious programs: they are designed to root out "patterns of discrimination." *Id. quoting Croson*, 488 U.S. at 504.

The Court stated that the issue is not whether Caltrans can show underutilization of disadvantaged businesses in *every* measured category of contract. But rather, the issue is whether Caltrans can meet the evidentiary standard required by *Western States Paving* if, looking at the evidence in its entirety, the data show substantial disparities in utilization of minority firms suggesting that public dollars are being poured into "a system of racial exclusion practiced by elements of the local construction industry." *Id.* at 1197 *quoting Croson* 488 U.S. at 492.

The Court concluded that the disparity study and anecdotal evidence document a pattern of disparities for the four groups, and that the study found substantial underutilization of these groups in numerous categories of California transportation contracts, which the anecdotal evidence confirms. *Id.* at 1197. The Court held this is sufficient to enable Caltrans to infer that these groups are systematically discriminated against in publicly-funded contracts. *Id.*

Third, the Court considered and rejected AGC's argument that the anecdotal evidence has little or no probative value in identifying discrimination because it is not verified. *Id.* at *9. The Court noted that the Fourth and Tenth Circuits have rejected the need to verify anecdotal evidence, and the Court stated the AGC made no persuasive argument that the Ninth Circuit should hold otherwise. *Id.*

The Court pointed out that AGC attempted to discount the anecdotal evidence because some accounts ascribe minority underutilization to factors other than overt discrimination, such as difficulties with obtaining bonding and breaking into the "good ol boy" network of contractors. *Id.* at 1197-1198. The Court held, however, that the federal courts and regulations have identified precisely these factors as barriers that disadvantage minority firms because of the lingering effects of discrimination. *Id.* at 1198, *citing Western States Paving*, 407 and *AGCC II*, 950 F.2d at 1414.

The Court found that AGC ignores the many incidents of racial and gender discrimination presented in the anecdotal evidence. *Id.* at 1198. The Court said that Caltrans does not claim, and the anecdotal evidence does not need to prove, that *every* minority-owned business is discriminated against. *Id.* The Court concluded: "It is enough that the anecdotal evidence supports Caltrans' statistical data showing a pervasive pattern of discrimination." *Id.* The individual accounts of discrimination offered by Caltrans, according to the Court, met this burden. *Id.*

Fourth, the Court rejected AGC's contention that Caltrans' evidence does not support an inference of discrimination against all women because gender-based disparities in the study are limited to white women. *Id.* at 1198. AGC, the Court said, misunderstands the statistical techniques used in the disparity study, and that the study correctly isolates the effect of gender by limiting its data pool to white women, ensuring that statistical results for gender-based

discrimination are not skewed by discrimination against minority women on account of their race. *Id.*

In addition, after AGC's early incorrect objections to the methodology, the research firm conducted a follow-up analysis of all women-owned firms that produced a disparity index of 59. *Id.* at 1198. The Court held that this index is evidence of a substantial disparity that raises an inference of discrimination and is sufficient to support Caltrans' decision to include all women in its DBE program. *Id.* at 1195.

Program tailored to groups who actually suffered discrimination. The Court pointed out that the second prong of the test articulated in *Western States Paving* requires that a DBE program be limited to those groups that actually suffered discrimination in the state's contracting industry. *Id.* at 1198. The Court found Caltrans' DBE program is limited to those minority groups that have actually suffered discrimination. *Id.* The Court held that the 2007 disparity study showed systematic and substantial underutilization of African American-, Native American-, Asian-Pacific American-, and women-owned firms across a range of contract categories. *Id.* at 1198-1199. *Id.* These disparities, according to the Court, support an inference of discrimination against those groups. *Id.*

Caltrans concluded that the statistical evidence did not support an inference of a pattern of discrimination against Hispanic or Subcontinent Asian Americans. *Id.* at 1199. California applied for and received a waiver from the USDOT in order to limit its 2009 program to African American, Native American, Asian-Pacific American, and women-owned firms. *Id.* The Court held that Caltrans' program "adheres precisely to the narrow tailoring requirements of *Western States.*" *Id.*

The Court rejected the AGC contention that the DBE program is not narrowly tailored because it creates race-based preferences for all transportation-related contracts, rather than distinguishing between construction and engineering contracts. *Id.* at 1199. The Court stated that AGC cited no case that requires a state preference program to provide separate goals for disadvantaged business participation on construction and engineering contracts. *Id.* The Court noted that to the contrary, the federal guidelines for implementing the federal program instruct states *not* to separate different types of contracts. *Id.* The Court found there are "sound policy reasons to not require such parsing, including the fact that there is substantial overlap in firms competing for construction and engineering contracts, as prime *and* subcontractors." *Id.*

Consideration of race-neutral alternatives. The Court rejected the AGC assertion that Caltrans' program is not narrowly tailored because it failed to evaluate race-neutral measures before implementing the system of racial preferences, and stated the law imposes no such requirement. *Id.* at 1199. The Court held that *Western States Paving* does not require states to independently meet this aspect of narrow tailoring, and instead focuses on whether the federal statute sufficiently considered race-neutral alternatives. *Id.*

Second, the Court found that even if this requirement does apply to Caltrans' program, narrow tailoring only requires "serious, good faith consideration of workable race-neutral alternatives." *Id.* at 1199, citing *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003). The Court found that the

Caltrans program has considered an increasing number of race-neutral alternatives, and it rejected AGC's claim that Caltrans' program does not sufficiently consider race-neutral alternatives. *Id.* at 1199.

Certification affidavits for Disadvantaged Business Enterprises. The Court rejected the AGC argument that Caltrans' program is not narrowly tailored because affidavits that applicants must submit to obtain certification as DBEs do not require applicants to assert they have suffered discrimination *in California*. *Id.* at 1199-1200. The Court held the certification process employed by Caltrans follows the process detailed in the federal regulations, and that this is an impermissible collateral attack on the facial validity of the Congressional Act authorizing the Federal DBE Program and the federal regulations promulgated by the USDOT (The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub.L.No. 109-59, § 1101(b), 119 Sect. 1144 (2005)). *Id.* at 1200.

Application of program to mixed state- and federally-funded contracts. The Court also rejected AGC's challenge that Caltrans applies its program to transportation contracts funded by both federal and state money. *Id.* at 1200. The Court held that this is another impermissible collateral attack on the federal program, which explicitly requires goals to be set for mix-funded contracts. *Id.*

Conclusion. The Court concluded that the AGC did not have standing, and that further, Caltrans' DBE program survives strict scrutiny by: 1) having a strong basis in evidence of discrimination within the California transportation contracting industry, and 2) being narrowly tailored to benefit only those groups that have actually suffered discrimination. *Id.* at 1200. The Court then dismissed the appeal. *Id.*

5. 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.*

6. M.K. Weeden Construction v. State of Montana, Montana Department of Transportation, et al., 2013 WL 4774517 (D. Mont.) (2013)

This case involved a challenge by a prime contractor, M.K. Weeden Construction, Inc. (“Weeden”) against the State of Montana, Montana Department of Transportation and others, to the DBE Program adopted by MDT implementing the Federal DBE Program at 49 CFR Part 26. Weeden sought an application for Temporary Restraining Order and Preliminary Injunction against the State of Montana and the MDT.

Factual background and claims. Weeden was the low dollar bidder with a bid of \$14,770,163.01 on the Arrow Creek Slide Project. The project received federal funding, and as such, was required to comply with the USDOT’s DBE Program. 2013 WL 4774517 at *1. MDT had established an overall goal of 5.83 percent DBE participation in Montana’s highway construction projects. On the Arrow Creek Slide Project, MDT established a DBE goal of 2 percent. *Id.*

Plaintiff Weeden, although it submitted the low dollar bid, did not meet the 2 percent DBE requirement. 2013 WL 4774517 at *1. Weeden claimed that its bid relied upon only 1.87 percent DBE subcontractors (although the court points out that Weeden’s bid actually identified only 81 percent DBE subcontractors). Weeden was the only bidder out of the six bidders who did not meet the 2 percent DBE goal. The other five bidders exceeded the 2 percent goal, with bids ranging from 2.19 percent DBE participation to 6.98 percent DBE participation. *Id.* at *2.

Weeden attempted to utilize a good faith exception to the DBE requirement under the Federal DBE Program and Montana’s DBE Program. MDT’s DBE Participation Review Committee considered Weeden’s good faith documentation and found that Weeden’s bid was non-compliant as to the DBE requirement, and that Weeden failed to demonstrate good faith efforts to solicit DBE subcontractor participation in the contract. 2013 WL 4774517 at *2. Weeden appealed that decision to the MDT DBE Review Board and appeared before the Board at a hearing. The DBE Review Board affirmed the Committee decision finding that Weeden’s bid was not in compliance with the contract DBE goal and that Weeden had failed to make a good faith effort to comply with the goal. *Id.* at *2. The DBE Review Board found that Weeden had received a DBE bid for traffic control, but Weeden decided to perform that work itself in order to lower its bid amount. *Id.* at *2. Additionally, the DBE Review Board found that Weeden’s mass email to 158 DBE subcontractors without any follow up was a *pro forma* effort not credited by the Review Board as an active and aggressive effort to obtain DBE participation. *Id.*

Plaintiff Weeden sought an injunction in federal district court against MDT to prevent it from letting the contract to another bidder. Weeden claimed that MDT’s DBE Program violated the Equal Protection Clause of the U.S. Constitution and the Montana Constitution, asserting that there was no supporting evidence of discrimination in the Montana highway construction industry, and therefore, there was no government interest that would justify favoring DBE entities. 2013 WL 4774517 at *2. Weeden also claimed that its right to Due Process under the U.S. Constitution and Montana Constitution had been violated. Specifically, Weeden claimed that MDT did not provide reasonable notice of the good faith effort requirements. *Id.*

No proof of irreparable harm and balance of equities favor MDT. First, the Court found that Weeden did not prove for a certainty that it would suffer irreparable harm based on the Court's conclusion that in the past four years, Weeden had obtained six state highway construction contracts valued at approximately \$26 million, and that MDT had \$50 million more in highway construction projects to be let during the remainder of 2013 alone. 2013 WL 4774517 at *3. Thus, the Court concluded that as demonstrated by its past performance, Weeden has the capacity to obtain other highway construction contracts and thus there is little risk of irreparable injury in the event MDT awards the Project to another bidder. *Id.*

Second, the Court found the balance of the equities did not tip in Weeden's favor. 2013 WL 4774517 at *3. Weeden had asserted that MDT and USDOT rules regarding good faith efforts to obtain DBE subcontractor participation are confusing, non-specific and contradictory. *Id.* The Court held that it is obvious the other five bidders were able to meet and exceed the 2 percent DBE requirement without any difficulty whatsoever. *Id.* The Court found that Weeden's bid is not responsive to the requirements, therefore is not and cannot be the lowest responsible bid. *Id.* The balance of the equities, according to the Court, do not tilt in favor of Weeden, who did not meet the requirements of the contract, especially when numerous other bidders ably demonstrated an ability to meet those requirements. *Id.*

No standing. The Court also questioned whether Weeden raised any serious issues on the merits of its equal protection claim because Weeden is a prime contractor and not a subcontractor. Since Weeden is a prime contractor, the Court held it is clear that Weeden lacks Article III standing to assert its equal protection claim. *Id.* at *3. The Court held that a prime contractor, such as Weeden, is not permitted to challenge MDT's DBE Project as if it were a non-DBE subcontractor because Weeden cannot show that *it* was subjected to a racial or gender-based barrier in its competition for the prime contract. *Id.* at *3. Because Weeden was not deprived of the ability to compete on equal footing with the other bidders, the Court found Weeden suffered no equal protection injury and lacks standing to assert an equal protection claim as it were a non-DBE subcontractor. *Id.*

Court applies AGC v. California DOT case; evidence supports narrowly tailored DBE program. Significantly, the Court found that even if Weeden had standing to present an equal protection claim, MDT presented significant evidence of underutilization of DBE's generally, evidence that supports a narrowly tailored race and gender preference program. 2013 WL 4774517 at *4. Moreover, the Court noted that although Weeden points out that some business categories in Montana's highway construction industry do not have a history of discrimination (namely, the category of construction businesses in contrast to the category of professional businesses), the Ninth Circuit "has recently rejected a similar argument requiring the evidence of discrimination in every single segment of the highway construction industry before a preference program can be implemented." *Id.*, citing *Associated General Contractors v. California Dept. of Transportation*, 713 F.3d 1187 (9th Cir. 2013) (holding that Caltrans' DBE program survived strict scrutiny, was narrowly tailored, did not violate equal protection, and was supported by substantial statistical and anecdotal evidence of discrimination).

The Court stated that particularly relevant in this case, "the Ninth Circuit held that California's DBE program need not isolate construction from engineering contracts or prime from

subcontracts to determine whether the evidence in each and every category gives rise to an inference of discrimination.” *Id.* at 4, *citing Associated General Contractors v. California DOT*, 713 F.3d at 1197. Instead, according to the Court, California – and, by extension, Montana – “is entitled to look at the evidence ‘in its entirety’ to determine whether there are ‘substantial disparities in utilization of minority firms’ practiced by some elements of the construction industry.” 2013 WL 4774517 at *4, *quoting AGC v. California DOT*, 713 F.3d at 1197. The Court, also quoting the decision in *AGC v. California DOT*, said: “It is enough that the anecdotal evidence supports Caltrans’ statistical data showing a pervasive pattern of discrimination.” *Id.* at *4, *quoting AGC v. California DOT*, 713 F.3d at 1197.

The Court pointed out that there is no allegation that MDT has exceeded any federal requirement or done other than complied with USDOT regulations. 2013 WL 4774517 at *4. Therefore, the Court concluded that given the similarities between Weeden’s claim and AGC’s equal protection claim against California DOT in the *AGC v. California DOT* case, it does not appear likely that Weeden will succeed on the merits of its equal protection claim. *Id.* at *4.

Due Process claim. The Court also rejected Weeden’s bald assertion that it has a protected property right in the contract that has not been awarded to it where the government agency retains discretion to determine the responsiveness of the bid. The Court found that Montana law requires that an award of a public contract for construction must be made to the lowest *responsible* bidder and that the applicable Montana statute confers upon the government agency broad discretion in the award of a public works contract. Thus, a lower bidder such as Weeden requires no vested property right in a contract until the contract has been awarded, which here obviously had not yet occurred. 2013 WL 4774517 at *5. In any event, the Court noted that Weeden was granted notice, hearing and appeal for MDT’s decision denying the good faith exception to the DBE contract requirement, and therefore it does not appear likely that Weeden would succeed on its due process claim. *Id.* at *5.

Holding and Voluntary Dismissal. The Court denied plaintiff Weeden’s application for Temporary Restraining Order and Preliminary Injunction. Subsequently, Weeden filed a Notice of Voluntary Dismissal Without Prejudice on September 10, 2013.

7. Braunstein v. Arizona DOT, 683 F.3d 1177 (9th Cir. 2012)

Braunstein is an engineering contractor that provided subsurface utility location services for ADOT. Braunstein sued the Arizona DOT and others seeking damages under the Civil Rights Act, pursuant to §§ 1981 and 1983, and challenging the use of Arizona’s former affirmative action program, or race- and gender- conscious DBE program implementing the Federal DBE Program, alleging violation of the equal protection clause.

Factual background. ADOT solicited bids for a new engineering and design contract. Six firms bid on the prime contract, but Braunstein did not bid because he could not satisfy a requirement that prime contractors complete 50 percent of the contract work themselves. Instead, Braunstein contacted the bidding firms to ask about subcontracting for the utility location work. 683 F.3d at 1181. All six firms rejected Braunstein’s overtures, and Braunstein did not submit a quote or subcontracting bid to any of them. *Id.*

As part of the bid, the prime contractors were required to comply with federal regulations that provide states receiving federal highway funds maintain a DBE program. 683 F.3d at 1182. Under this contract, the prime contractor would receive a maximum of 5 points for DBE participation. *Id. at 1182*. All six firms that bid on the prime contract received the maximum 5 points for DBE participation. All six firms committed to hiring DBE subcontractors to perform at least 6 percent of the work. Only one of the six bidding firms selected a DBE as its desired utility location subcontractor. Three of the bidding firms selected another company other than Braunstein to perform the utility location work. *Id.* DMJM won the bid for the 2005 contract using Aztec to perform the utility location work. Aztec was not a DBE. *Id. at 1182*.

District Court rulings. Braunstein brought this suit in federal court against ADOT and employees of the DOT alleging that ADOT violated his right to equal protection by using race and gender preferences in its solicitation and award of the 2005 contract. The district court dismissed as moot Braunstein’s claims for injunctive and declaratory relief because ADOT had suspended its DBE program in 2006 following the Ninth Circuit decision in *Western States Paving Co. v. Washington State DOT*, 407 F.3d 9882 (9th Cir. 2005). This left only Braunstein’s damages claims against the State and ADOT under §2000d, and against the named individual defendants in their individual capacities under §§ 1981 and 1983. *Id. at 1183*.

The district court concluded that Braunstein lacked Article III standing to pursue his remaining claims because he had failed to show that ADOT’s DBE program had affected him personally. The court noted that “Braunstein was afforded the opportunity to bid on subcontracting work, and the DBE goal did not serve as a barrier to doing so, nor was it an impediment to his securing a subcontract.” *Id. at 1183*. The district court found that Braunstein’s inability to secure utility location work stemmed from his past unsatisfactory performance, not his status as a non-DBE. *Id.*

Lack of standing. The Ninth Circuit Court of Appeals held that Braunstein lacked Article III standing and affirmed the entry of summary judgment in favor of ADOT and the individual employees of ADOT. The Court found that Braunstein had not provided any evidence showing that ADOT’s DBE program affected him personally or that it impeded his ability to compete for utility location work on an equal basis. *Id. at 1185*. The Court noted that Braunstein did not submit a quote or a bid to any of the prime contractors bidding on the government contract. *Id.*

The Court also pointed out that Braunstein did not seek prospective relief against the government “affirmative action” program, noting the district court dismissed as moot his claims for declaratory and injunctive relief since ADOT had suspended its DBE program before he brought the suit. *Id. at 1186*. Thus, Braunstein’s surviving claims were for damages based on the contract at issue rather than prospective relief to enjoin the DBE Program. *Id.* Accordingly, the Court held he must show more than that he is “able and ready” to seek subcontracting work. *Id.*

The Court found Braunstein presented no evidence to demonstrate that he was in a position to compete equally with the other subcontractors, no evidence comparing himself with the other subcontractors in terms of price or other criteria, and no evidence explaining why the six prospective prime contractors rejected him as a subcontractor. *Id. at 1186*. The Court stated that there was nothing in the record indicating the ADOT DBE program posed a barrier that impeded

Braunstein's ability to compete for work as a subcontractor. *Id. at 1187*. The Court held that the existence of a racial or gender barrier is not enough to establish standing, without a plaintiff's showing that he has been subjected to such a barrier. *Id. at 1186*.

The Court noted Braunstein had explicitly acknowledged previously that the winning bidder on the contract would not hire him as a subcontractor for reasons unrelated to the DBE program. *Id. at 1186*. At the summary judgment stage, the Court stated that Braunstein was required to set forth specific facts demonstrating the DBE program impeded his ability to compete for the subcontracting work on an equal basis. *Id. at 1187*.

Summary judgment granted to ADOT. The Court concluded that Braunstein was unable to point to any evidence to demonstrate how the ADOT DBE program adversely affected him personally or impeded his ability to compete for subcontracting work. *Id.* The Court thus held that Braunstein lacked Article III standing and affirmed the entry of summary judgment in favor of ADOT.

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

This case out of the Ninth Circuit struck down a state's implementation of the Federal DBE Program for failure to pass constitutional muster. In *Western States Paving*, the Ninth Circuit held that the State of Washington's implementation of the Federal DBE Program was unconstitutional because it did not satisfy the narrow tailoring element of the constitutional test. The Ninth Circuit held that the State must present its own evidence of past discrimination within its own boundaries in order to survive constitutional muster and could not merely rely upon data supplied by Congress. The United States Supreme Court denied certiorari. The analysis in the decision also is instructive in particular as to the application of the narrowly tailored prong of the strict scrutiny test.

Plaintiff Western States Paving Co. ("plaintiff") was a white male-owned asphalt and paving company. 407 F.3d 983, 987 (9th Cir. 2005). In July of 2000, plaintiff submitted a bid for a project for the City of Vancouver; the project was financed with federal funds provided to the Washington State DOT ("WSDOT") under the Transportation Equity Act for the 21st Century ("TEA-21"). *Id.*

Congress enacted TEA-21 in 1991 and after multiple renewals, it was set to expire on May 31, 2004. *Id. at 988*. TEA-21 established minimum minority-owned business participation requirements (10%) for certain federally-funded projects. *Id.* The regulations require each state accepting federal transportation funds to implement a DBE program that comports with the TEA-21. *Id.* TEA-21 indicates the 10 percent DBE utilization requirement is "aspirational," and the statutory goal "does not authorize or require recipients to set overall or contract goals at the 10 percent level, or any other particular level, or to take any special administrative steps if their goals are above or below 10 percent." *Id.*

TEA-21 sets forth a two-step process for a state to determine its own DBE utilization goal: (1) the state must calculate the relative availability of DBEs in its local transportation contracting industry (one way to do this is to divide the number of ready, willing and able DBEs in a state by the total number of ready, willing and able firms); and (2) the state is required to “adjust this base figure upward or downward to reflect the proven capacity of DBEs to perform work (as measured by the volume of work allocated to DBEs in recent years) and evidence of discrimination against DBEs obtained from statistical disparity studies.” *Id.* at 989 (citing regulation). A state is also permitted to consider discrimination in the bonding and financing industries and the present effects of past discrimination. *Id.* (citing regulation). TEA-21 requires a generalized, “undifferentiated” minority goal and a state is prohibited from apportioning their DBE utilization goal among different minority groups (*e.g.*, between Hispanics, blacks, and women). *Id.* at 990 (citing regulation).

“A state must meet the maximum feasible portion of this goal through race- [and gender-] neutral means, including informational and instructional programs targeted toward all small businesses.” *Id.* (citing regulation). Race- and gender-conscious contract goals must be used to achieve any portion of the contract goals not achievable through race- and gender-neutral measures. *Id.* (citing regulation). However, TEA-21 does not require that DBE participation goals be used on every contract or at the same level on every contract in which they are used; rather, the overall effect must be to “obtain that portion of the requisite DBE participation that cannot be achieved through race- [and gender-] neutral means.” *Id.* (citing regulation).

A prime contractor must use “good faith efforts” to satisfy a contract’s DBE utilization goal. *Id.* (citing regulation). However, a state is prohibited from enacting rigid quotas that do not contemplate such good faith efforts. *Id.* (citing regulation).

Under the TEA-21 minority utilization requirements, the City set a goal of 14 percent minority participation on the first project plaintiff bid on; the prime contractor thus rejected plaintiff’s bid in favor of a higher bidding minority-owned subcontracting firm. *Id.* at 987. In September of 2000, plaintiff again submitted a bid on a project financed with TEA-21 funds and was again rejected in favor of a higher bidding minority-owned subcontracting firm. *Id.* The prime contractor expressly stated that he rejected plaintiff’s bid due to the minority utilization requirement. *Id.*

Plaintiff filed suit against the WSDOT, Clark County, and the City, challenging the minority preference requirements of TEA-21 as unconstitutional both facially and as applied. *Id.* The district court rejected both of plaintiff’s challenges. The district court held the program was facially constitutional because it found that Congress had identified significant evidence of discrimination in the transportation contracting industry and the TEA-21 was narrowly tailored to remedy such discrimination. *Id.* at 988. The district court rejected the as-applied challenge concluding that Washington’s implementation of the program comported with the federal requirements and the state was not required to demonstrate that its minority preference program independently satisfied strict scrutiny. *Id.* Plaintiff appealed to the Ninth Circuit Court of Appeals. *Id.*

The Ninth Circuit considered whether the TEA-21, which authorizes the use of race- and gender-based preferences in federally-funded transportation contracts, violated equal protection, either on its face or as applied by the State of Washington.

The court applied a strict scrutiny analysis to both the facial and as-applied challenges to TEA-21. *Id.* at 990-91. The court did not apply a separate intermediate scrutiny analysis to the gender-based classifications because it determined that it “would not yield a different result.” *Id.* at 990, n. 6.

Facial challenge (Federal Government). The court first noted that the federal government has a compelling interest in “ensuring that its funding is not distributed in a manner that perpetuates the effects of either public or private discrimination within the transportation contracting industry.” *Id.* at 991, citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989) and *Adarand Constructors, Inc. v. Slater* (“Adarand VII”), 228 F.3d 1147, 1176 (10th Cir. 2000). The court found that “[b]oth statistical and anecdotal evidence are relevant in identifying the existence of discrimination.” *Id.* at 991. The court found that although Congress did not have evidence of discrimination against minorities in every state, such evidence was unnecessary for the enactment of nationwide legislation. *Id.* However, citing both the Eighth and Tenth Circuits, the court found that Congress had ample evidence of discrimination in the transportation contracting industry to justify TEA-21. *Id.* The court also found that because TEA-21 set forth flexible race-conscious measures to be used only when race-neutral efforts were unsuccessful, the program was narrowly tailored and thus satisfied strict scrutiny. *Id.* at 992-93. The court accordingly rejected plaintiff’s facial challenge. *Id.*

As-applied challenge (State of Washington). Plaintiff alleged TEA-21 was unconstitutional as-applied because there was no evidence of discrimination in Washington’s transportation contracting industry. *Id.* at 995. The State alleged that it was not required to independently demonstrate that its application of TEA-21 satisfied strict scrutiny. *Id.* The United States intervened to defend TEA-21’s facial constitutionality, and “unambiguously conceded that TEA-21’s race conscious measures can be constitutionally applied only in those states where the effects of discrimination are present.” *Id.* at 996; see also Br. for the United States at 28 (April 19, 2004) (“DOT’s regulations ... are designed to assist States in ensuring that race-conscious remedies are limited to only those jurisdictions where discrimination or its effects are a problem and only as a last resort when race-neutral relief is insufficient.” (emphasis in original)).

The court found that the Eighth Circuit was the only other court to consider an as-applied challenge to TEA-21 in *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d 964 (8th Cir. 2003), *cert. denied* 124 S. Ct. 2158 (2004). *Id.* at 996. The Eighth Circuit did not require Minnesota and Nebraska to identify a compelling purpose for their programs independent of Congress’s nationwide remedial objective. *Id.* However, the Eighth Circuit did consider whether the states’ implementation of TEA-21 was narrowly tailored to achieve Congress’s remedial objective. *Id.* The Eighth Circuit thus looked to the states’ independent evidence of discrimination because “to be narrowly tailored, a *national* program must be limited to those parts of the country where its race-based measures are demonstrably needed.” *Id.* (internal citations omitted). The Eighth Circuit relied on the states’ statistical analyses of the availability and capacity of DBEs in their

local markets conducted by outside consulting firms to conclude that the states satisfied the narrow tailoring requirement. *Id.* at 997.

The court concurred with the Eighth Circuit and found that Washington did not need to demonstrate a compelling interest for its DBE program, independent from the compelling nationwide interest identified by Congress. *Id.* However, the court determined that the district court erred in holding that mere compliance with the federal program satisfied strict scrutiny. *Id.* Rather, the court held that whether Washington's DBE program was narrowly tailored was dependent on the presence or absence of discrimination in Washington's transportation contracting industry. *Id.* at 997-98. "If no such discrimination is present in Washington, then the State's DBE program does not serve a remedial purpose; it instead provides an unconstitutional windfall to minority contractors solely on the basis of their race or sex." *Id.* at 998. The court held that a Sixth Circuit decision to the contrary, *Tennessee Asphalt Co. v. Farris*, 942 F.2d 969, 970 (6th Cir. 1991), misinterpreted earlier case law. *Id.* at 997, n. 9.

The court found that moreover, even where discrimination is present in a state, a program is narrowly tailored only if it applies only to those minority groups who have actually suffered discrimination. *Id.* at 998, citing *Croson*, 488 U.S. at 478. The court also found that in *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 713 (9th Cir. 1997), it had "previously expressed similar concerns about the haphazard inclusion of minority groups in affirmative action programs ostensibly designed to remedy the effects of discrimination." *Id.* In *Monterey Mechanical*, the court held that "the overly inclusive designation of benefited minority groups was a 'red flag signaling that the statute is not, as the Equal Protection Clause requires, narrowly tailored.'" *Id.*, citing *Monterey Mechanical*, 125 F.3d at 714. The court found that other courts are in accord. *Id.* at 998-99, citing *Builders Ass'n of Greater Chi. v. County of Cook*, 256 F.3d 642, 647 (7th Cir. 2001); *Associated Gen. Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 737 (6th Cir. 2000); *O'Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 427 (D.C. Cir. 1992). Accordingly, the court found that each of the principal minority groups benefited by WSDOT's DBE program must have suffered discrimination within the State. *Id.* at 999.

The court found that WSDOT's program closely tracked the sample USDOT DBE program. *Id.* WSDOT calculated its DBE participation goal by first calculating the availability of ready, willing and able DBEs in the State (dividing the number of transportation contracting firms in the Washington State Office of Minority, Women and Disadvantaged Business Enterprises Directory by the total number of transportation contracting firms listed in the Census Bureau's Washington database, which equaled 11.17%). *Id.* WSDOT then upwardly adjusted the 11.17 percent base figure to 14 percent "to account for the proven capacity of DBEs to perform work, as reflected by the volume of work performed by DBEs [during a certain time period]." *Id.* Although DBEs performed 18 percent of work on State projects during the prescribed time period, Washington set the final adjusted figure at 14 percent because TEA-21 reduced the number of eligible DBEs in Washington by imposing more stringent certification requirements. *Id.* at 999, n. 11. WSDOT did not make an adjustment to account for discriminatory barriers in obtaining bonding and financing. *Id.* WSDOT similarly did not make any adjustment to reflect present or past discrimination "because it lacked any statistical studies evidencing such discrimination." *Id.*

WSDOT then determined that it needed to achieve 5 percent of its 14 percent goal through race-conscious means based on a 9 percent DBE participation rate on state-funded contracts that did not include affirmative action components (*i.e.*, 9% participation could be achieved through race-neutral means). *Id.* at 1000. The USDOT approved WSDOT goal-setting program and the totality of its 2000 DBE program. *Id.*

Washington conceded that it did not have statistical studies to establish the existence of past or present discrimination. *Id.* It argued, however, that it had evidence of discrimination because minority-owned firms had the capacity to perform 14 percent of the State's transportation contracts in 2000 but received only 9 percent of the subcontracting funds on contracts that did not include an affirmative action's component. *Id.* The court found that the State's methodology was flawed because the 14 percent figure was based on the earlier 18 percent figure, discussed *supra*, which included contracts with affirmative action components. *Id.* The court concluded that the 14 percent figure did not accurately reflect the performance capacity of DBEs in a race-neutral market. *Id.* The court also found the State conceded as much to the district court. *Id.*

The court held that a disparity between DBE performance on contracts with an affirmative action component and those without "does not provide any evidence of discrimination against DBEs." *Id.* The court found that the only evidence upon which Washington could rely was the disparity between the proportion of DBE firms in the State (11.17%) and the percentage of contracts awarded to DBEs on race-neutral grounds (9%). *Id.* However, the court determined that such evidence was entitled to "little weight" because it did not take into account a multitude of other factors such as firm size. *Id.*

Moreover, the court found that the minimal statistical evidence was insufficient evidence, standing alone, of discrimination in the transportation contracting industry. *Id.* at 1001. The court found that WSDOT did not present any anecdotal evidence. *Id.* The court rejected the State's argument that the DBE applications themselves constituted evidence of past discrimination because the applications were not properly in the record, and because the applicants were not required to certify that they had been victims of discrimination in the contracting industry. *Id.* Accordingly, the court held that because the State failed to proffer evidence of discrimination within its own transportation contracting market, its DBE program was not narrowly tailored to Congress's compelling remedial interest. *Id.* at 1002-03.

The court affirmed the district court's grant on summary judgment to the United States regarding the facial constitutionality of TEA-21, reversed the grant of summary judgment to Washington on the as-applied challenge, and remanded to determine the State's liability for damages.

The dissent argued that where the State complied with TEA-21 in implementing its DBE program, it was not susceptible to an as-applied challenge.

9. Western States Paving Co. v. Washington DOT, USDOT & FHWA, 2006 WL 1734163, (W.D. Wash. June 23, 2006) (unpublished opinion)

This case was before the district court pursuant to the Ninth Circuit's remand order in *Western States Paving Co. v. Washington DOT, USDOT, and FHWA*, 407 F.3d 983 (9th Cir. 2005), *cert. denied*, 546 U.S. 1170 (2006). In this decision, the district court adjudicated cross Motions for Summary Judgment on plaintiff's claim for injunction and for damages under 42 U.S.C. §§1981, 1983, and §2000d.

Because the WSDOT voluntarily discontinued its DBE program after the Ninth Circuit decision, *supra*, the district court dismissed plaintiff's claim for injunctive relief as moot. The court found "it is absolutely clear in this case that WSDOT will not resume or continue the activity the Ninth Circuit found unlawful in *Western States*," and cited specifically to the informational letters WSDOT sent to contractors informing them of the termination of the program.

Second, the court dismissed Western States Paving's claims under 42 U.S.C. §§ 1981, 1983, and 2000d against Clark County and the City of Vancouver holding neither the City or the County acted with the requisite discriminatory intent. The court held the County and the City were merely implementing the WSDOT's unlawful DBE program and their actions in this respect were involuntary and required no independent activity. The court also noted that the County and the City were not parties to the precise discriminatory actions at issue in the case, which occurred due to the conduct of the "State defendants." Specifically, the WSDOT — and not the County or the City — developed the DBE program without sufficient anecdotal and statistical evidence, and improperly relied on the affidavits of contractors seeking DBE certification "who averred that they had been subject to 'general societal discrimination.'"

Third, the court dismissed plaintiff's 42 U.S.C. §§ 1981 and 1983 claims against WSDOT, finding them barred by the Eleventh Amendment sovereign immunity doctrine. However, the court allowed plaintiff's 42 U.S.C. §2000d claim to proceed against WSDOT because it was not similarly barred. The court held that Congress had conditioned the receipt of federal highway funds on compliance with Title VI (42 U.S.C. § 2000d et seq.) and the waiver of sovereign immunity from claims arising under Title VI. Section 2001 specifically provides that "a State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of ... Title VI." The court held that this language put the WSDOT on notice that it faced private causes of action in the event of noncompliance.

The court held that WSDOT's DBE program was not narrowly tailored to serve a compelling government interest. The court stressed that discriminatory intent is an essential element of a plaintiff's claim under Title VI. The WSDOT argued that even if sovereign immunity did not bar plaintiff's §2000d claim, WSDOT could be held liable for damages because there was no evidence that WSDOT staff knew of or consciously considered plaintiff's race when calculating the annual utilization goal. The court held that since the policy was not "facially neutral" — and was in fact "specifically race conscious" — any resulting discrimination was therefore intentional, whether the reason for the classification was benign or its purpose remedial. As such, WSDOT's program was subject to strict scrutiny.

In order for the court to uphold the DBE program as constitutional, WSDOT had to show that the program served a compelling interest and was narrowly tailored to achieve that goal. The court found that the Ninth Circuit had already concluded that the program was not narrowly tailored

and the record was devoid of any evidence suggesting that minorities currently suffer or have suffered discrimination in the Washington transportation contracting industry. The court therefore denied WSDOT's Motion for Summary Judgment on the §2000d claim. The remedy available to Western States remains for further adjudication and the case is currently pending.

10. Monterey Mechanical v. Wilson, 125 F.3d 702 (9th Cir. 1997)

This case is instructive in that the Ninth Circuit analyzed and held invalid the enforcement of a MBE/WBE-type program. Although the program at issue utilized the term "goals" as opposed to "quotas," the Ninth Circuit rejected such a distinction, holding "[t]he relevant question is not whether a statute requires the use of such measures, but whether it authorizes or encourages them." The case also is instructive because it found the use of "goals" and the application of "good faith efforts" in connection with achieving goals to trigger strict scrutiny.

Monterey Mechanical Co. (the "plaintiff") submitted the low bid for a construction project for the California Polytechnic State University (the "University"). 125 F.3d 702, 704 (9th Cir. 1994). The University rejected the plaintiff's bid because the plaintiff failed to comply with a state statute requiring prime contractors on such construction projects to subcontract 23 percent of the work to MBE/WBEs or, alternatively, demonstrate good faith outreach efforts. *Id.* The plaintiff conducted good faith outreach efforts but failed to provide the requisite documentation; the awardee prime contractor did not subcontract any portion of the work to MBE/WBEs but did include documentation of good faith outreach efforts. *Id.*

Importantly, the University did not conduct a disparity study, and instead argued that because "the 'goal requirements' of the scheme [did] not involve racial or gender quotas, set-asides or preferences," the University did not need a disparity study. *Id.* at 705. The plaintiff protested the contract award and sued the University's trustees, and a number of other individuals (collectively the "defendants") alleging the state law was violative of the Equal Protection Clause. *Id.* The district court denied the plaintiff's motion for an interlocutory injunction and the plaintiff appealed to the Ninth Circuit Court of Appeals. *Id.*

The defendants first argued that the statute was constitutional because it treated all general contractors alike, by requiring all to comply with the MBE/WBE participation goals. *Id.* at 708. The court held, however, that a minority or women business enterprise could satisfy the participation goals by allocating the requisite percentage of work to itself. *Id.* at 709. The court held that contrary to the district court's finding, such a difference was not *de minimis*. *Id.*

The defendants also argued that the statute was not subject to strict scrutiny because the statute did not impose rigid quotas, but rather only required good faith outreach efforts. *Id.* at 710. The court rejected the argument finding that although the statute permitted awards to bidders who did not meet the percentage goals, "they are rigid in requiring precisely described and monitored efforts to attain those goals." *Id.* The court cited its own earlier precedent to hold that "the provisions are not immunized from scrutiny because they purport to establish goals rather than quotas ... [T]he relevant question is not whether a statute requires the use of such measures, but whether it authorizes or encourages them." *Id.* at 710-11 (internal citations and quotations omitted). The court found that the statute encouraged set asides and cited *Concrete*

Works of Colorado v. Denver, 36 F.3d 1512 (10th Cir. 1994), as analogous support for the proposition. *Id.* at 711.

The court found that the statute treated contractors differently based upon their race, ethnicity and gender, and although “worded in terms of goals and good faith, the statute imposes mandatory requirements with concreteness.” *Id.* The court also noted that the statute may impose additional compliance expenses upon non-MBE/WBE firms who are required to make good faith outreach efforts (*e.g.*, advertising) to MBE/WBE firms. *Id.* at 712.

The court then conducted strict scrutiny (race), and an intermediate scrutiny (gender) analyses. *Id.* at 712-13. The court found the University presented “no evidence” to justify the race- and gender-based classifications and thus did not consider additional issues of proof. *Id.* at 713. The court found that the statute was not narrowly tailored because the definition of “minority” was overbroad (*e.g.*, inclusion of Aleuts). *Id.* at 714, citing *Wygant v. Jackson Board of Education*, 476 U.S. 267, 284, n. 13 (1986) and *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469, 505-06 (1989). The court found “[a] broad program that sweeps in all minorities with a remedy that is in no way related to past harms cannot survive constitutional scrutiny.” *Id.* at 714, citing *Hopwood v. State of Texas*, 78 F.3d 932, 951 (5th Cir. 1996). The court held that the statute violated the Equal Protection Clause.

11. 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 subpart of strict scrutiny review." *Id.* at 1413, quoting *Coral Construction Company v. King County*, 941 F.2d 910 at 916 (9th Cir. 1991). In addition, the [m]ere infusion of tax dollars into a discriminatory industry may be sufficient governmental involvement to satisfy this prong." *Id.* at 1413 quoting *Coral Construction*, 941 F.2d at 916.

The court pointed out that the City had made detailed findings of prior discrimination in construction and building within its borders, had testimony taken at more than ten public hearings and received numerous written submissions from the public as part of its anecdotal evidence. *Id.* at 1414. The City Departments continued to discriminate against MBEs and WBEs and continued to operate under the "old boy network" in awarding contracts, thereby disadvantaging MBEs and WBEs. *Id.* And, the City found that large statistical disparities existed between the percentage of contracts awarded to MBEs and the percentage of available MBEs. 950 F.2d at 1414. The court stated the City also found "discrimination in the private sector against MBEs and WBEs that is manifested in and exacerbated by the City's procurement practices." *Id.* at 1414.

The Ninth Circuit found the study commissioned by the City indicated the existence of large disparities between the award of city contracts to available non-minority businesses and to MBEs. *Id.* at 1414. Using the City and County of San Francisco as the "relevant market," the study compared the number of available MBE prime construction contractors in San Francisco with the amount of contract dollars awarded by the City to San Francisco-based MBEs for a particular year. *Id.* at 1414. The study found that available MBEs received far fewer city contracts in proportion to their numbers than their available non-minority counterparts. *Id.* Specifically, the study found that with respect to prime construction contracting, disparities between the number of available local Asian-, black- and Hispanic-owned firms and the number of contracts awarded to such firms were statistically significant and supported an inference of discrimination. *Id.* For example, in prime contracting for construction, although MBE availability was determined to be at 49.5 percent, MBE dollar participation was only 11.1 percent. *Id.* The Ninth Circuit stated that in its decision in *Coral Construction*, it emphasized that such statistical disparities are "an invaluable tool and demonstrating the discrimination necessary to establish a compelling interest. *Id.* at 1414, citing to *Coral Construction*, 941 F.2d at 918 and *Croson*, 488 U.S. at 509.

The court noted that the record documents a vast number of individual accounts of discrimination, which bring "the cold numbers convincingly to life. *Id.* at 1414, quoting *Coral Construction*, 941 F.2d at 919. These accounts include numerous reports of MBEs being denied

contracts despite being the low bidder, MBEs being told they were not qualified although they were later found qualified when evaluated by outside parties, MBEs being refused work even after they were awarded contracts as low bidder, and MBEs being harassed by city personnel to discourage them from bidding on city contracts. *Id.* at 1415. The City pointed to numerous individual accounts of discrimination, that an “old boy network” still exists, and that racial discrimination is still prevalent within the San Francisco construction industry. *Id.* The court found that such a “combination of convincing anecdotal and statistical evidence is potent.” *Id.* at 1415 quoting *Coral Construction*, 941 F.2d at 919.

The court also stated that the 1989 Ordinance applies only to resident MBEs. The City, therefore, according to the court, appropriately confined its study to the city limits in order to focus on those whom the preference scheme targeted. *Id.* at 1415. The court noted that the statistics relied upon by the City to demonstrate discrimination in its contracting processes considered only MBEs located within the City of San Francisco. *Id.*

The court pointed out the City’s findings were based upon dozens of specific instances of discrimination that are laid out with particularity in the record, as well as the significant statistical disparities in the award of contracts. The court noted that the City must simply demonstrate the existence of past discrimination with specificity, but there is no requirement that the legislative findings specifically detail each and every incidence that the legislative body has relied upon in support of this decision that affirmative action is necessary. *Id.* at 1416.

In its analysis of the “narrowly tailored” requirement, the court focused on three characteristics identified by the decision in *Croson* as indicative of narrow tailoring. First, an MBE program should be instituted either after, or in conjunction with, race-neutral means of increasing minority business participation in public contracting. *Id.* at 1416. Second, the plan should avoid the use of “rigid numerical quotas.” *Id.* According to the Supreme Court, systems that permit waiver in appropriate cases and therefore require some individualized consideration of the applicants pose a lesser danger of offending the Constitution. *Id.* Mechanisms that introduce flexibility into the system also prevent the imposition of a disproportionate burden on a few individuals. *Id.* Third, “an MBE program must be limited in its effective scope to the boundaries of the enacting jurisdiction. *Id.* at 1416 quoting *Coral Construction*, 941 F.2d at 922.

The court found that the record showed the City considered, but rejected as not viable, specific race-neutral alternatives including a fund to assist newly established MBEs in meeting bonding requirements. The court stated that “while strict scrutiny requires serious, good faith consideration of race-neutral alternatives, strict scrutiny does not require exhaustion of every possible such alternative ... however irrational, costly, unreasonable, and unlikely to succeed such alternative may be.” *Id.* at 1417 quoting *Coral Construction*, 941 F.2d at 923. The court found the City ten years before had attempted to eradicate discrimination in city contracting through passage of a race-neutral ordinance that prohibited city contractors from discriminating against their employees on the basis of race and required contractors to take steps to integrate their work force; and that the City made and continues to make efforts to enforce the anti-discrimination ordinance. *Id.* at 1417. The court stated inclusion of such race-neutral measures is one factor suggesting that an MBE plan is narrowly tailored. *Id.* at 1417.

The court also found that the Ordinance possessed the requisite flexibility. Rather than a rigid quota system, the City adopted a more modest system according to the court, that of bid preferences. *Id.* at 1417. The court pointed out that there were no goals, quotas, or set-asides and moreover, the plan remedies only specifically identified discrimination: the City provides preferences only to those minority groups found to have previously received a lower percentage of specific types of contracts than their availability to perform such work would suggest. *Id.* at 1417.

The court rejected the argument of AGCC that to pass constitutional muster any remedy must provide redress only to specific individuals who have been identified as victims of discrimination. *Id.* at 1417, n. 12. The Ninth Circuit agreed with the district court that an iron-clad requirement limiting any remedy to individuals personally proven to have suffered prior discrimination would render any race-conscious remedy “superfluous,” and would thwart the Supreme Court’s directive in *Croson* that race-conscious remedies may be permitted in some circumstances. *Id.* at 1417, n. 12. The court also found that the burdens of the bid preferences on those not entitled to them appear “relatively light and well distributed.” *Id.* at 1417. The court stated that the Ordinance was “limited in its geographical scope to the boundaries of the enacting jurisdiction. *Id.* at 1418, quoting *Coral Construction*, 941 F.2d at 925. The court found that San Francisco had carefully limited the ordinance to benefit only those MBEs located within the City’s borders. *Id.* 1418.

12. Coral Construction Co. v. King County, 941 F.2d 910 (9th Cir. 1991)

In *Coral Construction Co. v. King County*, 941 F.2d 910 (9th Cir. 1991), the Ninth Circuit examined the constitutionality of King County, Washington’s minority and women business set-aside program in light of the standard set forth in *City of Richmond v. J.A. Croson Co.* The court held that although the County presented ample anecdotal evidence of disparate treatment of MBE contractors and subcontractors, the total absence of pre-program enactment statistical evidence was problematic to the compelling government interest component of the strict scrutiny analysis. The court remanded to the district court for a determination of whether the post-program enactment studies constituted a sufficient compelling government interest. Per the narrow tailoring prong of the strict scrutiny test, the court found that although the program included race-neutral alternative measures and was flexible (*i.e.*, included a waiver provision), the over breadth of the program to include MBEs outside of King County was fatal to the narrow tailoring analysis.

The court also remanded on the issue of whether the plaintiffs were entitled to damages under 42 U.S.C. §§ 1981 and 1983, and in particular to determine whether evidence of causation existed. With respect to the WBE program, the court held the plaintiff had standing to challenge the program, and applying the intermediate scrutiny analysis, held the WBE program survived the facial challenge.

In finding the absence of any statistical data in support of the County’s MBE Program, the court made it clear that statistical analyses have served and will continue to serve an important role in cases in which the existence of discrimination is a disputed issue. 941 F.2d at 918. The court noted that it has repeatedly approved the use of statistical proof to establish a *prima facie* case of

discrimination. *Id.* The court pointed out that the U.S. Supreme Court in *Croson* held that where “gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination.” *Id.* at 918, quoting *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08, and *Croson*, 488 U.S. at 501.

The court points out that statistical evidence may not fully account for the complex factors and motivations guiding employment decisions, many of which may be entirely race-neutral. *Id.* at 919. The court noted that the record contained a plethora of anecdotal evidence, but that anecdotal evidence, standing alone, suffers the same flaws as statistical evidence. *Id.* at 919. While anecdotal evidence may suffice to prove individual claims of discrimination, rarely, according to the court, if ever, can such evidence show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan. *Id.*

Nonetheless, the court held that the combination of convincing anecdotal and statistical evidence is potent. *Id.* at 919. The court pointed out that individuals who testified about their personal experiences brought the cold numbers of statistics “convincingly to life.” *Id.* at 919, quoting *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 339 (1977). The court also pointed out that the Eleventh Circuit Court of Appeals, in passing upon a minority set aside program similar to the one in King County, concluded that the testimony regarding complaints of discrimination combined with the gross statistical disparities uncovered by the County studies provided more than enough evidence on the question of prior discrimination and need for racial classification to justify the denial of a Motion for Summary Judgment. *Id.* at 919, citing *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 916 (11th Cir. 1990).

The court found that the MBE Program of the County could not stand without a proper statistical foundation. *Id.* at 919. The court addressed whether post-enactment studies done by the County of a statistical foundation could be considered by the court in connection with determining the validity of the County MBE Program. The court held that a municipality must have *some* concrete evidence of discrimination in a particular industry before it may adopt a remedial program. *Id.* at 920. However, the court said this requirement of *some* evidence does not mean that a program will be automatically struck down if the evidence before the municipality at the time of enactment does not completely fulfill both prongs of the strict scrutiny test. *Id.* Rather, the court held, the factual predicate for the program should be evaluated based upon all evidence presented to the district court, whether such evidence was adduced before or after enactment of the MBE Program. *Id.* Therefore, the court adopted a rule that a municipality should have before it some evidence of discrimination before adopting a race-conscious program, while allowing post-adoption evidence to be considered in passing on the constitutionality of the program. *Id.*

The court, therefore, remanded the case to the district court for determination of whether the consultant studies that were performed after the enactment of the MBE Program could provide an adequate factual justification to establish a “propelling government interest” for King County’s adopting the MBE Program. *Id.* at 922.

The court also found that *Croson* does not require a showing of active discrimination by the enacting agency, and that passive participation, such as the infusion of tax dollars into a discriminatory industry, suffices. *Id.* at 922, citing *Croson*, 488 U.S. at 492. The court pointed out

that the Supreme Court in *Croson* concluded that if the City had evidence before it, that non-minority contractors were systematically excluding minority businesses from subcontracting opportunities, it could take action to end the discriminatory exclusion. *Id.* at 922. The court points out that if the record ultimately supported a finding of systemic discrimination, the County adequately limited its program to those businesses that receive tax dollars, and the program imposed obligations upon only those businesses which voluntarily sought King County tax dollars by contracting with the County. *Id.*

The court addressed several factors in terms of the narrowly tailored analysis, and found that first, an MBE program should be instituted either after, or in conjunction with, race-neutral means of increasing minority business participation and public contracting. *Id.* at 922, citing Croson, 488 U.S. at 507. The second characteristic of the narrowly-tailored program, according to the court, is the use of minority utilization goals on a case-by-case basis, rather than upon a system of rigid numerical quotas. *Id.* Finally, the court stated that an MBE program must be limited in its effective scope to the boundaries of the enacting jurisdiction. *Id.*

Among the various narrowly tailored requirements, the court held consideration of race-neutral alternatives is among the most important. *Id.* at 922. Nevertheless, the court stated that while strict scrutiny requires serious, good faith consideration of race-neutral alternatives, strict scrutiny does not require exhaustion of every possible such alternative. *Id.* at 923. The court noted that it does not intend a government entity exhaust *every* alternative, however irrational, costly, unreasonable, and unlikely to succeed such alternative might be. *Id.* Thus, the court required only that a state exhausts race-neutral measures that the state is authorized to enact, and that have a reasonable possibility of being effective. *Id.* The court noted in this case the County considered alternatives, but determined that they were not available as a matter of law. *Id.* The County cannot be required to engage in conduct that may be illegal, nor can it be compelled to expend precious tax dollars on projects where potential for success is marginal at best. *Id.*

The court noted that King County had adopted some race-neutral measures in conjunction with the MBE Program, for example, hosting one or two training sessions for small businesses, covering such topics as doing business with the government, small business management, and accounting techniques. *Id.* at 923. In addition, the County provided information on assessing Small Business Assistance Programs. *Id.* The court found that King County fulfilled its burden of considering race-neutral alternative programs. *Id.*

A second indicator of a program's narrowly tailoring is program flexibility. *Id.* at 924. The court found that an important means of achieving such flexibility is through use of case-by-case utilization goals, rather than rigid numerical quotas or goals. *Id.* at 924. The court pointed out that King County used a "percentage preference" method, which is not a quota, and while the preference is locked at 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.

13. Coral Construction, Inc. v. City and County of San Francisco, et. al., 50 Cal. 4th 315, 235 P.3d 947, 113 Cal.Rptr.3d 279 (S. Ct. Cal. 2010)

In *Coral Construction, Inc. v. the City and County of San Francisco* (“*Coral Construction*”), the Supreme Court of the State of California considered an action brought against the City and County of San Francisco for declaratory and injunctive relief from an ordinance establishing an MBE/WBE program, which established race- and gender-based remedies on construction contracts. 235 P.3d at 952-956. The parties filed cross-motions for summary judgment in the Superior Court of the City and County of San Francisco. 235 P.3d at 955-56. The Superior Court struck down the MBE/WBE ordinance as violative of California’s constitutional amendment (Proposition 209) prohibiting race- and gender-based preferences in public contracting. 235 P.3d at 956.

The City and County of San Francisco (the “City”) appealed to the California Court of Appeals, which affirmed in part, reversed in part, and remanded the case back to the Superior Court of the City and County of San Francisco. 235 P.3d at 956. The Court of Appeals remanded the case for adjudication of the City’s claim that the federal equal protection clause required the ordinance. *Id.* The Supreme Court of the State of California granted review, superseding the opinion of the California Court of Appeals. *Id.*

Political structure doctrine. Article I, section 31 of the California Constitution (“section 31”) prohibits a city awarding public contracts to discriminate or grant preferential treatment based on race or gender. 235 P.3d at 952. The Court stated that the City of San Francisco, “whose public contracting laws expressly violate section 31 challenges its validity under the so-called political structure doctrine, a judicial interpretation of the federal equal protection clause.” 235 P.3d at 952. The Court held that section 31 does not violate the political structure doctrine. *Id.* The Court also held that section 31 prohibits race- and gender-conscious programs the federal equal clause permits but does not require. 235 P.3d at 957. The Court stated that section 31 prohibits discrimination and preferential treatment, but poses no obstacle to race- or gender-conscious measures required by federal law or the federal Constitution. *Id.*

The Court, joining with the United States Court of Appeals for the Sixth and Ninth Circuits, concluded that the political structure doctrine does not invalidate state laws that broadly forbid preferences and discrimination based on race, gender and other similar classifications. *Id.* at 958-9. The Court found that a generally applicable rule forbidding preferences and discrimination not required by equal protection, such as section 31, does not require the same justification as a remedy in which racial preferences are required by equal protection as a remedy for discrimination. *Id.* at 960.

Federal funding exception. The Court also rejected the City’s argument that the MBE/WBE ordinance is unaffected by section 31 because the ordinance falls within the exception set out in subdivision (e) of section 31, which provides the section shall not be interpreted as prohibiting action that must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the state. 235 P.3d at 961. The Court rejected the City’s argument that its MBE/WBE ordinance invokes the federal funding exception to section 31 in subdivision (e). *Id.* The Court concluded that the relevant federal regulations do

not require racial preferences by the City. *Id.* The Court only addressed the question whether the relevant federal regulations, independently of the federal equal protection clause, required the City's MBE/WBE ordinance. *Id.* at n. 14.

The Court found that the federal regulations did not compel the City to adopt the MBE/WBE ordinance to avoid a loss of federal funding. *Id.* at 962. The Court made a distinction between regulations that mention race-based remedies which are permissive from regulations that require race-based remedies. *Id.* The Court held that the federal funding exception under subdivision (e) of section 31 does not exempt the MBE/WBE ordinance from section 31's general prohibition of racial preferences. *Id.* at 962.

Federal compulsion argument. Finally, the Court considered the City's argument that the federal equal protection clause requires the MBE/WBE ordinance as a remedy for the City's own discrimination. 235 P.3d at 962. The Court held the California Court of Appeals ruled correctly and affirmed its judgment remanding the case for the limited purpose of adjudicating the issue of whether the federal equal protection clause requires the MBE/WBE ordinance as a remedy for the City's own discrimination under the federal compulsion doctrine. *Id.*

The Court stated that unlike the political structure and federal funding issues, which it may resolve as questions of law, the federal compulsion claim is largely factual and depends on the evidence supporting the City's decision to adopt race-conscious legislation. *Id.* at 963.

The Court offered certain "comments" to assist the superior court in resolving the federal compulsion issue on remand. 235 P.3d at 963-965. The Court stated that the relevant decisions hold open the possibility that race-conscious measures might be required as a remedy for purposeful discrimination in public contracting. *Id.* at 963. The Court said that the "only possibly compelling governmental interest implicated by the facts of this case is the interest in providing a remedy for purposeful discrimination." *Id.* at 964.

The Court held that for the City to defeat plaintiff's motion for summary judgment, the City must show that triable issues of fact exist on each of the factual predicates for its federal compulsion claim, namely: (1) that the City has purposely or intentionally discriminated against MBE's and WBE's; (2) that the purpose of the City's MBE/WBE ordinance is to provide a remedy for such discrimination; (3) that the ordinance is narrowly tailored to achieve that purpose; and (4) that a race- and gender-conscious remedy is necessary as the only, or at least the most likely, means of rectifying the resulting injury. 235 P.3d at 964. The City, the Court stated, must establish all of these points to establish the federal compulsion doctrine. *Id.*

14. Hi-Voltage Wire Works, Inc. v. City of San Jose, 101 Cal.Rptr.2d 653, 12 P.3d 1068 (Cal. 2000)

In *Hi-Voltage Wire Works, Inc. v. City of San Jose*, the California Supreme Court held the City of San Jose's Nondiscrimination/Nonpreferential Treatment Program Applicable to Construction Contracts in Excess of \$50,000 (the "Program"), a goals oriented program requiring utilization of minority and women subcontractors or documentation of best efforts at utilization, violated Article I, Section 31 of the California Constitution as amended by Proposition 209.

Background. The Program at issue was adopted after the passage of Proposition 209 and sought to clarify the City's earlier goals oriented program that was enacted after the City commissioned a disparity study in 1990 that reported a disparity in as to the amount of contract dollars awarded to MBE subcontractors. The Program required contractors to fulfill an outreach or a participation requirement and applied to all contractors, including MBEs and WBEs and those not planning to subcontract out any portion of the contract. Hi-Voltage bid on a contract and because it intended to perform all of the work itself and not hire any subcontractors, it did not comply with the terms of the Program and was deemed a non-responsive bidder. Upon challenge thereto, the trial court held the Program violated Article I, Section 31; the Court of Appeals affirmed.

In affirming the lower courts and holding the Program unconstitutional, the California Supreme Court looked specifically to Title VII of the Civil Rights Act ("Title VII") and found that Article I, Section 31 "closely parallels this provision in both language and purpose;" the Court thus examined U.S. Supreme Court cases interpreting Title VII.

The Court found the Supreme Court's decision in *Steelworkers v. Weber*, 443 U.S. 193 (1979) marked a substantial modification in the interpretation and application of Title VII. In *Weber* and its progeny, the Supreme Court "interpreted Title VII to permit race-conscious action whenever the job category in question is traditionally segregated." 12 P.3d at 1077 (internal quotations omitted). The Court determined its own jurisprudence indicated a "fundamental shift from a staunch anti-discrimination jurisprudence to approval, sometimes endorsement, of remedial race- and sex- conscious government decision making." *Id.* at 1081

Proposition 209. In 1996, voters approved Proposition 209, adding Section 31 to Article I of the California Constitution and providing as follows:

(a) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

The Court found the language of the amendment was clear and found nothing in the ballot arguments or legislative analysis to indicate "discriminate" or "preferential treatment" should have any special meaning. The Court determined the intent of Proposition 209 was to "reinstitute the interpretation of the Civil Rights Act and equal protection that predated *Weber*."

Document and Outreach Component violated Proposition 209. The Court concluded the Program violated Proposition 209 inasmuch as the participation component is discriminatory against non-M/WBE's and the outreach component grants preferential treatment to M/WBE's. Specifically, the Court found the outreach component "requires contractors to treat MBE/WBE subcontractors more advantageously by providing them notice of bidding opportunities, soliciting their participation, and negotiating for their services, none of which they must do for non-MBE's/WBE's." *Id.* at 1068.

The Court did note however that not all outreach efforts are unlawful; rather the Court found "voters intended to preserve outreach efforts to disseminate information about public

employment, education, and contracting not predicated on an impermissible classification." *Id.* The Court expressed no opinion regarding the scope of such efforts.

In light of the analysis of Proposition 209 contained in the ballot pamphlet, the court found it is clear that the voters reasonably would have believed that an outreach program targeted to specific individuals or groups on the basis of their race or gender would be considered a program that grants preferential treatment within the meaning of article I, section 31. Interpreting the language of article I, section 31, to effectuate the voters' intent, the court said it must conclude that an outreach program directed to an audience on the basis of its members' race or gender constitutes a program that grants preferential treatment for purposes of article I, section 31. In view of this conclusion, the court stated it is clear that the Documentation of Outreach component that is challenged in this case violates the newly enacted constitutional provision.

As noted, the outreach component in question places an obligation on prime contractors to solicit bids from, and make follow-up contacts to, a specified number of MBE or WBE subcontractors, but the provision places no similar obligation on prime contractors to undertake outreach efforts to non-MBE or non-WBE subcontractors. The court concluded this aspect of the outreach component in itself grants preferential treatment to subcontractors on the basis of race and gender.

Moreover, the court said the city's outreach component contains an additional feature that requires a prime contractor to negotiate in good faith with and to justify any rejection of an offer made by any one of the MBE/WBE subcontractors that expresses an interest in participating in the project, while the provision places no similar requirements upon a prime contractor with regard to proposals made by a non-MBE or non-WBE subcontractor. These additional features of the outreach component, according to the court, similarly grant preferential treatment to subcontractors on the basis of race or gender. As a practical matter, the court pointed out, these features may create a significant incentive for a prime contractor to grant preferential treatment to an MBE/WBE subcontractor that expresses interest in participating in the project, in order to avoid a claim that the contractor's negotiation or justification for rejection was inadequate.

The Court also found that federal law did not require a different result as the "federal courts have held Proposition 209 does not conflict with Titles VI, VII, or IX of the Civil Rights Act of 1964."

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

Recent Decisions in Federal Circuit Courts of Appeal

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

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

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

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

In 2004, the State retained a consultant to prepare and issue a third study of subcontractors employed in North Carolina’s highway construction industry. The study, according to the Court, marshaled evidence to conclude that disparities in the utilization of minority subcontractors persisted. 615 F.3d 233 at 238. The Court pointed out that in response to the study, the North Carolina General Assembly substantially amended state legislation section 136-28.4 and the new law went into effect in 2006. The new statute modified the previous statutory scheme, according to the Court in five important respects. *Id.*

First, the amended statute expressly conditions implementation of any participation goals on the findings of the 2004 study. Second, the amended statute eliminates the 5 and 10 percent annual

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

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

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

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

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

Thus, the Court found that to justify a race-conscious measure, a state must identify that discrimination, public or private, with some specificity, and must have a strong basis in evidence for its conclusion that remedial action is necessary. 615 F.3d 233 at 241 *quoting Croson*, 488 U.S. at 504 and *Wygant v. Jackson Board of Education*, 476 U.S. 267, 277 (1986)(plurality opinion).

The Court significantly noted that: “There is no ‘precise mathematical formula to assess the quantum of evidence that rises to the *Croson* ‘strong basis in evidence’ benchmark.” 615 F.3d 233 at 241, *quoting Rothe Dev. Corp. v. Department of Defense*, 545 F.3d 1023, 1049 (Fed.Cir.

2008). The Court stated that the sufficiency of the State’s evidence of discrimination “must be evaluated on a case-by-case basis.” *Id.* at 241. (internal quotation marks omitted).

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

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

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

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

In defining what constitutes “something less” than a ‘strong basis in evidence,’ the courts, ... also agree that the party defending the statute must ‘present [] sufficient probative evidence in support of its stated rationale for enacting a gender preference, *i.e.*,...the evidence [must be] sufficient to show that the preference rests on evidence-informed analysis rather than on stereotypical generalizations.” 615 F.3d 233 at 242 *quoting Engineering Contractors*, 122 F.3d at 910 and *Concrete Works*, 321 F.3d at 959. The gender-based measures must be based on

“reasoned analysis rather than on the mechanical application of traditional, often inaccurate, assumptions.” *Id.* at 242 quoting *Hogan*, 458 U.S. at 726.

Plaintiff’s burden. The Court found that when a plaintiff alleges that a statute violates the Equal Protection Clause as applied and on its face, the plaintiff bears a heavy burden. In its facial challenge, the Court held that a plaintiff “has a very heavy burden to carry, and must show that [a statutory scheme] cannot operate constitutionally under any circumstance.” *Id.* at 243, quoting *West Virginia v. U.S. Department of Health & Human Services*, 289 F.3d 281, 292 (4th Cir. 2002).

Statistical evidence. The Court examined the State’s statistical evidence of discrimination in public-sector subcontracting, including its disparity evidence and regression analysis. The Court noted that the statistical analysis analyzed the difference or disparity between the amount of subcontracting dollars minority- and women-owned businesses actually won in a market and the amount of subcontracting dollars they would be expected to win given their presence in that market. 615 F.3d 233 at 243. The Court found that the study grounded its analysis in the “disparity index,” which measures the participation of a given racial, ethnic, or gender group engaged in subcontracting. *Id.* In calculating a disparity index, the study divided the percentage of total subcontracting dollars that a particular group won by the percent that group represents in the available labor pool, and multiplied the result by 100. *Id.* The closer the resulting index is to 100, the greater that group’s participation. *Id.*

The Court held that after *Croson*, a number of our sister circuits have recognized the utility of the disparity index in determining statistical disparities in the utilization of minority- and women-owned businesses. *Id.* at 243-244 (Citations to multiple federal circuit court decisions omitted.) The Court also found that generally “courts consider a disparity index lower than 80 as an indication of discrimination.” *Id.* at 244. Accordingly, the study considered only a disparity index lower than 80 as warranting further investigation. *Id.*

The Court pointed out that after calculating the disparity index for each relevant racial or gender group, the consultant tested for the statistical significance of the results by conducting standard deviation analysis through the use of t-tests. The Court noted that standard deviation analysis “describes the probability that the measured disparity is the result of mere chance.” 615 F.3d 233 at 244, quoting *Eng’g Contractors*, 122 F.3d at 914. The consultant considered the finding of two standard deviations to demonstrate “with 95 percent certainty that disparity, as represented by either overutilization or underutilization, is actually present.” *Id.*, citing *Eng’g Contractors*, 122 F.3d at 914.

The study analyzed the participation of minority and women subcontractors in construction contracts awarded and managed from the central NCDOT office in Raleigh, North Carolina. 615 F.3d 233 at 244. To determine utilization of minority and women subcontractors, the consultant developed a master list of contracts mainly from State-maintained electronic databases and hard copy files; then selected from that list a statistically valid sample of contracts, and calculated the percentage of subcontracting dollars awarded to minority- and women-owned businesses during the 5-year period ending in June 2003. (The study was published in 2004). *Id.* at 244.

The Court found that the use of data for centrally-awarded contracts was sufficient for its analysis. It was noted that data from construction contracts awarded and managed from the NCDOT divisions across the state and from preconstruction contracts, which involve work from engineering firms and architectural firms on the design of highways, was incomplete and not accurate. 615 F.3d 233 at 244, n.6. These data were not relied upon in forming the opinions relating to the study. *Id.* at 244, n. 6.

To estimate availability, which the Court defined as the percentage of a particular group in the relevant market area, the consultant created a vendor list comprising: (1) subcontractors approved by the department to perform subcontract work on state-funded projects, (2) subcontractors that performed such work during the study period, and (3) contractors qualified to perform prime construction work on state-funded contracts. 615 F.3d 233 at 244. The Court noted that prime construction work on state-funded contracts was included based on the testimony by the consultant that prime contractors are qualified to perform subcontracting work and often do perform such work. *Id.* at 245. The Court also noted that the consultant submitted its master list to the NCDOT for verification. *Id.* at 245.

Based on the utilization and availability figures, the study prepared the disparity analysis comparing the utilization based on the percentage of subcontracting dollars over the five year period, determining the availability in numbers of firms and their percentage of the labor pool, a disparity index which is the percentage of utilization in dollars divided by the percentage of availability multiplied by 100, and a T Value. 615 F.3d 233 at 245.

The Court concluded that the figures demonstrated prime contractors underutilized all of the minority subcontractor classifications on state-funded construction contracts during the study period. 615 F.3d 233 245. The disparity index for each group was less than 80 and, thus, the Court found warranted further investigation. *Id.* The t-test results, however, demonstrated marked underutilization only of African American and Native American subcontractors. *Id.* For African Americans the t-value fell outside of two standard deviations from the mean and, therefore, was statistically significant at a 95 percent confidence level. *Id.* The Court found there was at least a 95 percent probability that prime contractors' underutilization of African American subcontractors was *not* the result of mere chance. *Id.*

For Native American subcontractors, the t-value of 1.41 was significant at a confidence level of approximately 85 percent. 615 F.3d 233 at 245. The t-values for Hispanic American and Asian American subcontractors, demonstrated significance at a confidence level of approximately 60 percent. The disparity index for women subcontractors found that they were overutilized during the study period. The overutilization was statistically significant at a 95 percent confidence level. *Id.*

To corroborate the disparity study, the consultant conducted a regression analysis studying the influence of certain company and business characteristics – with a particular focus on owner race and gender – on a firm's gross revenues. 615 F.3d 233 at 246. The consultant obtained the data from a telephone survey of firms that conducted or attempted to conduct business with the NCDOT. The survey pool consisted of a random sample of such firms. *Id.*

The consultant used the firms' gross revenues as the dependent variable in the regression analysis to test the effect of other variables, including company age and number of full-time employees, and the owners' years of experience, level of education, race, ethnicity, and gender. 615 F.3d 233 at 246. The analysis revealed that minority and women ownership universally had a negative effect on revenue, and African American ownership of a firm had the largest negative effect on that firm's gross revenue of all the independent variables included in the regression model. *Id.* These findings led to the conclusion that for African Americans the disparity in firm revenue was not due to capacity-related or managerial characteristics alone. *Id.*

The Court rejected the arguments by the plaintiffs attacking the availability estimates. The Court rejected the plaintiff's expert, Dr. George LaNoue, who testified that bidder data – reflecting the number of subcontractors that actually bid on Department subcontracts – estimates availability better than “vendor data.” 615 F.3d 233 at 246. Dr. LaNoue conceded, however, that the State does not compile bidder data and that bidder data actually reflects skewed availability in the context of a goals program that urges prime contractors to solicit bids from minority and women subcontractors. *Id.* The Court found that the plaintiff's expert did not demonstrate that the vendor data used in the study was unreliable, or that the bidder data would have yielded less support for the conclusions reached. In sum, the Court held that the plaintiffs challenge to the availability estimate failed because it could not demonstrate that the 2004 study's availability estimate was inadequate. *Id.* at 246. The Court cited *Concrete Works*, 321 F.3d at 991 for the proposition that a challenger cannot meet its burden of proof through conjecture and unsupported criticisms of the state's evidence,” and that the plaintiff Rowe presented no viable alternative for determining availability. *Id.* at 246-247, citing *Concrete Works*, 321 F.3d 991 and *Sherbrooke Turf, Inc. v. Minn. Department of Transportation*, 345 F.3d 964, 973 (8th Cir. 2003).

The Court also rejected the plaintiff's argument that minority subcontractors participated on state-funded projects at a level consistent with their availability in the relevant labor pool, based on the state's response that evidence as to the *number* of minority subcontractors working with state-funded projects does not effectively rebut the evidence of discrimination in terms of subcontracting *dollars*. 615 F.3d 233 at 247. The State pointed to evidence indicating that prime contractors used minority businesses for low-value work in order to comply with the goals, and that African American ownership had a significant negative impact on firm revenue unrelated to firm capacity or experience. *Id.* The Court concluded plaintiff did not offer any contrary evidence. *Id.*

The Court found that the State bolstered its position by presenting evidence that minority subcontractors have the capacity to perform higher-value work. 615 F.3d 233 at 247. The study concluded, based on a sample of subcontracts and reports of annual firm revenue, that exclusion of minority subcontractors from contracts under \$500,000 was not a function of capacity. *Id.* at 247. Further, the State showed that over 90 percent of the NCDOT's subcontracts were valued at \$500,000 or less, and that capacity constraints do not operate with the same force on subcontracts as they may on prime contracts because subcontracts tend to be relatively small. *Id.* at 247. The Court pointed out that the Court in *Rothe II*, 545 F.3d at 1042-45, faulted disparity analyses of total construction dollars, including prime contracts, for failing to account for the relative capacity of firms in that case. *Id.* at 247.

The Court pointed out that in addition to the statistical evidence, the State also presented evidence demonstrating that from 1991 to 1993, during the Program’s suspension, prime contractors awarded substantially fewer subcontracting dollars to minority and women subcontractors on state-funded projects. The Court rejected the plaintiff’s argument that evidence of a decline in utilization does not raise an inference of discrimination. 615 F.3d 233 at 247-248. The Court held that the very significant decline in utilization of minority and women-subcontractors – nearly 38 percent – “surely provides a basis for a fact finder to infer that discrimination played some role in prime contractors’ reduced utilization of these groups during the suspension.” *Id.* at 248, *citing Adarand v. Slater*, 228 F.3d at 1174 (finding that evidence of declining minority utilization after a program has been discontinued “strongly supports the government’s claim that there are significant barriers to minority competition in the public subcontracting market, raising the specter of racial discrimination.”) The Court found such an inference is particularly compelling for minority-owned businesses because, even during the study period, prime contractors continue to underutilize them on state-funded road projects. *Id.* at 248.

Anecdotal evidence. The State additionally relied on three sources of anecdotal evidence contained in the study: a telephone survey, personal interviews, and focus groups. The Court found the anecdotal evidence showed an informal “good old boy” network of white contractors that discriminated against minority subcontractors. 615 F.3d 233 at 248. The Court noted that three-quarters of African American respondents to the telephone survey agreed that an informal network of prime and subcontractors existed in the State, as did the majority of other minorities, that more than half of African American respondents believed the network excluded their companies from bidding or awarding a contract as did many of the other minorities. *Id.* at 248. The Court found that nearly half of nonminority male respondents corroborated the existence of an informal network, however, only 17 percent of them believed that the network excluded their companies from bidding or winning contracts. *Id.*

Anecdotal evidence also showed a large majority of African American respondents reported that double standards in qualifications and performance made it more difficult for them to win bids and contracts, that prime contractors view minority firms as being less competent than nonminority firms, and that nonminority firms change their bids when not required to hire minority firms. 615 F.3d 233 at 248. In addition, the anecdotal evidence showed African American and Native American respondents believed that prime contractors sometimes dropped minority subcontractors after winning contracts. *Id.* at 248. The Court found that interview and focus-group responses echoed and underscored these reports. *Id.*

The anecdotal evidence indicated that prime contractors already know who they will use on the contract before they solicit bids: that the “good old boy network” affects business because prime contractors just pick up the phone and call their buddies, which excludes others from that market completely; that prime contractors prefer to use other less qualified minority-owned firms to avoid subcontracting with African American-owned firms; and that prime contractors use their preferred subcontractor regardless of the bid price. 615 F.3d 233 at 248-249. Several minority subcontractors reported that prime contractors do not treat minority firms fairly, pointing to instances in which prime contractors solicited quotes the day before bids were due,

did not respond to bids from minority subcontractors, refused to negotiate prices with them, or gave minority subcontractors insufficient information regarding the project. *Id.* at 249.

The Court rejected the plaintiffs' contention that the anecdotal data was flawed because the study did not verify the anecdotal data and that the consultant oversampled minority subcontractors in collecting the data. The Court stated that the plaintiffs offered no rationale as to why a fact finder could not rely on the State's "unverified" anecdotal data, and pointed out that a fact finder could very well conclude that anecdotal evidence need not- and indeed cannot-be verified because it "is nothing more than a witness' narrative of an incident told from the witness' perspective and including the witness' perceptions." 615 F.3d 233 at 249, *quoting Concrete Works*, 321 F.3d at 989.

The Court held that anecdotal evidence simply supplements statistical evidence of discrimination. *Id.* at 249. The Court rejected plaintiffs' argument that the study oversampled representatives from minority groups, and found that surveying more non-minority men would not have advanced the inquiry. *Id.* at 249. It was noted that the samples of the minority groups were randomly selected. *Id.* The Court found the state had compelling anecdotal evidence that minority subcontractors face race-based obstacles to successful bidding. *Id.* at 249.

Strong basis in evidence that the minority participation goals were necessary to remedy discrimination. The Court held that the State presented a "strong basis in evidence" for its conclusion that minority participation goals were necessary to remedy discrimination against African American and Native American subcontractors." 615 F.3d 233 at 250. Therefore, the Court held that the State satisfied the strict scrutiny test. The Court found that the State's data demonstrated that prime contractors grossly underutilized African American and Native American subcontractors in public sector subcontracting during the study. *Id.* at 250. The Court noted that these findings have particular resonance because since 1983, North Carolina has encouraged minority participation in state-funded highway projects, and yet African American and Native American subcontractors continue to be underutilized on such projects. *Id.* at 250.

In addition, the Court found the disparity index in the study demonstrated statistically significant underutilization of African American subcontractors at a 95 percent confidence level, and of Native American subcontractors at a confidence level of approximately 85 percent. 615 F.3d 233 at 250. The Court concluded the State bolstered the disparity evidence with regression analysis demonstrating that African American ownership correlated with a significant, negative impact on firm revenue, and demonstrated there was a dramatic decline in the utilization of minority subcontractors during the suspension of the program in the 1990s. *Id.*

Thus, the Court held the State's evidence showing a gross statistical disparity between the availability of qualified American and Native American subcontractors and the amount of subcontracting dollars they win on public sector contracts established the necessary statistical foundation for upholding the minority participation goals with respect to these groups. 615 F.3d 233 at 250. The Court then found that the State's anecdotal evidence of discrimination against these two groups sufficiently supplemented the State's statistical showing. *Id.* The survey in the study exposed an informal, racially exclusive network that systemically disadvantaged minority subcontractors. *Id.* at 251. The Court held that the State could conclude with good reason that

such networks exert a chronic and pernicious influence on the marketplace that calls for remedial action. *Id.* The Court found the anecdotal evidence indicated that racial discrimination is a critical factor underlying the gross statistical disparities presented in the study. *Id.* at 251. Thus, the Court held that the State presented substantial statistical evidence of gross disparity, corroborated by “disturbing” anecdotal evidence.

The Court held in circumstances like these, the Supreme Court has made it abundantly clear a state can remedy a public contracting system that withholds opportunities from minority groups because of their race. 615 F.3d 233 at 251-252.

Narrowly tailored. The Court then addressed whether the North Carolina statutory scheme was narrowly tailored to achieve the State’s compelling interest in remedying discrimination against African American and Native American subcontractors in public-sector subcontracting. The following factors were considered in determining whether the statutory scheme was narrowly tailored.

Neutral measures. The Court held that narrowly tailoring requires “serious, good faith consideration of workable race-neutral alternatives,” but a state need not “exhaust [] ... every conceivable race-neutral alternative.” 615 F.3d 233 at 252 *quoting Grutter v. Bollinger*, 539 U.S. 306, 339 (2003). The Court found that the study details numerous alternative race-neutral measures aimed at enhancing the development and competitiveness of small or otherwise disadvantaged businesses in North Carolina. *Id.* at 252. The Court pointed out various race-neutral alternatives and measures, including a Small Business Enterprise Program; waiving institutional barriers of bonding and licensing requirements on certain small business contracts of \$500,000 or less; and the Department contracts for support services to assist disadvantaged business enterprises with bookkeeping and accounting, taxes, marketing, bidding, negotiation, and other aspects of entrepreneurial development. *Id.* at 252.

The Court found that plaintiff identified no viable race-neutral alternatives that North Carolina had failed to consider and adopt. The Court also found that the State had undertaken most of the race-neutral alternatives identified by USDOT in its regulations governing the Federal DBE Program. 615 F.3d 233 at 252, *citing* 49 CFR § 26.51(b). The Court concluded that the State gave serious good faith consideration to race-neutral alternatives prior to adopting the statutory scheme. *Id.*

The Court concluded that despite these race-neutral efforts, the study demonstrated disparities continue to exist in the utilization of African American and Native American subcontractors in state-funded highway construction subcontracting, and that these “persistent disparities indicate the necessity of a race-conscious remedy.” 615 F.3d 233 at 252.

Duration. The Court agreed with the district court that the program was narrowly tailored in that it set a specific expiration date and required a new disparity study every five years. 615 F.3d 233 at 253. The Court found that the program’s inherent time limit and provisions requiring regular reevaluation ensure it is carefully designed to endure only until the discriminatory impact has been eliminated. *Id.* at 253, *citing Adarand Constructors v. Slater*, 228 F.3d at 1179 (*quoting United States v. Paradise*, 480 U.S. 149, 178 (1987)).

Program’s goals related to percentage of minority subcontractors. The Court concluded that the State had demonstrated that the Program’s participation goals are related to the percentage of minority subcontractors in the relevant markets in the State. 615 F.3d 233 at 253. The Court found that the NCDOT had taken concrete steps to ensure that these goals accurately reflect the availability of minority-owned businesses on a project-by-project basis. *Id.*

Flexibility. The Court held that the Program was flexible and thus satisfied this indicator of narrow tailoring. 615 F.3d 233 at 253. The Program contemplated a waiver of project-specific goals when prime contractors make good faith efforts to meet those goals, and that the good faith efforts essentially require only that the prime contractor solicit and consider bids from minorities. *Id.* The State does not require or expect the prime contractor to accept any bid from an unqualified bidder, or any bid that is not the lowest bid. *Id.* The Court found there was a lenient standard and flexibility of the “good faith” requirement, and noted the evidence showed only 13 of 878 good faith submissions failed to demonstrate good faith efforts. *Id.*

Burden on non-MWBE/DBEs. The Court rejected the two arguments presented by plaintiff that the Program created onerous solicitation and follow-up requirements, finding that there was no need for additional employees dedicated to the task of running the solicitation program to obtain MBE/WBEs, and that there was no evidence to support the claim that plaintiff was required to subcontract millions of dollars of work that it could perform itself for less money. 615 F.3d 233 at 254. The State offered evidence from the study that prime contractors need not submit subcontract work that they can self-perform. *Id.*

Overinclusive. The Court found by its own terms the statutory scheme is not overinclusive because it limited relief to only those racial or ethnicity classifications that have been subjected to discrimination in the relevant marketplace and that had been adversely affected in their ability to obtain contracts with the Department. 615 F.3d 233 at 254. The Court concluded that in tailoring the remedy this way, the legislature did not randomly include racial groups that may never have suffered from discrimination in the construction industry, but rather, contemplated participation goals only for those groups shown to have suffered discrimination. *Id.*

In sum, the Court held that the statutory scheme is narrowly tailored to achieve the State’s compelling interest in remedying discrimination in public-sector subcontracting against African American and Native American subcontractors. *Id.* at 254.

Women-owned businesses overutilized. The study’s public-sector disparity analysis demonstrated that women-owned businesses won far more than their expected share of subcontracting dollars during the study period. 615 F.3d 233 at 254. In other words, the Court concluded that prime contractors substantially overutilized women subcontractors on public road construction projects. *Id.* The Court found the public-sector evidence did not evince the “exceedingly persuasive justification” the Supreme Court requires. *Id.* at 255.

The Court noted that the State relied heavily on private-sector data from the study attempting to demonstrate that prime contractors significantly underutilized women subcontractors in the general construction industry statewide and in the Asheville, North Carolina area. 615 F.3d 233 at 255. However, because the study did not provide a t-test analysis on the private-sector

disparity figures to calculate statistical significance, the Court could not determine whether this private underutilization was “the result of mere chance.” *Id.* at 255. The Court found troubling the “evidentiary gap” that there was no evidence indicating the extent to which women-owned businesses competing on public-sector road projects vied for private-sector subcontracts in the general construction industry. *Id.* at 255. The Court also found that the State did not present any anecdotal evidence indicating that women subcontractors successfully bidding on State contracts faced private-sector discrimination. *Id.* In addition, the Court found missing any evidence prime contractors that discriminate against women subcontractors in the private sector nevertheless win public-sector contracts. *Id.*

The Court pointed out that it did not suggest that the proponent of a gender-conscious program “must always tie private discrimination to public action.” 615 F.3d 233 at 255, n. 11. But, the Court held where, as here, there existed substantial probative evidence of overutilization in the relevant public sector, a state must present something more than generalized private-sector data unsupported by compelling anecdotal evidence to justify a gender-conscious program. *Id.* at 255, n. 11.

Moreover, the Court found the state failed to establish the amount of overlap between general construction and road construction subcontracting. 615 F.3d 233 at 256. The Court said that the dearth of evidence as to the correlation between public road construction subcontracting and private general construction subcontracting severely limits the private data’s probative value in this case. *Id.*

Thus, the Court held that the State could not overcome the strong evidence of overutilization in the public sector in terms of gender participation goals, and that the proffered private-sector data failed to establish discrimination in the particular field in question. 615 F.3d 233 at 256. Further, the anecdotal evidence, the Court concluded, indicated that most women subcontractors do not experience discrimination. *Id.* Thus, the Court held that the State failed to present sufficient evidence to support the Program’s current inclusion of women subcontractors in setting participation goals. *Id.*

Holding. The Court held that the state legislature had crafted legislation that withstood the constitutional scrutiny. 615 F.3d 233 at 257. The Court concluded that in light of the statutory scheme’s flexibility and responsiveness to the realities of the marketplace, and given the State’s strong evidence of discrimination against African American and Native American subcontractors in public-sector subcontracting, the State’s application of the statute to these groups is constitutional. *Id.* at 257. However, the Court also held that because the State failed to justify its application of the statutory scheme to women, Asian American, and Hispanic American subcontractors, the Court found those applications were not constitutional.

Therefore, the Court affirmed the judgment of the district court with regard to the facial validity of the statute, and with regard to its application to African American and Native American subcontractors. 615 F.3d 233 at 258. The Court reversed the district court’s judgment insofar as it upheld the constitutionality of the state legislature as applied to women, Asian American and Hispanic American subcontractors. *Id.* The Court thus remanded the case to the district court to fashion an appropriate remedy consistent with the opinion. *Id.*

Concurring opinions. It should be pointed out that there were two concurring opinions by the three Judge panel: one judge concurred in the judgment, and the other judge concurred fully in the majority opinion and the judgment.

2. Jana-Rock Construction, Inc. v. New York State Dept. of Economic Development, 438 F.3d 195 (2d Cir. 2006)

This recent case is instructive in connection with the determination of the groups that may be included in a MBE/WBE-type program, and the standard of analysis utilized to evaluate a local government's non-inclusion of certain groups. In this case, the Second Circuit Court of Appeals held racial classifications that are challenged as "under-inclusive" (*i.e.*, those that exclude persons from a particular racial classification) are subject to a "rational basis" review, not strict scrutiny.

Plaintiff Luiere, a 70 percent shareholder of Jana-Rock Construction, Inc. ("Jana Rock") and the "son of a Spanish mother whose parents were born in Spain," challenged the constitutionality of the State of New York's definition of "Hispanic" under its local minority-owned business program. 438 F.3d 195, 199-200 (2d Cir. 2006). Under the USDOT regulations, 49 CFR § 26.5, "Hispanic Americans" are defined as "persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race." *Id.* at 201. Upon proper application, Jana-Rock was certified by the New York Department of Transportation as a Disadvantaged Business Enterprise ("DBE") under the federal regulations. *Id.*

However, unlike the federal regulations, the State of New York's local minority-owned business program included in its definition of minorities "Hispanic persons of Mexican, Puerto Rican, Dominican, Cuban, Central or South American of either Indian or Hispanic origin, regardless of race." The definition did not include all persons from, or descendants of persons from, Spain or Portugal. *Id.* Accordingly, Jana-Rock was denied MBE certification under the local program; Jana-Rock filed suit alleging a violation of the Equal Protection Clause. *Id.* at 202-03. The plaintiff conceded that the overall minority-owned business program satisfied the requisite strict scrutiny, but argued that the definition of "Hispanic" was fatally under-inclusive. *Id.* at 205.

The Second Circuit found that the narrow-tailoring prong of the strict scrutiny analysis "allows New York to identify which groups it is prepared to prove are in need of affirmative action without demonstrating that no other groups merit consideration for the program." *Id.* at 206. The court found that evaluating under-inclusiveness as an element of the strict scrutiny analysis was at odds with the United States Supreme Court decision in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) which required that affirmative action programs be no broader than necessary. *Id.* at 207-08. The court similarly rejected the argument that the state should mirror the federal definition of "Hispanic," finding that Congress has more leeway than the states to make broader classifications because Congress is making such classifications on the national level. *Id.* at 209.

The court opined — without deciding — that it may be impermissible for New York to simply adopt the "federal USDOT definition of Hispanic without at least making an independent

assessment of discrimination against Hispanics of Spanish Origin in New York.” *Id.* Additionally, finding that the plaintiff failed to point to any discriminatory purpose by New York in failing to include persons of Spanish or Portuguese descent, the court determined that the rational basis analysis was appropriate. *Id.* at 213.

The court held that the plaintiff failed the rational basis test for three reasons: (1) because it was not irrational nor did it display animus to exclude persons of Spanish and Portuguese descent from the definition of Hispanic; (2) because the fact the plaintiff could demonstrate evidence of discrimination that he personally had suffered did not render New York’s decision to exclude persons of Spanish and Portuguese descent irrational; and (3) because the fact New York may have relied on Census data including a small percentage of Hispanics of Spanish descent did not mean that it was irrational to conclude that Hispanics of Latin American origin were in greater need of remedial legislation. *Id.* at 213-14. Thus, the Second Circuit affirmed the conclusion that New York had a rational basis for its definition to not include persons of Spanish and Portuguese descent, and thus affirmed the district court decision upholding the constitutionality of the challenged definition.

3. 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 a MBE/WBE goal program that the court held contained racial classifications. The court based its ruling primarily on the failure of the DeKalb County School District (the "District") to seriously consider and implement a race-neutral program and to the infinite duration of the program.

Plaintiff Virdi, an Asian American architect of Indian descent, filed suit against the District, members of the DeKalb County Board of Education (both individually and in their official capacities) (the "Board") and the Superintendent (both individually and in his official capacity) (collectively "defendants") pursuant to 42 U.S.C. §§ 1981 and 1983 and the Fourteenth Amendment alleging that they discriminated against him on the basis of race when awarding architectural contracts. 135 Fed. Appx. 262, 264 (11th Cir. 2005). Virdi also alleged the school district's Minority Vendor Involvement Program was facially unconstitutional. *Id.*

The district court initially granted the defendants' Motions for Summary Judgment on all of Virdi's claims and the Eleventh Circuit Court of Appeals reversed in part, vacated in part, and remanded. *Id.* On remand, the district court granted the defendants' Motion for Partial Summary Judgment on the facial challenge, and then granted the defendants' motion for a judgment as a matter of law on the remaining claims at the close of Virdi's case. *Id.*

In 1989, the Board appointed the Tillman Committee (the "Committee") to study participation of female- and minority-owned businesses with the District. *Id.* The Committee met with various District departments and a number of minority contractors who claimed they had unsuccessfully attempted to solicit business with the District. *Id.* Based upon a "general feeling" that minorities were under-represented, the Committee issued the Tillman Report (the "Report") stating "the Committee's impression that '[m]inorities ha[d] not participated in school board purchases and contracting in a ratio reflecting the minority make-up of the community.'" *Id.* The Report contained no specific evidence of past discrimination nor any factual findings of discrimination. *Id.*

The Report recommended that the District: (1) Advertise bids and purchasing opportunities in newspapers targeting minorities, (2) conduct periodic seminars to educate minorities on doing business with the District, (3) notify organizations representing minority firms regarding bidding and purchasing opportunities, and (4) publish a "how to" booklet to be made available to any business interested in doing business with the District.

Id. The Report also recommended that the District adopt annual, aspirational participation goals for women- and minority-owned businesses. *Id.* The Report contained statements indicating the selection process should remain neutral and recommended that the Board adopt a non-discrimination statement. *Id.*

In 1991, the Board adopted the Report and implemented several of the recommendations, including advertising in the AJC, conducting seminars, and publishing the “how to” booklet. *Id.* The Board also implemented the Minority Vendor Involvement Program (the “MVP”) which adopted the participation goals set forth in the Report. *Id.* at 265.

The Board delegated the responsibility of selecting architects to the Superintendent. *Id.* Virdi sent a letter to the District in October 1991 expressing interest in obtaining architectural contracts. *Id.* Virdi sent the letter to the District Manager and sent follow-up literature; he re-contacted the District Manager in 1992 and 1993. *Id.* In August 1994, Virdi sent a letter and a qualifications package to a project manager employed by Heery International. *Id.* In a follow-up conversation, the project manager allegedly told Virdi that his firm was not selected not based upon his qualifications, but because the “District was only looking for ‘black-owned firms.’” *Id.* Virdi sent a letter to the project manager requesting confirmation of his statement in writing and the project manager forwarded the letter to the District. *Id.*

After a series of meetings with District officials, in 1997, Virdi met with the newly hired Executive Director. *Id.* at 266. Upon request of the Executive Director, Virdi re-submitted his qualifications but was informed that he would be considered only for future projects (Phase III SPLOST projects). *Id.* Virdi then filed suit before any Phase III SPLOST projects were awarded. *Id.*

The Eleventh Circuit considered whether the MVP was facially unconstitutional and whether the defendants intentionally discriminated against Virdi on the basis of his race. The court held that strict scrutiny applies to all racial classifications and is not limited to merely set-asides or mandatory quotas; therefore, the MVP was subject to strict scrutiny because it contained racial classifications. *Id.* at 267. The court first questioned whether the identified government interest was compelling. *Id.* at 268. However, the court declined to reach that issue because it found the race-based participation goals were not narrowly tailored to achieving the identified government interest. *Id.*

The court held the MVP was not narrowly tailored for two reasons. *Id.* First, because no evidence existed that the District considered race-neutral alternatives to “avoid unwitting discrimination.” The court found that “[w]hile narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, it does require serious, good faith consideration of whether such alternatives could serve the governmental interest at stake.” *Id.*, citing *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003), and *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509-10 (1989). The court found that District could have engaged in any number of equally effective race-neutral alternatives, including using its outreach procedure and tracking the participation and success of minority-owned business as compared to non-minority-owned businesses. *Id.* at 268, n.8. Accordingly, the court held the MVP was not narrowly tailored. *Id.* at 268.

Second, the court held that the unlimited duration of the MVP's racial goals negated a finding of narrow tailoring. *Id.* "[R]ace conscious ... policies must be limited in time." *Id.*, citing *Grutter*, 539 U.S. at 342, and *Walker v. City of Mesquite, TX*, 169 F.3d 973, 982 (5th Cir. 1999). The court held that because the government interest could have been achieved utilizing race-neutral measures, and because the racial goals were not temporally limited, the MVP could not withstand strict scrutiny and was unconstitutional on its face. *Id.* at 268.

With respect to Virdi's claims of intentional discrimination, the court held that although the MVP was facially unconstitutional, no evidence existed that the MVP or its unconstitutionality caused Virdi to lose a contract that he would have otherwise received. *Id.* Thus, because Virdi failed to establish a causal connection between the unconstitutional aspect of the MVP and his own injuries, the court affirmed the district court's grant of judgment on that issue. *Id.* at 269. Similarly, the court found that Virdi presented insufficient evidence to sustain his claims against the Superintendent for intentional discrimination. *Id.*

The court reversed the district court's order pertaining to the facial constitutionality of the MVP's racial goals, and affirmed the district court's order granting defendants' motion on the issue of intentional discrimination against Virdi. *Id.* at 270.

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

This case is instructive to the disparity study because it is a recent decision that upheld the validity of a local government MBE/WBE program. It is significant to note that the Tenth Circuit did not apply the narrowly tailored test and thus did not rule on an application of the narrowly tailored test, instead finding that the plaintiff had waived that challenge in one of the earlier decisions in the case. This case also is one of the only cases to have found private sector marketplace discrimination as a basis to uphold an MBE/WBE-type program.

In *Concrete Works* the United States Court of Appeals for the Tenth Circuit held that the City and County of Denver had a compelling interest in limiting race discrimination in the construction industry, that the City had an important governmental interest in remedying gender discrimination in the construction industry, and found that the City and County of Denver had established a compelling governmental interest to have a race- and gender-based program. In *Concrete Works*, the Court of Appeals did not address the issue of whether the MWBE Ordinance was narrowly tailored because it held the district court was barred under the law of the case doctrine from considering that issue since it was not raised on appeal by the plaintiff construction companies after they had lost that issue on summary judgment in an earlier decision. Therefore, the Court of Appeals did not reach a decision as to narrowly tailoring or consider that issue in the case.

Case history. Plaintiff, Concrete Works of Colorado, Inc. ("CWC") challenged the constitutionality of an "affirmative action" ordinance enacted by the City and County of Denver (hereinafter the "City" or "Denver"). 321 F.3d 950, 954 (10th Cir. 2003). The ordinance established participation

goals for racial minorities and women on certain City construction and professional design projects. *Id.*

The City enacted an Ordinance No. 513 (“1990 Ordinance”) containing annual goals for MBE/WBE utilization on all competitively bid projects. *Id.* at 956. A prime contractor could also satisfy the 1990 Ordinance requirements by using “good faith efforts.” *Id.* In 1996, the City replaced the 1990 Ordinance with Ordinance No. 304 (the “1996 Ordinance”). The district court stated that the 1996 Ordinance differed from the 1990 Ordinance by expanding the definition of covered contracts to include some privately financed contracts on City-owned land; added updated information and findings to the statement of factual support for continuing the program; refined the requirements for MBE/WBE certification and graduation; mandated the use of MBEs and WBEs on change orders; and expanded sanctions for improper behavior by MBEs, WBEs or majority-owned contractors in failing to perform the affirmative action commitments made on City projects. *Id.* at 956-57.

The 1996 Ordinance was amended in 1998 by Ordinance No. 948 (the “1998 Ordinance”). The 1998 Ordinance reduced annual percentage goals and prohibited an MBE or a WBE, acting as a bidder, from counting self-performed work toward project goals. *Id.* at 957.

CWC filed suit challenging the constitutionality of the 1990 Ordinance. *Id.* The district court conducted a bench trial on the constitutionality of the three ordinances. *Id.* The district court ruled in favor of CWC and concluded that the ordinances violated the Fourteenth Amendment. *Id.* The City then appealed to the Tenth Circuit Court of Appeals. *Id.* The Court of Appeals reversed and remanded. *Id.* at 954.

The Court of Appeals applied strict scrutiny to race-based measures and intermediate scrutiny to the gender-based measures. *Id.* at 957-58, 959. The Court of Appeals also cited *Richmond v. J.A. Croson Co.*, for the proposition that a governmental entity “can use its spending powers to remedy private discrimination, if it identifies that discrimination with the particularity required by the Fourteenth Amendment.” 488 U.S. 469, 492 (1989) (plurality opinion). Because “an effort to alleviate the effects of *societal* discrimination is not a compelling interest,” the Court of Appeals held that Denver could demonstrate that its interest is compelling only if it (1) identified the past or present discrimination “with some specificity,” and (2) demonstrated that a “strong basis in evidence” supports its conclusion that remedial action is necessary. *Id.* at 958, quoting *Shaw v. Hunt*, 517 U.S. 899, 909-10 (1996).

The court held that Denver could meet its burden without conclusively proving the existence of past or present racial discrimination. *Id.* Rather, Denver could rely on “empirical evidence that demonstrates ‘a significant statistical disparity between the number of qualified minority contractors ... and the number of such contractors actually engaged by the locality or the locality’s prime contractors.’” *Id.*, quoting *Croson*, 488 U.S. at 509 (plurality opinion). Furthermore, the Court of Appeals held that Denver could rely on statistical evidence gathered from the six-county Denver Metropolitan Statistical Area (MSA) and could supplement the statistical evidence with anecdotal evidence of public and private discrimination. *Id.*

The Court of Appeals held that Denver could establish its compelling interest by presenting evidence of its own direct participation in racial discrimination or its passive participation in private discrimination. *Id.* The Court of Appeals held that once Denver met its burden, CWC had to introduce “credible, particularized evidence to rebut [Denver’s] initial showing of the existence of a compelling interest, which could consist of a neutral explanation for the statistical disparities.” *Id.* (internal citations and quotations omitted). The Court of Appeals held that CWC could also rebut Denver’s statistical evidence “by (1) showing that the statistics are flawed; (2) demonstrating that the disparities shown by the statistics are not significant or actionable; or (3) presenting contrasting statistical data.” *Id.* (internal citations and quotations omitted). The Court of Appeals held that the burden of proof at all times remained with CWC to demonstrate the unconstitutionality of the ordinances. *Id.* at 960.

The Court of Appeals held that to meet its burden of demonstrating an important governmental interest per the intermediate scrutiny analysis, Denver must show that the gender-based measures in the ordinances were based on “reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions.” *Id.*, quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 726 (1982).

The studies. Denver presented historical, statistical and anecdotal evidence in support of its MBE/WBE programs. Denver commissioned a number of studies to assess its MBE/WBE programs. *Id.* at 962. The consulting firm hired by Denver utilized disparity indices in part. *Id.* at 962. The 1990 Study also examined MBE and WBE utilization in the overall Denver MSA construction market, both public and private. *Id.* at 963.

The consulting firm also interviewed representatives of MBEs, WBEs, majority-owned construction firms, and government officials. *Id.* Based on this information, the 1990 Study concluded that, despite Denver’s efforts to increase MBE and WBE participation in Denver Public Works projects, some Denver employees and private contractors engaged in conduct designed to circumvent the goals program. *Id.* After reviewing the statistical and anecdotal evidence contained in the 1990 Study, the City Council enacted the 1990 Ordinance. *Id.*

After the Tenth Circuit decided *Concrete Works II*, Denver commissioned another study (the “1995 Study”). *Id.* at 963. Using 1987 Census Bureau data, the 1995 Study again examined utilization of MBEs and WBEs in the construction and professional design industries within the Denver MSA. *Id.* The 1995 Study concluded that MBEs and WBEs were more likely to be one-person or family-run businesses. The Study concluded that Hispanic-owned firms were less likely to have paid employees than white-owned firms but that Asian/Native American-owned firms were more likely to have paid employees than white- or other minority-owned firms. To determine whether these factors explained overall market disparities, the 1995 Study used the Census data to calculate disparity indices for all firms in the Denver MSA construction industry and separately calculated disparity indices for firms with paid employees and firms with no paid employees. *Id.* at 964.

The Census Bureau information was also used to examine average revenues per employee for Denver MSA construction firms with paid employees. Hispanic-, Asian-, Native American-, and women-owned firms with paid employees all reported lower revenues per employee than

majority-owned firms. The 1995 Study also used 1990 Census data to calculate rates of self-employment within the Denver MSA construction industry. The Study concluded that the disparities in the rates of self-employment for blacks, Hispanics, and women persisted even after controlling for education and length of work experience. The 1995 Study controlled for these variables and reported that blacks and Hispanics working in the Denver MSA construction industry were less than half as likely to own their own businesses as were whites of comparable education and experience. *Id.*

In late 1994 and early 1995, a telephone survey of construction firms doing business in the Denver MSA was conducted. *Id.* at 965. Based on information obtained from the survey, the consultant calculated percentage utilization and percentage availability of MBEs and WBEs. Percentage utilization was calculated from revenue information provided by the responding firms. Percentage availability was calculated based on the number of MBEs and WBEs that responded to the survey question regarding revenues. Using these utilization and availability percentages, the 1995 Study showed disparity indices of 64 for MBEs and 70 for WBEs in the construction industry. In the professional design industry, disparity indices were 67 for MBEs and 69 for WBEs. The 1995 Study concluded that the disparity indices obtained from the telephone survey data were more accurate than those obtained from the 1987 Census data because the data obtained from the telephone survey were more recent, had a narrower focus, and included data on C corporations. Additionally, it was possible to calculate disparity indices for professional design firms from the survey data. *Id.*

In 1997, the City conducted another study to estimate the availability of MBEs and WBEs and to examine, *inter alia*, whether race and gender discrimination limited the participation of MBEs and WBEs in construction projects of the type typically undertaken by the City (the “1997 Study”). *Id.* at 966. The 1997 Study used geographic and specialization information to calculate MBE/WBE availability. Availability was defined as “the ratio of MBE/WBE firms to the total number of firms in the four-digit SIC codes and geographic market area relevant to the City’s contracts.” *Id.*

The 1997 Study compared MBE/WBE availability and utilization in the Colorado construction industry. *Id.* The statewide market was used because necessary information was unavailable for the Denver MSA. *Id.* at 967. Additionally, data collected in 1987 by the Census Bureau was used because more current data was unavailable. The Study calculated disparity indices for the statewide construction market in Colorado as follows: 41 for African American firms, 40 for Hispanic firms, 14 for Asian and other minorities, and 74 for women-owned firms. *Id.*

The 1997 Study also contained an analysis of whether African Americans, Hispanics, or Asian Americans working in the construction industry are less likely to be self-employed than similarly situated whites. *Id.* Using data from the Public Use Microdata Samples (“PUMS”) of the 1990 Census of Population and Housing, the Study used a sample of individuals working in the construction industry. The Study concluded that in both Colorado and the Denver MSA, African Americans, Hispanics, and Native Americans working in the construction industry had lower self-employment rates than whites. Asian Americans had higher self-employment rates than whites.

Using the availability figures calculated earlier in the Study, the Study then compared the actual availability of MBE/WBEs in the Denver MSA with the potential availability of MBE/WBEs if they formed businesses at the same rate as whites with the same characteristics. *Id.* Finally, the Study examined whether self-employed minorities and women in the construction industry have lower earnings than white males with similar characteristics. *Id.* at 968. Using linear regression analysis, the Study compared business owners with similar years of education, of similar age, doing business in the same geographic area, and having other similar demographic characteristics. Even after controlling for several factors, the results showed that self-employed African Americans, Hispanics, Native Americans, and women had lower earnings than white males. *Id.*

The 1997 Study also conducted a mail survey of both MBE/WBEs and non-MBE/WBEs to obtain information on their experiences in the construction industry. Of the MBE/WBEs who responded, 35 percent indicated that they had experienced at least one incident of disparate treatment within the last five years while engaged in business activities. The survey also posed the following question: “How often do prime contractors who use your firm as a subcontractor on public sector projects with [MBE/WBE] goals or requirements ... also use your firm on public sector or private sector projects without [MBE/WBE] goals or requirements?” Fifty-eight percent of minorities and 41 percent of white women who responded to this question indicated they were “seldom or never” used on non-goals projects. *Id.*

MBE/WBEs were also asked whether the following aspects of procurement made it more difficult or impossible to obtain construction contracts: (1) bonding requirements, (2) insurance requirements, (3) large project size, (4) cost of completing proposals, (5) obtaining working capital, (6) length of notification for bid deadlines, (7) prequalification requirements, and (8) previous dealings with an agency. This question was also asked of non-MBE/WBEs in a separate survey. With one exception, MBE/WBEs considered each aspect of procurement more problematic than non-MBE/WBEs. To determine whether a firm’s size or experience explained the different responses, a regression analysis was conducted that controlled for age of the firm, number of employees, and level of revenues. The results again showed that with the same, single exception, MBE/WBEs had more difficulties than non-MBE/WBEs with the same characteristics. *Id.* at 968-69.

After the 1997 Study was completed, the City enacted the 1998 Ordinance. The 1998 Ordinance reduced the annual goals to 10 percent for both MBEs and WBEs and eliminated a provision which previously allowed MBE/WBEs to count their own work toward project goals. *Id.* at 969.

The anecdotal evidence included the testimony of the senior vice-president of a large, majority-owned construction firm who stated that when he worked in Denver, he received credible complaints from minority and women-owned construction firms that they were subject to different work rules than majority-owned firms. *Id.* He also testified that he frequently observed graffiti containing racial or gender epithets written on job sites in the Denver metropolitan area. Further, he stated that he believed, based on his personal experiences, that many majority-owned firms refused to hire minority- or women-owned subcontractors because they believed those firms were not competent. *Id.*

Several MBE/WBE witnesses testified that they experienced difficulty prequalifying for private sector projects and projects with the City and other governmental entities in Colorado. One individual testified that her company was required to prequalify for a private sector project while no similar requirement was imposed on majority-owned firms. Several others testified that they attempted to prequalify for projects but their applications were denied even though they met the prequalification requirements. *Id.*

Other MBE/WBEs testified that their bids were rejected even when they were the lowest bidder; that they believed they were paid more slowly than majority-owned firms on both City projects and private sector projects; that they were charged more for supplies and materials; that they were required to do additional work not part of the subcontracting arrangement; and that they found it difficult to join unions and trade associations. *Id.* There was testimony detailing the difficulties MBE/WBEs experienced in obtaining lines of credit. One WBE testified that she was given a false explanation of why her loan was declined; another testified that the lending institution required the co-signature of her husband even though her husband, who also owned a construction firm, was not required to obtain her co-signature; a third testified that the bank required her father to be involved in the lending negotiations. *Id.*

The court also pointed out anecdotal testimony involving recitations of racially- and gender-motivated harassment experienced by MBE/WBEs at work sites. There was testimony that minority and female employees working on construction projects were physically assaulted and fondled, spat upon with chewing tobacco, and pelted with two-inch bolts thrown by males from a height of 80 feet. *Id.* at 969-70.

The legal framework applied by the court. The Court held that the district court incorrectly believed Denver was required to prove the existence of discrimination. Instead of considering whether Denver had demonstrated strong evidence from which an inference of past or present discrimination could be drawn, the district court analyzed whether Denver's evidence showed that there is pervasive discrimination. *Id.* at 970. The court, *quoting Concrete Works II*, stated that "the Fourteenth Amendment does not require a court to make an ultimate finding of discrimination before a municipality may take affirmative steps to eradicate discrimination." *Id.* at 970, *quoting Concrete Works II*, 36 F.3d 1513, 1522 (10th Cir. 1994). Denver's initial burden was to demonstrate that strong evidence of discrimination supported its conclusion that remedial measures were necessary. Strong evidence is that "approaching a prima facie case of a constitutional or statutory violation," not irrefutable or definitive proof of discrimination. *Id.* at 97, *quoting Croson*, 488 U.S. at 500. The burden of proof at all times remained with the contractor plaintiff to prove by a preponderance of the evidence that Denver's "evidence did not support an inference of prior discrimination and thus a remedial purpose." *Id.*, *quoting Adarand VII*, 228 F.3d at 1176.

Denver, the Court held, did introduce evidence of discrimination against each group included in the ordinances. *Id.* at 971. Thus, Denver's evidence did not suffer from the problem discussed by the court in *Croson*. The Court held the district court erroneously concluded that Denver must demonstrate that the private firms directly engaged in any discrimination in which Denver passively participates do so intentionally, with the purpose of disadvantaging minorities and women. The *Croson* majority concluded that a "city would have a compelling interest in

preventing its tax dollars from assisting [local trade] organizations in maintaining a racially segregated construction market.” *Id.* at 971, *quoting Croson*, 488 U.S. 503. Thus, the Court held Denver’s burden was to introduce evidence which raised the inference of discriminatory exclusion in the local construction industry and linked its spending to that discrimination. *Id.*

The Court noted the Supreme Court has stated that the inference of discriminatory exclusion can arise from statistical disparities. *Id.*, *citing Croson*, 488 U.S. at 503. Accordingly, it concluded that Denver could meet its burden through the introduction of statistical and anecdotal evidence. To the extent the district court required Denver to introduce additional evidence to show discriminatory motive or intent on the part of private construction firms, the district court erred. Denver, according to the Court, was under no burden to identify any specific practice or policy that resulted in discrimination. Neither was Denver required to demonstrate that the purpose of any such practice or policy was to disadvantage women or minorities. *Id.* at 972.

The court found Denver’s statistical and anecdotal evidence relevant because it identifies discrimination in the local construction industry, not simply discrimination in society. The court held the genesis of the identified discrimination is irrelevant and the district court erred when it discounted Denver’s evidence on that basis. *Id.*

The court held the district court erroneously rejected the evidence Denver presented on marketplace discrimination. *Id.* at 973. The court rejected the district court’s erroneous legal conclusion that a municipality may only remedy its own discrimination. The court stated this conclusion is contrary to the holdings in *Concrete Works II* and the plurality opinion in *Croson*. *Id.* The court held it previously recognized in this case that “a municipality has a compelling interest in taking affirmative steps to remedy both public *and private* discrimination specifically identified in its area.” *Id.*, *quoting Concrete Works II*, 36 F.3d at 1529 (emphasis added). In *Concrete Works II*, the court stated that “we do not read *Croson* as requiring the municipality to identify an exact linkage between its award of public contracts and private discrimination.” *Id.*, *quoting Concrete Works II*, 36 F.3d at 1529.

The court stated that Denver could meet its burden of demonstrating its compelling interest with evidence of private discrimination in the local construction industry coupled with evidence that it has become a passive participant in that discrimination. *Id.* at 973. Thus, Denver was not required to demonstrate that it is “guilty of prohibited discrimination” to meet its initial burden. *Id.*

Additionally, the court had previously concluded that Denver’s statistical studies, which compared utilization of MBE/WBEs to availability, supported the inference that “local prime contractors” are engaged in racial and gender discrimination. *Id.* at 974, *quoting Concrete Works II*, 36 F.3d at 1529. Thus, the court held Denver’s disparity studies should not have been discounted because they failed to specifically identify those individuals or firms responsible for the discrimination. *Id.*

The Court’s rejection of CWC’s arguments and the district court findings.

Use of marketplace data. The court held the district court, *inter alia*, erroneously concluded that the disparity studies upon which Denver relied were significantly flawed because they measured

discrimination in the overall Denver MSA construction industry, not discrimination by the City itself. *Id.* at 974. The court found that the district court’s conclusion was directly contrary to the holding in *Adarand VII* that evidence of both public and private discrimination in the construction industry is relevant. *Id.*, citing *Adarand VII*, 228 F.3d at 1166-67).

The court held the conclusion reached by the majority in *Croson* that marketplace data are relevant in equal protection challenges to affirmative action programs was consistent with the approach later taken by the court in *Shaw v. Hunt*. *Id.* at 975. In *Shaw*, a majority of the court relied on the majority opinion in *Croson* for the broad proposition that a governmental entity’s “interest in remedying the effects of past or present racial discrimination may in the proper case justify a government’s use of racial distinctions.” *Id.*, quoting *Shaw*, 517 U.S. at 909. The *Shaw* court did not adopt any requirement that only discrimination by the governmental entity, either directly or by utilizing firms engaged in discrimination on projects funded by the entity, was remediable. The court, however, did set out two conditions that must be met for the governmental entity to show a compelling interest. “First, the discrimination must be identified discrimination.” *Id.* at 976, quoting *Shaw*, 517 U.S. at 910. The City can satisfy this condition by identifying the discrimination, “public or private, with some specificity.” *Id.* at 976, citing *Shaw*, 517 U.S. at 910, quoting *Croson*, 488 U.S. at 504 (emphasis added). The governmental entity must also have a “strong basis in evidence to conclude that remedial action was necessary.” *Id.* Thus, the court concluded *Shaw* specifically stated that evidence of either public or private discrimination could be used to satisfy the municipality’s burden of producing strong evidence. *Id.* at 976.

In *Adarand VII*, the court noted it concluded that evidence of marketplace discrimination can be used to support a compelling interest in remedying past or present discrimination through the use of affirmative action legislation. *Id.*, citing *Adarand VII*, 228 F.3d at 1166-67 (“[W]e may consider public and private discrimination not only in the specific area of government procurement contracts but also in the construction industry generally; thus *any findings Congress has made as to the entire construction industry are relevant.*” (emphasis added)). Further, the court pointed out in this case it earlier rejected the argument CWC reasserted here that marketplace data are irrelevant and remanded the case to the district court to determine whether Denver could link its public spending to “the Denver MSA evidence of industry-wide discrimination.” *Id.*, quoting *Concrete Works II*, 36 F.3d at 1529. The court stated that evidence explaining “the Denver government’s role in contributing to the underutilization of MBEs and WBEs in the *private construction market in the Denver MSA*” was relevant to Denver’s burden of producing strong evidence. *Id.*, quoting *Concrete Works II*, 36 F.3d at 1530 (emphasis added).

Consistent with the court’s mandate in *Concrete Works II*, the City attempted to show at trial that it “indirectly contributed to private discrimination by awarding public contracts to firms that in turn discriminated against MBE and/or WBE subcontractors in other private portions of their business.” *Id.* The City can demonstrate that it is a “passive participant’ in a system of racial exclusion practiced by elements of the local construction industry” by compiling evidence of marketplace discrimination and then linking its spending practices to the private discrimination. *Id.*, quoting *Croson*, 488 U.S. at 492.

The court rejected CWC's argument that the lending discrimination studies and business formation studies presented by Denver were irrelevant. In *Adarand VII*, the court concluded that evidence of discriminatory barriers to the formation of businesses by minorities and women and fair competition between MBE/WBEs and majority-owned construction firms shows a "strong link" between a government's "disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination." *Id.* at 977, quoting *Adarand VII*, 228 F.3d at 1167-68. The court found that evidence that private discrimination resulted in barriers to business formation is relevant because it demonstrates that MBE/WBEs are precluded *at the outset* from competing for public construction contracts. The court also found that evidence of barriers to fair competition is relevant because it again demonstrates that *existing* MBE/WBEs are precluded from competing for public contracts. Thus, like the studies measuring disparities in the utilization of MBE/WBEs in the Denver MSA construction industry, studies showing that discriminatory barriers to business formation exist in the Denver construction industry are relevant to the City's showing that it indirectly participates in industry discrimination. *Id.* at 977.

The City presented evidence of lending discrimination to support its position that MBE/WBEs in the Denver MSA construction industry face discriminatory barriers to business formation. Denver introduced a disparity study prepared in 1996 and sponsored by the Denver Community Reinvestment Alliance, Colorado Capital Initiatives, and the City. The Study ultimately concluded that "despite the fact that loan applicants of three different racial/ethnic backgrounds in this sample were not appreciably different as businesspeople, they were ultimately treated differently by the lenders on the crucial issue of loan approval or denial." *Id.* at 977-78. In *Adarand VII*, the court concluded that this study, among other evidence, "strongly support[ed] an initial showing of discrimination in lending." *Id.* at 978, quoting *Adarand VII*, 228 F.3d at 1170, n. 13 ("Lending discrimination alone of course does not justify action in the construction market. However, the persistence of such discrimination ... supports the assertion that the formation, as well as utilization, of minority-owned construction enterprises has been impeded."). The City also introduced anecdotal evidence of lending discrimination in the Denver construction industry.

CWC did not present any evidence that undermined the reliability of the lending discrimination evidence but simply repeated the argument, foreclosed by circuit precedent, that it is irrelevant. The court rejected the district court criticism of the evidence because it failed to determine whether the discrimination resulted from discriminatory attitudes or from the neutral application of banking regulations. The court concluded that discriminatory motive can be inferred from the results shown in disparity studies. The court held the district court's criticism did not undermine the study's reliability as an indicator that the City is passively participating in marketplace discrimination. The court noted that in *Adarand VII* it took "judicial notice of the obvious causal connection between access to capital and ability to implement public works construction projects." *Id.* at 978, quoting *Adarand VII*, 228 F.3d at 1170.

Denver also introduced evidence of discriminatory barriers to competition faced by MBE/WBEs in the form of business formation studies. The 1990 Study and the 1995 Study both showed that all minority groups in the Denver MSA formed their own construction firms at rates lower than the total population but that women formed construction firms at higher rates. The 1997 Study examined self-employment rates and controlled for gender, marital status, education, availability

of capital, and personal/family variables. As discussed, *supra*, the Study concluded that African Americans, Hispanics, and Native Americans working in the construction industry have lower rates of self-employment than similarly situated whites. Asian Americans had higher rates. The 1997 Study also concluded that minority and female business owners in the construction industry, with the exception of Asian American owners, have lower earnings than white male owners. This conclusion was reached after controlling for education, age, marital status, and disabilities. *Id.* at 978.

The court held that the district court's conclusion that the business formation studies could not be used to justify the ordinances conflicts with its holding in *Adarand VII*. "[T]he existence of evidence indicating that the number of [MBEs] would be significantly (but unquantifiably) higher but for such barriers is nevertheless relevant to the assessment of whether a disparity is sufficiently significant to give rise to an inference of discriminatory exclusion." *Id.* at 979, quoting *Adarand VII*, 228 F.3d at 1174.

In sum, the court held the district court erred when it refused to consider or give sufficient weight to the lending discrimination study, the business formation studies, and the studies measuring marketplace discrimination. That evidence was legally relevant to the City's burden of demonstrating a strong basis in evidence to support its conclusion that remedial legislation was necessary. *Id.* at 979-80.

Variables. CWC challenged Denver's disparity studies as unreliable because the disparities shown in the studies may be attributable to firm size and experience rather than discrimination. Denver countered, however, that a firm's size has little effect on its qualifications or its ability to provide construction services and that MBE/WBEs, like all construction firms, can perform most services either by hiring additional employees or by employing subcontractors. CWC responded that elasticity itself is relative to size and experience; MBE/WBEs are less capable of expanding because they are smaller and less experienced. *Id.* at 980.

The court concluded that even if it assumed that MBE/WBEs are less able to expand because of their smaller size and more limited experience, CWC did not respond to Denver's argument and the evidence it presented showing that experience and size are not race- and gender-neutral variables and that MBE/WBE construction firms are generally smaller and less experienced *because of* industry discrimination. *Id.* at 981. The lending discrimination and business formation studies, according to the court, both strongly supported Denver's argument that MBE/WBEs are smaller and less experienced because of marketplace and industry discrimination. In addition, Denver's expert testified that discrimination by banks or bonding companies would reduce a firm's revenue and the number of employees it could hire. *Id.*

Denver also argued its Studies controlled for size and the 1995 Study controlled for experience. It asserted that the 1990 Study measured revenues per employee for construction for MBE/WBEs and concluded that the resulting disparities, "suggest [] that even among firms of the same employment size, industry utilization of MBEs and WBEs was lower than that of non-minority male-owned firms." *Id.* at 982. Similarly, the 1995 Study controlled for size, calculating, *inter alia*, disparity indices for firms with no paid employees which presumably are the same size.

Based on the uncontroverted evidence presented at trial, the court concluded that the district court did not give sufficient weight to Denver's disparity studies because of its erroneous conclusion that the studies failed to adequately control for size and experience. The court held that Denver is permitted to make assumptions about capacity and qualification of MBE/WBEs to perform construction services if it can support those assumptions. The court found the assumptions made in this case were consistent with the evidence presented at trial and supported the City's position that a firm's size does not affect its qualifications, willingness, or ability to perform construction services and that the smaller size and lesser experience of MBE/WBEs are, themselves, the result of industry discrimination. Further, the court pointed out CWC did not conduct its own disparity study using marketplace data and thus did not demonstrate that the disparities shown in Denver's studies would decrease or disappear if the studies controlled for size and experience to CWC's satisfaction. Consequently, the court held CWC's rebuttal evidence was insufficient to meet its burden of discrediting Denver's disparity studies on the issue of size and experience. *Id.* at 982.

Specialization. The district court also faulted Denver's disparity studies because they did not control for firm specialization. The court noted the district court's criticism would be appropriate only if there was evidence that MBE/WBEs are more likely to specialize in certain construction fields. *Id.* at 982.

The court found there was no identified evidence showing that certain construction specializations require skills less likely to be possessed by MBE/WBEs. The court found relevant the testimony of the City's expert, that the data he reviewed showed that MBEs were represented "widely across the different [construction] specializations." *Id.* at 982-83. There was no contrary testimony that aggregation bias caused the disparities shown in Denver's studies. *Id.* at 983.

The court held that CWC failed to demonstrate that the disparities shown in Denver's studies are eliminated when there is control for firm specialization. In contrast, one of the Denver studies, which controlled for SIC-code subspecialty and still showed disparities, provided support for Denver's argument that firm specialization does not explain the disparities. *Id.* at 983.

The court pointed out that disparity studies may make assumptions about availability as long as the same assumptions can be made for all firms. *Id.* at 983.

Utilization of MBE/WBEs on City projects. CWC argued that Denver could not demonstrate a compelling interest because it overutilized MBE/WBEs on City construction projects. This argument, according to the court, was an extension of CWC's argument that Denver could justify the ordinances only by presenting evidence of discrimination by the City itself or by contractors while working on City projects. Because the court concluded that Denver could satisfy its burden by showing that it is an indirect participant in industry discrimination, CWC's argument relating to the utilization of MBE/WBEs on City projects goes only to the weight of Denver's evidence. *Id.* at 984.

Consistent with the court's mandate in *Concrete Works II*, at trial Denver sought to demonstrate that the utilization data from projects subject to the goals program were tainted by the program

and “reflect[ed] the intended remedial effect on MBE and WBE utilization.” *Id.* at 984, quoting *Concrete Works II*, 36 F.3d at 1526. Denver argued that the non-goals data were the better indicator of past discrimination in public contracting than the data on all City construction projects. *Id.* at 984-85. The court concluded that Denver presented ample evidence to support the conclusion that the evidence showing MBE/WBE utilization on City projects not subject to the ordinances or the goals programs is the better indicator of discrimination in City contracting. *Id.* at 985.

The court rejected CWC’s argument that the marketplace data were irrelevant but agreed that the non-goals data were also relevant to Denver’s burden. The court noted that Denver did not rely heavily on the non-goals data at trial but focused primarily on the marketplace studies to support its burden. *Id.* at 985.

In sum, the court held Denver demonstrated that the utilization of MBE/WBEs on City projects had been affected by the affirmative action programs that had been in place in one form or another since 1977. Thus, the non-goals data were the better indicator of discrimination in public contracting. The court concluded that, on balance, the non-goals data provided some support for Denver’s position that racial and gender discrimination existed in public contracting before the enactment of the ordinances. *Id.* at 987-88.

Anecdotal evidence. The anecdotal evidence, according to the court, included several incidents involving profoundly disturbing behavior on the part of lenders, majority-owned firms, and individual employees. *Id.* at 989. The court found that the anecdotal testimony revealed behavior that was not merely sophomoric or insensitive, but which resulted in real economic or physical harm. While CWC also argued that all new or small contractors have difficulty obtaining credit and that treatment the witnesses characterized as discriminatory is experienced by all contractors, Denver’s witnesses specifically testified that they believed the incidents they experienced were motivated by race or gender discrimination. The court found they supported those beliefs with testimony that majority-owned firms were not subject to the same requirements imposed on them. *Id.*

The court held there was no merit to CWC’s argument that the witnesses’ accounts must be verified to provide support for Denver’s burden. The court stated that anecdotal evidence is nothing more than a witness’ narrative of an incident told from the witness’ perspective and including the witness’ perceptions. *Id.*

After considering Denver’s anecdotal evidence, the district court found that the evidence “shows that race, ethnicity and gender affect the construction industry and those who work in it” and that the egregious mistreatment of minority and women employees “had direct financial consequences” on construction firms. *Id.* at 989, quoting *Concrete Works III*, 86 F. Supp.2d at 1074, 1073. Based on the district court’s findings regarding Denver’s anecdotal evidence and its review of the record, the court concluded that the anecdotal evidence provided persuasive, unrebutted support for Denver’s initial burden. *Id.* at 989-90, citing *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977) (concluding that anecdotal evidence presented in a pattern or practice discrimination case was persuasive because it “brought the cold [statistics] convincingly to life”).

Summary. The court held the record contained extensive evidence supporting Denver’s position that it had a strong basis in evidence for concluding that the 1990 Ordinance and the 1998 Ordinance were necessary to remediate discrimination against both MBEs and WBEs. *Id.* at 990. The information available to Denver and upon which the ordinances were predicated, according to the court, indicated that discrimination was persistent in the local construction industry and that Denver was, at least, an indirect participant in that discrimination.

To rebut Denver’s evidence, the court stated CWC was required to “establish that Denver’s evidence did not constitute strong evidence of such discrimination.” *Id.* at 991, *quoting Concrete Works II*, 36 F.3d at 1523. CWC could not meet its burden of proof through conjecture and unsupported criticisms of Denver’s evidence. Rather, it must present “credible, particularized evidence.” *Id.*, *quoting Adarand VII*, 228 F.3d at 1175. The court held that CWC did not meet its burden. CWC *hypothesized* that the disparities shown in the studies on which Denver relies could be explained by any number of factors other than racial discrimination. However, the court found it did not conduct its own marketplace disparity study controlling for the disputed variables and presented no other evidence from which the court could conclude that such variables explain the disparities. *Id.* at 991-92.

Narrow tailoring. Having concluded that Denver demonstrated a compelling interest in the race-based measures and an important governmental interest in the gender-based measures, the court held it must examine whether the ordinances were narrowly tailored to serve the compelling interest and are substantially related to the achievement of the important governmental interest. *Id.* at 992.

The court stated it had previously concluded in its earlier decisions that Denver’s program was narrowly tailored. CWC appealed the grant of summary judgment and that appeal culminated in the decision in *Concrete Works II*. The court reversed the grant of summary judgment on the compelling-interest issue and concluded that CWC had waived any challenge to the narrow tailoring conclusion reached by the district court. Because the court found *Concrete Works* did not challenge the district court’s conclusion with respect to the second prong of *Croson’s* strict scrutiny standard — *i.e.*, that the Ordinance is narrowly tailored to remedy past and present discrimination — the court held it need not address this issue. *Id.* at 992, *citing Concrete Works II*, 36 F.3d at 1531, n. 24.

The court concluded that the district court lacked authority to address the narrow tailoring issue on remand because none of the exceptions to the law of the case doctrine are applicable. The district court’s earlier determination that Denver’s affirmative-action measures were narrowly tailored is law of the case and binding on the parties.

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

This case is instructive to the disparity study based on its holding that a local or state government may be prohibited from utilizing post-enactment evidence in support of a MBE/WBE-type program. 293 F.3d at 350-351. The United States Court of Appeals for the Sixth Circuit held that pre-enactment evidence was required to justify the City of Memphis’ MBE/WBE Program. *Id.* The Sixth Circuit held that a government must have had sufficient evidentiary justification for a racially conscious statute in *advance* of its passage.

The district court had ruled that the City could not introduce a post-enactment study as evidence of a compelling interest to justify its MBE/WBE Program. *Id.* at 350-351. The Sixth Circuit denied the City's application for an interlocutory appeal on the district court's order and refused to grant the City's request to appeal this issue. *Id.* at 350-351.

The City argued that a substantial ground for difference of opinion existed in the federal courts of appeal. 293 F.3d at 350. The court stated some circuits permit post-enactment evidence to supplement pre-enactment evidence. *Id.* This issue, according to the Court, appears to have been resolved in the Sixth Circuit. *Id.* The Court noted the Sixth Circuit decision in *AGC v. Drabik*, 214 F.3d 730 (6th Cir. 2000), which held that under *Crosby* 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 F.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 non-minority-owned firms were statutorily excluded from participating under Ohio’s state Minority Business Enterprise Act. 214 F.3d at 733.

AGC of Ohio and AGC of Northwest Ohio (Plaintiffs-Appellees) claimed the Ohio Minority Business Enterprise Act (“MBEA”) was unconstitutional in violation of the Equal Protection Clause of the Fourteenth Amendment. The district court agreed, and permanently enjoined the state from awarding any construction contracts under the MBEA. Drabik, Director of the Ohio Department of Administrative Services and others appealed the district court’s Order. *Id.* at 733.

The Sixth Circuit Court of Appeals affirmed the Order of the district court, holding unconstitutional the MBEA and enjoining the state from awarding any construction contracts under that statute. *Id.*

Ohio passed the MBEA in 1980. *Id.* at 733. This legislation “set aside” 5 percent, by value, of all state construction projects for bidding by certified MBEs exclusively. *Id.* Pursuant to the MBEA, the state decided to set aside, for MBEs only, bidding for construction of the Toledo Correctional Facility’s Administration Building. Non-MBEs were excluded on racial grounds from bidding on that aspect of the project and restricted in their participation as subcontractors. *Id.*

The Court noted it ruled in 1983 that the MBEA was constitutional, see *Ohio Contractors Ass’n v. Keip*, 713 F.2d 167 (6th Cir. 1983). *Id.* Subsequently, the United States Supreme Court in two landmark decisions applied the criteria of strict scrutiny under which such “racially preferential set-asides” were to be evaluated. *Id.* (see *City of Richmond v. J.A. Croson Co.* (1989) and *Adarand Constructors, Inc. v. Peña* (1995), citation omitted.) The Court noted that the decision in *Keip* was a more relaxed treatment accorded to equal protection challenges to state contracting disputes prior to *Croson*. *Id.* at 733-734.

Strict scrutiny. The Court found it is clear a government has a compelling interest in assuring that public dollars do not serve to finance the evil of private prejudice. *Id.* at 734-735, citing *Croson*, 488 U.S. at 492. But, the Court stated “statistical disparity in the proportion of contracts awarded to a particular group, standing alone does not demonstrate such an evil.” *Id.* at 735.

The Court said there is no question that remedying the effects of past discrimination constitutes a compelling governmental interest. *Id.* at 735. The Court stated to make this showing, a state cannot rely on mere speculation, or legislative pronouncements, of past discrimination, but rather, the Supreme Court has held the state bears the burden of demonstrating a strong basis in evidence for its conclusion that remedial action was necessary by proving either that the state itself discriminated in the past or was a passive participant in private industry’s discriminatory practices. *Id.* at 735, quoting *Croson*, 488 U.S. at 486-92.

Thus, the Court concluded that the linchpin of the *Croson* analysis is its mandating of strict scrutiny, the requirement that a program be narrowly tailored to achieve a compelling government interest, but above all its holding that governments must identify discrimination with some specificity before they may use race-conscious relief; explicit findings of a constitutional or statutory violation must be made. *Id.* at 735, quoting *Croson*, 488 U.S. at 497.

Statistical evidence: compelling interest. The Court pointed out that proponents of “racially discriminatory systems” such as the MBEA have sought to generate the necessary evidence by a variety of means, however, such efforts have generally focused on “mere underrepresentation” by showing a lesser percentage of contracts awarded to a particular group than that group’s percentage in the general population. *Id.* at 735. “Raw statistical disparity” of this sort is part of the evidence offered by Ohio in this case, according to the Court. *Id.* at 736. The Court stated however, “such evidence of mere statistical disparities has been firmly rejected as insufficient by the Supreme Court, particularly in a context such as contracting, where special qualifications are so relevant.” *Id.*

The Court said that although Ohio's most "compelling" statistical evidence in this case compared the percentage of contracts awarded to minorities to the percentage of minority-owned businesses in Ohio, which the Court noted provided stronger statistics than the statistics in *Croson*, it was still insufficient. *Id.* at 736. The Court found the problem with Ohio's statistical comparison was that the percentage of minority-owned businesses in Ohio "did not take into account how many of those businesses were construction companies of any sort, let alone how many were qualified, willing, and able to perform state construction contracts." *Id.*

The Court held the statistical evidence that the Ohio legislature had before it when the MBEA was enacted consisted of data that was deficient. *Id.* at 736. The Court said that much of the data was severely limited in scope (ODOT contracts) or was irrelevant to this case (ODOT purchasing contracts). *Id.* The Court again noted the data did not distinguish minority construction contractors from minority businesses generally, and therefore "made no attempt to identify minority construction contracting firms that are ready, willing, and able to perform state construction contracts of any particular size." *Id.* The Court also pointed out the program was not narrowly tailored, because the state conceded the AGC showed that the State had not performed a recent study. *Id.*

The Court also concluded that even statistical comparisons that might be apparently more pertinent, such as with the percentage of all firms qualified, in some minimal sense, to perform the work in question, would also fail to satisfy the Court's criteria. *Id.* at 736. "If MBEs comprise 10 percent of the total number of contracting firms in the state, but only get 3 percent of the dollar value of certain contracts, that does not alone show discrimination, or even disparity. It does not account for the relative size of the firms, either in terms of their ability to do particular work or in terms of the number of tasks they have the resources to complete." *Id.* at 736.

The Court stated the only cases found to present the necessary "compelling interest" sufficient to justify a narrowly tailored race-based remedy, are those that expose "pervasive, systematic, and obstinate discriminatory conduct. ..." *Id.* at 737, quoting *Adarand*, 515 U.S. at 237. The Court said that Ohio had made no such showing in this case.

Narrow tailoring. A second and separate hurdle for the MBEA, the Court held, is its failure of narrow tailoring. The Court noted the Supreme Court in *Adarand* taught that a court called upon to address the question of narrow tailoring must ask, "for example, whether there was 'any consideration of the use of race-neutral means to increase minority business participation' in government contracting" *Id.* at 737, quoting *Croson*, 488 U.S. at 507. The Court stated a narrowly-tailored set-aside program must be appropriately limited such that it will not last longer than the discriminatory effects it is designed to eliminate and must be linked to identified discrimination. *Id.* at 737. The Court said that the program must also not suffer from "overinclusiveness." *Id.* at 737, quoting *Croson*, 515 U.S. at 506.

The Court found the MBEA suffered from defects both of over and under-inclusiveness. *Id.* at 737. By lumping together the groups of Blacks, Native Americans, Hispanics and Orientals, the MBEA may well provide preference where there has been no discrimination, and may not provide relief to groups where discrimination might have been proven. *Id.* at 737. Thus, the Court said, the MBEA was satisfied if contractors of Thai origin, who might never have been seen

in Ohio until recently, receive 10 percent of state contracts, while African-Americans receive none. *Id.*

In addition, the Court found that Ohio's own underutilization statistics suffer from a fatal conceptual flaw: they do not report the actual use of minority firms; they only report the use of minority firms who have gone to the trouble of being certified and listed among the state's 1,180 MBEs. *Id.* at 737. The Court said there was no examination of whether contracts are being awarded to minority firms who have never sought such preference to take advantage of the special minority program, for whatever reason, and who have been awarded contracts in open bidding. *Id.*

The Court pointed out the district court took note of the outdated character of any evidence that might have been marshaled in support of the MBEA, and added that even if such data had been sufficient to justify the statute twenty years ago, it would not suffice to continue to justify it forever. *Id.* at 737-738. The MBEA, the Court noted, has remained in effect for twenty years and has no set expiration. *Id.* at 738. The Court reiterated a race-based preference program must be appropriately limited such that it will not last longer than the discriminatory effects it is designed to eliminate. *Id.* at 737.

Finally, the Court mentioned that one of the factors *Croson* identified as indicative of narrow tailoring is whether non-race-based means were considered as alternatives to the goal. *Id.* at 738. The Court concluded the historical record contained no evidence that the Ohio legislature gave any consideration to the use of race-neutral means to increase minority participation in state contracting before resorting to race-based quotas. *Id.* at 738.

The district court had found that the supplementation of the state's existing data which might be offered given a continuance of the case would not sufficiently enhance the relevance of the evidence to justify delay in the district court's hearing. *Id.* at 738. The Court stated that under *Croson*, the state must have had sufficient evidentiary justification for a racially-conscious statute in *advance* of its passage. *Id.* The Court said that *Croson* required governmental entities must identify that discrimination with some specificity *before* they may use race-conscious relief. *Id.* at 738.

The Court also referenced the district court finding that the state had been lax in maintaining the type of statistics that would be necessary to undergird its affirmative action program, and that the proper maintenance of current statistics is relevant to the requisite narrow tailoring of such a program. *Id.* at 738-739. But, the Court noted the state does not know how many minority-owned businesses are not certified as MBEs, and how many of them have been successful in obtaining state contracts. *Id.* at 739.

The court was mindful of the fact it was striking down an entire class of programs by declaring the State of Ohio MBE statute in question unconstitutional, and noted that its decision was "not reconcilable" with the Ohio Supreme Court's decision in *Ritchie Produce*, 707 N.E.2d 871 (Ohio 1999) (upholding the Ohio State MBE Program).

9. W.H. Scott Constr. Co. v. City of Jackson, Mississippi, 199 F.3d 206 (5th Cir. 1999)

A non-minority general contractor brought this action against the City of Jackson and City officials asserting that a City policy and its minority business enterprise program for participation and construction contracts violated the Equal Protection Clause of the U.S. Constitution.

City of Jackson MBE Program. In 1985 the City of Jackson adopted a MBE Program, which initially had a goal of 5 percent of all city contracts. 199 F.3d at 208. *Id.* The 5 percent goal was not based on any objective data. *Id.* at 209. Instead, it was a “guess” that was adopted by the City. *Id.* The goal was later increased to 15 percent because it was found that 10 percent of businesses in Mississippi were minority-owned. *Id.*

After the MBE Program’s adoption, the City’s Department of Public Works included a Special Notice to bidders as part of its specifications for all City construction projects. *Id.* The Special Notice encouraged prime construction contractors to include in their bid 15 percent participation by subcontractors certified as Disadvantaged Business Enterprises (DBEs) and 5 percent participation by those certified as WBEs. *Id.*

The Special Notice defined a DBE as a small business concern that is owned and controlled by socially and economically disadvantaged individuals, which had the same meaning as under Section 8(d) of the Small Business Act and subcontracting regulations promulgated pursuant to that Act. *Id.* The court found that Section 8(d) of the SBA states that prime contractors are to presume that socially and economically disadvantaged individuals include certain racial and ethnic groups or any other individual found to be disadvantaged by the SBA. *Id.*

In 1991, the Mississippi legislature passed a bill that would allow cities to set aside 20 percent of procurement for minority business. *Id.* at 209-210. The City of Jackson City Council voted to implement the set-aside, contingent on the City’s adoption of a disparity study. *Id.* at 210. The City conducted a disparity study in 1994 and concluded that the total underutilization of African-American and Asian-American-owned firms was statistically significant. *Id.* The study recommended that the City implement a range of MBE goals from 10-15 percent. *Id.* The City, however, was not satisfied with the study, according to the court, and chose not to adopt its conclusions. *Id.* Instead, the City retained its 15 percent MBE goal and did not adopt the disparity study. *Id.*

W.H. Scott did not meet DBE goal. In 1997 the City advertised for the construction of a project and the W.H. Scott Construction Company, Inc. (Scott) was the lowest bidder. *Id.* Scott obtained 11.5 percent WBE participation, but it reported that the bids from DBE subcontractors had not been low bids and, therefore, its DBE-participation percentage would be only 1 percent. *Id.*

Although Scott did not achieve the DBE goal and subsequently would not consider suggestions for increasing its minority participation, the Department of Public Works and the Mayor, as well as the City’s Financial Legal Departments, approved Scott’s bid and it was placed on the agenda to be approved by the City Council. *Id.* The City Council voted against the Scott bid without comment. Scott alleged that it was told the City rejected its bid because it did not achieve the

DBE goal, but the City alleged that it was rejected because it exceeded the budget for the project. *Id.*

The City subsequently combined the project with another renovation project and awarded that combined project to a different construction company. *Id.* at 210-211. Scott maintained the rejection of his bid was racially motivated and filed this suit. *Id.* at 211.

District court decision. The district court granted Scott’s motion for summary judgment agreeing with Scott that the relevant Policy included not just the Special Notice, but that it also included the MBE Program and Policy document regarding MBE participation. *Id.* at 211. The district court found that the MBE Policy was unconstitutional because it lacked requisite findings to justify the 15 percent minority-participation goal and survive strict scrutiny based on the 1989 decision in the *City of Richmond, v. J.A. Croson Co.* *Id.* The district court struck down minority-participation goals for the City’s construction contracts only. *Id.* at 211. The district court found that Scott’s bid was rejected because Scott lacked sufficient minority participation, not because it exceeded the City’s budget. *Id.* In addition, the district court awarded Scott lost profits. *Id.*

Standing. The Fifth Circuit determined that in equal protection cases challenging affirmative action policies, “injury in fact” for purposes of establishing standing is defined as the inability to compete on an equal footing in the bidding process. *Id.* at 213. The court stated that Scott need not prove that it lost contracts because of the Policy, but only prove that the Special Notice forces it to compete on an unequal basis. *Id.* The question, therefore, the court said is whether the Special Notice imposes an obligation that is born unequally by DBE contractors and non-DBE contractors. *Id.* at 213.

The court found that if a non-DBE contractor is unable to procure 15 percent DBE participation, it must still satisfy the City that adequate good faith efforts have been made to meet the contract goal or risk termination of its contracts, and that such efforts include engaging in advertising, direct solicitation and follow-up, assistance in attaining bonding or insurance required by the contractor. *Id.* at 214. The court concluded that although the language does not expressly authorize a DBE contractor to satisfy DBE-participation goals by keeping the requisite percentage of work for itself, it would be nonsensical to interpret it as precluding a DBE contractor from doing so. *Id.* at 215.

If a DBE contractor performed 15 percent of the contract dollar amount, according to the court, it could satisfy the participation goal and avoid both a loss of profits to subcontractors and the time and expense of complying with the good faith requirements. *Id.* at 215. The court said that non-DBE contractors do not have this option, and thus, Scott and other non-DBE contractors are at a competitive disadvantage with DBE contractors. *Id.*

The court, therefore, found Scott had satisfied standing to bring the lawsuit.

Constitutional strict scrutiny analysis and guidance in determining types of evidence to justify a remedial MBE program. The court first rejected the City’s contention that the Special Notice should not be subject to strict scrutiny because it establishes goals rather than mandate quotas for DBE participation. *Id.* at 215-217. The court stated the distinction between goals or quotas is

immaterial because these techniques induce an employer to hire with an eye toward meeting a numerical target, and as such, they will result in individuals being granted a preference because of their race. *Id.* at 215. The court also rejected the City's argument that the DBE classification created a preference based on "disadvantage," not race. *Id.* at 215-216. The court found that the Special Notice relied on Section 8(d) and Section 8(a) of the Small Business Act, which provide explicitly for a race-based presumption of social disadvantage, and thus requires strict scrutiny. *Id.* at 216-217.

The court discussed the *City of Richmond v. Croson* case as providing guidance in determining what types of evidence would justify the enactment of an MBE-type program. *Id.* at 217-218. The court noted the Supreme Court stressed that a governmental entity must establish a factual predicate, tying its set-aside percentage to identified injuries in the particular local industry. *Id.* at 217. The court pointed out given the Supreme Court in *Croson's* emphasis on statistical evidence, other courts considering equal protection challenges to minority-participation programs have looked to disparity indices, or to computations of disparity percentages, in determining whether *Croson's* evidentiary burden is satisfied. *Id.* at 218. The court found that disparity studies are probative evidence for discrimination because they ensure that the "relevant statistical pool," of qualified minority contractors is being considered. *Id.* at 218.

The court in a footnote stated that it did not attempt to craft a precise mathematical formula to assess the quantum of evidence that rises to the *Croson* "strong basis in evidence" benchmark. *Id.* at 218, n.11. The sufficiency of a municipality's findings of discrimination in a local industry must be evaluated on a case-by-case basis. *Id.*

The City argued that it was error for the district court to ignore its statistical evidence supporting the use of racial presumptions in its DBE-participation goals, and highlighted the disparity study it commissioned in response to *Croson*. *Id.* at 218. The court stated, however, that whatever probity the study's findings might have had on the analysis is irrelevant to the case, because the City refused to adopt the study when it was issued in 1995. *Id.* In addition, the court said the study was restricted to the letting of prime contracts by the City under the City's Program, and did not include an analysis of the availability and utilization of qualified minority subcontractors, the relevant statistical pool, in the City's construction projects. *Id.* at 218.

The court noted that had the City adopted particularized findings of discrimination within its various agencies, and set participation goals for each accordingly, the outcome of the decision might have been different. *Id.* at 219. Absent such evidence in the City's construction industry, however, the court concluded the City lacked the factual predicates required under the Equal Protection Clause to support the City's 15 percent DBE-participation goal. *Id.* Thus, the court held the City failed to establish a compelling interest justifying the MBE program or the Special Notice, and because the City failed a strict scrutiny analysis on this ground, the court declined to address whether the program was narrowly tailored.

Lost profits and damages. Scott sought damages from the City under 42 U.S.C. § 1983, including lost profits. *Id.* at 219. The court, affirming the district court, concluded that in light of the entire record the City Council rejected Scott's low bid because Scott failed to meet the Special Notice's

DBE-participation goal, not because Scott's bid exceeded the City's budget. *Id.* at 220. The court, therefore, affirmed the award of lost profits to Scott.

10. Eng'g Contractors Ass'n of S. Florida v. Metro. Dade County, 122 F.3d 895 (11th Cir. 1997)

Engineering Contractors Association of South Florida v. Metropolitan Dade County is a paramount case in the Eleventh Circuit and is instructive to the disparity study. This decision has been cited and applied by the courts in various circuits that have addressed MBE/WBE-type programs or legislation involving local government contracting and procurement.

In *Engineering Contractors Association*, six trade organizations (the "plaintiffs") filed suit in the district court for the Southern District of Florida, challenging three affirmative action programs administered by Engineering Contractors Association, Florida, (the "County") as violative of the Equal Protection Clause. 122 F.3d 895, 900 (11th Cir. 1997). The three affirmative action programs challenged were the Black Business Enterprise program ("BBE"), the Hispanic Business Enterprise program ("HBE"), and the Woman Business Enterprise program, ("WBE"), (collectively "MWBE" programs). *Id.* The plaintiffs challenged the application of the program to County construction contracts. *Id.*

For certain classes of construction contracts valued over \$25,000, the County set participation goals of 15 percent for BBes, 19 percent for HBes, and 11 percent for WBEs. *Id.* at 901. The County established five "contract measures" to reach the participation goals: (1) set asides, (2) subcontractor goals, (3) project goals, (4) bid preferences, and (5) selection factors. Once a contract was identified as covered by a participation goal, a review committee would determine whether a contract measure should be utilized. *Id.* The County Commission would make the final determination and its decision was appealable to the County Manager. *Id.* The County reviewed the efficacy of the MWBE programs annually, and reevaluated the continuing viability of the MWBE programs every five years. *Id.*

In a bench trial, the district court applied strict scrutiny to the BBE and HBE programs and held that the County lacked the requisite "strong basis in evidence" to support the race- and ethnicity-conscious measures. *Id.* at 902. The district court applied intermediate scrutiny to the WBE program and found that the "County had presented insufficient probative evidence to support its stated rationale for implementing a gender preference." *Id.* Therefore, the County had failed to demonstrate a "compelling interest" necessary to support the BBE and HBE programs, and failed to demonstrate an "important interest" necessary to support the WBE program. *Id.* The district court assumed the existence of a sufficient evidentiary basis to support the existence of the MWBE programs but held the BBE and HBE programs were not narrowly tailored to the interests they purported to serve; the district court held the WBE program was not substantially related to an important government interest. *Id.* The district court entered a final judgment enjoining the County from continuing to operate the MWBE programs and the County appealed. The Eleventh Circuit Court of Appeals affirmed. *Id.* at 900, 903.

On appeal, the Eleventh Circuit considered four major issues:

1. Whether the plaintiffs had standing. [The Eleventh Circuit answered this in the affirmative and that portion of the opinion is omitted from this summary];
2. Whether the district court erred in finding the County lacked a “strong basis in evidence” to justify the existence of the BBE and HBE programs;
3. Whether the district court erred in finding the County lacked a “sufficient probative basis in evidence” to justify the existence of the WBE program; and
4. Whether the MWBE programs were narrowly tailored to the interests they were purported to serve.

Id. at 903.

The Eleventh Circuit held that the BBE and HBE programs were subject to the strict scrutiny standard enunciated by the U.S. Supreme Court in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). *Id.* at 906. Under this standard, “an affirmative action program must be based upon a ‘compelling government interest’ and must be ‘narrowly tailored’ to achieve that interest.” *Id.* The Eleventh Circuit further noted:

“In practice, the interest that is alleged in support of racial preferences is almost always the same — remedying past or present discrimination. That interest is widely accepted as compelling. As a result, the true test of an affirmative action program is usually not the nature of the government’s interest, but rather the adequacy of the evidence of discrimination offered to show that interest.”

Id. (internal citations omitted).

Therefore, strict scrutiny requires a finding of a “‘strong basis in evidence’ to support the conclusion that remedial action is necessary.” *Id.*, citing *Croson*, 488 U.S. at 500). The requisite “‘strong basis in evidence’ cannot rest on ‘an amorphous claim of societal discrimination, on simple legislative assurances of good intention, or on congressional findings of discrimination in the national economy.’” *Id.* at 907, citing *Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548, 1565 (11th Cir. 1994) (citing and applying *Croson*). However, the Eleventh Circuit found that a governmental entity can “justify affirmative action by demonstrating ‘gross statistical disparities’ between the proportion of minorities hired ... and the proportion of minorities willing and able to do the work ... Anecdotal evidence may also be used to document discrimination, especially if buttressed by relevant statistical evidence.” *Id.* (internal citations omitted).

Notwithstanding the “exceedingly persuasive justification” language utilized by the Supreme Court in *United States v. Virginia*, 116 S. Ct. 2264 (1996) (evaluating gender-based government action), the Eleventh Circuit held that the WBE program was subject to traditional intermediate scrutiny. *Id.* at 908. Under this standard, the government must provide “sufficient probative evidence” of discrimination, which is a lesser standard than the “strong basis in evidence” under strict scrutiny. *Id.* at 910.

The County provided two types of evidence in support of the MWBE programs: (1) statistical evidence, and (2) non-statistical “anecdotal” evidence. *Id.* at 911. As an initial matter, the Eleventh Circuit found that in support of the BBE program, the County permissibly relied on substantially “post-enactment” evidence (*i.e.*, evidence based on data related to years following the initial enactment of the BBE program). *Id.* However, “such evidence carries with it the hazard that the program at issue may itself be masking discrimination that might otherwise be occurring in the relevant market.” *Id.* at 912. A district court should not “speculate about what the data *might* have shown had the BBE program never been enacted.” *Id.*

The statistical evidence. The County presented five basic categories of statistical evidence: (1) County contracting statistics; (2) County subcontracting statistics; (3) marketplace data statistics; (4) The Wainwright Study; and (5) The Brimmer Study. *Id.* In summary, the Eleventh Circuit held that the County’s statistical evidence (described more fully below) was subject to more than one interpretation. *Id.* at 924. The district court found that the evidence was “insufficient to form the requisite strong basis in evidence for implementing a racial or ethnic preference, and that it was insufficiently probative to support the County’s stated rationale for imposing a gender preference.” *Id.* The district court’s view of the evidence was a permissible one. *Id.*

County contracting statistics. The County presented a study comparing three factors for County non-procurement construction contracts over two time periods (1981-1991 and 1993): (1) the percentage of bidders that were MWBE firms; (2) the percentage of awardees that were MWBE firms; and (3) the proportion of County contract dollars that had been awarded to MWBE firms. *Id.* at 912.

The Eleventh Circuit found that notably, for the BBE and HBE statistics, generally there were no “consistently negative disparities between the bidder and awardee percentages. In fact, by 1993, the BBE and HBE bidders are being awarded *more* than their proportionate ‘share’ ... when the bidder percentages are used as the baseline.” *Id.* at 913. For the WBE statistics, the bidder/awardee statistics were “decidedly mixed” as across the range of County construction contracts. *Id.*

The County then refined those statistics by adding in the total percentage of annual County construction dollars awarded to MBE/WBEs, by calculating “disparity indices” for each program and classification of construction contract. The Eleventh Circuit explained:

“[A] disparity index compares the amount of contract awards a group actually got to the amount we would have expected it to get based on that group’s bidding activity and awardee success rate. More specifically, a disparity index measures the participation of a group in County contracting dollars by dividing that group’s contract dollar percentage by the related bidder or awardee percentage, and multiplying that number by 100 percent.”

Id. at 914. “The utility of disparity indices or similar measures ... has been recognized by a number of federal circuit courts.” *Id.*

The Eleventh Circuit found that “[i]n general ... disparity indices of 80 percent or greater, which are close to full participation, are not considered indications of discrimination.” *Id.* The Eleventh Circuit noted that “the EEOC’s disparate impact guidelines use the 80 percent test as the boundary line for determining a prima facie case of discrimination.” *Id.*, citing 29 CFR § 1607.4D. In addition, no circuit that has “explicitly endorsed the use of disparity indices [has] indicated that an index of 80 percent or greater might be probative of discrimination.” *Id.*, citing *Concrete Works v. City & County of Denver*, 36 F.3d 1513, 1524 (10th Cir. 1994) (crediting disparity indices ranging from 0% to 3.8%); *Contractors Ass’n v. City of Philadelphia*, 6 F.3d 990 (3d Cir. 1993) (crediting disparity index of 4%).

After calculation of the disparity indices, the County applied a standard deviation analysis to test the statistical significance of the results. *Id.* at 914. “The standard deviation figure describes the probability that the measured disparity is the result of mere chance.” *Id.* The Eleventh Circuit had previously recognized “[s]ocial scientists consider a finding of two standard deviations significant, meaning there is about one chance in 20 that the explanation for the deviation could be random and the deviation must be accounted for by some factor other than chance.” *Id.*

The statistics presented by the County indicated “statistically significant underutilization of BBEs in County construction contracting.” *Id.* at 916. The results were “less dramatic” for HBEs and mixed as between favorable and unfavorable for WBEs. *Id.*

The Eleventh Circuit then explained the burden of proof:

“[O]nce the proponent of affirmative action introduces its statistical proof as evidence of its remedial purpose, thereby supplying the [district] court with the means for determining that [it] had a firm basis for concluding that remedial action was appropriate, it is incumbent upon the [plaintiff] to prove their case; they continue to bear the ultimate burden of persuading the [district] court that the [defendant’s] evidence did not support an inference of prior discrimination and thus a remedial purpose, or that the plan instituted on the basis of this evidence was not sufficiently ‘narrowly tailored.’”

Id. (internal citations omitted).

The Eleventh Circuit noted that a plaintiff has at least three methods to rebut the inference of discrimination with a “neutral explanation” by: “(1) showing that the statistics are flawed; (2) demonstrating that the disparities shown by the statistics are not significant or actionable; or (3) presenting contrasting statistical data.” *Id.* (internal quotations and citations omitted). The Eleventh Circuit held that the plaintiffs produced “sufficient evidence to establish a neutral explanation for the disparities.” *Id.*

The plaintiffs alleged that the disparities were “better explained by firm size than by discrimination ... [because] minority and female-owned firms tend to be smaller, and that it stands to reason smaller firms will win smaller contracts.” *Id.* at 916-17. The plaintiffs produced Census data indicating, on average, minority- and female-owned construction firms in Engineering Contractors Association were smaller than non-MBE/WBE firms. *Id.* at 917. The

Eleventh Circuit found that the plaintiff's explanation of the disparities was a "plausible one, in light of the uncontroverted evidence that MBE/WBE construction firms tend to be substantially smaller than non-MBE/WBE firms." *Id.*

Additionally, the Eleventh Circuit noted that the County's own expert admitted that "firm size plays a significant role in determining which firms win contracts." *Id.* The expert stated:

The size of the firm has got to be a major determinant because of course some firms are going to be larger, are going to be better prepared, are going to be in a greater natural capacity to be able to work on some of the contracts while others simply by virtue of their small size simply would not be able to do it. *Id.*

The Eleventh Circuit then summarized:

Because they are bigger, bigger firms have a bigger chance to win bigger contracts. It follows that, all other factors being equal and in a perfectly nondiscriminatory market, one would expect the bigger (on average) non-MWBE firms to get a disproportionately higher percentage of total construction dollars awarded than the smaller MWBE firms. *Id.*

In anticipation of such an argument, the County conducted a regression analysis to control for firm size. *Id.* A regression analysis is "a statistical procedure for determining the relationship between a dependent and independent variable, *e.g.*, the dollar value of a contract award and firm size." *Id.* (internal citations omitted). The purpose of the regression analysis is "to determine whether the relationship between the two variables is statistically meaningful." *Id.*

The County's regression analysis sought to identify disparities that could not be explained by firm size, and theoretically instead based on another factor, such as discrimination. *Id.* The County conducted two regression analyses using two different proxies for firm size: (1) total awarded value of all contracts bid on; and (2) largest single contract awarded. *Id.* The regression analyses accounted for most of the negative disparities regarding MBE/WBE participation in County construction contracts (*i.e.*, most of the unfavorable disparities became statistically insignificant, corresponding to standard deviation values less than two). *Id.*

Based on an evaluation of the regression analysis, the district court held that the demonstrated disparities were attributable to firm size as opposed to discrimination. *Id.* at 918. The district court concluded that the few unexplained disparities that remained after regressing for firm size were insufficient to provide the requisite "strong basis in evidence" of discrimination of BBes and HBes. *Id.* The Eleventh Circuit held that this decision was not clearly erroneous. *Id.*

With respect to the BBE statistics, the regression analysis explained all but one negative disparity, for one type of construction contract between 1989-1991. *Id.* The Eleventh Circuit held the district court permissibly found that this did not constitute a "strong basis in evidence" of discrimination. *Id.*

With respect to the HBE statistics, one of the regression methods failed to explain the unfavorable disparity for one type of contract between 1989-1991, and both regression methods

failed to explain the unfavorable disparity for another type of contract during that same time period. *Id.* However, by 1993, both regression methods accounted for all of the unfavorable disparities, and one of the disparities for one type of contract was actually favorable for HBEs. *Id.* The Eleventh Circuit held the district court permissibly found that this did not constitute a “strong basis in evidence” of discrimination. *Id.*

Finally, with respect to the WBE statistics, the regression analysis explained all but one negative disparity, for one type of construction contract in the 1993 period. *Id.* The regression analysis explained all of the other negative disparities, and in the 1993 period, a disparity for one type of contract was actually favorable to WBEs. *Id.* The Eleventh Circuit held the district court permissibly found that this evidence was not “sufficiently probative of discrimination.” *Id.*

The County argued that the district court erroneously relied on the disaggregated data (*i.e.*, broken down by contract type) as opposed to the consolidated statistics. *Id.* at 919. The district court declined to assign dispositive weight to the aggregated data for the BBE statistics for 1989-1991 because (1) the aggregated data for 1993 did not show negative disparities when regressed for firm size, (2) the BBE disaggregated data left only one unexplained negative disparity for one type of contract for 1989-1991 when regressed for firm size, and (3) “the County’s own expert testified as to the utility of examining the disaggregated data ‘insofar as they reflect different kinds of work, different bidding practices, perhaps a variety of other factors that could make them heterogeneous with one another.’” *Id.*

Additionally, the district court noted, and the Eleventh Circuit found that “the aggregation of disparity statistics for nonheterogenous data populations can give rise to a statistical phenomenon known as ‘Simpson’s Paradox,’ which leads to illusory disparities in improperly aggregated data that disappear when the data are disaggregated.” *Id.* at 919, n. 4 (internal citations omitted). “Under those circumstances,” the Eleventh Circuit held that the district court did not err in assigning less weight to the aggregated data, in finding the aggregated data for BBEs for 1989-1991 did not provide a “strong basis in evidence” of discrimination, or in finding that the disaggregated data formed an insufficient basis of support for any of the MBE/WBE programs given the applicable constitutional requirements. *Id.* at 919.

County subcontracting statistics. The County performed a subcontracting study to measure MBE/WBE participation in the County’s subcontracting businesses. For each MBE/WBE category (BBE, HBE, and WBE), “the study compared the proportion of the designated group that filed a subcontractor’s release of lien on a County construction project between 1991 and 1994 with the proportion of sales and receipt dollars that the same group received during the same time period.” *Id.*

The district court found the statistical evidence insufficient to support the use of race- and ethnicity-conscious measures, noting problems with some of the data measures. *Id.* at 920.

Most notably, the denominator used in the calculation of the MWBE sales and receipts percentages is based upon the total sales and receipts from all sources for the firm filing a subcontractor’s release of lien with the County. That means, for instance, that if a nationwide non-MWBE company performing 99 percent of

its business outside of Dade County filed a single subcontractor's release of lien with the County during the relevant time frame, all of its sales and receipts for that time frame would be counted in the denominator against which MWBE sales and receipts are compared. As the district court pointed out, that is not a reasonable way to measure Dade County subcontracting participation.

Id. The County's argument that a strong majority (72%) of the subcontractors were located in Dade County did not render the district court's decision to fail to credit the study erroneous. *Id.*

Marketplace data statistics. The County conducted another statistical study "to see what the differences are in the marketplace and what the relationships are in the marketplace." *Id.* The study was based on a sample of 568 contractors, from a pool of 10,462 firms, that had filed a "certificate of competency" with Dade County as of January 1995. *Id.* The selected firms participated in a telephone survey inquiring about the race, ethnicity, and gender of the firm's owner, and asked for information on the firm's total sales and receipts from all sources. *Id.* The County's expert then studied the data to determine "whether meaningful relationships existed between (1) the race, ethnicity, and gender of the surveyed firm owners, and (2) the reported sales and receipts of that firm. *Id.* The expert's hypothesis was that unfavorable disparities may be attributable to marketplace discrimination. The expert performed a regression analysis using the number of employees as a proxy for size. *Id.*

The Eleventh Circuit first noted that the statistical pool used by the County was substantially larger than the actual number of firms, willing, able, and qualified to do the work as the statistical pool represented all those firms merely licensed as a construction contractor. *Id.* Although this factor did not render the study meaningless, the district court was entitled to consider that in evaluating the weight of the study. *Id.* at 921. The Eleventh Circuit quoted the Supreme Court for the following proposition: "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." *Id.*, quoting *Croson*, 488 U.S. at 501, quoting *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 308 n. 13 (1977).

The Eleventh Circuit found that after regressing for firm size, neither the BBE nor WBE data showed statistically significant unfavorable disparities. *Id.* Although the marketplace data did reveal unfavorable disparities even after a regression analysis, the district court was not required to assign those disparities controlling weight, especially in light of the dissimilar results of the County Contracting Statistics, discussed *supra*. *Id.*

The Wainwright Study. The County also introduced a statistical analysis prepared by Jon Wainwright, analyzing "the personal and financial characteristics of self-employed persons working full-time in the Dade County construction industry, based on data from the 1990 Public Use Microdata Sample database" (derived from the decennial census). *Id.* The study "(1) compared construction business ownership rates of MBE/WBEs to those of non-MBE/WBEs, and (2) analyzed disparities in personal income between MBE/WBE and non-MBE/WBE business owners." *Id.* "The study concluded that blacks, Hispanics, and women are less likely to

own construction businesses than similarly situated white males, and MBE/WBEs that do enter the construction business earn less money than similarly situated white males.” *Id.*

With respect to the first conclusion, Wainwright controlled for “human capital” variables (education, years of labor market experience, marital status, and English proficiency) and “financial capital” variables (interest and dividend income, and home ownership). *Id.* The analysis indicated that blacks, Hispanics and women enter the construction business at lower rates than would be expected, once numerosity, and identified human and financial capital are controlled for. *Id.* The disparities for blacks and women (but not Hispanics) were substantial and statistically significant. *Id.* at 922. The underlying theory of this business ownership component of the study is that any significant disparities remaining after control of variables are due to the ongoing effects of past and present discrimination. *Id.*

The Eleventh Circuit held, in light of *Croson*, the district court need not have accepted this theory. *Id.* The Eleventh Circuit quoted *Croson*, in which the Supreme Court responded to a similar argument advanced by the plaintiffs in that case: “There are numerous explanations for this dearth of minority participation, including past societal discrimination in education and economic opportunities as well as both black and white career and entrepreneurial choices. Blacks may be disproportionately attracted to industries other than construction.” *Id.*, quoting *Croson*, 488 U.S. at 503. Following the Supreme Court in *Croson*, the Eleventh Circuit held “the disproportionate attraction of a minority group to non-construction industries does not mean that discrimination in the construction industry is the reason.” *Id.*, quoting *Croson*, 488 U.S. at 503. Additionally, the district court had evidence that between 1982 and 1987, there was a substantial growth rate of MBE/WBE firms as opposed to non-MBE/WBE firms, which would further negate the proposition that the construction industry was discriminating against minority- and women-owned firms. *Id.* at 922.

With respect to the personal income component of the Wainwright study, after regression analyses were conducted, only the BBE statistics indicated a statistically significant disparity ratio. *Id.* at 923. However, the Eleventh Circuit held the district court was not required to assign the disparity controlling weight because the study did not regress for firm size, and in light of the conflicting statistical evidence in the County Contracting Statistics and Marketplace Data Statistics, discussed supra, which did regress for firm size. *Id.*

The Brimmer Study. The final study presented by the County was conducted under the supervision of Dr. Andrew F. Brimmer and concerned only black-owned firms. *Id.* The key component of the study was an analysis of the business receipts of black-owned construction firms for the years of 1977, 1982 and 1987, based on the Census Bureau’s Survey of Minority- and Women-Owned Businesses, produced every five years. *Id.* The study sought to determine the existence of disparities between sales and receipts of black-owned firms in Dade County compared to the sales and receipts of all construction firms in Dade County. *Id.*

The study indicated substantial disparities in 1977 and 1987 but not 1982. *Id.* The County alleged that the absence of disparity in 1982 was due to substantial race-conscious measures for a major construction contract (Metrorail project), and not due to a lack of discrimination in the industry. *Id.* However, the study made no attempt to filter for the Metrorail project and

“complete[ly] fail[ed]” to account for firm size. *Id.* Accordingly, the Eleventh Circuit found the district court permissibly discounted the results of the Brimmer study. *Id.* at 924.

Anecdotal evidence. In addition, the County presented a substantial amount of anecdotal evidence of perceived discrimination against BBEs, a small amount of similar anecdotal evidence pertaining to WBEs, and no anecdotal evidence pertaining to HBEs. *Id.* The County presented three basic forms of anecdotal evidence: “(1) the testimony of two County employees responsible for administering the MBE/WBE programs; (2) the testimony, primarily by affidavit, of twenty-three MBE/WBE contractors and subcontractors; and (3) a survey of black-owned construction firms.” *Id.*

The County employees testified that the decentralized structure of the County construction contracting system affords great discretion to County employees, which in turn creates the opportunity for discrimination to infect the system. *Id.* They also testified to specific incidents of discrimination, for example, that MBE/WBEs complained of receiving lengthier punch lists than their non-MBE/WBE counterparts. *Id.* They also testified that MBE/WBEs encounter difficulties in obtaining bonding and financing. *Id.*

The MBE/WBE contractors and subcontractors testified to numerous incidents of perceived discrimination in the Dade County construction market, including:

Situations in which a project foreman would refuse to deal directly with a black or female firm owner, instead preferring to deal with a white employee; instances in which an MWBE owner knew itself to be the low bidder on a subcontracting project, but was not awarded the job; instances in which a low bid by an MWBE was “shopped” to solicit even lower bids from non-MWBE firms; instances in which an MWBE owner received an invitation to bid on a subcontract within a day of the bid due date, together with a “letter of unavailability” for the MWBE owner to sign in order to obtain a waiver from the County; and instances in which an MWBE subcontractor was hired by a prime contractor, but subsequently was replaced with a non-MWBE subcontractor within days of starting work on the project.

Id. at 924-25.

Finally, the County submitted a study prepared by Dr. Joe E. Feagin, comprised of interviews of 78 certified black-owned construction firms. *Id.* at 925. The interviewees reported similar instances of perceived discrimination, including: “difficulty in securing bonding and financing; slow payment by general contractors; unfair performance evaluations that were tainted by racial stereotypes; difficulty in obtaining information from the County on contracting processes; and higher prices on equipment and supplies than were being charged to non-MBE/WBE firms.” *Id.*

The Eleventh Circuit found that numerous black- and some female-owned construction firms in Dade County perceived that they were the victims of discrimination and two County employees also believed that discrimination could taint the County’s construction contracting process. *Id.* However, such anecdotal evidence is helpful “only when it [is] combined with and reinforced by

sufficiently probative statistical evidence.” *Id.* In her plurality opinion in *Croson*, Justice O’Connor found that “evidence of a pattern of individual discriminatory acts can, *if supported by appropriate statistical proof*, lend support to a local government’s determination that broader remedial relief is justified.” *Id.*, quoting *Croson*, 488 U.S. at 509 (emphasis added by the Eleventh Circuit). Accordingly, the Eleventh Circuit held that “anecdotal evidence can play an important role in bolstering statistical evidence, but that only in the rare case will anecdotal evidence suffice standing alone.” *Id.* at 925. The Eleventh Circuit also cited to opinions from the Third, Ninth and Tenth Circuits as supporting the same proposition. *Id.* at 926. The Eleventh Circuit affirmed the decision of the district court enjoining the continued operation of the MBE/WBE programs because they did not rest on a “constitutionally sufficient evidentiary foundation.” *Id.*

Although the Eleventh Circuit determined that the MBE/WBE program did not survive constitutional muster due to the absence of a sufficient evidentiary foundation, the Eleventh Circuit proceeded with the second prong of the strict scrutiny analysis of determining whether the MBE/WBE programs were narrowly tailored (BBE and HBE programs) or substantially related (WBE program) to the legitimate government interest they purported to serve, *i.e.*, “remedying the effects of present and past discrimination against blacks, Hispanics, and women in the Dade County construction market.” *Id.*

Narrow tailoring. “The essence of the ‘narrowly tailored’ inquiry is the notion that explicitly racial preferences ... must only be a ‘last resort’ option.” *Id.*, quoting *Hayes v. North Side Law Enforcement Officers Ass’n*, 10 F.3d 207, 217 (4th Cir. 1993) and citing *Croson*, 488 U.S. at 519 (Kennedy, J., concurring in part and concurring in the judgment) (“[T]he strict scrutiny standard ... forbids the use of even narrowly drawn racial classifications except as a last resort.”).

The Eleventh Circuit has identified four factors to evaluate whether a race- or ethnicity-conscious affirmative action program is narrowly tailored: (1) “the necessity for the relief and the efficacy of alternative remedies; (2) the flexibility and duration of the relief; (3) the relationship of numerical goals to the relevant labor market; and (4) the impact of the relief on the rights of innocent third parties.” *Id.* at 927, citing *Ensley Branch*, 31 F.3d at 1569. The four factors provide “a useful analytical structure.” *Id.* at 927. The Eleventh Circuit focused only on the first factor in the present case “because that is where the County’s MBE/WBE programs are most problematic.” *Id.*

The Eleventh Circuit

flatly reject[ed] the County’s assertion that ‘given a strong basis in evidence of a race-based problem, a race-based remedy is necessary.’ That is simply not the law. If a race-neutral remedy is sufficient to cure a race-based problem, then a race-conscious remedy can never be narrowly tailored to that problem.” *Id.*, citing *Croson*, 488 U.S. at 507 (holding that affirmative action program was not narrowly tailored where “there does not appear to have been any consideration of the use of race-neutral means to increase minority business participation in city contracting”) ... Supreme Court decisions teach that a race-conscious remedy is not merely one of many equally acceptable medications the government may use to treat a race-based problem. Instead, it is the strongest of

medicines, with many potential side effects, and must be reserved for those severe cases that are highly resistant to conventional treatment.

Id. at 927.

The Eleventh Circuit held that the County “clearly failed to give serious and good faith consideration to the use of race- and ethnicity-neutral measures.” *Id.* Rather, the determination of the necessity to establish the MWBE programs was based upon a conclusory legislative statement as to its necessity, which in turn was based upon an “equally conclusory analysis” in the Brimmer study, and a report that the SBA only was able to direct 5 percent of SBA financing to black-owned businesses between 1968-1980. *Id.*

The County admitted, and the Eleventh Circuit concluded, that the County failed to give any consideration to any alternative to the HBE affirmative action program. *Id.* at 928. Moreover, the Eleventh Circuit found that the testimony of the County’s own witnesses indicated the viability of race- and ethnicity-neutral measures to remedy many of the problems facing black- and Hispanic-owned construction firms. *Id.* The County employees identified problems, virtually all of which were related to the County’s own processes and procedures, including: “the decentralized County contracting system, which affords a high level of discretion to County employees; the complexity of County contract specifications; difficulty in obtaining bonding; difficulty in obtaining financing; unnecessary bid restrictions; inefficient payment procedures; and insufficient or inefficient exchange of information.” *Id.* The Eleventh Circuit found that the problems facing MBE/WBE contractors were “institutional barriers” to entry facing every new entrant into the construction market, and were perhaps affecting the MBE/WBE contractors disproportionately due to the “institutional youth” of black- and Hispanic-owned construction firms. *Id.* “It follows that those firms should be helped the most by dismantling those barriers, something the County could do at least in substantial part.” *Id.*

The Eleventh Circuit noted that the race- and ethnicity-neutral options available to the County mirrored those available and cited by Justice O’Connor in *Croson*:

[T]he city has at its disposal a whole array of race-neutral measures to increase the accessibility of city contracting opportunities to small entrepreneurs of all races. Simplification of bidding procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races would open the public contracting market to all those who have suffered the effects of past societal discrimination and neglect ... The city may also act to prohibit discrimination in the provision of credit or bonding by local suppliers and banks.

Id., quoting *Croson*, 488 U.S. at 509-10. The Eleventh Circuit found that except for some “half-hearted programs” consisting of “limited technical and financial aid that might benefit BBEs and HBEs,” the County had not “seriously considered” or tried most of the race- and ethnicity-neutral alternatives available. *Id.* at 928. “Most notably ... the County has not taken any action whatsoever to ferret out and respond to instances of discrimination if and when they have occurred in the County’s own contracting process.” *Id.*

The Eleventh Circuit found that the County had taken no steps to “inform, educate, discipline, or penalize” discriminatory misconduct by its own employees. *Id.* at 929. Nor had the County passed any local ordinances expressly prohibiting discrimination by local contractors, subcontractors, suppliers, bankers, or insurers. *Id.* “Instead of turning to race- and ethnicity-conscious remedies as a last resort, the County has turned to them as a first resort.” Accordingly, the Eleventh Circuit held that even if the BBE and HBE programs were supported by the requisite evidentiary foundation, they violated the Equal Protection Clause because they were not narrowly tailored. *Id.*

Substantial relationship. The Eleventh Circuit held that due to the relaxed “substantial relationship” standard for gender-conscious programs, if the WBE program rested upon a sufficient evidentiary foundation, it could pass the substantial relationship requirement. *Id.* However, because it did not rest upon a sufficient evidentiary foundation, the WBE program could not pass constitutional muster. *Id.*

For all of the foregoing reasons, the Eleventh Circuit affirmed the decision of the district court declaring the MBE/WBE programs unconstitutional and enjoining their continued operation.

11. Contractor’s Association of E. Pennsylvania v. City of Philadelphia, 91 F.3d 586 (3d Cir. 1996)

The City of Philadelphia (City) and intervening defendant United Minority Enterprise Associates (UMEA) appealed from the district court’s judgment declaring that the City’s DBE/MBE/WBE program for black construction contractors, violated the Equal Protection rights of the Contractors Association of Eastern Pennsylvania (CAEP) and eight other contracting associations (Contractors). The Third Circuit affirmed the district court that the Ordinance was not narrowly tailored to serve a compelling state interest. 91 F. 3d 586, 591 (3d Cir. 1996), *affirming*, *Contractors Ass’n of Eastern Pa. v. City of Philadelphia*, 893 F.Supp. 419 (E.D.Pa.1995).

The Ordinance. The City’s Ordinance sought to increase the participation of “disadvantaged business enterprises” (DBEs) in City contracting. *Id.* at 591. DBEs are businesses defined as those at least 51 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 1979–81. The disparity indices were calculated by dividing the percentage of all City construction dollars received by black construction firms by their percentage representation among all area construction firms, multiplied by 100.

The consultant testified that the disparity index for black construction firms in the Philadelphia metropolitan area for the period studied was about 22.5. According to the consultant, the smaller the resulting figure was, the greater the inference of discrimination, and he believed that 22.5 was a disparity attributable to discrimination. *Id.* at 595. A number of witnesses testified to discrimination in City contracting before the City Council, prior to the enactment of the Ordinance, and the consultant testified that his statistical evidence was corroborated by their testimony. *Id.* at 595.

Based on information provided in an affidavit by a former City employee (John Macklin), the study consultant also concluded that black representation in contractor associations was disproportionately low in 1981 and that between 1979 and 1981 black firms had received no subcontracts on City-financed construction projects. *Id.* at 595. The City also offered evidence concerning two programs instituted by others prior to 1982 which were intended to remedy the effects of discrimination in the construction industry but which, according to the City, had been unsuccessful. *Id.* The first was the Philadelphia Plan, a program initiated in the late 1960s to increase the hiring of minorities on public construction sites.

The second program was a series of programs implemented by the Philadelphia Urban Coalition, a non-profit organization (Urban Coalition programs). These programs were established around 1970, and offered loans, loan guarantees, bonding assistance, training, and various forms of non-financial assistance concerning the management of a construction firm and the procurement of public contracts. *Id.* According to testimony from a former City Council member and others, neither program succeeded in eradicating the effects of discrimination. *Id.*

The City pointed to the waiver and exemption sections of the Ordinance as proof that there was adequate flexibility in its program. The City contended that its 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, non-minority prime contractors, or contractors associations during any relevant period. *Id.* at 596 *citing*, 893 F.Supp. at 447. The court also determined that the Ordinance was “not ‘narrowly tailored’ to even the perceived objective declared by City Council as the reason for the Ordinance.” *Id.* at 596, *citing*, 893 F. Supp. at 441.

Burden of Persuasion. The Court held affirmative action programs, when challenged, must be subjected to “strict scrutiny” review. *Id.* at 596. Accordingly, a program can withstand a challenge only if it is narrowly tailored to serve a compelling state interest. The municipality has a compelling state interest that can justify race-based preferences only when it has acted to remedy identified present or past discrimination in which it engaged or was a “passive participant;” race-based preferences cannot be justified by reference to past “societal” discrimination in which the municipality played no material role. *Id.* Moreover, the Court found the remedy must be tailored to the discrimination identified. *Id.*

The Court said that a municipality must justify its conclusions regarding discrimination in connection with the award of its construction contracts and the necessity for a remedy of the scope chosen. *Id.* at 597. While this does not mean the municipality must convince a court of the accuracy of its conclusions, the Court stated that it does mean the program cannot be sustained unless there is a strong basis in evidence for those conclusions. *Id.* The party challenging the race-based preferences can succeed by showing either (1) the subjective intent of the legislative

body was not to remedy race discrimination in which the municipality played a role, or (2) there is no “strong basis in evidence” for the conclusions that race-based discrimination existed and that the remedy chosen was necessary. *Id.*

The Third Circuit noted it and other courts have concluded that when the race-based classifications of an affirmative action plan are challenged, the proponents of the plan have the burden of coming forward with evidence providing a firm basis for inferring that the legislatively identified discrimination in fact exists or existed and that the race-based classifications are necessary to remedy the effects of the identified discrimination. *Id.* at 597. Once the proponents of the program meet this burden of production, the opponents of the program must be permitted to attack the tendered evidence and offer evidence of their own tending to show that the identified discrimination did or does not exist and/or that the means chosen as a remedy do not “fit” the identified discrimination. *Id.*

Ultimately, however, the Court found that plaintiffs challenging the program retain the burden of persuading the district court that a violation of the Equal Protection Clause has occurred. *Id.* at 597. This means that the plaintiffs bear the burden of persuading the court that the race-based preferences were not intended to serve the identified compelling interest or that there is no strong basis in the evidence as a whole for the conclusions the municipality needed to have reached with respect to the identified discrimination and the necessity of the remedy chosen. *Id.*

The Court explained the significance of the allocation of the burden of persuasion differs depending on the theory of constitutional invalidity that is being considered. If the theory is that the race-based preferences were adopted by the municipality with an intent unrelated to remedying its past discrimination, the plaintiff has the burden of convincing the court that the identified remedial motivation is a pretext and that the real motivation was something else. *Id.* at 597. As noted in *Contractors II*, the Third Circuit held the burden of persuasion here is analogous to the burden of persuasion in Title VII cases. *Id.* at 598, *citing*, 6 F.3d at 1006. The ultimate issue under this theory is one of fact, and the burden of persuasion on that ultimate issue can be very important. *Id.*

The Court said the situation is different when the plaintiff’s theory of constitutional invalidity is that, although the municipality may have been thinking of past discrimination and a remedy therefor, its conclusions with respect to the existence of discrimination and the necessity of the remedy chosen have no strong basis in evidence. In such a situation, when the municipality comes forward with evidence of facts alleged to justify its conclusions, the Court found that the plaintiff has the burden of persuading the court that those facts are not accurate. *Id.* The ultimate issue as to whether a strong basis in evidence exists is an issue of law, however. The burden of persuasion in the traditional sense plays no role in the court’s resolution of that ultimate issue. *Id.*

The Court held the district court’s opinion explicitly demonstrates its recognition that the plaintiffs bore the burden of persuading it that an equal protection violation occurred. *Id.* at 598. The Court found the district court applied the appropriate burdens of production and persuasion, conducted the required evaluation of the evidence, examined the credited record

evidence as a whole, and concluded that the “strong basis in evidence” for the City’s position did not exist. *Id.*

Three forms of discrimination advanced by the City. The Court pointed out that several distinct forms of racial discrimination were advanced by the City as establishing a pattern of discrimination against minority contractors. The first was discrimination by prime contractors in the awarding of subcontracts. The second was discrimination by contractor associations in admitting members. The third was discrimination by the City in the awarding of prime contracts. The City and UMEA argued that the City may have “passively participated” in the first two forms of discrimination. *Id.* at 599.

A. The evidence of discrimination by private prime contractors. One of the City’s theories is that discrimination by prime contractors in the selection of subcontractors existed and may be remedied by the City. The Court noted that as Justice O’Connor observed in *Crosby*: if the city could show that it had essentially become a “passive participant” in a system of racial exclusion practiced by elements of the local construction industry, ... the city could take affirmative steps to dismantle such a system. It is beyond dispute that any public entity ... has a compelling government interest in assuring that public dollars ... do not serve to finance the evil of private prejudice. *Id.* at 599, *citing*, 488 U.S. at 492.

The Court found the disparity study focused on just one aspect of the Philadelphia construction industry—the award of prime contracts by the City. *Id.* at 600. The City’s expert consultant acknowledged that the only information he had about subcontracting came from an affidavit of one person, John Macklin, supplied to him in the course of his study. As he stated on cross-examination, “I have made no presentation to the Court as to participation by black minorities or blacks in subcontracting.” *Id.* at 600. The only record evidence with respect to black participation in the subcontracting market comes from Mr. Macklin who was a member of the MBEC staff and a proponent of the Ordinance. *Id.* Based on a review of City records, found by the district court to be “cursory,” Mr. Macklin reported that not a single subcontract was awarded to minority subcontractors in connection with City-financed construction contracts during fiscal years 1979 through 1981. The district court did not credit this assertion. *Id.*

Prior to 1982, for solely City-financed projects, the City did not require subcontractors to prequalify, did not keep consolidated records of the subcontractors working on prime contracts let by the City, and did not record whether a particular contractor was an MBE. *Id.* at 600. To prepare a report concerning the participation of minority businesses in public works, Mr. Macklin examined the records at the City’s Procurement Department. The department kept procurement logs, project engineer logs, and contract folders. The subcontractors involved in a project were only listed in the engineer’s log. The court found Mr. Macklin’s testimony concerning his methodology was hesitant and unclear, but it does appear that he examined only 25 to 30 percent of the project engineer logs, and that his only basis for identifying a name in that segment of the logs as an MBE was his personal memory of the information he had received in the course of approximately a year of work with the OMO that certified minority contractors. *Id.* The Court quoted the district court finding as to Macklin’s testimony:

Macklin] went to the contract files and looked for contracts in excess of \$30,000.00 that in his view appeared to provide opportunities for subcontracting. (*Id.* at 13.) With that information, Macklin examined some of the project engineer logs for those projects to determine whether minority subcontractors were used by the prime contractors. (*Id.*) Macklin did not look at every available project engineer log. (*Id.*) Rather, he looked at a random 25 to 30 percent of all the project engineer logs. (*Id.*) As with his review of the Procurement Department log, Macklin determined that a minority subcontractor was used on the project only if he personally recognized the firm to be a minority. (*Id.*) Quite plainly, Macklin was unable to determine whether minorities were used on the remaining 65 to 70 percent of the projects that he did not review. When questioned whether it was possible that minority subcontractors did perform work on some City public works projects during fiscal years 1979 to 1981, and that he just did not see them in the project logs that he looked at, Macklin answered “it is a very good possibility.” 893 F.Supp. at 434.

Id. at 600.

The district court found two other portions of the record significant on this point. First, during the trial, the City presented Oscar Gaskins (“Gaskins”), former general counsel to the General and Specialty Contractors Association of Philadelphia (“GASCAP”) and the Philadelphia Urban Coalition, to testify about minority participation in the Philadelphia construction industry during the 1970s and early 1980s. Gaskins testified that, in his opinion, black contractors are still being subjected to racial discrimination in the private construction industry, and in subcontracting within the City limits. However, the Court pointed out, when Gaskins was asked by the district court to identify even one instance where a minority contractor was denied a private contract or subcontract after submitting the lowest bid, Gaskins was unable to do so. *Id.* at 600-601.

Second, the district court noted that since 1979 the City’s “standard requirements warn [would-be prime contractors] that discrimination will be deemed a ‘substantial breach’ of the public works contract which could subject the prime contractor to an investigation by the Commission and, if warranted, fines, penalties, termination of the contract and forfeiture of all money due.” Like the Supreme Court in *Croson*, the Court stated the district court found significant the City’s inability to point to any allegations that this requirement was being violated. *Id.* at 601.

The Court held the district court did not err by declining to accept Mr. Macklin’s conclusion that there were no subcontracts awarded to black contractors in connection with City-financed construction contracts in fiscal years 1979 to 1981. *Id.* at 601. Accepting that refusal, the Court agreed with the district court’s conclusion that the record provides no firm basis for inferring discrimination by prime contractors in the subcontracting market during that period. *Id.*

B. The evidence of discrimination by contractor associations. The Court stated that a city may seek to remedy discrimination by local trade associations to prevent its passive participation in a system of private discrimination. Evidence of “extremely low” membership by MBEs, standing by itself, however, is not sufficient to support remedial action; the city must “link [low MBE membership] to the number of local MBEs eligible for membership.” *Id.* at 601.

The City's expert opined that there was statistically low representation of eligible MBEs in the local trade associations. He testified that, while numerous MBEs were eligible to join these associations, three such associations had only one MBE member, and one had only three MBEs. In concluding that there were many eligible MBEs not in the associations, however, he again relied entirely upon the work of Mr. Macklin. The district court rejected the expert's conclusions because it found his reliance on Mr. Macklin's work misplaced. *Id.* at 601. Mr. Macklin formed an opinion that a listed number of MBE and WBE firms were eligible to be members of the plaintiff Associations. *Id.* Because Mr. Macklin did not set forth the criteria for association membership and because the OMO certification list did not provide any information about the MBEs and WBEs other than their names and the fact that they were such, the Court found the district court was without a basis for evaluating Mr. Macklin's opinions. *Id.*

On the other hand, the district court credited "the uncontroverted testimony of John Smith [a former general manager of the CAEP and member of the MBEC] that no black contractor who has ever applied for membership in the CAEP has been denied." *Id.* at 601 *citing*, 893 F.Supp. at 440. The Court pointed out the district court noted as well that the City had not "identified even a single black contractor who was eligible for membership in any of the plaintiffs' associations, who applied for membership, and was denied." *Id.* at 601, *quoting*, 893 F.Supp at 441.

The Court held that given the City's failure to present more than the essentially unexplained opinion of Mr. Macklin, the opposing, uncontradicted testimony of Mr. Smith, and the failure of anyone to identify a single victim of the alleged discrimination, it was appropriate for the district court to conclude that a constitutionally sufficient basis was not established in the evidence. *Id.* at 601. The Court found that even if it accepted Mr. Macklin's opinions, however, it could not hold that the Ordinance was justified by that discrimination. *Id.* at 602. Racial discrimination can justify a race-based remedy only if the City has somehow participated in or supported that discrimination. *Id.* The Court said that this record would not support a finding that this occurred. *Id.*

Contrary to the City's argument, the Court stated nothing in *Croson* suggests that awarding contracts pursuant to a competitive bidding scheme and without reference to association membership could alone constitute passive participation by the City in membership discrimination by contractor associations. *Id.* Prior to 1982, the City let construction contracts on a competitive bid basis. It did not require bidders to be association members, and nothing in the record suggests that it otherwise favored the associations or their members. *Id.*

C. The evidence of discrimination by the City. The Court found the record provided substantially more support for the proposition that there was discrimination on the basis of race in the award of prime contracts by the City in the fiscal 1979–1981 period. *Id.* The Court also found the Contractors' critique of that evidence less cogent than did the district court. *Id.*

The centerpiece of the City's evidence was its expert's calculation of disparity indices which gauge the disparity in the award of prime contracts by the City. *Id.* at 602. Following *Contractors II*, the expert calculated a disparity index for black construction firms of 11.4, based on a figure of 114 such firms available to perform City contracts. At trial, he recognized that the 114 figure included black engineering and architecture firms, so he recalculated the index, using only black

construction firms (i.e., 57 firms). This produced a disparity index of 22.5. Thus, based on this analysis, black construction firms would have to have received approximately 4.5 times more public works dollars than they did receive in order to have achieved an amount proportionate to their representation among all construction firms. The expert found the disparity sufficiently large to be attributable to discrimination against black contractors. *Id.*

The district court found the study did not provide a strong basis in evidence for an inference of discrimination in the prime contract market. It reached this conclusion primarily for three reasons. The study, in the district court's view, (1) did not take into account whether the black construction firms were qualified and willing to perform City contracts; (2) mixed statistical data from different sources; and (3) did not account for the "neutral" explanation that qualified black firms were too preoccupied with large, federally-assisted projects to perform City projects. *Id.* at 602-3.

The Court said the district court was correct in concluding that a statistical analysis should focus on the minority population capable of performing the relevant work. *Id.* at 603. As *Croson* indicates, "[w]hen special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value." *Id.*, citing, 488 U.S. at 501. In *Croson* and other cases, the Court pointed out, however, the discussion by the Supreme Court concerning qualifications came in the context of a rejection of an analysis using the percentage of a particular minority in the general population. *Id.*

The issue of qualifications can be approached at different levels of specificity, however, the Court stated, and some consideration of the practicality of various approaches is required. An analysis is not devoid of probative value, the Court concluded, simply because it may theoretically be possible to adopt a more refined approach. *Id.* at 603.

To the extent the district court found fault with the analysis for failing to limit its consideration to those black contractors "willing" to undertake City work, the Court found its criticism more problematic. *Id.* at 603. In the absence of some reason to believe otherwise, the Court said one can normally assume that participants in a market with the ability to undertake gainful work will be "willing" to undertake it. Moreover, past discrimination in a marketplace may provide reason to believe the minorities who would otherwise be willing are discouraged from trying to secure the work. *Id.* at 603.

The Court stated that it seemed a substantial overstatement to assert that the study failed to take into account the qualifications and willingness of black contractors to participate in public works. *Id.* at 603. During the time period in question, fiscal years 1979–81, those firms seeking to bid on City contracts had to prequalify for *each and every* contract they bid on, and the criteria could be set differently from contract to contract. *Id.* The Court said it would be highly impractical to review the hundreds of contracts awarded each year and compare them to each and every MBE. *Id.* The expert chose instead to use as the relevant minority population the black firms listed in the 1982 OMO Directory. The Court found this would appear to be a reasonable choice that, if anything, may have been on the conservative side. *Id.*

When a firm applied to be certified, the OMO required it to detail its bonding experience, prior experience, the size of prior contracts, number of employees, financial integrity, and equipment owned. *Id.* at 603. The OMO visited each firm to substantiate its claims. Although this additional information did not go into the final directory, the OMO was confident that those firms on the list were capable of doing the work required on large scale construction projects. *Id.*

The Contractors point to the small number of black firms that sought to prequalify for City-funded contracts as evidence that black firms were unwilling to work on projects funded solely by the City. *Id.* at 603. During the time period in question, City records showed that only seven black firms sought to prequalify, and only three succeeded in prequalifying. The Court found it inappropriate, however, to conclude that this evidence undermines the inference of discrimination. As the expert indicated in his testimony, the Court noted, if there has been discrimination in City contracting, it is to be expected that black firms may be discouraged from applying, and the low numbers may tend to corroborate the existence of discrimination rather than belie it. The Court stated that in a sense, to weigh this evidence for or against either party required it to presume the conclusion to be proved. *Id.* at 604.

The Court found that while it was true that the study “mixed data,” the weight given that fact by the district court seemed excessive. *Id.* at 604. The study expert used data from only two sources in calculating the disparity index of 22.5. He used data that originated from the City to determine the total amount of contract dollars awarded by the City, the amount that went to MBEs, and the number of black construction firms. *Id.* He “mixed” this with data from the Bureau of the Census concerning the number of total construction firms in the Philadelphia Standard Metropolitan Statistical Area (PSMSA). The data from the City is not geographically bounded to the same extent that the Census information is. *Id.* Any firm could bid on City work, and any firm could seek certification from the OMO.

Nevertheless, the Court found that due to the burdens of conducting construction at a distant location, the vast majority of the firms were from the Philadelphia region and the Census data offers a reasonable approximation of the total number of firms that might vie for City contracts. *Id.* Although there is a minor mismatch in the geographic scope of the data, given the size of the disparity index calculated by the study, the Court was not persuaded that it was significant. *Id.* at 604.

Considering the use of the OMO Directory and the Census data, the Court found that the index of 22.5 may be a conservative estimate of the actual disparity. *Id.* at 604. While the study used a figure for black firms that took into account qualifications and willingness, it used a figure for total firms that did not. *Id.* If the study under-counted the number of black firms qualified and willing to undertake City construction contracts or over-counted the total number of firms qualified and willing to undertake City construction contracts, the actual disparity would be greater than 22.5. *Id.* Further, while the study limited the index to black firms, the study did not similarly reduce the dollars awarded to minority firms. The study used the figure of \$667,501, which represented the total amount going to all MBEs. If minorities other than blacks received some of that amount, the actual disparity would again be greater. *Id.* at 604.

The Court then considered the district court's suggestion that the extensive participation of black firms in federally-assisted projects, which were also procured through the City's Procurement Office, accounted for their low participation in the other construction contracts awarded by the City. *Id.* The Court found the district court was right in suggesting that the availability of substantial amounts of federally funded work and the federal set-aside undoubtedly had an impact on the number of black contractors available to bid on other City contracts. *Id.* at 605.

The extent of that impact, according to the Court, was more difficult to gauge, however. That such an impact existed does not necessarily mean that the study's analysis was without probative force. *Id.* at 605. If, the Court noted for example, one reduced the 57 available black contractors by the 20 to 22 that participated in federally assisted projects in fiscal years 1979–81 and used 35 as a fair approximation of the black contractors available to bid on the remaining City work, the study's analysis produces a disparity index of 37, which the Court found would be a disparity that still suggests a substantial under-participation of black contractors among the successful bidders on City prime contracts. *Id.*

The court in conclusion stated whether this record provided a strong basis in evidence for an inference of discrimination in the prime contract market "was a close call." *Id.* at 605. In the final analysis, however, the Court held it was a call that it found unnecessary to make, and thus it chose not to make it. *Id.* Even assuming that the record presents an adequately firm basis for that inference, the Court held the judgment of the district court must be affirmed because the Ordinance was clearly not narrowly tailored to remedy that discrimination. *Id.*

Narrowly Tailored. The Court said that strict scrutiny review requires it to examine the "fit" between the identified discrimination and the remedy chosen in an affirmative action plan. *Croson* teaches that there must be a strong basis in evidence not only for a conclusion that there is, or has been, discrimination, but also for a conclusion that the particular remedy chosen is made "necessary" by that discrimination. *Id.* at 605. The Court concluded that issue is shaped by its prior conclusions regarding the absence of a strong basis in evidence reflecting discrimination by prime contractors in selecting subcontractors and by contractor associations in admitting members. *Id.* at 606.

This left as a possible justification for the Ordinance only the assumption that the record provided a strong basis in evidence for believing the City discriminated against black contractors in the award of prime contracts during fiscal years 1979 to 1981. *Id.* at 606. If the remedy reflected in the Ordinance cannot fairly be said to be necessary in light of the assumed discrimination in awarding prime construction projects, the Court said that the Ordinance cannot stand. The Court held, as did the district court, that the Ordinance was not narrowly tailored. *Id.*

A. Inclusion of preferences in the subcontracting market. The Court found the primary focus of the City's program was the market for subcontracts to perform work included in prime contracts awarded by the City. *Id.* at 606. While the program included authorization for the award of prime contracts on a "sheltered market" basis, that authorization had been sparsely invoked by the City. Its goal with respect to dollars for black contractors had been pursued primarily through

requiring that bidding prime contractors subcontract to black contractors in stipulated percentages. *Id.* The 15 percent participation goal and the system of presumptions, which in practice required non-black contractors to meet the goal on virtually every contract, the Court found resulted in a 15 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 non-minority contractors will not hire black subcontractors. *Id.* Rather, the Court concluded the evidence, to the extent it suggests that racial discrimination had occurred, suggested discrimination by the City’s Procurement Department against black contractors who were capable of bidding on prime City construction contracts. *Id.* To the considerable extent that the program sought to constrain decision making by private contractors and favor black participation in the subcontracting market, the Court held it was ill-suited as a remedy for the discrimination identified. *Id.*

The Court pointed out it did not suggest that an appropriate remedial program for discrimination by a municipality in the award of primary contracts could never include a component that affects the subcontracting market in some way. *Id.* at 606. It held, however, that a program, like Philadelphia’s program, which focused almost exclusively on the subcontracting market, was not narrowly tailored to address discrimination by the City in the market for prime contracts. *Id.*

B. The amount of the set-aside in the prime contract market. Having decided that the Ordinance is overbroad in its inclusion of subcontracting, the Court considered whether the 15 percent goal was narrowly tailored to address discrimination in prime contracting. *Id.* at 606. The Court found the record supported the district court’s findings that the Council’s attention at the time of the original enactment and at the time of the subsequent extension was focused solely on the percentage of minorities and women in the general population, and that Council made no effort at either time to determine how the Ordinance might be drafted to remedy particular discrimination—to achieve, for example, the approximate market share for black contractors that would have existed, had the purported discrimination not occurred. *Id.* at 607. While the City Council did not tie the 15 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 non-minority contractors. In holding that the Richmond plan was not narrowly tailored, the Court pointed out, the Supreme Court in *Croson* considered it significant that race-neutral remedial alternatives were available and that the City had not considered the use of these means to increase minority business participation in City contracting. *Id.* at 608. It noted, in particular, that barriers to entry like capital and bonding requirements could be addressed by a race-neutral program of city financing for small firms and could be expected to lead to greater minority participation. Nevertheless, such alternatives were not pursued or even considered in connection with the Richmond's efforts to remedy past discrimination. *Id.*

The district court found that the City's procurement practices created significant barriers to entering the market for City-awarded construction contracts. *Id.* at 608. Small contractors, in particular, were deterred by the City's prequalification and bonding requirements from competing in that market. *Id.* Relaxation of those requirements, the district court found, was an available race-neutral alternative that would be likely to lead to greater participation by black contractors. No effort was made by the City, however, to identify barriers to entry in its procurement process and that process was not altered before or in conjunction with the adoption of the Ordinance. *Id.*

The district court also found that the City could have implemented training and financial assistance programs to assist disadvantaged contractors of all races. *Id.* at 608. The record established that certain neutral City programs had achieved substantial success in fulfilling its goals. The district court concluded, however, that the City had not supported the programs and had not considered emulating and/or expanding the programs in conjunction with the adoption of the Ordinance. *Id.*

The Court held the record provided ample support for the finding of the district court that alternatives to race-based preferences were available in 1982, which would have been either race neutral or, at least, less burdensome to non-minority contractors. *Id.* at 609. The Court found the City could have lowered administrative barriers to entry, instituted a training and financial assistance program, and carried forward the OMO's certification of minority contractor qualifications. *Id.* The record likewise provided ample support for the district court's conclusion that the "City Council was not interested in considering race-neutral measures, and it did not do so." *Id.* at 609. To the extent the City failed to consider or adopt these alternatives, the Court held it failed to narrowly tailor its remedy to prior or existing discrimination against black contractors. *Id.*

The Court found it particularly noteworthy that the Ordinance, since its extension, in 1987, for an additional 12 years, had been targeted exclusively toward benefiting only minority and women contractors "whose ability to compete in the free enterprise system has been impaired

due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged.” *Id.* at 609. The City’s failure to consider a race-neutral program designed to encourage investment in and/or credit extension to small contractors or minority contractors, the Court stated, seemed particularly telling in light of the limited classification of victims of discrimination that the Ordinance sought to favor. *Id.*

Conclusion. The Court held the remedy provided by the program substantially exceeds the limited justification that the record provided. *Id.* at 609. The program provided race-based preferences for blacks in the market for subcontracts where the Court found there was no strong basis in the evidence for concluding that discrimination occurred. *Id.* at 610. The program authorized a 15 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.*

12. Contractor’s Association of Eastern Pennsylvania v. City of Philadelphia, 6 F.3d 996 (3d Cir. 1993)

An association of construction contractors filed suit challenging, on equal protection grounds, a city of Philadelphia ordinance that established a set-aside program for “disadvantaged business enterprises” owned by minorities, women, and handicapped persons. 6 F.3d. at 993. The United States District Court for the Eastern District of Pennsylvania, 735 F.Supp. 1274 (E.D. Phila. 1990), granted summary judgment for the contractors 739 F.Supp. 227, and denied the City’s motion to stay the injunctive relief. Appeal was taken. The Third Circuit Court of Appeals, 945 F.2d 1260 (3d Cir. 1991), affirmed in part and vacated in part the district court’s decision. *Id.* On remand, the district court again granted summary judgment for the contractors. The City appealed. The Third Circuit Court of Appeals, held that: (1) the contractors association had standing, but only to challenge the portions of the ordinance that applied to construction contracts; (2) the City presented sufficient evidence to withstand summary judgment with respect to the race and gender preferences; and (3) the preference for businesses owned by handicapped persons was rationally related to a legitimate government purpose and, thus, did not violate equal protection. *Id.*

Procedural history. Nine associations of construction contractors challenged on equal protection grounds a City of Philadelphia ordinance creating preferences in City contracting for businesses owned by racial and ethnic minorities, women, and handicapped persons. *Id.* at 993. The district court granted summary judgment to the Contractors, holding they had standing to bring this

lawsuit and invalidating the Ordinance in all respects. *Contractors Association v. City of Philadelphia*, 735 F.Supp. 1274 (E.D.Pa.1990). In an earlier opinion, the Third Circuit affirmed the district court's ruling on standing, but vacated summary judgment on the merits because the City had outstanding discovery requests. *Contractors Association v. City of Philadelphia*, 945 F.2d 1260 (3d Cir.1991). On remand after discovery, the district court again entered summary judgment for the Contractors. The Third Circuit in this case affirmed in part, vacated in part, and reversed in part. 6 F.3d 990, 993.

In 1982, the Philadelphia City Council enacted an ordinance to increase participation in City contracts by minority-owned and women-owned businesses. Phila.Code § 17-500. *Id.* The Ordinance established "goals" for the participation of "disadvantaged business enterprises." § 17-503. "Disadvantaged business enterprises" (DBEs) were defined as those enterprises at least 51 percent owned by "socially and economically disadvantaged individuals," defined in turn as: those individuals who have been subjected to racial, sexual or ethnic prejudice because of their identity as a member of a group or differential treatment because of their handicap without regard to their individual qualities, and whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged. *Id.* at 994. The Ordinance further provided that racial minorities and women are rebuttably presumed to be socially and economically disadvantaged individuals, § 17-501(11)(a), but that a business which has received more than \$5 million in City contracts, even if owned by such an individual, is rebuttably presumed not to be a DBE, § 17-501(10). *Id.* at 994.

The Ordinance set goals for participation of DBEs in city contracts: 15 percent for minority-owned businesses, 10 percent for women-owned businesses, and 2 percent for businesses owned by handicapped persons. § 17-503(1). *Id.* at 994. The Ordinance applied to all City contracts, which are divided into three types—vending, construction, and personal and professional services. § 17-501(6). The percentage goals related to the total dollar amounts of City contracts and are calculated separately for each category of contracts and each City agency. *Id.* at 994.

In 1989, nine contractors associations brought suit in the Eastern District of Pennsylvania against the City of Philadelphia and two city officials, challenging the Ordinance as a facial violation of the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 994. After the City moved for judgment on the pleadings contending the Contractors lacked standing, the Contractors moved for summary judgment on the merits. The district court granted the Contractors' motion. It ruled the Contractors had standing, based on affidavits of individual association members alleging they had been denied contracts for failure to meet the DBE goals despite being low bidders. *Id.* at 995 *citing*, 735 F.Supp. at 1283 & n. 3.

Turning to the merits of the Contractors' equal protection claim, the district court held that *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), required it to apply the strict scrutiny standard to review the sections of the Ordinance creating a preference for minority-owned businesses. *Id.* Under that standard, the Third Circuit held a law will be invalidated if it is not "narrowly tailored" to a "compelling government interest." *Id.* at 995.

Applying *Croson*, the district court struck down the Ordinance because the City had failed to adduce sufficiently specific evidence of past racial discrimination against minority construction contractors in Philadelphia to establish a “compelling government interest.” *Id.* at 995, *quoting*, 735 F.Supp. at 1295–98. The court also held the Ordinance was not “narrowly tailored,” emphasizing the City had not considered using race-neutral means to increase minority participation in City contracting and had failed to articulate a rationale for choosing 15 percent as the goal for minority participation. *Id.* at 995; 735 F.Supp. at 1298–99. The court held the Ordinance’s preferences for businesses owned by women and handicapped persons were similarly invalid under the less rigorous intermediate scrutiny and rational basis standards of review. *Id.* at 995 *citing*, 735 F.Supp. at 1299–1309.

On appeal, the Third Circuit in 1991 affirmed the district court’s ruling on standing, but vacated its judgment on the merits as premature because the Contractors had not responded to certain discovery requests at the time the court ruled. 945 F.2d 1260 (3d Cir.1991). The Court remanded so discovery could be completed and explicitly reserved judgment on the merits. *Id.* at 1268. On remand, all parties moved for summary judgment, and the district court reaffirmed its prior decision, holding discovery had not produced sufficient evidence of discrimination in the Philadelphia construction industry against businesses owned by racial minorities, women, and handicapped persons to withstand summary judgment. The City and United Minority Enterprise Associates, Inc. (UMEA), which had intervened filed an appeal. *Id.*

This appeal, the Court said, presented three sets of questions: whether and to what extent the Contractors have standing to challenge the Ordinance, which standards of equal protection review govern the different sections of the Ordinance, and whether these standards justify invalidation of the Ordinance in whole or in part. *Id.* at 995.

Standing. The Supreme Court has confirmed that construction contractors have standing to challenge a minority preference ordinance upon a showing they are “able and ready to bid on contracts [subject to the ordinance] and that a discriminatory policy prevents [them] from doing so on an equal basis.” *Id.* at 995. Because the affidavits submitted to the district court established the Contractors were able and ready to bid on construction contracts, but could not do so for failure to meet the DBE percentage requirements, the court held they had standing to challenge the sections of the Ordinance covering construction contracts. *Id.* at 996.

Standards of equal protection review. The Contractors challenge the preferences given by the Ordinance to businesses owned and operated by minorities, women, and handicapped persons. In analyzing these classifications separately, the Court first considered which standard of equal protection review applies to each classification. *Id.* at 999.

Race, ethnicity, and gender. The Court found that choice of the appropriate standard of review turns on the nature of the classification. *Id.* at 999. Because under equal protection analysis classifications based on race, ethnicity, or gender are inherently suspect, they merit closer judicial attention. *Id.* Accordingly, the Court determined whether the Ordinance contains race- or gender-based classifications. The Ordinance’s classification scheme is spelled out in its definition of “socially and economically disadvantaged.” *Id.* The district court interpreted this definition to apply only to minorities, women, and handicapped persons and viewed the definition’s economic

criteria as in addition to rather than in lieu of race, ethnicity, gender, and handicap. *Id.* Therefore, it applied strict scrutiny to the racial preference under *Croson* and intermediate scrutiny to the gender preference under *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982). *Id.* at 999.

A. Strict scrutiny. Under strict scrutiny, a law may only stand if it is “narrowly tailored” to a “compelling government interest.” *Id.* at 999. Under intermediate scrutiny, a law must be “substantially related” to the achievement of “important government objectives.” *Id.*

The Court agreed with the district court that the definition of “socially and economically disadvantaged individuals” included only individuals who are both victims of prejudice based on status and economically deprived. *Id.* at 999. Additionally, the last clause of the definition described economically disadvantaged individuals as those “whose ability to compete in the free enterprise system has been impaired ... as compared to others ... who are not socially disadvantaged.” *Id.* This clause, the Court found, demonstrated the drafters wished to rectify only economic disadvantage that results from social disadvantage, i.e., prejudice based on race, ethnicity, gender, or handicapped status. *Id.* The Court said the plain language of the Ordinance foreclosed the City’s argument that a white male contractor could qualify for preferential treatment solely on the basis of economic disadvantage. *Id.* at 1000.

B. Intermediate scrutiny. The Court considered the proper standard of review for the Ordinance’s gender preference. The Court held a gender-based classification favoring women merited intermediate scrutiny. *Id.* at 1000, *citing*, *Hogan* 458 U.S. at 728. The Ordinance, the Court stated, is such a program. *Id.* Several federal courts, the Court noted, have applied intermediate scrutiny to similar gender preferences contained in state and municipal affirmative action contracting programs. *Id.* at 1001, *citing*, *Coral Constr. Co. v. King County*, 941 F.2d 910, 930 (9th Cir.1991), *cert. denied*, 502 U.S. 1033 (1992); *Michigan Road Builders Ass’n, Inc. v. Milliken*, 834 F.2d 583, 595 (6th Cir.1987), *aff’d mem.*, 489 U.S. 1061(1989); *Associated General Contractors of Cal. v. City and County of San Francisco*, 813 F.2d 922, 942 (9th Cir.1987); *Main Line Paving Co. v. Board of Educ.*, 725 F.Supp. 1349, 1362 (E.D.Pa.1989).

Application of intermediate scrutiny to the Ordinance’s gender preference, the Court said, also follows logically from *Croson*, which held municipal affirmative action programs benefiting racial minorities merit the same standard of review as that given other race-based classifications. *Id.* For these reasons, the Third Circuit rejected, as did the district court, those cases applying strict scrutiny to gender-based classifications. *Cone Corp. v. Hillsborough County*, 908 F.2d 908 (11th Cir.), *cert. denied*, 498 U.S. 983, 111 S.Ct. 516, 112 L.Ed.2d 528 (1990). *Id.* at 1000-1001. The Court agreed with the district court’s choice of intermediate scrutiny to review the Ordinance’s gender preference. *Id.*

Handicap. The district court reviewed the preference for handicapped business owners under the rational basis test. *Id.* at 1000, *citing* 735 F.Supp. at 1307. That standard validates the classification if it is “rationally related to a legitimate governmental purpose.” *Id.* at 1001, *citing* *Cleburne*, 473 U.S. at 445. The Court held the district court properly chose the rational basis standard in reviewing the Ordinance’s preference for handicapped persons. *Id.*

Constitutionality of the ordinance: race and ethnicity. Because strict scrutiny applies to the Ordinance’s racial and ethnic preferences, the Court stated it may only uphold them if they are “narrowly tailored” to a “compelling government interest.” *Id.* at 1001-2. The Court noted that in *Croson*, the Supreme Court made clear that combatting racial discrimination is a “compelling government interest.” *Id.* at 1002, *quoting*, 488 U.S. at 492, 509. It also held a city can enact such a preference to remedy past or present discrimination where it has actively discriminated in its award of contracts or has been a “ ‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry.” *Id.* at 1002, *quoting*, 488 U.S. at 492.

In the Supreme Court’s view, the “relevant statistical pool” was not the minority population, but the number of qualified minority contractors. It stressed the city did not know the number of qualified minority businesses in the area and had offered no evidence of the percentage of contract dollars minorities received as subcontractors. *Id.* at 1002, citing 488 U.S. at 502.

Ruling the Philadelphia Ordinance’s racial preference failed to overcome strict scrutiny, the district court concluded the Ordinance “possesses four of the five characteristics fatal to the constitutionality of the Richmond Plan,” *Id.* at 1002, *quoting*, 735 F.Supp. at 1298. As in *Croson*, the district court reasoned, the City relied on national statistics, a comparison between prime contract awards and the percentage of minorities in Philadelphia’s population, the Ordinance’s declaration it was remedial, and “conclusory” testimony of witnesses regarding discrimination in the Philadelphia construction industry. *Id.* at 1002, *quoting*, 1295-98.

In a footnote, the Court pointed out the district court also interpreted *Croson* to require “specific evidence of systematic prior discrimination in the industry in question by th[e] governmental unit” enacting the ordinance. 735 F.Supp. at 1295. The Court said this reading overlooked the statement in *Croson* that a City can be a “*passive participant*” in private discrimination by awarding contracts to firms that practice racial discrimination, and that a city “has a compelling interest in assuring that public dollars ... do not serve to finance the evil of private prejudice.” *Id.* at 1002, n. 10, *quoting*, 488 U.S. at 492.

Anecdotal evidence of racial discrimination. The City contended the district court understated the evidence of prior discrimination available to the Philadelphia City Council when it enacted the 1982 ordinance. The City Council Finance Committee received testimony from at least fourteen minority contractors who recounted personal experiences with racial discrimination. *Id.* at 1002. In certain instances, these contractors lost out despite being low bidders. The Court found this anecdotal evidence significantly outweighed that presented in *Croson*, where the Richmond City Council heard “no direct evidence of race discrimination on the part of the city in letting contracts or any evidence that the city’s prime contractors had discriminated against minority-owned subcontractors.” *Id.*, *quoting*, 488 U.S. at 480.

Although the district court acknowledged the minority contractors’ testimony was relevant under *Croson*, it discounted this evidence because “other evidence of the type deemed impermissible by the Supreme Court ... unsupported general testimony, impermissible statistics and information on the national set-aside program, ... overwhelmingly formed the basis for the enactment of the set-aside ... and therefore taint[ed] the minds of city councilmembers.” *Id.* at 1002, *quoting*, 735 F.Supp. at 1296.

The Third Circuit held, however, given *Croson's* emphasis on statistical evidence, even had the district court credited the City's anecdotal evidence, the Court did not believe this amount of anecdotal evidence was sufficient to satisfy strict scrutiny. *Id.* at 1003, quoting, *Coral Constr.*, 941 F.2d at 919 (“anecdotal evidence ... rarely, if ever, can ... show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan.”). Although anecdotal evidence alone may, the Court said, in an exceptional case, be so dominant or pervasive that it passes muster under *Croson*, it is insufficient here. *Id.* But because the combination of “anecdotal and statistical evidence is potent,” *Coral Constr.*, 941 F.2d at 919, the Court considered the statistical evidence proffered in support of the Ordinance.

Statistical evidence of racial discrimination. There are two categories of statistical evidence here, evidence undisputedly considered by City Council before it enacted the Ordinance in 1982 (the “pre-enactment” evidence), and evidence developed by the City on remand (the “post-enactment” evidence). *Id.* at 1003.

Pre-Enactment statistical evidence. The principal pre-enactment statistical evidence appeared in the 1982 Report of the City Council Finance Committee and recited that minority contractors were awarded only 0.09 percent of City contract dollars during the preceding three years, 1979 through 1981, although businesses owned by Blacks and Hispanics accounted for 6.4 percent of all businesses licensed to operate in Philadelphia. The Court found these statistics did not satisfy *Croson* because they did not indicate what proportion of the 6.4 percent of minority-owned businesses were available or qualified to perform City construction contracts. *Id.* at 1003. Under *Croson*, available minority-owned businesses comprise the “relevant statistical pool.” *Id.* at 1003. Therefore, the Court held the data in the Finance Committee Report did not provide a sufficient evidentiary basis for the Ordinance.

Post-Enactment statistical evidence. The “post-enactment” evidence consists of a study conducted by an economic consultant to demonstrate the disproportionately low share of public and private construction contracts awarded to minority-owned businesses in Philadelphia. The study provided the “relevant statistical pool” needed to satisfy *Croson*—the percentage of minority businesses engaged in the Philadelphia construction industry. *Id.* at 1003. The study also presented data showing that minority subcontractors were underrepresented in the private sector construction market. This data may be relevant, the Court said, if at trial the City can link it to discrimination occurring in the public sector construction market because the Ordinance covers subcontracting. *Id.* at n. 13.

The Court noted that several courts have held post-enactment evidence is admissible in determining whether an Ordinance satisfies *Croson*. *Id.* at 1004. Consideration of post-enactment evidence, the Court found was appropriate here, where the principal relief sought and the only relief granted by the district court, was an injunction. Because injunctions are prospective only, it makes sense the Court said to consider all available evidence before the district court, including the post-enactment evidence, which the district court did. *Id.*

Sufficiency of the statistical and anecdotal evidence and burden of proof. In determining whether the statistical evidence was adequate, the Court looked to what it referred to as its critical component—the “disparity index.” The index consists of the percentage of minority

contractor participation in City contracts divided by the percentage of minority contractor availability or composition in the “population” of Philadelphia area construction firms. This equation yields a percentage figure which is then multiplied by 100 to generate a number between 0 and 100, with 100 consisting of full participation by minority contractors given the amount of the total contracting population they comprise. *Id.* at 1005.

The Court noted that other courts considering equal protection challenges to similar ordinances have relied on disparity indices in determining whether *Croson*’s evidentiary burden is satisfied. *Id.* Disparity indices are highly probative evidence of discrimination because they ensure that the “relevant statistical pool” of minority contractors is being considered. *Id.*

A. Statistical evidence. The study reported a disparity index for City of Philadelphia construction contracts during the years 1979 through 1981 of 4 out of a possible 100. This index, the Court stated, was significantly worse than that in other cases where ordinances have withstood constitutional attack. *Id.* at 1004, *citing, Cone Corp.*, 908 F.2d at 916 (10.78 disparity index); *AGC of California*, 950 F.2d at 1414 (22.4 disparity index); *Concrete Works*, 823 F.Supp. at 834 (disparity index “significantly less than” 100); *see also Stuart*, 951 F.2d at 451 (disparity index of 10 in police promotion program); *compare O’Donnell*, 963 F.2d at 426 (striking down ordinance given disparity indices of approximately 100 in two categories). Therefore, the Court found the disparity index probative of discrimination in City contracting in the Philadelphia construction industry prior to enactment of the Ordinance. *Id.*

The Contractors contended the study was methodologically flawed because it considered only prime contractors and because it failed to consider the qualifications of the minority businesses or their interest in performing City contracts. The Contractors maintained the study did not indicate why there was a disparity between available minority contractors and their participation in contracting. The Contractors contended that these objections, without more, entitled them to summary judgment, arguing that under the strict scrutiny standard they do not bear the burden of proof, and therefore need not offer a neutral explanation for the disparity to prevail. *Id.* at 1005.

The Contractors, the Court found, misconceived the allocation of the burden of proof in affirmative action cases. *Id.* at 1005. The Supreme Court has indicated that “[t]he ultimate burden remains with [plaintiffs] to demonstrate the unconstitutionality of an affirmative action program.” *Id.* 1005. Thus, the Court held the Contractors, not the City, bear the burden of proof. *Id.* Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of contractors actually engaged by the locality or the locality’s prime contractors, an inference of discriminatory exclusion could arise. *Id.* Moreover, evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government’s determination that broader remedial relief is justified. *Id.*

The Court, following *Croson*, held where a city defends an affirmative action ordinance as a remedy for past discrimination, issues of proof are handled as they are in other cases involving a pattern or practice of discrimination. *Id.* at 1006. *Croson*’s reference to an “inference of discriminatory exclusion” based on statistics, as well as its citation to Title VII pattern cases, the

Court stated, supports this interpretation. *Id.* The plaintiff bears the burden in such a case. *Id.* The Court noted the Third Circuit has indicated statistical proof of discrimination is handled similarly under Title VII and equal protection principles. *Id.*

The Court found the City's statistical evidence had created an inference of discrimination which the Contractors would have to rebut at trial either by proving a "neutral explanation" for the disparity, "showing the statistics are flawed, ... demonstrating that the disparities shown by the statistics are not significant or actionable, ... or presenting contrasting statistical data." *Id.* at 1007. *A fortiori*, this evidence, the Court said is sufficient for the City to withstand summary judgment. The Court stated that the Contractors' objections to the study were properly presented to the trier of fact. *Id.* Accordingly, the Court found the City's statistical evidence established a prima facie case of racial discrimination in the award of City of Philadelphia construction contracts. *Id.*

Consistent with strict scrutiny, the Court stated it must examine the data for each minority group contained in the Ordinance. *Id.* The Census data on which the study relied demonstrated that in 1982, the year the Ordinance was enacted, there were construction firms owned in Philadelphia by Blacks, Hispanics, and Asian-Americans, but not Native Americans. *Id.* Therefore, the Court held neither the City nor prime contractors could have discriminated against construction companies owned by Native Americans at the time of the Ordinance, and the Court affirmed summary judgment as to them. *Id.*

The Census Report indicated there were 12 construction firms owned by Hispanic persons, six firms owned by Asian-American persons, three firms owned by persons of Pacific Islands descent, and one other minority-owned firm. *Id.* at 1008. The study calculated Hispanic firms represented 0.15 percent of the available firms and Asian-American, Pacific-Islander, and "other" minorities represented 0.12 percent of the available firms, and that these firms received no City contracts during the years 1979 through 1981. The Court did not believe these numbers were large enough to create a triable issue of discrimination. The mere fact that 0.27 percent of City construction firms—the percentage of all of these groups combined—received no contracts does not rise to the "significant statistical disparity." *Id.* at 1008.

B. Anecdotal evidence. Nor, the Court found, does it appear that there was any anecdotal evidence of discrimination against construction businesses owned by people of Hispanic or Asian-American descent. *Id.* at 1008. The district court found "there is no evidence whatsoever in the legislative history of the Philadelphia Ordinance that an American Indian, Eskimo, Aleut or Native Hawaiian has ever been discriminated against in the procurement of city contracts," *Id.* at 1008, *quoting*, 735 F.Supp. at 1299, and there was no evidence of any witnesses who were members of these groups or who were Hispanic. *Id.*

The Court recognized that the small number of Philadelphia-area construction businesses owned by Hispanic or Asian-American persons did not eliminate the possibility of discrimination against these firms. *Id.* at 1008. The small number itself, the Court said, may reflect barriers to entry caused in part by discrimination. *Id.* But, the Court held, plausible hypotheses are not enough to satisfy strict scrutiny, even at the summary judgment stage. *Id.*

Conclusion on compelling government interest. The Court found that nothing in its decision prevented the City from re-enacting a preference for construction firms owned by Hispanic, Asian–American, or Native American persons based on more concrete evidence of discrimination. *Id.* In sum, the Court held, the City adduced enough evidence of racial discrimination against Blacks in the award of City construction contracts to withstand summary judgment on the compelling government interest prong of the *Croson* test. *Id.*

Narrowly Tailored. The Court then decided whether the Ordinance’s racial preference was “narrowly tailored” to the compelling government interest of eradicating racial discrimination in the award of City construction contracts. *Id.* at 1008. *Croson* held this inquiry turns on four factors: (1) whether the city has first considered and found ineffective “race-neutral measures,” such as enhanced access to capital and relaxation of bonding requirements, (2) the basis offered for the percentage selected, (3) whether the program provides for waivers of the preference or other means of affording individualized treatment to contractors, and (4) whether the Ordinance applies only to minority businesses who operate in the geographic jurisdiction covered by the Ordinance. *Id.*

The City contended it enacted the Ordinance only after race-neutral alternatives proved insufficient to improve minority participation in City contracting. *Id.* It relied on the affidavits of City Council President and former Philadelphia Urban Coalition General Counsel who testified regarding the race-neutral precursors of the Ordinance—the Philadelphia Plan, which set goals for employment of minorities on public construction sites, and the Urban Coalition’s programs, which included such race-neutral measures as a revolving loan fund, a technical assistance and training program, and bonding assistance efforts. *Id.* The Court found the information in these affidavits sufficiently established the City’s prior consideration of race-neutral programs to withstand summary judgment. *Id.* at 1009.

Unlike the Richmond Ordinance, the Philadelphia Ordinance provided for several types of waivers of the 15 percent goal. *Id.* at 1009. It exempted individual contracts or classes of contracts from the Ordinance where there were an insufficient number of available minority-owned businesses “to ensure adequate competition and an expectation of reasonable prices on bids or proposals,” and allowed a prime contractor to request a waiver of the 15 percent requirement where the contractor shows he has been unable after “a good faith effort to comply with the goals for DBE participation.” *Id.*

Furthermore, as the district court noted, the Ordinance eliminated from the program successful minority businesses—those who have won \$5 million in city contracts. *Id.* Also unlike the Richmond program, the City’s program was geographically targeted to Philadelphia businesses, as waivers and exemptions are permitted where there exist an insufficient number of MBEs “within the Philadelphia Standard Metropolitan Statistical Area.” *Id.* The Court noted other courts have found these targeting mechanisms significant in concluding programs are narrowly tailored. *Id.*

The Court said a closer question was presented by the Ordinance’s 15 percent goal. The City’s data demonstrated that, prior to the Ordinance, only 2.4 percent of available construction contractors were minority-owned. The Court found that the goal need not correspond precisely

to the percentage of available contractors. *Id. Croson* does not impose this requirement, the Third Circuit concluded, as the Supreme Court stated only that Richmond’s 30 percent goal inappropriately assumed “minorities [would] choose a particular trade in lockstep proportion to their representation in the local population.” *Id., quoting*, 488 U.S. at 507.

The Court pointed out that imposing a 15 percent goal for each contract may reflect the need to account for those contractors who received a waiver because insufficient minority businesses were available, and the contracts exempted from the program. *Id.* Given the strength of the Ordinance’s showing with respect to other *Croson* factors, the Court concluded the City had created a dispute of fact on whether the minority preference in the Ordinance was “narrowly tailored.” *Id.*

Gender and intermediate scrutiny. Under the intermediate scrutiny standard, the gender preference is valid if it was “substantially related to an important governmental objective.” *Id.*, at 1009.

The City contended the gender preference was aimed at the “important government objective” of remedying economic discrimination against women, and that the 10 percent goal was substantially related to this objective. In assessing this argument, the Court noted that “[i]n the context of women-business enterprise preferences, the two prongs of this intermediate scrutiny test tend to converge into one.” *Id.* at 1009. The Court held it could uphold the construction provisions of this program if the City had established a sufficient factual predicate for the claim that women-owned construction businesses have suffered economic discrimination and the ten percent gender preference is an appropriate response. *Id.* at 1010.

Few cases have considered the evidentiary burden needed to satisfy intermediate scrutiny in this context, the Court pointed out, and there is no *Croson* analogue to provide a ready reference point. *Id.* at 1010. In particular, the Court said, it is unclear whether statistical evidence as well as anecdotal evidence is required to establish the discrimination necessary to satisfy intermediate scrutiny, and if so, how much statistical evidence is necessary. *Id.* The Court stated that the Supreme Court gender-preference cases are inconclusive. The Supreme Court, the Court concluded, had not squarely ruled on the necessity of statistical evidence of gender discrimination, and its decisions, according to the Court, were difficult to reconcile on the point. *Id.* The Court noted the Supreme Court has upheld gender preferences where no statistics were offered. *Id.*

The Supreme Court has stated that an affirmative action program survives intermediate scrutiny if the proponent can show it was “a product of analysis rather than a stereotyped reaction based on habit.” *Id.* at 1010. The Third Circuit found this standard requires the City to present probative evidence in support of its stated rationale for the gender preference, discrimination against women-owned contractors. *Id.* The Court held the City had not produced enough evidence of discrimination, noting that in its brief, the City relied on statistics in the City Council Finance Committee Report and one affidavit from a woman engaged in the catering business. *Id.*, But, the Court found this evidence only reflected the participation of women in City contracting generally, rather than in the construction industry, which was the only cognizable issue in this case. *Id.* at 1011.

The Court concluded the evidence offered by the City regarding women-owned construction businesses was insufficient to create an issue of fact. *Id.* at 1011. Significantly, the Court said the study contained no disparity index for women-owned construction businesses in City contracting, such as that presented for minority-owned businesses. *Id.* at 1011. Given the absence of probative statistical evidence, the City, according to the Court, must rely solely on anecdotal evidence to establish gender discrimination necessary to support the Ordinance. *Id.* But the record contained only one three-page affidavit alleging gender discrimination in the construction industry. *Id.* The only other testimony on this subject, the Court found, consisted of a single, conclusory sentence of one witness who appeared at a City Council hearing. *Id.*

This evidence the Court held was not enough to create a triable issue of fact regarding gender discrimination under the intermediate scrutiny standard. Therefore, the Court affirmed the grant of summary judgment invalidating the gender preference for construction contracts. *Id.* at 1011. The Court noted that it saw no impediment to the City re-enacting the preference if it can provide probative evidence of discrimination. *Id.* at 1011.

Handicap and rational basis. The Court then addressed the 2 percent preference for businesses owned by handicapped persons. *Id.* at 1011. The district court struck down this preference under the rational basis test, based on the belief according to the Third Circuit, that *Croson* required some evidence of discrimination against business enterprises owned by handicapped persons and therefore that the City could not rely on testimony of discrimination against handicapped individuals. *Id.*, citing 735 F.Supp. at 1308. The Court stated that a classification will pass the rational basis test if it is “rationally related to a legitimate government purpose,” *Id.*, citing, *Cleburne*, 473 U.S. at 440.

The Court pointed out that the Supreme Court had affirmed the permissiveness of the rational basis test in *Heller v. Doe*, 509 U.S. 312–43 (1993), indicating that “a [statutory] classification” subject to rational basis review “is accorded a strong presumption of validity,” and that “a state ... has no obligation to produce evidence to sustain the rationality of [the] classification.” *Id.* at 1011. Moreover, “the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record.” *Id.* at 1011.

The City stated it sought to minimize discrimination against businesses owned by handicapped persons and encouraged them to seek City contracts. The Court agreed with the district court that these are legitimate goals, but unlike the district court, the Court held the 2 percent preference was rationally related to this goal. *Id.* at 1011.

The City offered anecdotal evidence of discrimination against handicapped persons. *Id.* at 1011. Prior to amending the Ordinance in 1988 to include the preference, City Council held a hearing where eight witnesses testified regarding employment discrimination against handicapped persons both nationally and in Philadelphia. *Id.* Four witnesses spoke of discrimination against blind people, and three testified to discrimination against people with other physical handicaps. *Id.* Two of the witnesses, who were physically disabled, spoke of discrimination they and others had faced in the work force. *Id.* One of these disabled witnesses testified he was in the process of forming his own residential construction company. *Id.* at 1011-12. Additionally, two witnesses

testified that the preference would encourage handicapped persons to own and operate their own businesses. *Id.* at 1012.

The Court held that under the rational basis standard, the Contractors did not carry their burden of negating every basis which supported the legislative arrangement, and that City Council was entitled to infer discrimination against the handicapped from this evidence and was entitled to conclude the Ordinance would encourage handicapped persons to form businesses to win City contracts. *Id.* at 1012. Therefore, the Court reversed the district court's grant of summary judgment invalidating this aspect of the Ordinance and remanded for entry of an order granting summary judgment to the City on this issue. *Id.*

Holding. The Court vacated the district court's grant of summary judgment on the non-construction provisions of the Ordinance, reversed the grant of summary judgment to plaintiff contractors on the construction provisions of the Ordinance as applied to businesses owned by Black persons and handicapped persons, affirmed the grant of summary judgment to the plaintiff contractors on the construction provisions of the Ordinance as applied to businesses owned by Hispanic, Asian-American, or Native American persons or women, and remanded the case for further proceedings and a trial in accordance with the opinion.

13. 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 subpart of strict scrutiny review." *Id.* at 1413, *quoting Coral Construction Company v. King County*, 941 F.2d 910 at 916 (9th Cir. 1991). In addition, the [m]ere infusion of tax dollars into a discriminatory industry may be sufficient governmental involvement to satisfy this prong." *Id.* at 1413 *quoting Coral Construction*, 941 F.2d at 916.

The court pointed out that the City had made detailed findings of prior discrimination in construction and building within its borders, had testimony taken at more than ten public hearings and received numerous written submissions from the public as part of its anecdotal evidence. *Id.* at 1414. The City Departments continued to discriminate against MBEs and WBEs and continued to operate under the "old boy network" in awarding contracts, thereby disadvantaging MBEs and WBEs. *Id.* And, the City found that large statistical disparities existed between the percentage of contracts awarded to MBEs and the percentage of available MBEs. 950 F.2d at 1414. The court stated the City also found "discrimination in the private sector against MBEs and WBEs that is manifested in and exacerbated by the City's procurement practices." *Id.* at 1414.

The Ninth Circuit found the study commissioned by the City indicated the existence of large disparities between the award of city contracts to available non-minority businesses and to MBEs. *Id.* at 1414. Using the City and County of San Francisco as the "relevant market," the study compared the number of available MBE prime construction contractors in San Francisco with the amount of contract dollars awarded by the City to San Francisco-based MBEs for a particular year. *Id.* at 1414. The study found that available MBEs received far fewer city contracts in proportion to their numbers than their available non-minority counterparts. *Id.* Specifically, the study found that with respect to prime construction contracting, disparities between the number of available local Asian-, black- and Hispanic-owned firms and the number of contracts awarded to such firms were statistically significant and supported an inference of discrimination. *Id.* For example, in prime contracting for construction, although MBE availability was determined to be at 49.5 percent, MBE dollar participation was only 11.1 percent. *Id.* The Ninth Circuit stated that in its decision in *Coral Construction*, it emphasized that such statistical disparities are "an invaluable tool and demonstrating the discrimination necessary to establish a compelling interest. *Id.* at 1414, *citing to Coral Construction*, 941 F.2d at 918 and *Croson*, 488 U.S. at 509.

The court noted that the record documents a vast number of individual accounts of discrimination, which bring "the cold numbers convincingly to life. *Id.* at 1414, *quoting Coral Construction*, 941 F.2d at 919. These accounts include numerous reports of MBEs being denied contracts despite being the low bidder, MBEs being told they were not qualified although they were later found qualified when evaluated by outside parties, MBEs being refused work even after they were awarded contracts as low bidder, and MBEs being harassed by city personnel to

discourage them from bidding on city contracts. *Id.* at 1415. The City pointed to numerous individual accounts of discrimination, that an “old boy network” still exists, and that racial discrimination is still prevalent within the San Francisco construction industry. *Id.* The court found that such a “combination of convincing anecdotal and statistical evidence is potent.” *Id.* at 1415 quoting *Coral Construction*, 941 F.2d at 919.

The court also stated that the 1989 Ordinance applies only to resident MBEs. The City, therefore, according to the court, appropriately confined its study to the city limits in order to focus on those whom the preference scheme targeted. *Id.* at 1415. The court noted that the statistics relied upon by the City to demonstrate discrimination in its contracting processes considered only MBEs located within the City of San Francisco. *Id.*

The court pointed out the City’s findings were based upon dozens of specific instances of discrimination that are laid out with particularity in the record, as well as the significant statistical disparities in the award of contracts. The court noted that the City must simply demonstrate the existence of past discrimination with specificity, but there is no requirement that the legislative findings specifically detail each and every incidence that the legislative body has relied upon in support of this decision that affirmative action is necessary. *Id.* at 1416.

In its analysis of the “narrowly tailored” requirement, the court focused on three characteristics identified by the decision in *Crososon* 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.

14. Concrete Works of Colorado, Inc. v. City and County of Denver, 36 F.3d 1513 (10th Cir. 1994)

The court considered whether the City and County of Denver’s race- and gender-conscious public contract award program complied with the Fourteenth Amendment’s guarantee of equal protection of the laws. Plaintiff-Appellant Concrete Works of Colorado, Inc. (“Concrete Works”) appealed the district court’s summary judgment order upholding the constitutionality of Denver’s public contract program. The court concluded that genuine issues of material fact exist with regard to the evidentiary support that Denver presents to demonstrate that its program satisfies the requirements of *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). Accordingly, the court reversed and remanded. 36 F.3d 1513 (10th Cir. 1994).

Background. In, 1990, the Denver City Council enacted Ordinance (“Ordinance”) to enable certified racial minority business enterprises (“MBEs”) and women-owned business enterprises (“WBEs”) to participate in public works projects “to an extent approximating the level of [their] availability and capacity.” *Id.* at 1515. This Ordinance was the most recent in a series of provisions that the Denver City Council has adopted since 1983 to remedy perceived race and gender discrimination in the distribution of public and private construction contracts. *Id.* at 1516.

In 1992, Concrete Works, a nonminority and male-owned construction firm, filed this Equal Protection Clause challenge to the Ordinance. *Id.* Concrete Works alleged that the Ordinance caused it to lose three construction contracts for failure to comply with either the stated MBE and WBE participation goals or the good-faith requirements. Rather than pursuing administrative or state court review of the OCC’s findings, Concrete Works initiated this action, seeking a permanent injunction against enforcement of the Ordinance and damages for lost contracts. *Id.*

In 1993, and after extensive discovery, the district court granted Denver's summary judgment motion. *Concrete Works, Inc. v. City and County of Denver*, 823 F.Supp. 821 (D.Colo.1993). The court concluded that Concrete Works had standing to bring this claim. *Id.* With respect to the merits, the court held that Denver's program satisfied the strict scrutiny standard embraced by a majority of the Supreme Court in *Croson* because it was narrowly tailored to achieve a compelling government interest. *Id.*

Standing. At the outset, the Tenth Circuit on appeal considered Denver's contention that Concrete Works fails to satisfy its burden of establishing standing to challenge the Ordinance's constitutionality. *Id.* at 1518. The court concluded that Concrete Works demonstrated "injury in fact" because it submitted bids on three projects and the Ordinance prevented it from competing on an equal basis with minority and women-owned prime contractors. *Id.*

Specifically, the unequal nature of the bidding process lied in the Ordinance's requirement that a nonminority prime contractor must meet MBE and WBE participation goals by entering into joint ventures with MBEs and WBEs or hiring them as subcontractors (or satisfying the ten-step good faith requirement). *Id.* In contrast, minority and women-owned prime contractors could use their own work to satisfy MBE and WBE participation goals. *Id.* Thus, the extra requirements, the court found imposed costs and burdens on nonminority firms that precluded them from competing with MBEs and WBEs on an equal basis. *Id.* at 1519.

In addition to demonstrating "injury in fact," Concrete Works, the court held, also satisfied the two remaining elements to establish standing: (1) a causal relationship between the injury and the challenged conduct; and (2) a likelihood that the injury will be redressed by a favorable ruling. Thus, the court concluded that Concrete Works had standing to challenge the constitutionality of Denver's race- and gender-conscious contract program. *Id.*

Equal Protection Clause Standards. The court determined the appropriate standard of equal protection review by examining the nature of the classifications embodied in the statute. The court applied strict scrutiny to the Ordinance's race-based preference scheme, and thus inquired whether the statute was narrowly tailored to achieve a compelling government interest. *Id.* Gender-based classifications, in contrast, the court concluded are evaluated under the intermediate scrutiny rubric, which provides that the law must be substantially related to an important government objective. *Id.*

Permissible Evidence and Burdens of Proof. In *Croson*, a plurality of the Court concluded that state and local governments have a compelling interest in remedying identified past and present discrimination within their borders. *Id. citing, Croson*, 488 U.S. at 492, 509, The plurality explained that the Fourteenth Amendment permits race-conscious programs that seek both to eradicate discrimination by the governmental entity itself and to prevent the public entity from acting as a " 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry" by allowing tax dollars "to finance the evil of private prejudice." *Id. citing, Croson* at 492.

A. Geographic Scope of the Data. Concrete Works contended that *Croson* precluded the court from considering empirical evidence of discrimination in the six-county Denver Metropolitan

Statistical Area (MSA). Instead, it argued *Croson* would allow Denver only to use data describing discrimination within the City and County of Denver. *Id.* at 1520.

The court stated that a majority in *Croson* observed that because discrimination varies across market areas, state and local governments cannot rely on national statistics of discrimination in the construction industry to draw conclusions about prevailing market conditions in their own regions. *Id.* at 1520, *citing Croson* at 504. The relevant area in which to measure discrimination, then, is the local construction market, but that is not necessarily confined by jurisdictional boundaries. *Id.*

The court said that *Croson* supported its consideration of data from the Denver MSA because this data was sufficiently geographically targeted to the relevant market area. *Id.* The record revealed that over 80 percent of Denver Department of Public Works (“DPW”) construction and design contracts were awarded to firms located within the Denver MSA. *Id.* at 1520. To confine the permissible data to a governmental body’s strict geographical boundaries, the court found, would ignore the economic reality that contracts are often awarded to firms situated in adjacent areas. *Id.*

The court said that it is important that the pertinent data closely relate to the jurisdictional area of the municipality whose program is scrutinized, but here Denver’s contracting activity, insofar as construction work was concerned, was closely related to the Denver MSA. *Id.* at 1520. Therefore, the court held that data from the Denver MSA was adequately particularized for strict scrutiny purposes. *Id.*

B. Anecdotal Evidence. Concrete Works argued that the district court committed reversible error by considering such non-empirical evidence of discrimination as testimony from minority and women-owned firms delivered during public hearings, affidavits from MBEs and WBEs, summaries of telephone interviews that Denver officials conducted with MBEs and WBEs, and reports generated during Office of Affirmative Action compliance investigations. *Id.*

The court stated that selective anecdotal evidence about minority contractors’ experiences, without more, would not provide a strong basis in evidence to demonstrate public or private discrimination in Denver’s construction industry sufficient to pass constitutional muster under *Croson*. *Id.* at 1520.

Personal accounts of actual discrimination or the effects of discriminatory practices may, according to the court, however, vividly complement empirical evidence. *Id.* The court concluded that anecdotal evidence of a municipality’s institutional practices that exacerbate discriminatory market conditions are often particularly probative. *Id.* Therefore, the government may include anecdotal evidence in its evidentiary mosaic of past or present discrimination. *Id.*

The court pointed out that in the context of employment discrimination suits arising under Title VII of the Civil Rights Act of 1964, the Supreme Court has stated that anecdotal evidence may bring “cold numbers convincingly to life.” *Id.* at 1520, *quoting, International Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977). In fact, the court found, the majority in *Croson* impliedly endorsed the inclusion of personal accounts of discrimination. *Id.* at 1521. The court thus

deemed anecdotal evidence of public and private race and gender discrimination appropriate supplementary evidence in the strict scrutiny calculus. *Id.*

C. Post-Enactment Evidence. Concrete Works argued that the court should consider only evidence of discrimination that existed prior to Denver’s enactment of the Ordinance. *Id.* In *Croson*, the court noted that the Supreme Court underscored that a municipality “must identify [the] discrimination ... with some specificity *before* [it] may use race-conscious relief.” *Id.* at 1521, *quoting*, *Croson*, 488 U.S. at 504 (emphasis added). Absent any pre-enactment evidence of discrimination, the court said a municipality would be unable to satisfy *Croson*. *Id.*

However, the court did not read *Croson*’s evidentiary requirement as foreclosing the consideration of post-enactment evidence. *Id.* at 1521. Post-enactment evidence, if carefully scrutinized for its accuracy, the court found would often prove quite useful in evaluating the remedial effects or shortcomings of the race-conscious program. *Id.* This, the court noted was especially true in this case, where Denver first implemented a limited affirmative action program in 1983 and has since modified and expanded its scope. *Id.*

The court held the strong weight of authority endorses the admissibility of post-enactment evidence to determine whether an affirmative action contract program complies with *Croson*. *Id.* at 1521. The court agreed that post-enactment evidence may prove useful for a court’s determination of whether an ordinance’s deviation from the norm of equal treatment is necessary. *Id.* Thus, evidence of discrimination existing subsequent to enactment of the 1990 Ordinance, the court concluded was properly before it. *Id.*

D. Burdens of Production and Proof. The court stated that the Supreme Court in *Croson* struck down the City of Richmond’s minority set-aside program because the City failed to provide an adequate evidentiary showing of past or present discrimination. *Id.* at 1521, *citing*, *Croson*, 488 U.S. at 498–506. The court pointed out that because the Fourteenth Amendment only tolerates race-conscious programs that narrowly seek to remedy identified discrimination, the Supreme Court in *Croson* explained that state and local governments “must identify that discrimination ... with some specificity before they may use race-conscious relief.” *Id.*, *citing* *Croson*, at 504. The court said that the Supreme Court’s benchmark for judging the adequacy of the government’s factual predicate for affirmative action legislation was whether there exists a “*strong basis in evidence* for [the government’s] conclusion that remedial action was necessary.” *Id.*, *quoting*, *Croson*, at 500.

Although *Croson* places the burden of production on the municipality to demonstrate a “strong basis in evidence” that its race- and gender-conscious contract program aims to remedy specifically identified past or present discrimination, the court held the Fourteenth Amendment does not require a court to make an ultimate judicial finding of discrimination before a municipality may take affirmative steps to eradicate discrimination. *Id.* at 1521, *citing*, *Wygant*, 476 U.S. at 292 (O’Connor, J., concurring in part and concurring in the judgment). An affirmative action response to discrimination is sustainable against an equal protection challenge so long as it is predicated upon strong evidence of discrimination. *Id.* at 1522, *citing*, *Croson*, 488 U.S. at 504.

An inference of discrimination, the court found, may be made with empirical evidence that demonstrates “a significant statistical disparity between the number of qualified minority contractors ... and the number of such contractors actually engaged by the locality or the locality’s prime contractors.” *Id.* at 1522, *quoting, Croson* at 509 (plurality). The court concluded that it did not read *Croson* to require an attempt to craft a precise mathematical formula to assess the quantum of evidence that rises to the *Croson* “strong basis in evidence” benchmark. *Id.* That, the court stated, must be evaluated on a case-by-case basis. *Id.*

The court said that the adequacy of a municipality’s showing of discrimination must be evaluated in the context of the breadth of the remedial program advanced by the municipality. *Id.* at 1522, *citing, Croson* at 498. Ultimately, whether a strong basis in evidence of past or present discrimination exists, thereby establishing a compelling interest for the municipality to enact a race-conscious ordinance, the court found is a question of law. *Id.* Underlying that legal conclusion, however, the court noted are factual determinations about the accuracy and validity of a municipality’s evidentiary support for its program. *Id.*

Notwithstanding the burden of initial production that rests with the municipality, “[t]he ultimate burden [of proof] remains with [the challenging party] to demonstrate the unconstitutionality of an affirmative-action program.” *Id.* at 1522, *quoting, Wygant*, 476 U.S. at 277–78(plurality). Thus, the court stated that once Denver presented adequate statistical evidence of precisely defined discrimination in the Denver area construction market, it became incumbent upon Concrete Works either to establish that Denver’s evidence did not constitute strong evidence of such discrimination or that the remedial statute was not narrowly drawn. *Id.* at 1523. Absent such a showing by Concrete Works, the court said, summary judgment upholding Denver’s Ordinance would be appropriate. *Id.*

E. Evidentiary Predicate Underlying Denver’s Ordinance. The evidence of discrimination that Denver presents to demonstrate a compelling government interest in enacting the Ordinance consisted of three categories: (1) evidence of discrimination in city contracting from the mid–1970s to 1990; (2) data about MBE and WBE utilization in the overall Denver MSA construction market between 1977 and 1992; and (3) anecdotal evidence that included personal accounts by MBEs and WBEs who have experienced both public and private discrimination and testimony from city officials who describe institutional governmental practices that perpetuate public discrimination. *Id.* at 1523.

1. Discrimination in the Award of Public Contracts. The court considered the evidence that Denver presented to demonstrate underutilization of MBEs and WBEs in the award of city contracts from the mid 1970s to 1990. The court found that Denver offered persuasive pieces of evidence that, considered in the abstract, could give rise to an inference of race- and gender-based public discrimination on isolated public works projects. *Id.* at 1523. However, the court also found the record showed that MBE and WBE utilization on public contracts as a whole during this period was strong in comparison to the total number of MBEs and WBEs within the local construction industry. *Id.* at 1524. Denver offered a rebuttal to this more general evidence, but the court stated it was clear that the weight to be given both to the general evidence and to the specific evidence relating to individual contracts presented genuine disputes of material facts.

The court then engaged in an analysis of the factual record and an identification of the genuine material issues of fact arising from the parties' competing evidence.

(a) Federal Agency Reports of Discrimination in Denver. Denver submitted federal agency reports of discrimination in Denver public contract awards. *Id.* at 1524. The record contained a summary of a 1978 study by the United States General Accounting Office ("GAO"), which showed that between 1975 and 1977 minority businesses were significantly underrepresented in the performance of Denver public contracts that were financed in whole or in part by federal grants. *Id.*

Concrete Works argued that a material fact issue arose about the validity of this evidence because "the 1978 GAO Report was nothing more than a listing of the problems faced by all small firms, first starting out in business." *Id.* at 1524. The court pointed out, however, Concrete Works ignored the GAO Report's empirical data, which quantified the actual disparity between the utilization of minority contractors and their representation in the local construction industry. *Id.* In addition, the court noted that the GAO Report reflected the findings of an objective third party. *Id.* Because this data remained uncontested, notwithstanding Concrete Works' conclusory allegations to the contrary, the court found the 1978 GAO Report provided evidence to support Denver's showing of discrimination. *Id.*

Added to the GAO findings was a 1979 letter from the United States Department of Transportation ("US DOT") to the Mayor of the City of Denver, describing the US DOT Office of Civil Rights' study of Denver's discriminatory contracting practices at Stapleton International Airport. *Id.* at 1524. US DOT threatened to withhold additional federal funding for Stapleton because Denver had "denied minority contractors the benefits of, excluded them from, or otherwise discriminated against them concerning contracting opportunities at Stapleton," in violation of Title VI of the Civil Rights Act of 1964 and other federal laws. *Id.*

The court discussed the following data as reflected of the low level of MBE and WBE utilization on Stapleton contracts prior to Denver's adoption of an MBE and WBE goals program at Stapleton in 1981: for the years 1977 to 1980, respectively, MBE utilization was 0 percent, 3.8 percent, 0.7 percent, and 2.1 percent; data on WBE utilization was unknown for the years 1977 to 1979, and it was 0.05 percent for 1980. *Id.* at 1524.

The court stated that like its unconvincing attempt to discredit the GAO Report, Concrete Works presented no evidence to challenge the validity of US DOT's allegations. *Id.* Concrete Works, the court said, failed to introduce evidence refuting the substance of US DOT's information, attacking its methodology, or challenging the low utilization figures for MBEs at Stapleton before 1981. *Id.* at 1525. Thus, according to the court, Concrete Works failed to create a genuine issue of fact about the conclusions in the US DOT's report. *Id.* In sum, the court found the federal agency reports of discrimination in Denver's contract awards supported Denver's contention that race and gender discrimination existed prior to the enactment of the challenged Ordinance. *Id.*

(b) Denver's Reports of Discrimination. Denver pointed to evidence of public discrimination prior to 1983, the year that the first Denver ordinance was enacted. *Id.* at 1525. A 1979 DPW "Major Bond Projects Final Report," which reviewed MBE and WBE utilization on projects

funded by the 1972 and 1974 bond referenda and the 1975 and 1976 revenue bonds, the court said, showed strong evidence of underutilization of MBEs and WBEs. *Id.* Based on this Report's description of the approximately \$85 million in contract awards, there was 0 percent MBE and WBE utilization for professional design and construction management projects, and less than 1 percent utilization for construction. *Id.* The Report concluded that if MBEs and WBEs had been utilized in the same proportion as found in the construction industry, 5 percent of the contract dollars would have been awarded to MBEs and WBEs. *Id.*

To undermine this data, Concrete Works alleged that the DPW Report contained "no information about the number of minority or women owned firms that were used" on these bond projects. *Id.* at 1525. However, the court concluded the Report's description of MBE and WBE utilization in terms of contract dollars provided a more accurate depiction of total utilization than would the mere number of MBE and WBE firms participating in these projects. *Id.* Thus, the court said this line of attack by Concrete Works was unavailing. *Id.*

Concrete Works also advanced expert testimony that Denver's data demonstrated strong MBE and WBE utilization on the total DPW contracts awarded between 1978 and 1982. *Id.* Denver responded by pointing out that because federal and city affirmative action programs were in place from the mid-1970s to the present, this overall DPW data reflected the intended remedial effect on MBE and WBE utilization of these programs. *Id.* at 1526. Based on its contention that the overall DPW data was therefore "tainted" and distorted by these pre-existing affirmative action goals programs, Denver asked the court to focus instead on the data generated from specific public contract programs that were, for one reason or another, insulated from federal and local affirmative action goals programs, i.e. "non-goals public projects." *Id.*

Given that the same local construction industry performed both goals and non-goals public contracts, Denver argued that data generated on non-goals public projects offered a control group with which the court could compare MBE and WBE utilization on public contracts governed by a goals program and those insulated from such goal requirements. *Id.* Denver argued that the utilization of MBEs and WBEs on non-goals projects was the better test of whether there had been discrimination historically in Denver contracting practices. *Id.* at 1526.

DGS data. The first set of data from non-goals public projects that Denver identified were MBE and WBE disparity indices on Denver Department of General Services ("DGS") contracts, which represented one-third of all city construction funding and which, prior to the enactment of the 1990 Ordinance, were not subject to the goals program instituted in the earlier ordinances for DPW contracts. *Id.* at 1526. The DGS data, the court found, revealed extremely low MBE and WBE utilization. *Id.* For MBEs, the DGS data showed a .14 disparity index in 1989 and a .19 disparity index in 1990—evidence the court stated was of significant underutilization. *Id.* For WBEs, the disparity index was .47 in 1989 and 1.36 in 1990—the latter, the court said showed greater than full participation and the former demonstrating underutilization. *Id.*

The court noted that it did not have the benefit of relevant authority with which to compare Denver's disparity indices for WBEs. Nevertheless, the court concluded Denver's data indicated significant WBE underutilization such that the Ordinance's gender classification arose from

“reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions.” *Id.* at 1526, n.19, quoting, *Mississippi Univ. of Women*, 458 U.S. at 726.

DPW data. The second set of data presented by Denver, the court said, reflected distinct MBE and WBE underutilization on non-goals public projects consisting of separate DPW projects on which no goals program was imposed. *Id.* at 1527. Concrete Works, according to the court, attempted to trivialize the significance of this data by contending that the projects, in dollar terms, reflected a small fraction of the total Denver MSA construction market. *Id.* But, the court noted that Concrete Works missed the point because the data was not intended to reflect conditions in the overall market. *Id.* Instead the data dealt solely with the utilization levels for city-funded projects on which no MBE and WBE goals were imposed. *Id.* The court found that it was particularly telling that the disparity index significantly deteriorated on projects for which the city did not establish minority and gender participation goals. *Id.* Insofar as Concrete Works did not attack the data on any other grounds, the court considered it was persuasive evidence of underlying discrimination in the Denver construction market. *Id.*

Empirical data. The third evidentiary item supporting Denver’s contention that public discrimination existed prior to enactment of the challenged Ordinance was empirical data from 1989, generated after Denver modified its race- and gender-conscious program. *Id.* at 1527. In the wake of *Croson*, Denver amended its program by eliminating the minimum annual goals program for MBE and WBE participation and by requiring MBEs and WBEs to demonstrate that they had suffered from past discrimination. *Id.*

This modification, the court said, resulted in a noticeable decline in the share of DPW construction dollars awarded to MBEs. *Id.* From 1985 to 1988 (prior to the 1989 modification of Denver’s program), DPW construction dollars awarded to MBEs ranged from 17 to nearly 20 percent of total dollars. *Id.* However, the court noted the figure dropped to 10.4 percent in 1989, after the program modifications took effect. *Id.* at 1527. Like the DGS and non-goals DPW projects, this 1989 data, the court concluded, further supported the inference that MBE and WBE utilization significantly declined after deletion of a goals program or relaxation of the minimum MBE and WBE utilization goal requirements. *Id.*

Nonetheless, the court stated it must consider Denver’s empirical support for its contention that public discrimination existed prior to the enactment of the Ordinance in the context of the overall DPW data, which showed consistently strong MBE and WBE utilization from 1978 to the present. *Id.* at 1528. The court noted that although Denver’s argument may prove persuasive at trial that the non-goals projects were the most reliable indicia of discrimination, the record on summary judgment contained two sets of data, one that gave rise to an inference of discrimination and the other that undermined such an inference. *Id.* This discrepancy, the court found, highlighted why summary judgment was inappropriate on this record. *Id.*

Availability data. The court concluded that uncertainty about the capacity of MBEs and WBEs in the local market to compete for, and perform, the public projects for which there was underutilization of MBEs and WBEs further highlighted why the record was not ripe for summary judgment. *Id.* at 1528. Although Denver’s data used as its baseline the percentage of firms in the local construction market that were MBEs and WBEs, Concrete Works argued that a

more accurate indicator would consider the capacity of local MBEs and WBEs to undertake the work. *Id.* The court said that uncertainty about the capacity of MBEs and WBEs in the local market to compete for, and perform, the public projects for which there was underutilization of MBEs and WBEs further highlighted why the record was not ripe for summary judgment. *Id.*

The court agreed with the other circuits which had at that time interpreted *Croson* impliedly to permit a municipality to rely, as did Denver, on general data reflecting the number of MBEs and WBEs in the marketplace to defeat the challenger's summary judgment motion or request for a preliminary injunction. *Id.* at 1527 citing, *Contractors Ass'n*, 6 F.3d at 1005 (comparing MBE participation in city contracts with the "percentage of [MBE] availability or composition in the 'population' of Philadelphia area construction firms"); *Associated Gen. Contractors*, 950 F.2d at 1414 (relying on availability data to conclude that city presented "detailed findings of prior discrimination"); *Cone Corp.*, 908 F.2d at 916 (statistical disparity between "the total percentage of minorities involved in construction and the work going to minorities" shows that "the racial classification in the County plan [was] necessary").

But, the court found Concrete Works had identified a legitimate factual dispute about the accuracy of Denver's data and questioned whether Denver's reliance on the percentage of MBEs and WBEs available in the marketplace overstated "the ability of MBEs or WBEs to conduct business relative to the industry as a whole because M/WBEs tend to be smaller and less experienced than nonminority-owned firms." *Id.* at 1528. In other words, the court said, a disparity index calculated on the basis of the absolute number of MBEs in the local market may show greater underutilization than does data that takes into consideration the size of MBEs and WBEs. *Id.*

The court stated that it was not implying that availability was not an appropriate barometer to calculate MBE and WBE utilization, nor did it cast aspersions on data that simply used raw numbers of MBEs and WBEs compared to numbers of total firms in the market. *Id.* The court concluded, however, once credible information about the size or capacity of the firms was introduced in the record, it became a factor that the court should consider. *Id.*

Denver presented several responses. *Id.* at 1528. It argued that a construction firm's precise "capacity" at a given moment in time belied quantification due to the industry's highly elastic nature. *Id.* DPW contracts represented less than 4 percent of total MBE revenues and less than 2 percent of WBE revenues in 1989, thereby the court said, strongly implied that MBE and WBE participation in DPW contracts did not render these firms incapable of concurrently undertaking additional work. *Id.* at 1529. Denver presented evidence that most MBEs and WBEs had never participated in city contracts, "although almost all firms contacted indicated that they were interested in City work." *Id.* Of those MBEs and WBEs who have received work from DPW, available data showed that less than 10 percent of their total revenues were from DPW contracts. *Id.*

The court held all of the back and forth arguments highlighted that there were genuine and material factual disputes in the record, and that such disputes about the accuracy of Denver's data should not be resolved at summary judgment. *Id.* at 1529.

(c) Evidence of Private Discrimination in the Denver MSA. In recognition that a municipality has a compelling interest in taking affirmative steps to remedy both public and private discrimination specifically identified in its area, the court also considered data about conditions in the overall Denver MSA construction industry between 1977 and 1992. *Id.* at 1529. The court stated that given DPW and DGS construction contracts represented approximately 2 percent of all construction in the Denver MSA, Denver MSA industry data sharpened the picture of local market conditions for MBEs and WBEs. *Id.*

According to Denver’s expert affidavits, the MBE disparity index in the Denver MSA was .44 in 1977, .26 in 1982, and .43 in 1990. *Id.* The corresponding WBE disparity indices were .46 in 1977, .30 in 1982, and .42 in 1989. *Id.* This pre-enactment evidence of the overall Denver MSA construction market—i.e. combined public and private sector utilization of MBEs and WBEs—the court found gave rise to an inference that local prime contractors discriminated on the basis of race and gender. *Id.*

The court pointed out that rather than offering any evidence in rebuttal, Concrete Works merely stated that this empirical evidence did not prove that the Denver government itself discriminated against MBEs and WBEs. *Id.* at 1529. Concrete Works asked the court to define the appropriate market as limited to contracts with the City and County of Denver. *Id.* But, the court said that such a request ignored the lesson of *Croson* that a municipality may design programs to prevent tax dollars from “financ[ing] the evil of private prejudice.” *Id.*, quoting, *Croson*, 488 U.S. at 492.

The court found that what the Denver MSA data did not indicate, however, was whether there was any linkage between Denver’s award of public contracts and the Denver MSA evidence of industry-wide discrimination. *Id.* at 1529. The court said it could not tell whether Denver indirectly contributed to private discrimination by awarding public contracts to firms that in turn discriminated against MBE and/or WBE subcontractors in other private portions of their business or whether the private discrimination was practiced by firms who did not receive any public contracts. *Id.*

Neither *Croson* nor its progeny, the court pointed out, clearly stated whether private discrimination that was in no way funded with public tax dollars could, by itself, provide the requisite strong basis in evidence necessary to justify a municipality’s affirmative action program. *Id.* The court said a plurality in *Croson* suggested that remedial measures could be justified upon a municipality’s showing that “it had essentially become a ‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry.” *Id.* at 1529, quoting, *Croson*, 488 U.S. at 492.

The court concluded that *Croson* did not require the municipality to identify an exact linkage between its award of public contracts and private discrimination, but such evidence would at least enhance the municipality’s factual predicate for a race- and gender-conscious program. *Id.* at 1529. The record before the court did not explain the Denver government’s role in contributing to the underutilization of MBEs and WBEs in the private construction market in the Denver MSA, and the court stated that this may be a fruitful issue to explore at trial. *Id.* at 1530.

(d). Anecdotal Evidence. The record, according to the court, contained numerous personal accounts by MBEs and WBEs, as well as prime contractors and city officials, describing discriminatory practices in the Denver construction industry. *Id.* at 1530. Such anecdotal evidence was collected during public hearings in 1983 and 1988, interviews, the submission of affidavits, and case studies performed by a consulting firm that Denver employed to investigate public and private market conditions in 1990, prior to the enactment of the 1990 Ordinance. *Id.*

The court indicated again that anecdotal evidence about minority- and women-owned contractors' experiences could bolster empirical data that gave rise to an inference of discrimination. *Id.* at 1530. While a factfinder, the court stated, should accord less weight to personal accounts of discrimination that reflect isolated incidents, anecdotal evidence of a municipality's institutional practices carry more weight due to the systemic impact that such institutional practices have on market conditions. *Id.*

The court noted that in addition to the individual accounts of discrimination that MBEs and WBEs had encountered in the Denver MSA, City affirmative action officials explained that change orders offered a convenient means of skirting project goals by permitting what would otherwise be a new construction project (and thus subject to the MBE and WBE participation requirements) to be characterized as an extension of an existing project and thus within DGS's bailiwick. *Id.* at 1530. An assistant city attorney, the court said, also revealed that projects have been labelled "remodeling," as opposed to "reconstruction," because the former fall within DGS, and thus were not subject to MBE and WBE goals prior to the enactment of the 1990 Ordinance. *Id.* at 1530. The court concluded over the object of Concrete Works that this anecdotal evidence could be considered in conjunction with Denver's statistical analysis. *Id.*

2. Summary. The court summarized its ruling by indicating Denver had compiled substantial evidence to support its contention that the Ordinance was enacted to remedy past race- and gender-based discrimination. *Id.* at 1530. The court found in contrast to the predicate facts on which Richmond unsuccessfully relied in *Croson*, that Denver's evidence of discrimination both in the award of public contracts and within the overall Denver MSA was particularized and geographically targeted. *Id.* The court emphasized that Denver need not negate all evidence of non-discrimination, nor was it Denver's burden to prove judicially that discrimination did exist. *Id.* Rather, the court held, Denver need only come forward with a "strong basis in evidence" that its Ordinance was a narrowly-tailored response to specifically identified discrimination. *Id.* Then, the court said it became Concrete Works' burden to show that there was no such strong basis in evidence to support Denver's affirmative action legislation. *Id.*

The court also stated that Concrete Works had specifically identified potential flaws in Denver's data and had put forth evidence that Denver's data failed to support an inference of either public or private discrimination. *Id.* at 1530. With respect to Denver's evidence of public discrimination, for example, the court found overall DPW data demonstrated strong MBE and WBE utilization, yet data for isolated DPW projects and DGS contract awards suggested to the contrary. *Id.* The parties offered conflicting rationales for this disparate data, and the court concluded the record did not provide a clear explanation. *Id.* In addition, the court said that Concrete Works presented a legitimate contention that Denver's disparity indices failed to consider the relatively small size

of MBEs and WBEs, which the court noted further impeded its ability to draw conclusions from the existing record. *Id.* at 1531.

Significantly, the court pointed out that because Concrete Works did not challenge the district court's conclusion with respect to the second prong of Croson's strict scrutiny standard—i.e. that the Ordinance was narrowly tailored to remedy past and present discrimination—the court need not and did not address this issue. *Id.* at 1531.

On remand, the court stated the parties should be permitted to develop a factual record to support their competing interpretations of the empirical data. *Id.* at 1531. Accordingly, the court reversed the district court ruling granting summary judgment and remanded the case for further proceedings. See *Concrete Works of Colorado v. City and County of Denver*, 321 F. 3d 950 (10th Cir. 2003).

15. Coral Construction Co. v. King County, 941 F.2d 910 (9th Cir. 1991)

In *Coral Construction Co. v. King County*, 941 F.2d 910 (9th Cir. 1991), the Ninth Circuit examined the constitutionality of King County, Washington's minority and women business set-aside program in light of the standard set forth in *City of Richmond v. J.A. Croson Co.* The court held that although the County presented ample anecdotal evidence of disparate treatment of MBE contractors and subcontractors, the total absence of pre-program enactment statistical evidence was problematic to the compelling government interest component of the strict scrutiny analysis. The court remanded to the district court for a determination of whether the post-program enactment studies constituted a sufficient compelling government interest. Per the narrow tailoring prong of the strict scrutiny test, the court found that although the program included race-neutral alternative measures and was flexible (*i.e.*, included a waiver provision), the over breadth of the program to include MBEs outside of King County was fatal to the narrow tailoring analysis.

The court also remanded on the issue of whether the plaintiffs were entitled to damages under 42 U.S.C. §§ 1981 and 1983, and in particular to determine whether evidence of causation existed. With respect to the WBE program, the court held the plaintiff had standing to challenge the program, and applying the intermediate scrutiny analysis, held the WBE program survived the facial challenge.

In finding the absence of any statistical data in support of the County's MBE Program, the court made it clear that statistical analyses have served and will continue to serve an important role in cases in which the existence of discrimination is a disputed issue. 941 F.2d at 918. The court noted that it has repeatedly approved the use of statistical proof to establish a prima facie case of discrimination. *Id.* The court pointed out that the U.S. Supreme Court in *Croson* held that where "gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination." *Id.* at 918, quoting *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08, and *Croson*, 488 U.S. at 501.

The court points out that statistical evidence may not fully account for the complex factors and motivations guiding employment decisions, many of which may be entirely race-neutral. *Id.* at

919. The court noted that the record contained a plethora of anecdotal evidence, but that anecdotal evidence, standing alone, suffers the same flaws as statistical evidence. *Id.* at 919. While anecdotal evidence may suffice to prove individual claims of discrimination, rarely, according to the court, if ever, can such evidence show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan. *Id.*

Nonetheless, the court held that the combination of convincing anecdotal and statistical evidence is potent. *Id.* at 919. The court pointed out that individuals who testified about their personal experiences brought the cold numbers of statistics “convincingly to life.” *Id.* at 919, quoting *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 339 (1977). The court also pointed out that the Eleventh Circuit Court of Appeals, in passing upon a minority set aside program similar to the one in King County, concluded that the testimony regarding complaints of discrimination combined with the gross statistical disparities uncovered by the County studies provided more than enough evidence on the question of prior discrimination and need for racial classification to justify the denial of a Motion for Summary Judgment. *Id.* at 919, citing *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 916 (11th Cir. 1990).

The court found that the MBE Program of the County could not stand without a proper statistical foundation. *Id.* at 919. The court addressed whether post-enactment studies done by the County of a statistical foundation could be considered by the court in connection with determining the validity of the County MBE Program. The court held that a municipality must have *some* concrete evidence of discrimination in a particular industry before it may adopt a remedial program. *Id.* at 920. However, the court said this requirement of *some* evidence does not mean that a program will be automatically struck down if the evidence before the municipality at the time of enactment does not completely fulfill both prongs of the strict scrutiny test. *Id.* Rather, the court held, the factual predicate for the program should be evaluated based upon all evidence presented to the district court, whether such evidence was adduced before or after enactment of the MBE Program. *Id.* Therefore, the court adopted a rule that a municipality should have before it some evidence of discrimination before adopting a race-conscious program, while allowing post-adoption evidence to be considered in passing on the constitutionality of the program. *Id.*

The court, therefore, remanded the case to the district court for determination of whether the consultant studies that were performed after the enactment of the MBE Program could provide an adequate factual justification to establish a “propelling government interest” for King County’s adopting the MBE Program. *Id.* at 922.

The court also found that *Croson* does not require a showing of active discrimination by the enacting agency, and that passive participation, such as the infusion of tax dollars into a discriminatory industry, suffices. *Id.* at 922, citing *Croson*, 488 U.S. at 492. The court pointed out that the Supreme Court in *Croson* concluded that if the City had evidence before it, that non-minority contractors were systematically excluding minority businesses from subcontracting opportunities, it could take action to end the discriminatory exclusion. *Id.* at 922. The court points out that if the record ultimately supported a finding of systemic discrimination, the County adequately limited its program to those businesses that receive tax dollars, and the program imposed obligations upon only those businesses which voluntarily sought King County tax dollars by contracting with the County. *Id.*

The court addressed several factors in terms of the narrowly tailored analysis, and found that first, an MBE program should be instituted either after, or in conjunction with, race-neutral means of increasing minority business participation and public contracting. *Id.* at 922, citing Crosby, 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.

Recent District Court Decisions

16. United States v. Taylor, 232 F.Supp. 3d 741 (W.D. Penn. 2017)

In a criminal case that is noteworthy because it involved a challenge to the Federal DBE Program, a federal district court in the Western District of Pennsylvania upheld the Indictment by the United States against Defendant Taylor who had been indicted on multiple counts arising

out of a scheme to defraud the United States Department of Transportation's Disadvantaged Business Enterprise Program ("Federal DBE Program"). *United States v. Taylor*, 232 F.Supp. 3d 741, 743 (W.D. Penn. 2017). Also, the court in denying the motion to dismiss the Indictment upheld the federal regulations in issue against a challenge to the Federal DBE Program.

Procedural and case history. This was a white collar criminal case arising from a fraud on the Federal DBE Program by Century Steel Erectors ("CSE") and WMCC, Inc., and their respective principals. In this case, the Government charged one of the owners of CSE, Defendant Donald Taylor, with fourteen separate criminal offenses. The Government asserted that Defendant and CSE used WMCC, Inc., a certified DBE as a "front" to obtain 13 federally funded highway construction contracts requiring DBE status, and that CSE performed the work on the jobs while it was represented to agencies and contractors that WMCC would be performing the work. *Id.* at 743.

The Government contended that WMCC did not perform a "commercially useful function" on the jobs as the DBE regulations require and that CSE personnel did the actual work concealing from general contractors and government entities that CSE and its personnel were doing the work. *Id.* WMCC's principal was paid a relatively nominal "fixed-fee" for permitting use of WMCC's name on each of these subcontracts. *Id.* at 744.

Defendant's contentions. This case concerned *inter alia* a motion to dismiss the Indictment. Defendant argued that Count One must be dismissed because he had been mischarged under the "defraud clause" of 18 U.S.C. § 371, in that the allegations did not support a charge that he defrauded the United States. *Id.* at 745. He contended that the DBE program is administered through state and county entities, such that he could not have defrauded the United States, which he argued merely provides funding to the states to administer the DBE program. *Id.*

Defendant also argued that the Indictment must be dismissed because the underlying federal regulations, 49 C.F.R. § 26.55(c), that support the counts against him were void for vagueness as applied to the facts at issue. *Id.* More specifically, he challenged the definition of "commercially useful function" set forth in the regulations and also contended that Congress improperly delegated its duties to the Executive branch in promulgating the federal regulations at issue. *Id.* at 745.

Federal government position. The Government argued that the charge at Count One was supported by the allegations in the Indictment which made clear that the charge was for defrauding the United States' Federal DBE Program rather than the state and county entities. *Id.* The Government also argued that the challenged federal regulations are neither unconstitutionally vague nor were they promulgated in violation of the principles of separation of powers. *Id.*

Material facts in Indictment. The court pointed out that the Pennsylvania Department of Transportation ("PennDOT") and the Pennsylvania Turnpike Commission ("PTC") receive federal funds from FHWA for federally funded highway projects and, as a result, are required to establish goals and objectives in administering the DBE Program. *Id.* at 745. State and local authorities, the court stated, are also delegated the responsibility to administer the program by,

among other things, certifying entities as DBEs; tracking the usage of DBEs on federally funded highway projects through the award of credits to general contractors on specific projects; and reporting compliance with the participation goals to the federal authorities. *Id.* at 745-746.

WMCC received 13 federally-funded subcontracts totaling approximately \$2.34 million under PennDOT's and PTC's DBE program and WMCC was paid a total of \$1.89 million." *Id.* at 746 . These subcontracts were between WMCC and a general contractor, and required WMCC to furnish and erect steel and/or precast concrete on federally funded Pennsylvania highway projects. *Id.* Under PennDOT's program, the entire amount of WMCC's subcontract with the general contractor, including the cost of materials and labor, was counted toward the general contractor's DBE goal because WMCC was certified as a DBE and "ostensibly performed a commercially useful function in connection with the subcontract." *Id.*

The stated purpose of the conspiracy was for Defendant and his co-conspirators to enrich themselves by using WMCC as a "front" company to fraudulently obtain the profits on DBE subcontracts slotted for legitimate DBE's and to increase CSE profits by marketing CSE to general contractors as a "one-stop shop," which could not only provide the concrete or steel beams, but also erect the beams and provide the general contractor with DBE credits. *Id.* at 746 .

As a result of these efforts, the court said the "conspirators" caused the general contractors to pay WMCC for DBE subcontracts and were deceived into crediting expenditures toward DBE participation goals, although they were not eligible for such credits because WMCC was not performing a commercially useful function on the jobs. *Id.* at 747. CSE also obtained profits from DBE subcontracts that it was not entitled to receive as it was not a DBE and thereby precluded legitimate DBE's from obtaining such contracts. *Id.*

Motion to Dismiss—challenges to Federal DBE Regulations. Defendant sought dismissal of the Indictment by contesting the propriety of the underlying federal regulations in several different respects, including claiming that 49 C.F.R. § 26.55(c) was "void for vagueness" because the phrase "commercially useful function" and other phrases therein were not sufficiently defined. *Id.* at 754. Defendant also presented a non-delegation challenge to the regulatory scheme involving the DBE Program. *Id.* The Government countered that dismissal of the Indictment was not justified under these theories and that the challenges to the regulations should be overruled. The court agreed with the Government's position and denied the motion to dismiss. *Id.* at 754.

The court disagreed with Defendant's assessment that the challenged DBE regulations are so vague that people of ordinary intelligence cannot ascertain the meaning of same, including the phrases "commercially useful function;" "industry practices;" and "other relevant factors." *Id.* at 755, *citing*, 49 C.F.R. § 26.55(c). The court noted that other federal courts have rejected vagueness and related challenges to the federal DBE regulations in both civil, *see Midwest Fence Corp. v. United States Dep't of Transp.*, 840 F.3d 932 (7th Cir. 2016) (rejecting vagueness challenge to 49 C.F.R. § 26.53(a) and "good faith efforts" language), and criminal matters, *United States v. Maxwell*, 579 F.3d 1282, at 1302 (11th Cir. 2009).

With respect to the alleged vagueness of the phrase "commercially useful function," the court found the regulations both specifically describes the types of activities that: (1) fall within the

definition of that phrase in § 26.55(c)(1); and, (2) are beyond the scope of the definition of that phrase in § 26.55(c)(2). *Id.* at 755, *citing*, 49 C.F.R. §§ 26.55(c)(1)–(2). The phrases “industry practices” and “other relevant factors” are undefined, the court said, but “an undefined word or phrase does not render a statute void when a court could ascertain the term’s meaning by reading it in context.” *Id.* at 756.

The context, according to the court, is that these federal DBE regulations are used in a comprehensive regulatory scheme by the DOT and FHWA to ensure participation of DBEs in federally funded highway construction projects. *Id.* at 756. These particular phrases, the court pointed out, are also not the most prominently featured in the regulations as they are utilized in a sentence describing how to determine if the activities of a DBE constitute a “commercially useful function.” *Id.*, *citing*, 49 C.F.R. § 26.55(c).

While Defendant suggested that the language of these undefined phrases was overbroad, the court held it is necessarily limited by § 26.55(c)(2), expressly stating that “[a] DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation.” *Id.* at 756, *quoting*, 49 C.F.R. § 26.55(c).

The district court in this case also found persuasive the reasoning of both the United States District Court for the Southern District of Florida and the United States Court of Appeals for the Eleventh Circuit, construing the federal DBE regulations in *United States v. Maxwell*. *Id.* at 756. The court noted that in *Maxwell*, the defendant argued in a post-trial motion that § 26.55(c) was “ambiguous” and the evidence presented at trial showing that he violated this regulation could not support his convictions for various mail and wire fraud offenses. *Id.* at 756. The trial court disagreed, holding that:

the rules involving which entities must do the DBE/CSBE work are not ambiguous, or susceptible to different but equally plausible interpretations. Rather, the rules clearly state that a DBE [...] is required to do its own work, which includes managing, supervising and performing the work involved.... And, under the federal program, it is clear that the DBE is also required to negotiate, order, pay for, and install its own materials.

Id. at 756, *quoting*, *United States v. Maxwell*, 579 F.3d 1282, 1302 (11th Cir. 2009). The defendant in *Maxwell*, the court said, made this same argument on appeal to the Eleventh Circuit, which soundly rejected it, explaining that:

[b]oth the County and federal regulations explicitly say that a CSBE or DBE is required to perform a commercially useful function. Both regulatory schemes define a commercially useful function as being responsible for the execution of the contract and actually performing, managing, and supervising the work involved. And the DBE regulations make clear that a DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation. 49 C.F.R. § 26.55(c)(2). There is no obvious ambiguity about whether a CSBE or DBE subcontractor performs a commercially useful function when the job is managed by the primary contractor, the work is performed by the employees of

the primary contractor, the primary contractor does all of the negotiations, evaluations, and payments for the necessary materials, and the subcontractor does nothing more than provide a minimal amount of labor and serve as a signatory on two-party checks. In short, no matter how these regulations are read, the jury could conclude that what FLP did was not the performance of a “commercially useful function.”

Id. at 756, quoting, *United States v. Maxwell*, 579 F.3d 1282, 1302 (11th Cir. 2009).

Thus, the Western District of Pennsylvania federal district court in this case concluded the Eleventh Circuit in *Maxwell* found that the federal regulations were sufficient in the context of a scheme similar to that charged against Defendant Taylor in this case: WMCC was “fronted” as the DBE, receiving a fixed fee for passing through funds to CSE, which utilized its personnel to perform virtually all of the work under the subcontracts. *Id.* at 757.

Federal DBE regulations are authorized by Congress and the Federal DBE Program has been upheld by the courts. The court stated Defendant’s final argument to dismiss the charges relied upon his unsupported claims that the U.S. DOT lacked the authority to promulgate the DBE regulations and that it exceeded its authority in doing so. *Id.* at 757. The court found that the Government’s exhaustive summary of the legislative history and executive rulemaking that has taken place with respect to the relevant statutory provisions and regulations suffices to demonstrate that the federal DBE regulations were made under the broad grant of rights authorized by Congressional statutes. *Id.*, citing, 49 U.S.C. § 322(a) (“The Secretary of Transportation may prescribe regulations to carry out the duties and powers of the Secretary. An officer of the Department of Transportation may prescribe regulations to carry out the duties and powers of the officer.”); 23 U.S.C. § 304 (The Secretary of Transportation “should assist, insofar as feasible, small business enterprises in obtaining contracts in connection with the prosecution of the highway system.”); 23 U.S.C. § 315 (“[Subject to certain exceptions related to tribal lands and national forests], the Secretary is authorized to prescribe and promulgate all needful rules and regulations for the carrying out of the provisions of this Title.”).

Also, significantly, the court pointed out that the Federal DBE Program has been upheld in various contexts, “even surviving strict scrutiny review,” with courts holding that the program is narrowly tailored to further compelling governmental interests. *Id.* at 757, citing, *Midwest Fence Corp.*, 840 F.3d at 942 (citing *Western States Paving Co. v. Washington State Dep’t of Transportation*, 407 F.3d 983, 993 (9th Cir. 2005); *Sherbrooke Turf, Inc. v. Minnesota Dep’t of Transportation*, 345 F.3d 964, 973 (8th Cir. 2003); *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1155 (10th Cir. 2000)).

In light of this authority as to the validity of the federal regulations and the Federal DBE Program, the Western District of Pennsylvania federal district court in this case held that Defendant failed to meet his burden to demonstrate that dismissal of the Indictment was warranted. *Id.*

Conclusion. The court denied the Defendant’s motion to dismiss the Indictment. The Defendant subsequently pleaded guilty. Recently on March 13, 2018, the court issued the final Judgment

sentencing the Defendant to Probation for 3 years; ordered Restitution in the amount of \$85,221.21; and a \$30,000 fine. The case also was terminated on March 13, 2018.

17. Kossman Contracting Co., Inc. v. City of Houston, 2016 WL 1104363 (S.D. Tex. 2016).

Plaintiff Kossman is a company engaged in the business of providing erosion control services and is majority owned by a white male. 2016 WL 1104363 at *1. Kossman brought this action as an equal protection challenge to the City of Houston’s Minority and Women Owned Business Enterprise (“MWBE”) program. *Id.* The MWBE program that is challenged has been in effect since 2013 and sets a 34 percent MWBE goal for construction projects. *Id.* Houston set this goal based on a disparity study issued in 2012. *Id.* The study analyzed the status of minority-owned and women-owned business enterprises in the geographic and product markets of Houston’s construction contracts. *Id.*

Kossman alleges that the MWBE program is unconstitutional on the ground that it denies non-MWBEs equal protection of the law, and asserts that it has lost business as a result of the MWBE program because prime contractors are unwilling to subcontract work to a non-MWBE firm like Kossman. *Id.* at *1. Kossman filed a motion for summary judgment; Houston filed a motion to exclude the testimony of Kossman’s expert; and Houston filed a motion for summary judgment. *Id.*

The district court referred these motions to the Magistrate Judge. The Magistrate Judge, on February 17, 2016, issued its Memorandum & Recommendation to the district court in which it found that Houston’s motion to exclude Kossman’s expert should be granted because the expert articulated no method and had no training in statistics or economics that would allow him to comment on the validity of the disparity study. *Id.* at *1 The Magistrate Judge also found that the MWBE program was constitutional under strict scrutiny, except with respect to the inclusion of Native-American-owned businesses. *Id.* The Magistrate Judge found there was insufficient evidence to establish a need for remedial action for businesses owned by Native Americans, but found there was sufficient evidence to justify remedial action and inclusion of other racial and ethnic minorities and women-owned businesses. *Id.*

After the Magistrate Judge issued its Memorandum & Recommendation, Kossman filed objections, which the district court subsequently in its order adopting Memorandum & Recommendation, decided on March 22, 2016, affirmed and adopted the Memorandum & Recommendation of the magistrate judge and overruled the objections by Kossman. *Id.* at *2.

District court order adopting Memorandum & Recommendation of Magistrate Judge.

Dun & Bradstreet underlying data properly withheld and Kossman’s proposed expert properly excluded. The district court first rejected Kossman’s objection that the City of Houston improperly withheld the Dun & Bradstreet data that was utilized in the disparity study. This ruling was in connection with the district court’s affirming the decision of the Magistrate Judge granting the motion of Houston to exclude the testimony of Kossman’s proposed expert. Kossman had conceded that the Magistrate Judge correctly determined that Kossman’s proposed

expert articulated no method and relied on untested hypotheses. *Id.* at *2. Kossman also acknowledged that the expert was unable to produce data to confront the disparity study. *Id.*

Kossman had alleged that Houston withheld the underlying data from Dun & Bradstreet. The court found that under the contractual agreement between Houston and its consultant, the consultant for Houston had a licensing agreement with Dun & Bradstreet that prohibited it from providing the Dun & Bradstreet data to any third-party. *Id.* at *2. In addition, the court agreed with Houston that Kossman would not be able to offer admissible analysis of the Dun & Bradstreet data, even if it had access to the data. *Id.* As the Magistrate Judge pointed out, the court found Kossman's expert had no training in statistics or economics, and thus would not be qualified to interpret the Dun & Bradstreet data or challenge the disparity study's methods. *Id.* Therefore, the court affirmed the grant of Houston's motion to exclude Kossman's expert.

Dun & Bradstreet data is reliable and accepted by courts; bidding data rejected as problematic. The court rejected Kossman's argument that the disparity study was based on insufficient, unverified information furnished by others, and rejected Kossman's argument that bidding data is a superior measure of determining availability. *Id.* at *3.

The district court held that because the disparity study consultant did not collect the data, but instead utilized data that Dun & Bradstreet had collected, the consultant could not guarantee the information it relied on in creating the study and recommendations. *Id.* at *3. The consultant's role was to analyze that data and make recommendations based on that analysis, and it had no reason to doubt the authenticity or accuracy of the Dun & Bradstreet data, nor had Kossman presented any evidence that would call that data into question. *Id.* As Houston pointed out, Dun & Bradstreet data is extremely reliable, is frequently used in disparity studies, and has been consistently accepted by courts throughout the country. *Id.*

Kossman presented no evidence indicating that bidding data is a comparably more accurate indicator of availability than the Dun & Bradstreet data, but rather Kossman relied on pure argument. *Id.* at *3. The court agreed with the Magistrate Judge that bidding data is inherently problematic because it reflects only those firms actually solicited for bids. *Id.* Therefore, the court found the bidding data would fail to identify those firms that were not solicited for bids due to discrimination. *Id.*

The anecdotal evidence is valid and reliable. The district court rejected Kossman's argument that the study improperly relied on anecdotal evidence, in that the evidence was unreliable and unverified. *Id.* at *3. The district court held that anecdotal evidence is a valid supplement to the statistical study. *Id.* The MWBE program is supported by both statistical and anecdotal evidence, and anecdotal evidence provides a valuable narrative perspective that statistics alone cannot provide. *Id.*

The district court also found that Houston was not required to independently verify the anecdotes. *Id.* at *3. Kossman, the district court concluded, could have presented contrary evidence, but it did not. *Id.* The district court cited other courts for the proposition that the combination of anecdotal and statistical evidence is potent, and that anecdotal evidence is nothing more than a witness's narrative of an incident told from the witness's perspective and

including the witness's perceptions. *Id.* Also, the court held the city was not required to present corroborating evidence, and the plaintiff was free to present its own witness to either refute the incident described by the city's witnesses or to relate their own perceptions on discrimination in the construction industry. *Id.*

The data relied upon by the study was not stale. The court rejected Kossman's argument that the study relied on data that is too old and no longer relevant. *Id.* at *4. The court found that the data was not stale and that the study used the most current available data at the time of the study, including Census Bureau data (2006-2008) and Federal Reserve data (1993, 1998 and 2003), and the study performed regression analyses on the data. *Id.*

Moreover, Kossman presented no evidence to suggest that Houston's consultant could have accessed more recent data or that the consultant would have reached different conclusions with more recent data. *Id.*

The Houston MWBE program is narrowly tailored. The district court agreed with the Magistrate Judge that the study provided substantial evidence that Houston engaged in race-neutral alternatives, which were insufficient to eliminate disparities, and that despite race-neutral alternatives in place in Houston, adverse disparities for MWBEs were consistently observed. *Id.* at *4. Therefore, the court found there was strong evidence that a remedial program was necessary to address discrimination against MWBEs. *Id.* Moreover, Houston was not required to exhaust every possible race-neutral alternative before instituting the MWBE program. *Id.*

The district court also found that the MWBE program did not place an undue burden on Kossman or similarly situated companies. *Id.* at *4. Under the MWBE program, a prime contractor may substitute a small business enterprise like Kossman for an MWBE on a race and gender-neutral basis for up to 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 non-minority women. *Id.* at 55-56. The MJ found, however, the evidence of significant statistical adverse disparity in the utilization of Hispanic-owned businesses in the unremediated, private sector met Houston's *prima facie* burden of producing a strong evidentiary basis for the continued inclusion of businesses owned by Hispanic Americans. *Id.* at 56. The MJ said the difference between the private sector and Houston's construction contracting was especially notable because the utilization of Hispanic-owned businesses by Houston has benefitted from Houston's remedial program for many years. *Id.* Without a remedial program, the MJ stated the evidence suggests, and no evidence contradicts, a finding that utilization would fall back to private sector levels. *Id.*

With regard to businesses owned by Native Americans, the study indicated they were utilized to a higher percentage than their availability in the relevant market area. *Id.* at 56. Although the consultant for Houston suggested that a significant statistical disparity would exist if two of the contracting Native-American-owned businesses were disregarded, the MJ found that opinion is not evidence of the need for remedial action. *Id.* at 56. The MJ concluded there was no-equal protection significance to the fact the majority of contracts let to Native-American-owned businesses were to only two firms, which was indicated by Houston's consultant. *Id.*

The utilization of women-owned businesses (WBEs) declined by 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 non-minorities. *Id.* at 62. The burden on non-minority 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.

18. H. B. Rowe Corp., Inc. v. W. Lyndo Tippett, North Carolina DOT, et al., 589 F. Supp.2d 587 (E.D.N.C. 2008), affirmed in part, reversed in part, and remanded, 615 F.3d 233 (4th Cir. 2010)

In *H.B. Rowe Company v. Tippett, North Carolina Department of Transportation, et al.* (“Rowe”), the United States District Court for the Eastern District of North Carolina, Western Division, heard a challenge to the State of North Carolina MBE and WBE Program, which is a State of North Carolina “affirmative action” program administered by the NCDOT. The NCDOT MWBE Program challenged in *Rowe* involves projects funded solely by the State of North Carolina and not funded by the USDOT. 589 F.Supp.2d 587.

Background. In this case plaintiff, a family-owned road construction business, bid on a NCDOT initiated state-funded project. NCDOT rejected plaintiff’s bid in favor of the next low bid that had proposed higher minority participation on the project as part of its bid. According to NCDOT, plaintiff’s bid was rejected because of plaintiff’s failure to demonstrate “good faith efforts” to obtain pre-designated levels of minority participation on the project.

As a prime contractor, plaintiff Rowe was obligated under the MWBE Program to either obtain participation of specified levels of MBE and WBE participation as subcontractors, or to demonstrate good faith efforts to do so. For this particular project, NCDOT had set MBE and WBE subcontractor participation goals of 10 percent and 5 percent, respectively. Plaintiff’s bid included 6.6 percent WBE participation, but no MBE participation. The bid was rejected after a review of plaintiff’s good faith efforts to obtain MBE participation. The next lowest bidder submitted a bid including 3.3 percent MBE participation and 9.3 percent WBE participation, and although not obtaining a specified level of MBE participation, it was determined to have made good faith efforts to do so. (Order of the District Court, dated March 29, 2007).

NCDOT's MWBE Program "largely mirrors" the Federal DBE Program, which NCDOT is required to comply with in awarding construction contracts that utilize Federal funds. (589 F.Supp.2d 587; Order of the District Court, dated September 28, 2007). Like the Federal DBE Program, under NCDOT's MWBE Program, the goals for minority and female participation are aspirational rather than mandatory. *Id.* An individual target for MBE participation was set for each project. *Id.*

Historically, NCDOT had engaged in several disparity studies. The most recent study was done in 2004. *Id.* The 2004 study, which followed the study in 1998, concluded that disparities in utilization of MBEs persist and that a basis remains for continuation of the MWBE Program. The new statute as revised was approved in 2006, which modified the previous MBE statute by eliminating the 10 percent and 5 percent goals and establishing a fixed expiration date of 2009.

Plaintiff filed its complaint in this case in 2003 against the NCDOT and individuals associated with the NCDOT, including the Secretary of NCDOT, W. Lyndo Tippet. In its complaint, plaintiff alleged that the MWBE statute for NCDOT was unconstitutional on its face and as applied. 589 F.Supp.2d 587.

March 29, 2007 Order of the District Court. The matter came before the district court initially on several motions, including the defendants' Motion to Dismiss or for Partial Summary Judgment, defendants' Motion to Dismiss the Claim for Mootness and plaintiff's Motion for Summary Judgment. The court in its October 2007 Order granted in part and denied in part defendants' Motion to Dismiss or for partial summary judgment; denied defendants' Motion to Dismiss the Claim for Mootness; and dismissed without prejudice plaintiff's Motion for Summary Judgment.

The court held the Eleventh Amendment to the United States Constitution bars plaintiff from obtaining any relief against defendant NCDOT, and from obtaining a retrospective damages award against any of the individual defendants in their official capacities. The court ruled that plaintiff's claims for relief against the NCDOT were barred by the Eleventh Amendment, and the NCDOT was dismissed from the case as a defendant. Plaintiff's claims for interest, actual damages, compensatory damages and punitive damages against the individual defendants sued in their official capacities also was held barred by the Eleventh Amendment and were dismissed. But, the court held that plaintiff was entitled to sue for an injunction to prevent state officers from violating a federal law, and under the *Ex Parte Young* exception, plaintiff's claim for declaratory and injunctive relief was permitted to go forward as against the individual defendants who were acting in an official capacity with the NCDOT. The court also held that the individual defendants were entitled to qualified immunity, and therefore dismissed plaintiff's claim for money damages against the individual defendants in their individual capacities. Order of the District Court, dated March 29, 2007.

Defendants argued that the recent amendment to the MWBE statute rendered plaintiff's claim for declaratory injunctive relief moot. The new MWBE statute adopted in 2006, according to the court, does away with many of the alleged shortcomings argued by the plaintiff in this lawsuit. The court found the amended statute has a sunset date in 2009; specific aspirational participation goals by women and minorities are eliminated; defines "minority" as including only those racial groups which disparity studies identify as subject to underutilization in state road construction contracts; explicitly references the findings of the 2004 Disparity Study and

requires similar studies to be conducted at least once every five years; and directs NCDOT to enact regulations targeting discrimination identified in the 2004 and future studies.

The court held, however, that the 2004 Disparity Study and amended MWBE statute do not remedy the primary problem which the plaintiff complained of: the use of remedial race- and gender- based preferences allegedly without valid evidence of past racial and gender discrimination. In that sense, the court held the amended MWBE statute continued to present a live case or controversy, and accordingly denied the defendants' Motion to Dismiss Claim for Mootness as to plaintiff's suit for prospective injunctive relief. Order of the District Court, dated March 29, 2007.

The court also held that since there had been no analysis of the MWBE statute apart from the briefs regarding mootness, plaintiff's pending Motion for Summary Judgment was dismissed without prejudice. Order of the District Court, dated March 29, 2007.

September 28, 2007 Order of the District Court. On September 28, 2007, the district court issued a new order in which it denied both the plaintiff's and the defendants' Motions for Summary Judgment. Plaintiff claimed that the 2004 Disparity Study is the sole basis of the MWBE statute, that the study is flawed, and therefore it does not satisfy the first prong of strict scrutiny review. Plaintiff also argued that the 2004 study tends to prove non-discrimination in the case of women; and finally the MWBE Program fails the second prong of strict scrutiny review in that it is not narrowly tailored.

The court found summary judgment was inappropriate for either party and that there are genuine issues of material fact for trial. The first and foremost issue of material fact, according to the court, was the adequacy of the 2004 Disparity Study as used to justify the MWBE Program. Therefore, because the court found there was a genuine issue of material fact regarding the 2004 Study, summary judgment was denied on this issue.

The court also held there was confusion as to the basis of the MWBE Program, and whether it was based solely on the 2004 Study or also on the 1993 and 1998 Disparity Studies. Therefore, the court held a genuine issue of material fact existed on this issue and denied summary judgment. Order of the District Court, dated September 28, 2007.

December 9, 2008 Order of the District Court (589 F.Supp.2d 587). The district court on December 9, 2008, after a bench trial, issued an Order that found as a fact and concluded as a matter of law that plaintiff failed to satisfy its burden of proof that the North Carolina Minority and Women's Business Enterprise program, enacted by the state legislature to affect the awarding of contracts and subcontracts in state highway construction, violated the United States Constitution.

Plaintiff, in its complaint filed against the NCDOT alleged that N.C. Gen. St. § 136-28.4 is unconstitutional on its face and as applied, and that the NCDOT while administering the MWBE program violated plaintiff's rights under the federal law and the United States Constitution. Plaintiff requested a declaratory judgment that the MWBE program is invalid and sought actual and punitive damages.

As a prime contractor, plaintiff was obligated under the MWBE program to either obtain participation of specified levels of MBE and WBE subcontractors, or to demonstrate that good faith efforts were made to do so. Following a review of plaintiff's good faith efforts to obtain minority participation on the particular contract that was the subject of plaintiff's bid, the bid was rejected. Plaintiff's bid was rejected in favor of the next lowest bid, which had proposed higher minority participation on the project as part of its bid. According to NCDOT, plaintiff's bid was rejected because of plaintiff's failure to demonstrate good faith efforts to obtain pre-designated levels of minority participation on the project. 589 F.Supp.2d 587.

North Carolina's MWBE program. The MWBE program was implemented following amendments to N.C. Gen. Stat. §136-28.4. Pursuant to the directives of the statute, the NCDOT promulgated regulations governing administration of the MWBE program. See N.C. Admin. Code tit. 19A, § 2D.1101, *et seq.* The regulations had been amended several times and provide that NCDOT shall ensure that MBEs and WBEs have the maximum opportunity to participate in the performance of contracts financed with non-federal funds. N.C. Admin. Code Tit. 19A § 2D.1101.

North Carolina's MWBE program, which affected only highway bids and contracts funded solely with state money, according to the district court, largely mirrored the Federal DBE Program which NCDOT is required to comply with in awarding construction contracts that utilize federal funds. 589 F.Supp.2d 587. Like the Federal DBE Program, under North Carolina's MWBE program, the targets for minority and female participation were aspirational rather than mandatory, and individual targets for disadvantaged business participation were set for each individual project. N.C. Admin. Code tit. 19A § 2D.1108. In determining what level of MBE and WBE participation was appropriate for each project, NCDOT would take into account "the approximate dollar value of the contract, the geographical location of the proposed work, a number of the eligible funds in the geographical area, and the anticipated value of the items of work to be included in the contract." *Id.* NCDOT would also consider "the annual goals mandated by Congress and the North Carolina General Assembly." *Id.*

A firm could be certified as a MBE or WBE by showing NCDOT that it is "owner controlled by one or more socially and economically disadvantaged individuals." NC Admin. Code tit. 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.

19. *Thomas v. City of Saint Paul*, 526 F. Supp.2d 959 (D. Minn 2007), affirmed, 321 Fed. Appx. 541, 2009 WL 777932 (8th Cir. March 26, 2009) (unpublished opinion), cert. denied, 130 S.Ct. 408 (2009)

In *Thomas v. City of Saint Paul*, the plaintiffs are African American business owners who brought this lawsuit claiming that the City of Saint Paul, Minnesota discriminated against them in awarding publicly-funded contracts. The City moved for summary judgment, which the United States District Court granted and issued an order dismissing the plaintiff's lawsuit in December 2007.

The background of the case involves the adoption by the City of Saint Paul of a Vendor Outreach Program ("VOP") that was designed to assist minority and other small business owners in competing for City contracts. Plaintiffs were VOP-certified minority business owners. Plaintiffs contended that the City engaged in racially discriminatory illegal conduct in awarding City

contracts for publicly-funded projects. Plaintiff Thomas claimed that the City denied him opportunities to work on projects because of his race arguing that the City failed to invite him to bid on certain projects, the City failed to award him contracts and the fact independent developers had not contracted with his company. 526 F. Supp.2d at 962. The City contended that Thomas was provided opportunities to bid for the City's work.

Plaintiff Brian Conover owned a trucking firm, and he claimed that none of his bids as a subcontractor on 22 different projects to various independent developers were accepted. 526 F. Supp.2d at 962. The court found that after years of discovery, plaintiff Conover offered no admissible evidence to support his claim, had not identified the subcontractors whose bids were accepted, and did not offer any comparison showing the accepted bid and the bid he submitted. *Id.* Plaintiff Conover also complained that he received bidding invitations only a few days before a bid was due, which did not allow him adequate time to prepare a competitive bid. *Id.* The court found, however, he failed to identify any particular project for which he had only a single day of bid, and did not identify any similarly situated person of any race who was afforded a longer period of time in which to submit a bid. *Id.* at 963. Plaintiff Newell claimed he submitted numerous bids on the City's projects all of which were rejected. *Id.* The court found, however, that he provided no specifics about why he did not receive the work. *Id.*

The VOP. Under the VOP, the City sets annual bench marks or levels of participation for the targeted minorities groups. *Id.* at 963. The VOP prohibits quotas and imposes various "good faith" requirements on prime contractors who bid for City projects. *Id.* at 964. In particular, the VOP requires that when a prime contractor rejects a bid from a VOP-certified business, the contractor must give the City its basis for the rejection, and evidence that the rejection was justified. *Id.* The VOP further imposes obligations on the City with respect to vendor contracts. *Id.* The court found the City must seek where possible and lawful to award a portion of vendor contracts to VOP-certified businesses. *Id.* The City contract manager must solicit these bids by phone, advertisement in a local newspaper or other means. Where applicable, the contract manager may assist interested VOP participants in obtaining bonds, lines of credit or insurance required to perform under the contract. *Id.* The VOP ordinance provides that when the contract manager engages in one or more possible outreach efforts, he or she is in compliance with the ordinance. *Id.*

Analysis and Order of the Court. The district court found that the City is entitled to summary judgment because plaintiffs lack standing to bring these claims and that no genuine issue of material fact remains. *Id.* at 965. The court held that the plaintiffs had no standing to challenge the VOP because they failed to show they were deprived of an opportunity to compete, or that their inability to obtain any contract resulted from an act of discrimination. *Id.* The court found they failed to show any instance in which their race was a determinant in the denial of any contract. *Id.* at 966. As a result, the court held plaintiffs failed to demonstrate the City engaged in discriminatory conduct or policy which prevented plaintiffs from competing. *Id.* at 965-966.

The court held that in the absence of any showing of intentional discrimination based on race, the mere fact the City did not award any contracts to plaintiffs does not furnish that causal nexus necessary to establish standing. *Id.* at 966. The court held the law does not require the City to voluntarily adopt "aggressive race-based affirmative action programs" in order to award specific

groups publicly-funded contracts. *Id.* at 966. The court found that plaintiffs had failed to show a violation of the VOP ordinance, or any illegal policy or action on the part of the City. *Id.*

The court stated that the plaintiffs must identify a discriminatory policy in effect. *Id.* at 966. The court noted, for example, even assuming the City failed to give plaintiffs more than one day's notice to enter a bid, such a failure is not, per se, illegal. *Id.* The court found the plaintiffs offered no evidence that anyone else of any other race received an earlier notice, or that he was given this allegedly tardy notice as a result of his race. *Id.*

The court concluded that even if plaintiffs may not have been hired as a subcontractor to work for prime contractors receiving City contracts, these were independent developers and the City is not required to defend the alleged bad acts of others. *Id.* Therefore, the court held plaintiffs had no standing to challenge the VOP. *Id.* at 966.

Plaintiff's claims. The court found that even assuming plaintiffs possessed standing, they failed to establish facts which demonstrated a need for a trial, primarily because each theory of recovery is viable only if the City "intentionally" treated plaintiffs unfavorably because of their race. *Id.* at 967. The court held to establish a prima facie violation of the equal protection clause, there must be state action. *Id.* Plaintiffs must offer facts and evidence that constitute proof of "racially discriminatory intent or purpose." *Id.* at 967. Here, the court found that plaintiff failed to allege any single instance showing the City "intentionally" rejected VOP bids based on their race. *Id.*

The court also found that plaintiffs offered no evidence of a specific time when any one of them submitted the lowest bid for a contract or a subcontract, or showed any case where their bids were rejected on the basis of race. *Id.* The court held the alleged failure to place minority contractors in a preferred position, without more, is insufficient to support a finding that the City failed to treat them equally based upon their race. *Id.*

The City rejected the plaintiff's claims of discrimination because the plaintiffs did not establish by evidence that the City "intentionally" rejected their bid due to race or that the City "intentionally" discriminated against these plaintiffs. *Id.* at 967-968. The court held that the plaintiffs did not establish a single instance showing the City deprived them of their rights, and the plaintiffs did not produce evidence of a "discriminatory motive." *Id.* at 968. The court concluded that plaintiffs had failed to show that the City's actions were "racially motivated." *Id.*

The Eighth Circuit Court of Appeals affirmed the ruling of the district court. *Thomas v. City of Saint Paul*, 2009 WL 777932 (8th Cir. 2009)(unpublished opinion). The Eighth Circuit affirmed based on the decision of the district court and finding no reversible error.

20. Thompson Building Wrecking Co. v. Augusta, Georgia, No. 1:07CV019, 2007 WL 926153 (S.D. Ga. Mar. 14, 2007)(Slip. Op.)

This case considered the validity of the City of Augusta's local minority DBE program. The district court enjoined the City from favoring any contract bid on the basis of racial classification

and based its decision principally upon the outdated and insufficient data proffered by the City in support of its program. 2007 WL 926153 at *9-10.

The City of Augusta enacted a local DBE program based upon the results of a disparity study completed in 1994. The disparity study examined the disparity in socioeconomic status among races, compared black-owned businesses in Augusta with those in other regions and those owned by other racial groups, examined “Georgia’s racist history” in contracting and procurement, and examined certain data related to Augusta’s contracting and procurement. *Id.* at *1-4. The plaintiff contractors and subcontractors challenged the constitutionality of the DBE program and sought to extend a temporary injunction enjoining the City’s implementation of racial preferences in public bidding and procurement.

The City defended the DBE program arguing that it did not utilize racial classifications because it only required vendors to make a “good faith effort” to ensure DBE participation. *Id.* at *6. The court rejected this argument noting that bidders were required to submit a “Proposed DBE Participation” form and that bids containing DBE participation were treated more favorably than those bids without DBE participation. The court stated: “Because a person’s business can qualify for the favorable treatment based on that person’s race, while a similarly situated person of another race would not qualify, the program contains a racial classification.” *Id.*

The court noted that the DBE program harmed subcontractors in two ways: first, because prime contractors will discriminate between DBE and non-DBE subcontractors and a bid with a DBE subcontractor would be treated more favorably; and second, because the City would favor a bid containing DBE participation over an equal or even superior bid containing no DBE participation. *Id.*

The court applied the strict scrutiny standard set forth in *Croson* and *Engineering Contractors Association* to determine whether the City had a compelling interest for its program and whether the program was narrowly tailored to that end. The court noted that pursuant to *Croson*, the City would have a compelling interest in assuring that tax dollars would not perpetuate private prejudice. But, the court found (*citing to Croson*), that a state or local government must identify that discrimination, “public or private, with some specificity before they may use race-conscious relief.” The court cited the Eleventh Circuit’s position that “‘gross statistical disparities’ between the proportion of minorities hired by the public employer and the proportion of minorities willing and able to work” may justify an affirmative action program. *Id.* at *7. The court also stated that anecdotal evidence is relevant to the analysis.

The court determined that while the City’s disparity study showed some statistical disparities buttressed by anecdotal evidence, the study suffered from multiple issues. *Id.* at *7-8. Specifically, the court found that those portions of the study examining discrimination outside the area of subcontracting (*e.g.*, socioeconomic status of racial groups in the Augusta area) were irrelevant for purposes of showing a compelling interest. The court also cited the failure of the study to differentiate between different minority races as well as the improper aggregation of race- and gender-based discrimination referred to as Simpson’s Paradox.

The court assumed for purposes of its analysis that the City could show a compelling interest but concluded that the program was not narrowly tailored and thus could not satisfy strict scrutiny. The court found that it need look no further beyond the fact of the thirteen-year duration of the program absent further investigation, and the absence of a sunset or expiration provision, to conclude that the DBE program was not narrowly tailored. *Id.* at *8. Noting that affirmative action is permitted only sparingly, the court found: “[i]t would be impossible for Augusta to argue that, 13 years after last studying the issue, racial discrimination is so rampant in the Augusta contracting industry that the City must affirmatively act to avoid being complicit.” *Id.* The court held in conclusion, that the plaintiffs were “substantially likely to succeed in proving that, when the City requests bids with minority participation and in fact favors bids with such, the plaintiffs will suffer racial discrimination in violation of the Equal Protection Clause.” *Id.* at *9.

In a subsequent Order dated September 5, 2007, the court denied the City’s motion to continue plaintiff’s Motion for Summary Judgment, denied the City’s Rule 12(b)(6) motion to dismiss, and stayed the action for 30 days pending mediation between the parties. Importantly, in this Order, the court reiterated that the female- and locally-owned business components of the program (challenged in plaintiff’s Motion for Summary Judgment) would be subject to intermediate scrutiny and rational basis scrutiny, respectively. The court also reiterated its rejection of the City’s challenge to the plaintiffs’ standing. The court noted that under *Adarand*, preventing a contractor from competing on an equal footing satisfies the particularized injury prong of standing. And showing that the contractor will sometime in the future bid on a City contract “that offers financial incentives to a prime contractor for hiring disadvantaged subcontractors” satisfies the second requirement that the particularized injury be actual or imminent. Accordingly, the court concluded that the plaintiffs have standing to pursue this action.

21. *Hershell Gill Consulting Engineers, Inc. v. Miami-Dade County*, 333 F. Supp.2d 1305 (S.D. Fla. 2004)

The decision in *Hershell Gill Consulting Engineers, Inc. v. Miami-Dade County*, is significant to the disparity study because it applied and followed the *Engineering Contractors Association* decision in the context of contracting and procurement for goods and services (including architect and engineer services). Many of the other cases focused on construction, and thus *Hershell Gill* is instructive as to the analysis relating to architect and engineering services. The decision in *Hershell Gill* also involved a district court in the Eleventh Circuit imposing compensatory and punitive damages upon individual County Commissioners due to the district court’s finding of their willful failure to abrogate an unconstitutional MBE/WBE Program. In addition, the case is noteworthy because the district court refused to follow the 2003 Tenth Circuit Court of Appeals decision in *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003). *See* discussion, *infra*.

Six years after the decision in *Engineering Contractors Association*, two white male-owned engineering firms (the “plaintiffs”) brought suit against Engineering Contractors Association (the “County”), the former County Manager, and various current County Commissioners (the “Commissioners”) in their official and personal capacities (collectively the “defendants”), seeking to enjoin the same “participation goals” in the same MWBE program deemed to violate the

Fourteenth Amendment in the earlier case. 333 F. Supp. 1305, 1310 (S.D. Fla. 2004). After the Eleventh Circuit's decision in *Engineering Contractors Association* striking down the MWBE programs as applied to construction contracts, the County enacted a Community Small Business Enterprise ("CSBE") program for construction contracts, "but continued to apply racial, ethnic, and gender criteria to its purchases of goods and services in other areas, including its procurement of A&E services." *Id.* at 1311.

The plaintiffs brought suit challenging the Black Business Enterprise (BBE) program, the Hispanic Business Enterprise (HBE) program, and the Women Business Enterprise (WBE) program (collectively "MBE/WBE"). *Id.* The MBE/WBE programs applied to A&E contracts in excess of \$25,000. *Id.* at 1312. The County established five "contract measures" to reach the participation goals: (1) set asides, (2) subcontractor goals, (3) project goals, (4) bid preferences, and (5) selection factors. *Id.* Once a contract was identified as covered by a participation goal, a review committee would determine whether a contract measure should be utilized. *Id.* The County was required to review the efficacy of the MBE/WBE programs annually, and reevaluated the continuing viability of the MBE/WBE programs every five years. *Id.* at 1313. However, the district court found "the participation goals for the three MBE/WBE programs challenged ... remained unchanged since 1994." *Id.*

In 1998, counsel for plaintiffs contacted the County Commissioners requesting the discontinuation of contract measures on A&E contracts. *Id.* at 1314. Upon request of the Commissioners, the county manager then made two reports (an original and a follow-up) measuring parity in terms of dollars awarded and dollars paid in the areas of A&E for blacks, Hispanics, and women, and concluded both times that the "County has reached parity for black, Hispanic, and Women-owned firms in the areas of [A&E] services." The final report further stated "Based on all the analyses that have been performed, the County does not have a basis for the establishment of participation goals which would allow staff to apply contract measures." *Id.* at 1315. The district court also found that the Commissioners were informed that "there was even less evidence to support [the MBE/WBE] programs as applied to architects and engineers than there was in contract construction." *Id.* Nonetheless, the Commissioners voted to continue the MBE/WBE participation goals at their previous levels. *Id.*

In May of 2000 (18 months after the lawsuit was filed), the County commissioned Dr. Manuel J. Carvajal, an econometrician, to study architects and engineers in the county. His final report had four parts:

(1) data identification and collection of methodology for displaying the research results; (2) presentation and discussion of tables pertaining to architecture, civil engineering, structural engineering, and awards of contracts in those areas; (3) analysis of the structure and empirical estimates of various sets of regression equations, the calculation of corresponding indices, and an assessment of their importance; and (4) a conclusion that there is discrimination against women and Hispanics — but not against blacks — in the fields of architecture and engineering.

Id. The district court issued a preliminary injunction enjoining the use of the MBE/WBE programs for A&E contracts, pending the United States Supreme Court decisions in *Gratz v. Bollinger*, 539 U.S. 244 (2003) and *Grutter v. Bollinger*, 539 U.S. 306 (2003). *Id.* at 1316.

The court considered whether the MBE/WBE programs were violative of Title VII of the Civil Rights Act, and whether the County and the County Commissioners were liable for compensatory and punitive damages.

The district court found that the Supreme Court decisions in *Gratz* and *Grutter* did not alter the constitutional analysis as set forth in *Adarand* and *Croson*. *Id.* at 1317. Accordingly, the race- and ethnicity-based classifications were subject to strict scrutiny, meaning the County must present “a strong basis of evidence” indicating the MBE/WBE program was necessary and that it was narrowly tailored to its purported purpose. *Id.* at 1316. The gender-based classifications were subject to intermediate scrutiny, requiring the County to show the “gender-based classification serves an important governmental objective, and that it is substantially related to the achievement of that objective.” *Id.* at 1317 (internal citations omitted). The court found that the proponent of a gender-based affirmative action program must present “sufficient probative evidence” of discrimination. *Id.* (internal citations omitted). The court found that under the intermediate scrutiny analysis, the County must (1) demonstrate past discrimination against women but not necessarily at the hands of the County, and (2) that the gender-conscious affirmative action program need not be used only as a “last resort.” *Id.*

The County presented both statistical and anecdotal evidence. *Id.* at 1318. The statistical evidence consisted of Dr. Carvajal’s report, most of which consisted of “post-enactment” evidence. *Id.* Dr. Carvajal’s analysis sought to discover the existence of racial, ethnic and gender disparities in the A&E industry, and then to determine whether any such disparities could be attributed to discrimination. *Id.* The study used four data sets: three were designed to establish the marketplace availability of firms (architecture, structural engineering, and civil engineering), and the fourth focused on awards issued by the County. *Id.* Dr. Carvajal used the phone book, a list compiled by infoUSA, and a list of firms registered for technical certification with the County’s Department of Public Works to compile a list of the “universe” of firms competing in the market. *Id.* For the architectural firms only, he also used a list of firms that had been issued an architecture professional license. *Id.*

Dr. Carvajal then conducted a phone survey of the identified firms. Based on his data, Dr. Carvajal concluded that disparities existed between the percentage of A&E firms owned by blacks, Hispanics, and women, and the percentage of annual business they received. *Id.* Dr. Carvajal conducted regression analyses “in order to determine the effect a firm owner’s gender or race had on certain dependent variables.” *Id.* Dr. Carvajal used the firm’s annual volume of business as a dependent variable and determined the disparities were due in each case to the firm’s gender and/or ethnic classification. *Id.* at 1320. He also performed variants to the equations including: (1) using certification rather than survey data for the experience / capacity indicators, (2) with the outliers deleted, (3) with publicly-owned firms deleted, (4) with the dummy variables reversed, and (5) using only currently certified firms.” *Id.* Dr. Carvajal’s results remained substantially unchanged. *Id.*

Based on his analysis of the marketplace data, Dr. Carvajal concluded that the “gross statistical disparities” in the annual business volume for Hispanic- and women-owned firms could be attributed to discrimination; he “did not find sufficient evidence of discrimination against blacks.” *Id.*

The court held that Dr. Carvajal's study constituted neither a "strong basis in evidence" of discrimination necessary to justify race- and ethnicity-conscious measures, nor did it constitute "sufficient probative evidence" necessary to justify the gender-conscious measures. *Id.* The court made an initial finding that no disparity existed to indicate underutilization of MBE/WBEs in the award of A&E contracts by the County, nor was there underutilization of MBE/WBEs in the contracts they were awarded. *Id.* The court found that an analysis of the award data indicated, "[i]f anything, the data indicates an overutilization of minority-owned firms by the County in relation to their numbers in the marketplace." *Id.*

With respect to the marketplace data, the County conceded that there was insufficient evidence of discrimination against blacks to support the BBE program. *Id.* at 1321. With respect to the marketplace data for Hispanics and women, the court found it "unreliable and inaccurate" for three reasons: (1) the data failed to properly measure the geographic market, (2) the data failed to properly measure the product market, and (3) the marketplace survey was unreliable. *Id.* at 1321-25.

The court ruled that it would not follow the Tenth Circuit decision of *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003), as the burden of proof enunciated by the Tenth Circuit conflicts with that of the Eleventh Circuit, and the "Tenth Circuit's decision is flawed for the reasons articulated by Justice Scalia in his dissent from the denial of certiorari." *Id.* at 1325 (internal citations omitted).

The defendant intervenors presented anecdotal evidence pertaining only to discrimination against women in the County's A&E industry. *Id.* The anecdotal evidence consisted of the testimony of three A&E professional women, "nearly all" of which was related to discrimination in the award of County contracts. *Id.* at 1326. However, the district court found that the anecdotal evidence contradicted Dr. Carvajal's study indicating that no disparity existed with respect to the award of County A&E contracts. *Id.*

The court quoted the Eleventh Circuit in *Engineering Contractors Association* for the proposition "that only in the rare case will anecdotal evidence suffice standing alone." *Id.* (internal citations omitted). The court held that "[t]his is not one of those rare cases." The district court concluded that the statistical evidence was "unreliable and fail[ed] to establish the existence of discrimination," and the anecdotal evidence was insufficient as it did not even reach the level of anecdotal evidence in *Engineering Contractors Association* where the County employees themselves testified. *Id.*

The court made an initial finding that a number of minority groups provided preferential treatment were in fact majorities in the County in terms of population, voting capacity, and representation on the County Commission. *Id.* at 1326-1329. For purposes only of conducting the strict scrutiny analysis, the court then assumed that Dr. Carvajal's report demonstrated discrimination against Hispanics (note the County had conceded it had insufficient evidence of discrimination against blacks) and sought to determine whether the HBE program was narrowly tailored to remedying that discrimination. *Id.* at 1330. However, the court found that because the study failed to "identify who is engaging in the discrimination, what form the discrimination might take, at what stage in the process it is taking place, or how the discrimination is

accomplished ... it is virtually impossible to narrowly tailor any remedy, and the HBE program fails on this fact alone.” *Id.*

The court found that even after the County Managers informed the Commissioners that the County had reached parity in the A&E industry, the Commissioners declined to enact a CSBE ordinance, a race-neutral measure utilized in the construction industry after *Engineering Contractors Association*. *Id.* Instead, the Commissioners voted to continue the HBE program. *Id.* The court held that the County’s failure to even explore a program similar to the CSBE ordinance indicated that the HBE program was not narrowly tailored. *Id.* at 1331.

The court also found that the County enacted a broad anti-discrimination ordinance imposing harsh penalties for a violation thereof. *Id.* However, “not a single witness at trial knew of any instance of a complaint being brought under this ordinance concerning the A&E industry,” leading the court to conclude that the ordinance was either not being enforced, or no discrimination existed. *Id.* Under either scenario, the HBE program could not be narrowly tailored. *Id.*

The court found the waiver provisions in the HBE program inflexible in practice. *Id.* Additionally, the court found the County had failed to comply with the provisions in the HBE program requiring adjustment of participation goals based on annual studies, because the County had not in fact conducted annual studies for several years. *Id.* The court found this even “more problematic” because the HBE program did not have a built-in durational limit, and thus blatantly violated Supreme Court jurisprudence requiring that racial and ethnic preferences “must be limited in time.” *Id.* at 1332, *citing Grutter*, 123 S. Ct. at 2346. For the foregoing reasons, the court concluded the HBE program was not narrowly tailored. *Id.* at 1332.

With respect to the WBE program, the court found that “the failure of the County to identify who is discriminating and where in the process the discrimination is taking place indicates (though not conclusively) that the WBE program is not substantially related to eliminating that discrimination.” *Id.* at 1333. The court found that the existence of the anti-discrimination ordinance, the refusal to enact a small business enterprise ordinance, and the inflexibility in setting the participation goals rendered the WBE program unable to satisfy the substantial relationship test. *Id.*

The court held that the County was liable for any compensatory damages. *Id.* at 1333-34. The court held that the Commissioners had absolute immunity for their legislative actions; however, they were not entitled to qualified immunity for their actions in voting to apply the race-, ethnicity-, and gender-conscious measures of the MBE/WBE programs if their actions violated “clearly established statutory or constitutional rights of which a reasonable person would have known ... Accordingly, the question is whether the state of the law at the time the Commissioners voted to apply [race-, ethnicity-, and gender-conscious measures] gave them ‘fair warning’ that their actions were unconstitutional.” *Id.* at 1335-36 (internal citations omitted).

The court held that the Commissioners were not entitled to qualified immunity because they “had before them at least three cases that gave them fair warning that their application of the MBE/WBE programs ... were unconstitutional: *Croson*, *Adarand* and [*Engineering Contractors*

Association].” *Id.* at 1137. The court found that the Commissioners voted to apply the contract measures after the Supreme Court decided both *Croson* and *Adarand*. *Id.* Moreover, the Eleventh Circuit had already struck down the construction provisions of the same MBE/WBE programs. *Id.* Thus, the case law was “clearly established” and gave the Commissioners fair warning that the MBE/WBE programs were unconstitutional. *Id.*

The court also found the Commissioners had specific information from the County Manager and other internal studies indicating the problems with the MBE/WBE programs and indicating that parity had been achieved. *Id.* at 1338. Additionally, the Commissioners did not conduct the annual studies mandated by the MBE/WBE ordinance itself. *Id.* For all the foregoing reasons, the court held the Commissioners were subject to individual liability for any compensatory and punitive damages.

The district court enjoined the County, the Commissioners, and the County Manager from using, or requiring the use of, gender, racial, or ethnic criteria in deciding (1) whether a response to an RFP submitted for A&E work is responsive, (2) whether such a response will be considered, and (3) whether a contract will be awarded to a consultant submitting such a response. The court awarded the plaintiffs \$100 each in nominal damages and reasonable attorneys’ fees and costs, for which it held the County and the Commissioners jointly and severally liable.

22. Florida A.G.C. Council, Inc. v. State of Florida, 303 F. Supp.2d 1307 (N.D. Fla. 2004)

This case is instructive to the disparity study as to the manner in which district courts within the Eleventh Circuit are interpreting and applying *Engineering Contractors Association*. It is also instructive in terms of the type of legislation to be considered by the local and state governments as to what the courts consider to be a “race-conscious” program and/or legislation, as well as to the significance of the implementation of the legislation to the analysis.

The plaintiffs, A.G.C. Council, Inc. and the South Florida Chapter of the Associated General Contractors brought this case challenging the constitutionality of certain provisions of a Florida statute (Section 287.09451, *et seq.*). The plaintiffs contended that the statute violated the Equal Protection Clause of the Fourteenth Amendment by instituting race- and gender-conscious “preferences” in order to increase the numeric representation of “MBEs” in certain industries.

According to the court, the Florida Statute enacted race-conscious and gender-conscious remedial programs to ensure minority participation in state contracts for the purchase of commodities and in construction contracts. The State created the Office of Supplier Diversity (“OSD”) to assist MBEs to become suppliers of commodities, services and construction to the state government. The OSD had certain responsibilities, including adopting rules meant to assess whether state agencies have made good faith efforts to solicit business from MBEs, and to monitor whether contractors have made good faith efforts to comply with the objective of greater overall MBE participation.

The statute enumerated measures that contractors should undertake, such as minority-centered recruitment in advertising as a means of advancing the statute’s purpose. The statute provided

that each State agency is “encouraged” to spend 21 percent of the monies actually expended for construction contracts, 25 percent of the monies actually expended for architectural and engineering contracts, 24 percent of the monies actually expended for commodities and 50.5 percent of the monies actually expended for contractual services during the fiscal year for the purpose of entering into contracts with certified MBEs. The statute also provided that state agencies are allowed to allocate certain percentages for black Americans, Hispanic Americans and for American women, and the goals are broken down by construction contracts, architectural and engineering contracts, commodities and contractual services.

The State took the position that the spending goals were “precatory.” The court found that the plaintiffs had standing to maintain the action and to pursue prospective relief. The court held that the statute was unconstitutional based on the finding that the spending goals were not narrowly tailored to achieve a governmental interest. The court did not specifically address whether the articulated reasons for the goals contained in the statute had sufficient evidence, but instead found that the articulated reason would, “if true,” constitute a compelling governmental interest necessitating race-conscious remedies. Rather than explore the evidence, the court focused on the narrowly tailored requirement and held that it was not satisfied by the State.

The court found that there was no evidence in the record that the State contemplated race-neutral means to accomplish the objectives set forth in Section 287.09451 *et seq.*, such as “simplification of bidding procedures, relaxation of bonding requirements, training or financial aid for disadvantaged entrepreneurs of all races [which] would open the public contracting market to all those who have suffered the effects of past discrimination.” *Florida A.G.C. Council*, 303 F.Supp.2d at 1315, *quoting Eng’g Contractors Ass’n*, 122 F.3d at 928, *quoting Croson*, 488 U.S. at 509-10.

The court noted that defendants did not seem to disagree with the report issued by the State of Florida Senate that concluded there was little evidence to support the spending goals outlined in the statute. Rather, the State of Florida argued that the statute is “permissive.” The court, however, held that “there is no distinction between a statute that is precatory versus one that is compulsory when the challenged statute ‘induces an employer to hire with an eye toward meeting ... [a] numerical target.’” *Florida A.G.C. Council*, 303 F.Supp.2d at 1316.

The court found that the State applies pressure to State agencies to meet the legislative objectives of the statute extending beyond simple outreach efforts. The State agencies, according to the court, were required to coordinate their MBE procurement activities with the OSD, which includes adopting a MBE utilization plan. If the State agency deviated from the utilization plan in two consecutive and three out of five total fiscal years, then the OSD could review any and all solicitations and contract awards of the agency as deemed necessary until such time as the agency met its utilization plan. The court held that based on these factors, although alleged to be “permissive,” the statute textually was not.

Therefore, the court found that the statute was not narrowly tailored to serve a compelling governmental interest, and consequently violated the Equal Protection Clause of the Fourteenth Amendment.

23. The Builders Ass'n of Greater Chicago v. The City of Chicago, 298 F. Supp.2d 725 (N.D. Ill. 2003)

This case is instructive because of the court's focus and analysis on whether the City of Chicago's MBE/WBE program was narrowly tailored. The basis of the court's holding that the program was not narrowly tailored is instructive for any program considered because of the reasons provided as to why the program did not pass muster.

The plaintiff, the Builders Association of Greater Chicago, brought this suit challenging the constitutionality of the City of Chicago's construction Minority- and Women-Owned Business ("MWBE") Program. The court held that the City of Chicago's MWBE program was unconstitutional because it did not satisfy the requirement that it be narrowly tailored to achieve a compelling governmental interest. The court held that it was not narrowly tailored for several reasons, including because there was no "meaningful individualized review" of MBE/WBEs; it had no termination date nor did it have any means for determining a termination; the "graduation" revenue amount for firms to graduate out of the program was very high, \$27,500,000, and in fact very few firms graduated; there was no net worth threshold; and, waivers were rarely or never granted on construction contracts. The court found that the City program was a "rigid numerical quota," not related to the number of available, willing and able firms. Formulistic percentages, the court held, could not survive the strict scrutiny.

The court held that the goals plan did not address issues raised as to discrimination regarding market access and credit. The court found that a goals program does not directly impact prime contractor's selection of subcontractors on non-goals private projects. The court found that a set-aside or goals program does not directly impact difficulties in accessing credit, and does not address discriminatory loan denials or higher interest rates. The court found the City has not sought to attack discrimination by primes directly, "but it could." 298 F.2d 725. "To monitor possible discriminatory conduct it could maintain its certification list and require those contracting with the City to consider unsolicited bids, to maintain bidding records, and to justify rejection of any certified firm submitting the lowest bid. It could also require firms seeking City work to post private jobs above a certain minimum on a website or otherwise provide public notice ..." *Id.*

The court concluded that other race-neutral means were available to impact credit, high interest rates, and other potential marketplace discrimination. The court pointed to race-neutral means including linked deposits, with the City banking at institutions making loans to startup and smaller firms. Other race-neutral programs referenced included quick pay and contract downsizing; restricting self-performance by prime contractors; a direct loan program; waiver of bonds on contracts under \$100,000; a bank participation loan program; a 2 percent local business preference; outreach programs and technical assistance and workshops; and seminars presented to new construction firms.

The court held that race and ethnicity do matter, but that racial and ethnic classifications are highly suspect, can be used only as a last resort, and cannot be made by some mechanical formulation. Therefore, the court concluded the City's MWBE Program could not stand in its

present guise. The court held that the present program was not narrowly tailored to remedy past discrimination and the discrimination demonstrated to now exist.

The court entered an injunction, but delayed the effective date for six months from the date of its Order, December 29, 2003. The court held that the City had a “compelling interest in not having its construction projects slip back to near monopoly domination by white male firms.” The court ruled a brief continuation of the program for six months was appropriate “as the City rethinks the many tools of redress it has available.” Subsequently, the court declared unconstitutional the City’s MWBE Program with respect to construction contracts and permanently enjoined the City from enforcing the Program. 2004 WL 757697 (N.D. Ill 2004).

24. Associated Utility Contractors of Maryland, Inc. v. Mayor and City Council of Baltimore, 218 F. Supp.2d 749 (D. Md. 2002)

This case is instructive because the court found the Executive Order of the Mayor of the City of Baltimore was precatory in nature (creating no legal obligation or duty) and contained no enforcement mechanism or penalties for noncompliance and imposed no substantial restrictions; the Executive Order announced goals that were found to be aspirational only.

The Associated Utility Contractors of Maryland, Inc. (“AUC”) sued the City of Baltimore challenging its ordinance providing for minority and women-owned business enterprise (“MWBE”) participation in city contracts. Previously, an earlier City of Baltimore MWBE program was declared unconstitutional. *Associated Utility Contractors of Maryland, Inc. v. Mayor and City Council of Baltimore*, 83 F. Supp.2d 613 (D. Md. 2000). The City adopted a new ordinance that provided for the establishment of MWBE participation goals on a contract-by-contract basis, and made several other changes from the previous MWBE program declared unconstitutional in the earlier case.

In addition, the Mayor of the City of Baltimore issued an Executive Order that announced a goal of awarding 35 percent of all City contracting dollars to MBE/WBEs. The court found this goal of 35 percent participation was aspirational only and the Executive Order contained no enforcement mechanism or penalties for noncompliance. The Executive Order also specified many “noncoercive” outreach measures to be taken by the City agencies relating to increasing participation of MBE/WBEs. These measures were found to be merely aspirational and no enforcement mechanism was provided.

The court addressed in this case only a motion to dismiss filed by the City of Baltimore arguing that the Associated Utility Contractors had no standing. The court denied the motion to dismiss holding that the association had standing to challenge the new MBE/WBE ordinance, although the court noted that it had significant issues with the AUC having representational standing because of the nature of the MBE/WBE plan and the fact the AUC did not have any of its individual members named in the suit. The court also held that the AUC was entitled to bring an as applied challenge to the Executive Order of the Mayor, but rejected it having standing to bring a facial challenge based on a finding that it imposes no requirement, creates no sanctions, and does not inflict an injury upon any member of the AUC in any concrete way. Therefore, the Executive Order did not create a “case or controversy” in connection with a facial attack. The

court found the wording of the Executive Order to be precatory and imposing no substantive restrictions.

After this decision the City of Baltimore and the AUC entered into a settlement agreement and a dismissal with prejudice of the case. An order was issued by the court on October 22, 2003 dismissing the case with prejudice.

25. Kornhass Construction, Inc. v. State of Oklahoma, Department of Central Services, 140 F.Supp.2d 1232 (W.D. OK. 2001)

Plaintiffs, non-minority contractors, brought this action against the State of Oklahoma challenging minority bid preference provisions in the Oklahoma Minority Business Enterprise Assistance Act (“MBE Act”). The Oklahoma MBE Act established a bid preference program by which certified minority business enterprises are given favorable treatment on competitive bids submitted to the state. 140 F.Supp.2d at 1235–36. Under the MBE Act, the bids of non-minority contractors were raised by 5 percent, placing them at a competitive disadvantage according to the district court. *Id.* at 1235–1236.

The named plaintiffs bid on state contracts in which their bids were increased by 5 percent as they were non-minority business enterprises. Although the plaintiffs actually submitted the lowest dollar bids, once the 5 percent factor was applied, minority bidders became the successful bidders on certain contracts. 140 F.Supp. at 1237.

In determining the constitutionality or validity of the Oklahoma MBE Act, the district court was guided in its analysis by the Tenth Circuit Court of Appeals decision in *Adarand Constructors, Inc. v. Slater*, 288 F.3d 1147 (10th Cir. 2000). The district court pointed out that in *Adarand VII*, the Tenth Circuit found compelling evidence of barriers to both minority business formation and existing minority businesses. *Id.* at 1238. In sum, the district court noted that the Tenth Circuit concluded that the Government had met its burden of presenting a strong basis in evidence sufficient to support its articulated, constitutionally valid, compelling interest. 140 F.Supp.2d at 1239, *citing Adarand VII*, 228 F.3d 1147, 1174.

Compelling state interest. The district court, following *Adarand VII*, applied the strict scrutiny analysis, arising out of the Fourteenth Amendment’s Equal Protection Clause, in which a race-based affirmative action program withstands strict scrutiny only if it is narrowly tailored to serve a compelling governmental interest. *Id.* at 1239. The district court pointed out that it is clear from Supreme Court precedent, there may be a compelling interest sufficient to justify race-conscious affirmative action measures. *Id.* The Fourteenth Amendment permits race-conscious programs that seek both to eradicate discrimination by the governmental entity itself and to prevent the governmental entity from becoming a “passive participant” in a system of racial exclusion practiced by private businesses. *Id.* at 1240. Therefore, the district court concluded that both the federal and state governments have a compelling interest assuring that public dollars do not serve to finance the evil of private prejudice. *Id.*

The district court stated that a “mere statistical disparity in the proportion of contracts awarded to a particular group, standing alone, does not demonstrate the evil of private or public racial

prejudice.” *Id.* Rather, the court held that the “benchmark for judging the adequacy of a state’s factual predicate for affirmative action legislation is whether there exists a strong basis in the evidence of the state’s conclusion that remedial action was necessary.” *Id.* The district court found that the Supreme Court made it clear that the state bears the burden of demonstrating a strong basis in evidence for its conclusion that remedial action was necessary by proving either that the state itself discriminated in the past or was “a passive participant” in private industry’s discriminatory practices. *Id.* at 1240, citing to *Associated General Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 735 (6th Cir. 2000) and *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 at 486-492 (1989).

With this background, the State of Oklahoma stated that its compelling state interest “is to promote the economy of the State and to ensure that minority business enterprises are given an opportunity to compete for state contracts.” *Id.* at 1240. Thus, the district court found the State admitted that the MBE Act’s bid preference “is not based on past discrimination,” rather, it is based on a desire to “encourag[e] economic development of minority business enterprises which in turn will benefit the State of Oklahoma as a whole.” *Id.* In light of *Adarand VII*, and prevailing Supreme Court case law, the district court found that this articulated interest is not “compelling” in the absence of evidence of past or present racial discrimination. *Id.*

The district court considered testimony presented by Intervenors who participated in the case for the defendants and asserted that the Oklahoma legislature conducted an interim study prior to adoption of the MBE Act, during which testimony and evidence were presented to members of the Oklahoma Legislative Black Caucus and other participating legislators. The study was conducted more than 14 years prior to the case and the Intervenors did not actually offer any of the evidence to the court in this case. The Intervenors submitted an affidavit from the witness who serves as the Title VI Coordinator for the Oklahoma Department of Transportation. The court found that the affidavit from the witness averred in general terms that minority businesses were discriminated against in the awarding of state contracts. The district court found that the Intervenors have not produced — or indeed even described — the evidence of discrimination. *Id.* at 1241. The district court found that it cannot be discerned from the documents which minority businesses were the victims of discrimination, or which racial or ethnic groups were targeted by such alleged discrimination. *Id.*

The court also found that the Intervenors’ evidence did not indicate what discriminatory acts or practices allegedly occurred, or when they occurred. *Id.* The district court stated that the Intervenors did not identify “a single qualified, minority-owned bidder who was excluded from a state contract.” *Id.* The district court, thus, held that broad allegations of “systematic” exclusion of minority businesses were not sufficient to constitute a compelling governmental interest in remedying past or current discrimination. *Id.* at 1242. The district court stated that this was particularly true in light of the “State’s admission here that the State’s governmental interest was not in remedying past discrimination in the state competitive bidding process, but in ‘encouraging economic development of minority business enterprises which in turn will benefit the State of Oklahoma as a whole.’” *Id.* at 1242.

The court found that the State defendants failed to produce any admissible evidence of a single, specific discriminatory act, or any substantial evidence showing a pattern of deliberate exclusion from state contracts of minority-owned businesses. *Id.* at 1241 - 1242, footnote 11.

The district court also noted that the Sixth Circuit Court of Appeals in *Drabik* rejected Ohio's statistical evidence of underutilization of minority contractors because the evidence did not report the actual use of minority firms; rather, they reported only the use of those minority firms that had gone to the trouble of being certified and listed by the state. *Id.* at 1242, footnote 12. The district court stated that, as in *Drabik*, the evidence presented in support of the Oklahoma MBE Act failed to account for the possibility that some minority contractors might not register with the state, and the statistics did not account for any contracts awarded to businesses with minority ownership of less than 51 percent, or for contracts performed in large part by minority-owned subcontractors where the prime contractor was not a certified minority-owned business. *Id.*

The district court found that the MBE Act's minority bidding preference was not predicated upon a finding of discrimination in any particular industry or region of the state, or discrimination against any particular racial or ethnic group. The court stated that there was no evidence offered of actual discrimination, past or present, against the specific racial and ethnic groups to whom the preference was extended, other than an attempt to show a history of discrimination against African Americans. *Id.* at 1242.

Narrow tailoring. The district court found that even if the State's goals could not be considered "compelling," the State did not show that the MBE Act was narrowly tailored to serve those goals. The court pointed out that the Tenth Circuit in *Adarand VII* identified six factors the court must consider in determining whether the MBE Act's minority preference provisions were sufficiently narrowly tailored to satisfy equal protection: (1) the availability of race-neutral alternative remedies; (2) limits on the duration of the challenged preference provisions; (3) flexibility of the preference provisions; (4) numerical proportionality; (5) the burden on third parties; and (6) over- or under-inclusiveness. *Id.* at 1242-1243.

First, in terms of race-neutral alternative remedies, the court found that the evidence offered showed, at most, that nominal efforts were made to assist minority-owned businesses prior to the adoption of the MBE Act's racial preference program. *Id.* at 1243. The court considered evidence regarding the Minority Assistance Program, but found that to be primarily informational services only, and was not designed to actually assist minorities or other disadvantaged contractors to obtain contracts with the State of Oklahoma. *Id.* at 1243. In contrast to this "informational" program, the court noted the Tenth Circuit in *Adarand VII* favorably considered the federal government's use of racially neutral alternatives aimed at disadvantaged businesses, including assistance with obtaining project bonds, assistance with securing capital financing, technical assistance, and other programs designed to assist start-up businesses. *Id.* at 1243 citing *Adarand VII*, 228 F.3d at 1178-1179.

The district court found that it does not appear from the evidence that Oklahoma's Minority Assistance Program provided the type of race-neutral relief required by the Tenth Circuit in *Adarand VII*, in the Supreme Court in the *Croson* decision, nor does it appear that the Program

was racially neutral. *Id.* at 1243. The court found that the State of Oklahoma did not show any meaningful form of assistance to new or disadvantaged businesses prior to the adoption of the MBE Act, and thus, the court found that the state defendants had not shown that Oklahoma considered race-neutral alternative means to achieve the state's goal prior to adoption of the minority bid preference provisions. *Id.* at 1243.

In a footnote, the district court pointed out that the Tenth Circuit has recognized racially neutral programs designed to assist *all* new or financially disadvantaged businesses in obtaining government contracts tend to benefit minority-owned businesses, and can help alleviate the effects of past and present-day discrimination. *Id.* at 1243, footnote 15 *citing Adarand VII*.

The court considered the evidence offered of post-enactment efforts by the State to increase minority participation in State contracting. The court found that most of these efforts were directed toward encouraging the participation of certified minority business enterprises, "and are thus not racially neutral. This evidence fails to demonstrate that the State employed race-neutral alternative measures prior to or after adopting the Minority Business Enterprise Assistance Act." *Id.* at 1244. Some of the efforts the court found were directed toward encouraging the participation of certified minority business enterprises and thus not racially neutral, included mailing vendor registration forms to minority vendors, telephoning and mailing letters to minority vendors, providing assistance to vendors in completing registration forms, assuring the vendors received bid information, preparing a minority business directory and distributing it to all state agencies, periodically mailing construction project information to minority vendors, and providing commodity information to minority vendors upon request. *Id.* at 1244, footnote 16.

In terms of durational limits and flexibility, the court found that the "goal" of 10 percent of the state's contracts being awarded to certified minority business enterprises had never been reached, or even approached, during the thirteen years since the MBE Act was implemented. *Id.* at 1244. The court found the defendants offered no evidence that the bid preference was likely to end at any time in the foreseeable future, or that it is otherwise limited in its duration. *Id.* Unlike the federal programs at issue in *Adarand VII*, the court stated the Oklahoma MBE Act has no inherent time limit, and no provision for disadvantaged minority-owned businesses to "graduate" from preference eligibility. *Id.* The court found the MBE Act was not limited to those minority-owned businesses which are shown to be economically disadvantaged. *Id.*

The court stated that the MBE Act made no attempt to address or remedy any actual, demonstrated past or present racial discrimination, and the MBE Act's duration was not tied in any way to the eradication of such discrimination. *Id.* Instead, the court found the MBE Act rests on the "questionable assumption that 10 percent of all state contract dollars should be awarded to certified minority-owned and operated businesses, without any showing that this assumption is reasonable." *Id.* at 1244.

By the terms of the MBE Act, the minority preference provisions would continue in place for five years after the goal of 10 percent minority participation was reached, and thus the district court concluded that the MBE Act's minority preference provisions lacked reasonable durational limits. *Id.* at 1245.

With regard to the factor of “numerical proportionality” between the MBE Act’s aspirational goal and the number of existing available minority-owned businesses, the court found the MBE Act’s 10 percent goal was not based upon demonstrable evidence of the availability of minority contractors who were either qualified to bid or who were ready, willing and able to become qualified to bid on state contracts. *Id.* at 1246–1247. The court pointed out that the MBE Act made no attempt to distinguish between the four minority racial groups, so that contracts awarded to members of all of the preferred races were aggregated in determining whether the 10 percent aspirational goal had been reached. *Id.* at 1246. In addition, the court found the MBE Act aggregated all state contracts for goods and services, so that minority participation was determined by the total number of dollars spent on state contracts. *Id.*

The court stated that in *Adarand VII*, the Tenth Circuit rejected the contention that the aspirational goals were required to correspond to an actual finding as to the number of existing minority-owned businesses. *Id.* at 1246. The court noted that the government submitted evidence in *Adarand VII*, that the effects of past discrimination had excluded minorities from entering the construction industry, and that the number of available minority subcontractors reflected that discrimination. *Id.* In light of this evidence, the district court said the Tenth Circuit held that the existing percentage of minority-owned businesses is “not necessarily an absolute cap” on the percentage that a remedial program might legitimately seek to achieve. *Id.* at 1246, citing *Adarand VII*, 228 F.3d at 1181.

Unlike *Adarand VII*, the court found that the Oklahoma State defendants did not offer “substantial evidence” that the minorities given preferential treatment under the MBE Act were prevented, through past discrimination, from entering any particular industry, or that the number of available minority subcontractors in that industry reflects that discrimination. 140 F.Supp.2d at 1246. The court concluded that the Oklahoma State defendants did not offer any evidence of the number of minority-owned businesses doing business in any of the many industries covered by the MBE Act. *Id.* at 1246–1247.

With regard to the impact on third parties factor, the court pointed out the Tenth Circuit in *Adarand VII* stated the mere possibility that innocent parties will share the burden of a remedial program is itself insufficient to warrant the conclusion that the program is not narrowly tailored. *Id.* at 1247. The district court found the MBE Act’s bid preference provisions prevented non-minority businesses from competing on an equal basis with certified minority business enterprises, and that in some instances plaintiffs had been required to lower their intended bids because they knew minority firms were bidding. *Id.* The court pointed out that the 5 percent preference is applicable to *all* contracts awarded under the state’s Central Purchasing Act with no time limitation. *Id.*

In terms of the “under- and over-inclusiveness” factor, the court observed that the MBE Act extended its bidding preference to several racial minority groups without regard to whether each of those groups had suffered from the effects of past or present racial discrimination. *Id.* at 1247. The district court reiterated the Oklahoma State defendants did not offer any evidence at all that the minority racial groups identified in the Act had actually suffered from discrimination. *Id.*

Second, the district court found the MBE Act's bidding preference extends to all contracts for goods and services awarded under the State's Central Purchasing Act, without regard to whether members of the preferred minority groups had been the victims of past or present discrimination within that particular industry or trade. *Id.*

Third, the district court noted the preference extends to all businesses certified as minority-owned and controlled, without regard to whether a particular business is economically or socially disadvantaged, or has suffered from the effects of past or present discrimination. *Id.* The court thus found that the factor of over-inclusiveness weighs against a finding that the MBE Act was narrowly tailored. *Id.*

The district court in conclusion found that the Oklahoma MBE Act violated the Constitution's Fifth Amendment guarantee of equal protection and granted the plaintiffs' Motion for Summary Judgment.

26. Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore and Maryland Minority Contractors Association, Inc., 83 F. Supp.2d 613 (D. Md. 2000)

Plaintiff Associated Utility Contractors of Maryland, Inc. ("AUC") filed this action to challenge the continued implementation of the affirmative action program created by Baltimore City Ordinance ("the Ordinance"). 83 F.Supp.2d 613 (D. Md. 2000)

The Ordinance was enacted in 1990 and authorized the City to establish annually numerical set-aside goals applicable to a wide range of public contracts, including construction subcontracts. *Id.*

AUC filed a motion for summary judgment, which the City and intervening defendant Maryland Minority Contractors Association, Inc. ("MMCA") opposed. *Id.* at 614. In 1999, the court issued an order granting in part and denying in part the motion for summary judgment ("the December injunction"). *Id.* Specifically, as to construction contracts entered into by the City, the court enjoined enforcement of the Ordinance (and, consequently, continued implementation of the affirmative action program it authorized) in respect to the City's 1999 numerical set-aside goals for Minority-and Women-Owned Business Enterprises ("MWBs"), which had been established at 20 percent and 3 percent, respectively. *Id.* The court denied the motion for summary judgment as to the plaintiff's facial attack on the constitutionality of the Ordinance, concluding that there existed "a dispute of material fact as to whether the enactment of the Ordinance was adequately supported by a factual record of unlawful discrimination properly remediable through race- and gender-based affirmative action." *Id.*

The City appealed the entry of the December injunction to the United States Court of Appeals for the Fourth Circuit. In addition, the City filed a motion for stay of the injunction. *Id.* In support of the motion for stay, the City contended that AUC lacked organizational standing to challenge the Ordinance. The court held the plaintiff satisfied the requirements for organizational standing as to the set-aside goals established by the City for 1999. *Id.*

The City also contended that the court erred in failing to forebear from the adjudication of this case and of the motion for summary judgment until after it had completed an alleged disparity study which, it contended, would establish a justification for the set-aside goals established for 1999. *Id.* The court said this argument, which the court rejected, rested on the notion that a governmental entity might permissibly adopt an affirmative action plan including set-aside goals and wait until such a plan is challenged in court before undertaking the necessary studies upon which the constitutionality of the plan depends. *Id.*

Therefore, because the City offered no contemporaneous justification for the 1999 set-aside goals it adopted on the authority of the Ordinance, the court issued an injunction in its 1999 decision and declined to stay its effectiveness. *Id.* Since the injunction awarded complete relief to the AUC, and any effort to adjudicate the issue of whether the City would adopt revised set-aside goals on the authority of the Ordinance was wholly speculative undertaking, the court dismissed the case without prejudice. *Id.*

Facts and Procedural History. In 1986, the City Council enacted in Ordinance 790 the first city-wide affirmative action set-aside goals, which required, *inter alia*, that for all City contracts, 20 percent of the value of subcontracts be awarded to Minority-Owned Business Enterprises (“MBEs”) and 3 percent to Women-Owned Business Enterprises (“WBEs”). *Id.* at 615. As permitted under then controlling Supreme Court precedent, the court said Ordinance 790 was justified by a finding that general societal discrimination had disadvantaged MWBEs. Apparently, no disparity statistics were offered to justify Ordinance 790. *Id.*

After the Supreme Court announced its decision in *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989), the City convened a Task Force to study the constitutionality of Ordinance 790. *Id.* The Task Force held hearings and issued a Public Comment Draft Report on November 1, 1989. *Id.* It held additional hearings, reviewed public comments and issued its final report on April 11, 1990, recommending several amendments to Ordinance 790. *Id.* The City Council conducted hearings, and in June 1990, enacted Ordinance 610, the law under attack in this case. *Id.*

In enacting Ordinance 610, the City Council found that it was justified as an appropriate remedy of “[p]ast discrimination in the City’s contracting process by prime contractors against minority and women’s business enterprises....” *Id.* The City Council also found that “[m]inority and women’s business enterprises ... have had difficulties in obtaining financing, bonding, credit and insurance;” that “[t]he City of Baltimore has created a number of different assistance programs to help small businesses with these problems ... [but that t]hese assistance programs have not been effective in either remedying the effects of past discrimination ... or in preventing ongoing discrimination.” *Id.*

The operative section of Ordinance 610 relevant to this case mandated a procedure by which set-aside goals were to be established each year for minority and women owned business participation in City contracts. *Id.* The Ordinance itself did not establish any goals, but directed the Mayor to consult with the Chief of Equal Opportunity Compliance and “contract authorities” and to annually specify goals for each separate category of contracting “such as public works, professional services, concession and purchasing contracts, as well as any other categories that the Mayor deems appropriate.” *Id.*

In 1990, upon its enactment of the Ordinance, the City established across-the-board set-aside goals of 20 percent MBE and 3 percent WBE for all City contracts with no variation by market. *Id.* The court found the City simply readopted the 20 percent MBE and 3 percent WBE subcontractor participation goals from the prior law, Ordinance 790, which the Ordinance had specifically repealed. *Id.* at 616. These same set-aside goals, the court said, were adopted without change and without factual support in each succeeding year since 1990. *Id.*

No annual study ever was undertaken to support the implementation of the affirmative action program generally or to support the establishment of any annual goals, the court concluded, and the City did not collect the data which could have permitted such findings. *Id.* No disparity study existed or was undertaken until the commencement of this law suit. *Id.* Thus, the court held the City had no reliable record of the availability of MWBEs for each category of contracting, and thus no way of determining whether its 20 percent and 3 percent goals were rationally related to extant discrimination (or the continuing effects thereof) in the letting of public construction contracts. *Id.*

AUC has associational standing. AUC established that it had associational standing to challenge the set-aside goals adopted by the City in 1999. *Id.* Specifically, AUC sufficiently established that its members were “ready and able” to bid for City public works contracts. *Id.* No more, the court noted, was required. *Id.*

The court found that AUC’s members were disadvantaged by the goals in the bidding process, and this alone was a cognizable injury. *Id.* For the purposes of an equal protection challenge to affirmative action set-aside goals, the court stated the Supreme Court has held that the “ ‘injury in fact’ is the inability to compete on an equal footing in the bidding process ...” *Id.* at 617, quoting *Northeastern Florida Chapter*, 508 U.S. at 666, and citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 211 (1995).

The Supreme Court in *Northeastern Florida Chapter* held that individual standing is established to challenge a set-aside program when a party demonstrates “that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis.” *Id.* at 616 quoting *Northeastern*, 508 U.S. at 666. The Supreme Court further held that once a party shows it is “ready and able” to bid in this context, the party will have sufficiently shown that the set-aside goals are “the ‘cause’ of its injury and that a judicial decree directing the city to discontinue its program would ‘redress’ the injury,” thus satisfying the remaining requirements for individual standing. *Id.* quoting *Northeastern*, at 666 & n. 5.

The court found there was ample evidence that AUC members were “ready and able” to bid on City public works contracts based on several documents in the record, and that members of AUC would have individual standing in their own right to challenge the constitutionality of the City’s set-aside goals applicable to construction contracting, satisfying the associational standing test. *Id.* at 617-18. The court held AUC had associational standing to challenge the constitutionality of the public works contracts set-aside provisions established in 1999. *Id.* at 618.

Strict scrutiny analysis. AUC complained that since their initial promulgation in 1990, the City’s set-aside goals required AUC members to “select or reject certain subcontractors based upon the

race, ethnicity, or gender of such subcontractors” in order to bid successfully on City public works contracts for work exceeding \$25,000 (“City public works contracts”). *Id.* at 618. AUC claimed, therefore, that the City’s set-aside goals violated the Fourteenth Amendment’s guarantee of equal protection because they required prime contractors to engage in discrimination which the government itself cannot perpetrate. *Id.*

The court stated that government classifications based upon race and ethnicity are reviewed under strict scrutiny, citing the Supreme Court in *Adarand*, 515 U.S. at 227; and that those based upon gender are reviewed under the less stringent intermediate scrutiny. *Id.* at 618, *citing United States v. Virginia*, 518 U.S. 515, 531 (1996). *Id.* “[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.” *Id.* at 619, *quoting Adarand*, 515 U.S. at 227. The government classification must be narrowly tailored to achieve a compelling government interest. *Id.* *citing Croson*, 488 U.S. at 493–95. The court then noted that the Fourth Circuit has explained:

The rationale for this stringent standard of review is plain. Of all the criteria by which men and women can be judged, the most pernicious is that of race. The injustice of judging human beings by the color of their skin is so apparent that racial classifications cannot be rationalized by the casual invocation of benign remedial aims.... While the inequities and indignities visited by past discrimination are undeniable, the use of race as a reparational device risks perpetuating the very race-consciousness such a remedy purports to overcome.

Id. at 619, *quoting Maryland Troopers Ass’n, Inc. v. Evans*, 993 F.2d 1072, 1076 (4th Cir.1993) (citation omitted).

The court also pointed out that in *Croson*, a plurality of the Supreme Court concluded that state and local governments have a compelling interest in remedying identified past and present race discrimination within their borders. *Id.* at 619, *citing Croson*, 488 U.S. at 492. The plurality of the Supreme Court, according to the court, explained that the Fourteenth Amendment permits race-conscious programs that seek both to eradicate discrimination by the governmental entity itself, and to prevent the public entity from acting as a “ ‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry” by allowing tax dollars “to finance the evil of private prejudice.” *Id.* at 619, *quoting Croson*, 488 U.S. at 492. Thus, the court found *Croson* makes clear that the City has a compelling interest in eradicating and remedying *private discrimination* in the *private subcontracting* inherent in the letting of City construction contracts. *Id.*

The Fourth Circuit, the court stated, has interpreted *Croson* to impose a “two step analysis for evaluating a race-conscious remedy.” *Id.* at 619 *citing Maryland Troopers Ass’n*, 993 F.2d at 1076. “First, the [government] must have a ‘strong basis in evidence for its conclusion that remedial action [is] necessary....’ ‘Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are ... in fact motivated by illegitimate notions of racial inferiority or simple racial politics.’ ” *Id.* at 619, *quoting Maryland Troopers Ass’n*, 993 F.2d at 1076 (*citing Croson*).

The second step in the Croson analysis, according to the court, is to determine whether the government has adopted programs that “ ‘narrowly tailor’ any preferences based on race to meet their remedial goal.” *Id.* at 619. The court found that the Fourth Circuit summarized Supreme Court jurisprudence on “narrow tailoring” as follows:

The preferences may remain in effect only so long as necessary to remedy the discrimination at which they are aimed; they may not take on a life of their own. The numerical goals must be waivable if qualified minority applications are scarce, and such goals must bear a reasonable relation to minority percentages in the relevant qualified labor pool, not in the population as a whole. Finally, the preferences may not supplant race-neutral alternatives for remedying the same discrimination.

Id. at 620, quoting *Maryland Troopers Ass’n*, 993 F.2d at 1076–77 (citations omitted).

Intermediate scrutiny analysis. The court stated the intermediate scrutiny analysis for gender-based discrimination as follows: “Parties who seek to defend gender-based government action must demonstrate an ‘exceedingly persuasive justification’ for that action.” *Id.* at 620, quoting *Virginia*, 518 U.S. at 531, 116. This burden is a “demanding [one] and it rests entirely on the State.” *Id.* at 620 quoting *Virginia*, 518 U.S. at 533.

Although gender is not “a proscribed classification,” in the way race or ethnicity is, the courts nevertheless “carefully inspect[] official action that closes a door or denies opportunity” on the basis of gender. *Id.* at 620, quoting *Virginia*, 518 U.S. at 532-533. At bottom, the court concluded, a government wishing to discriminate on the basis of gender must demonstrate that its doing so serves “important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.” *Id.* at 620, quoting *Virginia*, 518 U.S. at 533 (citations and quotations omitted).

As with the standards for race-based measures, the court found no formula exists by which to determine what evidence will justify every different type of gender-conscious measure. *Id.* at 620. However, as the Third Circuit has explained, “[l]ogically, a city must be able to rely on less evidence in enacting a gender preference than a racial preference because applying Croson’s evidentiary standard to a gender preference would eviscerate the difference between strict and intermediate scrutiny.” *Id.* at 620, quoting *Contractors Ass’n*, 6 F.3d at 1010.

The court pointed out that the Supreme Court has stated an affirmative action program survives intermediate scrutiny if the proponent can show it was “a product of analysis rather than a stereotyped reaction based on habit.” *Id.* at 620, quoting *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547, 582–83 (1990)(internal quotations omitted). The Third Circuit, the court said, determined that “this standard requires the City to present probative evidence in support of its stated rationale for the [10 percent gender set-aside] preference, discrimination against women-owned contractors.” *Id.* at 620, quoting *Contractors Ass’n*, 6 F.3d at 1010.

Preenactment versus postenactment evidence. In evaluating the first step of the Croson test, whether the City had a “strong basis in evidence for its conclusion that [race-conscious] remedial

action was necessary,” the court held that it must limit its inquiry to evidence which the City actually considered before enacting the numerical goals. *Id.* at 620. The court found the Supreme Court has established the standard that preenactment evidence must provide the “strong basis in evidence” that race-based remedial action is necessary. *Id.* at 620-621.

The court noted the Supreme Court in *Wygant*, the plurality opinion, joined by four justices including Justice O’Connor, held that a state entity “must ensure that, before it embarks on an affirmative-action program, it has convincing evidence that remedial action is warranted. That is, it must have sufficient evidence to justify the conclusion that there has been prior discrimination.” *Id.* at 621, quoting *Wygant*, 476 U.S. at 277.

The court stated that because of this controlling precedent, it was compelled to analyze the evidence before the City when it adopted the 1999 set-aside goals specifying the 20 percent MBE participation in City construction subcontracts, and for analogous reasons, the 3 percent WBE preference must also be justified by preenactment evidence. *Id.* at 621.

The court said the Fourth Circuit has not ruled on the issue whether affirmative action measures must be justified by a strong basis in preenactment evidence. The court found that in the Fourth Circuit decisions invalidating state affirmative action policies in *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir.1994), and *Maryland Troopers Ass’n, Inc. v. Evans*, 993 F.2d 1072 (4th Cir.1993), the court apparently relied without comment upon post enactment evidence when evaluating the policies for *Croson* “strong basis in evidence.” *Id.* at 621, n.6, citing *Podberesky*, 38 F.3d at 154 (referring to post enactment surveys of African-American students at College Park campus); *Maryland Troopers*, 993 F.2d at 1078 (evaluating statistics about the percentage of black troopers in 1991 when deciding whether there was a statistical disparity great enough to justify the affirmative action measures in a 1990 consent decree). The court concluded, however, this issue was apparently not raised in these cases, and both were decided before the 1996 Supreme Court decision in *Shaw v. Hunt*, 517 U.S. 899, which clarified that the *Wygant* plurality decision was controlling authority on this issue. *Id.* at 621, n.6.

The court noted that three courts had held, prior to *Shaw*, that post enactment evidence may be relied upon to satisfy the *Croson* “strong basis in evidence” requirement. *Concrete Works of Colorado, Inc. v. Denver*, 36 F.3d 1513 (10th Cir.1994), *cert. denied*, 514 U.S. 1004, 115 S.Ct. 1315, 131 L.Ed.2d 196 (1995); *Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 981 F.2d 50, 60 (2d Cir.1992); *Coral Construction Co. v. King County*, 941 F.2d 910 (9th Cir.1991). *Id.* In addition, the Eleventh Circuit held in 1997 that “post enactment evidence is admissible to determine whether an affirmative action program” satisfies *Croson*. *Engineering Contractors Ass’n of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895, 911-12 (11th Cir.1997), *cert. denied*, 523 U.S. 1004 (1998). Because the court believed that *Shaw* and *Wygant* provided controlling authority on the role of post enactment evidence in the “strong basis in evidence” inquiry, it did not find these cases persuasive. *Id.* at 621.

City did not satisfy strict or intermediate scrutiny: no disparity study was completed or preenactment evidence established. In this case. the court found that the City considered no evidence in 1999 before promulgating the construction subcontracting set-aside goals of 20 percent for MBEs and 3 percent for WBEs. *Id.* at 621. Based on the absence of any record of what

evidence the City considered prior to promulgating the set-aside goals for 1999, the court held there was no dispute of material fact foreclosing summary judgment in favor of plaintiff. *Id.* The court thus found that the 20 percent preference is not supported by a “strong basis in evidence” showing a need for a race-conscious remedial plan in 1999; nor is the 3 percent preference shown to be “substantially related to achievement” of the important objective of remedying gender discrimination in 1999, in the construction industry in Baltimore. *Id.*

The court rejected the City’s assertions throughout the case that the court should uphold the set-aside goals based upon statistics, which the City was in the process of gathering in a disparity study it had commissioned. *Id.* at 622. The court said the City did not provide any legal support for the proposition that a governmental entity might permissibly adopt an affirmative action plan including set-aside goals and wait until such a plan is challenged in court before undertaking the necessary studies upon which the constitutionality of the plan depends. *Id.* The in process study was not complete as of the date of this decision by the court. *Id.* The court thus stated the study could not have produced data upon which the City actually relied in establishing the set-aside goals for 1999. *Id.*

The court noted that if the data the study produced were reliable and complete, the City could have the statistical basis upon which to make the findings Ordinance 610 required, and which could satisfy the constitutionally required standards for the promulgation and implementation of narrowly tailored set-aside race-and gender conscious goals. *Id.* at 622. Nonetheless, as the record stood when the court entered the December 1999 injunction and as it stood as of the date of the decision, there were no data in evidence showing a disparity, let alone a gross disparity, between MWBE availability and utilization in the subcontracting construction market in Baltimore City. *Id.* The City possessed no such evidence when it established the 1999 set-aside goals challenged in the case. *Id.*

A percentage set-aside measure, like the MWBE goals at issue, the court held could only be justified by reference to the overall availability of minority- and women-owned businesses in the relevant markets. *Id.* In the absence of such figures, the 20 percent MBE and 3 percent WBE set aside figures were arbitrary and unenforceable in light of controlling Supreme Court and Fourth Circuit authority. *Id.*

Holding. The court held that for these reasons it entered the injunction against the City on December 1999 and it remained fully in effect. *Id.* at 622. Accordingly, the City’s motion for stay of the injunction order was denied and the action was dismissed without prejudice. *Id.* at 622.

The court held unconstitutional the City of Baltimore’s “affirmative action” program, which had construction subcontracting “set-aside” goals of 20 percent for MBEs and 3 percent for WBEs. The court held there was no data or statistical evidence submitted by the City prior to enactment of the Ordinance. There was no evidence showing a disparity between MBE/WBE availability and utilization in the subcontracting construction market in Baltimore. The court enjoined the City Ordinance.

27. Webster v. Fulton County, 51 F. Supp.2d 1354 (N.D. Ga. 1999), affirmed per curiam 218 F.3d 1267 (11th Cir. 2000)

This case is instructive as it is another instance in which a court has considered, analyzed, and ruled upon a race-, ethnicity- and gender-conscious program, holding the local government MBE/WBE-type program failed to satisfy the strict scrutiny constitutional standard. The case also is instructive in its application of the *Engineering Contractors Association* case, including to a disparity analysis, the burdens of proof on the local government, and the narrowly tailored prong of the strict scrutiny test.

In this case, plaintiff Webster brought an action challenging the constitutionality of Fulton County's (the "County") minority and female business enterprise program ("M/FBE") program. 51 F. Supp.2d 1354, 1357 (N.D. Ga. 1999). [The district court first set forth the provisions of the M/FBE program and conducted a standing analysis at 51 F. Supp.2d at 1356-62].

The court, citing *Engineering Contractors Association of S. Florida, Inc. v. Metro Dade County*, 122 F.3d 895 (11th Cir. 1997), held that "[e]xplicit racial preferences may not be used except as a 'last resort.'" *Id.* at 1362-63. The court then set forth the strict scrutiny standard for evaluating racial and ethnic preferences and the four factors enunciated in *Engineering Contractors Association*, and the intermediate scrutiny standard for evaluating gender preferences. *Id.* at 1363. The court found that under *Engineering Contractors Association*, the government could utilize both post-enactment and pre-enactment evidence to meet its burden of a "strong basis in evidence" for strict scrutiny, and "sufficient probative evidence" for intermediate scrutiny. *Id.*

The court found that the defendant bears the initial burden of satisfying the aforementioned evidentiary standard, and the ultimate burden of proof remains with the challenging party to demonstrate the unconstitutionality of the M/FBE program. *Id.* at 1364. The court found that the plaintiff has at least three methods "to rebut the inference of discrimination with a neutral explanation: (1) demonstrate that the statistics are flawed; (2) demonstrate that the disparities shown by the statistics are not significant; or (3) present conflicting statistical data." *Id.*, citing *Eng'g Contractors Ass'n*, 122 F.3d at 916.

[The district court then set forth the *Engineering Contractors Association* opinion in detail.]

The court first noted that the Eleventh Circuit has recognized that disparity indices greater than 80 percent are generally not considered indications of discrimination. *Id.* at 1368, citing *Eng'g Contractors Assoc.*, 122 F.3d at 914. The court then considered the County's pre-1994 disparity study (the "Brimmer-Marshall Study") and found that it failed to establish a strong basis in evidence necessary to support the M/FBE program. *Id.* at 1368.

First, the court found that the study rested on the inaccurate assumption that a statistical showing of underutilization of minorities in the marketplace as a whole was sufficient evidence of discrimination. *Id.* at 1369. The court cited *City of Richmond v. J.A. Croson Co.*, 488 U.S. 496 (1989) for the proposition that discrimination must be focused on contracting by the entity that is considering the preference program. *Id.* Because the Brimmer-Marshall Study contained no statistical evidence of discrimination by the County in the award of contracts, the court found the

County must show that it was a “passive participant” in discrimination by the private sector. *Id.* The court found that the County could take remedial action if it had evidence that prime contractors were systematically excluding minority-owned businesses from subcontracting opportunities, or if it had evidence that its spending practices are “exacerbating a pattern of prior discrimination that can be identified with specificity.” *Id.* However, the court found that the Brimmer-Marshall Study contained no such data. *Id.*

Second, the Brimmer-Marshall study contained no regression analysis to account for relevant variables, such as firm size. *Id.* at 1369-70. At trial, Dr. Marshall submitted a follow-up to the earlier disparity study. However, the court found the study had the same flaw in that it did not contain a regression analysis. *Id.* The court thus concluded that the County failed to present a “strong basis in evidence” of discrimination to justify the County’s racial and ethnic preferences. *Id.*

The court next considered the County’s post-1994 disparity study. *Id.* at 1371. The study first sought to determine the availability and utilization of minority- and female-owned firms. *Id.* The court explained:

Two methods may be used to calculate availability: (1) bid analysis; or (2) bidder analysis. In a bid analysis, the analyst counts the number of bids submitted by minority or female firms over a period of time and divides it by the total number of bids submitted in the same period. In a bidder analysis, the analyst counts the number of minority or female firms submitting bids and divides it by the total number of firms which submitted bids during the same period.

Id. The court found that the information provided in the study was insufficient to establish a firm basis in evidence to support the M/FBE program. *Id.* at 1371-72. The court also found it significant to conduct a regression analysis to show whether the disparities were either due to discrimination or other neutral grounds. *Id.* at 1375-76.

The plaintiff and the County submitted statistical studies of data collected between 1994 and 1997. *Id.* at 1376. The court found that the data were potentially skewed due to the operation of the M/FBE program. *Id.* Additionally, the court found that the County’s standard deviation analysis yielded non-statistically significant results (noting the Eleventh Circuit has stated that scientists consider a finding of two standard deviations significant). *Id.* (internal citations omitted).

The court considered the County’s anecdotal evidence, and quoted *Engineering Contractors Association* for the proposition that “[a]necdotal evidence can play an important role in bolstering statistical evidence, but that only in the rare case will anecdotal evidence suffice standing alone.” *Id.*, quoting *Eng’g Contractors Ass’n*, 122 F.3d at 907. The Brimmer-Marshall Study contained anecdotal evidence. *Id.* at 1379. Additionally, the County held hearings but after reviewing the tape recordings of the hearings, the court concluded that only two individuals testified to discrimination by the County; one of them complained that the County used the M/FBE program to only benefit African Americans. *Id.* The court found the most common

complaints concerned barriers in bonding, financing, and insurance and slow payment by prime contractors. *Id.* The court concluded that the anecdotal evidence was insufficient in and of itself to establish a firm basis for the M/FBE program. *Id.*

The court also applied a narrow tailoring analysis of the M/FBE program. “The Eleventh Circuit has made it clear that the essence of this inquiry is whether racial preferences were adopted only as a ‘last resort.’” *Id.* at 1380, citing *Eng’g Contractors Assoc.*, 122 F.3d at 926. The court cited the Eleventh Circuit’s four-part test and concluded that the County’s M/FBE program failed on several grounds. First, the court found that a race-based problem does not necessarily require a race-based solution. “If a race-neutral remedy is sufficient to cure a race-based problem, then a race-conscious remedy can never be narrowly tailored to that problem.” *Id.*, quoting *Eng’g Contractors Ass’n*, 122 F.3d at 927. The court found that there was no evidence of discrimination by the County. *Id.* at 1380.

The court found that even though a majority of the Commissioners on the County Board were African American, the County had continued the program for decades. *Id.* The court held that the County had not seriously considered race-neutral measures:

There is no evidence in the record that any Commissioner has offered a resolution during this period substituting a program of race-neutral measures as an alternative to numerical set-asides based upon race and ethnicity. There is no evidence in the record of any proposal by the staff of Fulton County of substituting a program of race-neutral measures as an alternative to numerical set-asides based upon race and ethnicity. There has been no evidence offered of any debate within the Commission about substituting a program of race-neutral measures as an alternative to numerical set-asides based upon race and ethnicity *Id.*

The court found that the random inclusion of ethnic and racial groups who had not suffered discrimination by the County also mitigated against a finding of narrow tailoring. *Id.* The court found that there was no evidence that the County considered race-neutral alternatives as an alternative to race-conscious measures nor that race-neutral measures were initiated and failed. *Id.* at 1381. The court concluded that because the M/FBE program was not adopted as a last resort, it failed the narrow tailoring test. *Id.*

Additionally, the court found that there was no substantial relationship between the numerical goals and the relevant market. *Id.* The court rejected the County’s argument that its program was permissible because it set “goals” as opposed to “quotas,” because the program in *Engineering Contractors Association* also utilized “goals” and was struck down. *Id.*

Per the M/FBE program’s gender-based preferences, the court found that the program was sufficiently flexible to satisfy the substantial relationship prong of the intermediate scrutiny standard. *Id.* at 1383. However, the court held that the County failed to present “sufficient probative evidence” of discrimination necessary to sustain the gender-based preferences portion of the M/FBE program. *Id.*

The court found the County’s M/FBE program unconstitutional and entered a permanent injunction in favor of the plaintiff. *Id.* On appeal, the Eleventh Circuit affirmed per curiam, stating

only that it affirmed on the basis of the district court's opinion. *Webster v. Fulton County, Georgia*, 218 F.3d 1267 (11th Cir. 2000).

28. Associated Gen. Contractors v. Drabik, 50 F. Supp.2d 741 (S.D. Ohio 1999)

The district court in this case pointed out that it had struck down Ohio's MBE statute that provided race-based preferences in the award of state construction contracts in 1998. 50 F.Supp.2d at 744. Two weeks earlier, the district court for the Northern District of Ohio, likewise, found the same Ohio law unconstitutional when it was relied upon to support a state mandated set-aside program adopted by the Cuyahoga Community College. *See F. Buddie Contracting, Ltd. v. Cuyahoga Community College District*, 31 F.Supp.2d 571 (N.D. Ohio 1998). *Id.* at 741.

The state defendant's appealed this court's decision to the United States court of Appeals for the Sixth Circuit. *Id.* Thereafter, the Supreme Court of Ohio held in the case of *Ritchey Produce, Co., Inc. v. The State of Ohio, Department of Administrative*, 704 N.E. 2d 874 (1999), that the Ohio statute, which provided race-based preferences in the state's purchase of nonconstruction-related goods and services, was constitutional. *Id.* at 744.

While this court's decision related to construction contracts and the Ohio Supreme Court's decision related to other goods and services, the decisions could not be reconciled, according to the district court. *Id.* at 744. Subsequently, the state defendants moved this court to stay its order of November 2, 1998 in light of the Ohio State Supreme Court's decision in *Ritchey Produce*. The district court took the opportunity in this case to reconsider its decision of November 2, 1998, and to the reasons given by the Supreme Court of Ohio for reaching the opposite result in *Ritchey Produce*, and decide in this case that its original decision was correct, and that a stay of its order would only serve to perpetuate a "blatantly unconstitutional program of race-based benefits. *Id.* at 745.

In this decision, the district court reaffirmed its earlier holding that the State of Ohio's MBE program of construction contract awards is unconstitutional. The court cited to *F. Buddie Contracting v. Cuyahoga Community College*, 31 F. Supp.2d 571 (N.D. Ohio 1998), holding a similar local Ohio program unconstitutional. The court repudiated the Ohio Supreme Court's holding in *Ritchey Produce*, 707 N.E. 2d 871 (Ohio 1999), which held that the State of Ohio's MBE program as applied to the state's purchase of non-construction-related goods and services was constitutional. The court found the evidence to be insufficient to justify the Ohio MBE program. The court held that the program was not narrowly tailored because there was no evidence that the State had considered a race-neutral alternative.

Strict Scrutiny. The district court held that the Supreme Court of Ohio decision in *Ritchey Produce* was wrongly decided for the following reasons:

(1) Ohio's MBE program of race-based preferences in the award of state contracts was unconstitutional because it is unlimited in duration. *Id.* at 745.

(2) a program of race-based benefits can not be supported by evidence of discrimination which is over 20 years old. *Id.*

(3) the state Supreme Court found that there was a severe numerical imbalance in the amount of business the State did with minority-owned enterprises, based on its uncritical acceptance of essentially “worthless calculations contained in a twenty-one year-old report, which miscalculated the percentage of minority-owned businesses in Ohio and misrepresented data on the percentage of state purchase contracts they had received, all of which was easily detectable by examining the data cited by the authors of the report.” *Id.* at 745.

(4) The state Supreme Court failed to recognize that the incorrectly calculated percentage of minority-owned businesses in Ohio (6.7%) bears no relationship to the 15 percent set-aside goal of the Ohio Act. *Id.*

(5) the state Supreme Court applied an incorrect rule of law when it announced that Ohio’s program must be upheld unless it is clearly unconstitutional beyond a reasonable doubt, whereas according to the district court in this case, the Supreme Court of the United States has said that all racial class classifications are highly suspect and must be subjected to strict judicial scrutiny. *Id.*

(6) the evidence of past discrimination that the Ohio General Assembly had in 1980 did not provide a firm basis in evidence for a race-based remedy. *Id.*

Thus, the district court determined the evidence could not support a compelling state-interest for race-based preferences for the state of Ohio MBE Act, in part based on the fact evidence of past discrimination was stale and twenty years old, and the statistical analysis was insufficient because the state did not know how many MBE’s in the relevant market are qualified to undertake prime or subcontracting work in public construction contracts. *Id.* at 763-771. The statistical evidence was fatally flawed because the relevant universe of minority businesses is not all minority businesses in the state of Ohio, but only those willing and able to enter into contracts with the state of Ohio. *Id.* at 761. In the case of set-aside program in state construction, the relevant universe is minority-owned construction firms willing and able to enter into state construction contracts. *Id.*

Narrow Tailoring. The court addressed the second prong of the strict scrutiny analysis, and found that the Ohio MBE program at issue was not narrowly tailored. The court concluded that the state could not satisfy the four factors to be considered in determining whether race-conscious remedies are appropriate. *Id.* at 763. First, the court stated that there was no consideration of race-neutral alternatives to increase minority participation in state contracting before resorting to “race-based quotas”. *Id.* at 763-764. The court held that failure to consider race-neutral means was fatal to the set-aside program in *Croson*, and the failure of the State of Ohio to consider race-neutral means before adopting the MBE Act in 1980 likewise “dooms Ohio’s program of race-based quotas”. *Id.* at 765.

Second, the court found the Ohio MBE Act was not flexible. The court stated that instead of allowing flexibility to ameliorate harmful effects of the program, the imprecision of the statutory goals has been used to justify bureaucratic decisions which increase its impact on non-minority business.” *Id.* at 765. The court said the waiver system for prime contracts focuses solely on the

availability of MBEs. *Id.* at 766. The court noted the awarding agency may remove the contract from the set aside program and open it up for bidding by non-minority contractors if no certified MBE submits a bid, or if all bids submitted by MBEs are considered unacceptably high. *Id.* But, in either event, the court pointed out the agency is then required to set aside additional contracts to satisfy the numerical quota required by the statute. *Id.* The court concluded that there is no consideration given to whether the particular MBE seeking a racial preference has suffered from the effects of past discrimination by the state or prime contractors. *Id.*

Third, the court found the Ohio MBE Act was not appropriately limited such that it will not last longer than the discriminatory effects it was designed to eliminate. *Id.* at 766. The court stated the 1980 MBE Act is unlimited in duration, and there is no evidence the state has ever reconsidered whether a compelling state interest exists that would justify the continuation of a race-based remedy at any time during the two decades the Act has been in effect. *Id.*

Fourth, the court found the goals of the Ohio MBE Act were not related to the relevant market and that the Act failed this element of the “narrowly tailored” requirement of strict scrutiny. *Id.* at 767-768. The court said the goal of 15 percent far exceeds the percentage of available minority firms, and thus bears no relationship to the relevant market. *Id.*

Fifth, the court found the conclusion of the Ohio Supreme Court that the burdens imposed on non-MBEs by virtue of the set-aside requirements were relatively light was incorrect. *Id.* at 768. The court concluded non-minority contractors in various trades were effectively excluded from the opportunity to bid on any work from large state agencies, departments, and institutions solely because of their race. *Id.* at 678.

Sixth, the court found the Ohio MBE Act provided race-based benefits based on a random inclusion of minority groups. *Id.* at 770-771. The court stated there was no evidence about the number of each racial or ethnic group or the respective shares of the total capital improvement expenditures they received. *Id.* at 770. None of the statistical information, the court said, broke down the percentage of all firms that were owned by specific minority groups or the dollar amounts of contracts received by firms in specific minority groups. *Id.* The court, thus, concluded that the Ohio MBE Act included minority groups randomly without any specific evidence that any group suffered from discrimination in the construction industry in Ohio. *Id.* at 771.

Conclusion. The court thus denied the motion of the state defendants to stay the court’s prior order holding unconstitutional the Ohio MBE Act pending the appeal of the court’s order. *Id.* at 771. This opinion underscored that governments must show several factors to demonstrate narrow tailoring: (1) the necessity for the relief and the efficacy of alternative remedies, (2) flexibility and duration of the relief, (3) relationship of numerical goals to the relevant labor market, and (4) impact of the relief on the rights of third parties. The court held the Ohio MBE program failed to satisfy this test.

29. Phillips & Jordan, Inc. v. Watts, 13 F. Supp.2d 1308 (N.D. Fla. 1998)

This case is instructive because it addressed a challenge to a state and local government MBE/WBE-type program and considered the requisite evidentiary basis necessary to support

the program. In *Phillips & Jordan*, the district court for the Northern District of Florida held that the Florida Department of Transportation's ("FDOT") program of "setting aside" certain highway maintenance contracts for African American- and Hispanic-owned businesses violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The parties stipulated that the plaintiff, a non-minority business, had been excluded in the past and may be excluded in the future from competing for certain highway maintenance contracts "set aside" for business enterprises owned by Hispanic and African American individuals. The court held that the evidence of statistical disparities was insufficient to support the Florida DOT program.

The district court pointed out that Florida DOT did not claim that it had evidence of intentional discrimination in the award of its contracts. The court stated that the essence of FDOT's claim was that the two year disparity study provided evidence of a disparity between the proportion of minorities awarded FDOT road maintenance contracts and a portion of the minorities "supposedly willing and able to do road maintenance work," and that FDOT did not itself engage in any racial or ethnic discrimination, so FDOT must have been a passive participant in "somebody's" discriminatory practices.

Since it was agreed in the case that FDOT did not discriminate against minority contractors bidding on road maintenance contracts, the court found that the record contained insufficient proof of discrimination. The court found the evidence insufficient to establish acts of discrimination against African American- and Hispanic-owned businesses.

The court raised questions concerning the choice and use of the statistical pool of available firms relied upon by the disparity study. The court expressed concern about whether it was appropriate to use Census data to analyze and determine which firms were available (qualified and/or willing and able) to bid on FDOT road maintenance contracts.

F. Recent Decisions Involving the Federal DBE Program and its Implementation by State and Local Governments

There are several recent 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, an

d that where gross statistical disparities can be shown, they alone may constitute prima facie proof of a pattern or practice of discrimination. *Id.* at *15. The court also rejected Midwest Fence's attack on the anecdotal evidence stating that the anecdotal evidence bolsters the state defendants' statistical analyses. *Id.* at *15.

In connection with Midwest Fence's argument relating to the Tollway defendant, Midwest Fence argued that the Tollway's supporting data was from before it instituted its DBE program. *Id.* at *16. The Tollway responded by arguing that it used the best data available and that in any event its data sets show disparities. *Id.* at *16. The court found this point persuasive even assuming some of the Tollway's data were not exact. *Id.* The court said that while every single number in the Tollway's "arsenal of evidence" may not be exact, the overall picture still shows beyond reasonable dispute a marketplace with systemic under-utilization of DBEs far below the disparity index lower than 80 as an indication of discrimination, and that Midwest Fence's "abstract criticisms" do not undermine that core of evidence. *Id.* at *16.

Narrow Tailoring. The court applied the narrow tailoring factors to determine whether IDOT's and the Tollway's implementation of their DBE programs yielded a close match between the evil against which the remedy is directed and the terms of the remedy. *Id.* at *16. First the court addressed the necessity for the relief and the efficacy of alternative race-neutral remedies factor. *Id.* The court reiterated that Midwest Fence has not undermined the defendants' strong combination of statistical and other evidence to show that their programs are needed to remedy discrimination. *Id.*

Both IDOT and the Tollway, according to the court, use race- and gender-neutral alternatives, and the undisputed facts show that those alternatives have not been sufficient to remedy discrimination. *Id.* The court noted that the record shows IDOT uses nearly all of the methods described in the federal regulations to maximize a portion of the goal that will be achieved through race-neutral means. *Id.*

As for flexibility, both IDOT and the Tollway make front-end waivers available when a contractor has made good faith efforts to comply with a DBE goal. *Id.* at *17. The court rejected Midwest Fence's arguments that there were a low number of waivers granted, and that contractors fear of having a waiver denied showed the system was a *de facto* quota system. *Id.* The court found that IDOT and the Tollway have not granted large numbers of waivers, but there was also no evidence that they have *denied* large numbers of waivers. *Id.* The court pointed out that the

evidence from Midwest Fence does not show that defendants are responsible for failing to grant front-end waivers that the contractors do not request. *Id.*

The court stated in the absence of evidence that defendants failed to adhere to the general good faith effort guidelines and arbitrarily deny or discourage front-end waiver requests, Midwest Fence's contention that contractors fear losing contracts if they ask for a waiver does not make the system a quota system. *Id.* at *17. Midwest Fence's own evidence, the court stated, shows that IDOT granted in 2007, 57 of 63 front-end waiver requests, and in 2010, it granted 21 of 35 front-end waiver requests. *Id.* at *17. In addition, the Tollway granted at least some front-end waivers involving 1.02 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. 799 F.3d at 679. (*See* 2014 WL 552213, C.D. Ill. Fed. 12, 2014) (*See* summary of district decision in Section E. below). The Court of Appeals affirmed the grant of summary judgment to IDOT.

Dunnet Bay engages in general highway construction and is owned and controlled by two white males. 799 F. 3d at 679. Its average annual gross receipts between 2007 and 2009 were over \$52 million. *Id.* IDOT administers its DBE Program implementing the Federal DBE Program. IDOT established a statewide aspirational goal for DBE participation of 22.77 percent. *Id.* at 680. Under IDOT’s DBE Program, if a bidder fails to meet the DBE contract goal, it may request a modification of the goal, and provide documentation of its good faith efforts to meet the goal. *Id.* at 681. These requests for modification are also known as “waivers.” *Id.*

The record showed that IDOT historically granted goal modification request or waivers: in 2007, it granted 57 of 63 pre-award goal modification requests; the six other bidders ultimately met the contract goal with post-bid assistance. *Id.* at 681. In 2008, IDOT granted 50 of the 55 pre-award goal modification requests; the other five bidders ultimately met the DBE goal. In

calendar year 2009, IDOT granted 32 of 58 goal modification requests; the other contractors ultimately met the goals. In calendar year 2010, IDOT received 35 goal modification requests; it granted 21 of them and denied the rest. *Id.*

Dunnet Bay alleged that IDOT had taken the position no waivers would be granted. *Id.* at 697-698. IDOT responded that it was not its policy to not grant waivers, but instead IDOT would aggressively pursue obtaining the DBE participation in their contract goals, including that waivers were going to be reviewed at a high level to make sure the appropriate documentation was provided in order for a waiver to be issued. *Id.*

The U.S. FHWA approved the methodology IDOT used to establish a statewide overall DBE goal of 22.77 percent. *Id.* at 683, 698. The FHWA reviewed and approved the individual contract goals set for work on a project known as the Eisenhower project that Dunnet Bay bid on in 2010. *Id.* Dunnet Bay submitted to IDOT a bid that was the lowest bid on the project, but it was substantially over the budget estimate for the project. *Id.* at 683-684. Dunnet Bay did not achieve the goal of 22 percent, but three other bidders each met the DBE goal. *Id.* at 684. Dunnet Bay requested a waiver based on its good faith efforts to obtain the DBE goal. *Id.* at 684. Ultimately, IDOT determined that Dunnet Bay did not properly exercise good faith efforts and its bid was rejected. *Id.* at 684-687, 699.

Because all the bids were over budget, IDOT decided to rebid the Eisenhower project. *Id.* at 687. There were four separate Eisenhower projects advertised for bids, and IDOT granted one of the four goal modification requests from that bid letting. Dunnet Bay bid on one of the rebid projects, but it was not the lowest bid; it was the third out of five bidders. *Id.* at 687. Dunnet Bay did meet the 22.77 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 687. The district court concluded that Dunnet Bay lacked Article III standing to raise an equal protection challenge because it has not suffered a particularized injury that was called by IDOT, and that Dunnet Bay was not deprived of the ability to compete on an equal basis. *Id. Dunnet Bay Construction Company v. Hannig*, 2014 WL 552213, at *30 (C.D. Ill. Feb. 12, 2014).

Even if Dunnet Bay had standing to bring an equal protection claim, the district court held that IDOT was entitled to summary judgment. The district court concluded that Dunnet Bay was held to the same standards as every other bidder, and thus could not establish that it was the victim of racial discrimination. *Id.* at 687. In addition, the district court determined that IDOT had not exceeded its federal authority under the federal rules and that Dunnet Bay's challenge to the DBE Program failed under the Seventh Circuit Court of Appeals decision in *Northern Contracting, Inc. v. Illinois*, 473 F.3d 715, 721 (7th Cir. 2007), which insulates a state DBE Program from a constitutional attack absent a showing that the state exceeded its federal authority. *Id.* at 688. (See discussion of the district court decision in *Dunnet Bay* below in Section E).

Dunnet Bay lacks standing to raise an equal protection claim. The court first addressed the issue whether Dunnet Bay had standing to challenge IDOT's DBE Program on the ground that it discriminated on the basis of race in the award of highway construction contracts.

The court found that Dunnet Bay had not established that it was excluded from competition or otherwise disadvantaged because of race-based measures. *Id.* at 690. Nothing in IDOT's DBE Program, the court stated, excluded Dunnet Bay from competition for any contract. *Id.* IDOT's DBE Program is not a "set aside program," in which non-minority owned businesses could not even bid on certain contracts. *Id.* Under IDOT's DBE Program, all contractors, minority and non-minority contractors, can bid on all contracts. *Id.* at 690-691.

The court said the absence of complete exclusion from competition with minority- or women-owned businesses distinguished the IDOT DBE Program from other cases in which the court ruled there was standing to challenge a program. *Id.* at 691. Dunnet Bay, the court found, has not alleged and has not produced evidence to show that it was treated less favorably than any other contractor because of the race of its owners. *Id.* This lack of an explicit preference from minority-owned businesses distinguishes the IDOT DBE Program from other cases. *Id.* Under IDOT's DBE Program, all contractors are treated alike and subject to the same rules. *Id.*

In addition, the court distinguished other cases in which the contractors were found to have standing because in those cases standing was based in part on the fact they had lost an award of a contract for failing to meet the DBE goal or failing to show good faith efforts, despite being the low bidders on the contract, and the second lowest bidder was awarded the contract. *Id.* at 691. In contrast with these cases where the plaintiffs had standing, the court said Dunnet Bay could not establish that it would have been awarded the contract but for its failure to meet the DBE goal or demonstrate good faith efforts. *Id.* at 692.

The evidence established that Dunnet Bay's bid was substantially over the program estimated budget, and IDOT rebid the contract because the low bid was over the project estimate. *Id.* In addition, Dunnet Bay had been left off the For Bidders List that is submitted to DBEs, which was another reason IDOT decided to rebid the contract. *Id.*

The court found that even assuming Dunnet Bay could establish it was excluded from competition with DBEs or that it was disadvantaged as compared to DBEs, it could not show that any difference in treatment was because of race. *Id.* at 692. For the three years preceding 2010, the year it bid on the project, Dunnet Bay's average gross receipts were over \$52 million. *Id.* Therefore, the court found Dunnet Bay's size makes it ineligible to qualify as a DBE, regardless of the race of its owners. *Id.* Dunnet Bay did not show that any additional costs or burdens that it would incur are because of race, but the additional costs and burdens are equally attributable to Dunnet Bay's size. *Id.* Dunnet Bay had not established, according to the court, that the denial of equal treatment resulted from the imposition of a racial barrier. *Id.* at 693.

Dunnet Bay also alleged that it was forced to participate in a discriminatory scheme and was required to consider race in subcontracting, and thus argued that it may assert third-party rights. *Id.* at 693. The court stated that it has not adopted the broad view of standing regarding asserting third-party rights. *Id.* The court concluded that Dunnet Bay's claimed injury of being

forced to participate in a discriminatory scheme amounts to a challenge to the state's application of a federally mandated program, which the Seventh Circuit Court of Appeals has determined "must be limited to the question of whether the state exceeded its authority." *Id.* at 694, quoting, *Northern Contracting*, 473 F.3d at 720-21. The court found Dunnet Bay was not denied equal treatment because of racial discrimination, but instead any difference in treatment was equally attributable to Dunnet Bay's size. *Id.*

The court stated that Dunnet Bay did not establish causational or redressability. *Id.* at 695. It failed to demonstrate that the DBE Program caused it any injury during the first bid process. *Id.* IDOT did not award the contract to anyone under the first bid and re-let the contract. *Id.* Therefore, Dunnet Bay suffered no injury because of the DBE Program. *Id.* The court also found that Dunnet Bay could not establish redressability because IDOT's decision to re-let the contract redressed any injury. *Id.*

In addition, the court concluded that prudential limitations preclude Dunnet Bay from bringing its claim. *Id.* at 695. The court said that a litigant generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties. *Id.* The court rejected Dunnet Bay's attempt to assert the equal protection rights of a non-minority-owned small business. *Id.* at 695-696.

Dunnet Bay did not produce sufficient evidence that IDOT's implementation of the Federal DBE Program constitutes race discrimination as it did not establish that IDOT exceeded its federal authority. The court said that in the alternative to denying Dunnet Bay standing, even if Dunnet Bay had standing, IDOT was still entitled to summary judgment. *Id.* at 696. The court stated that to establish an equal protection claim under the Fourteenth Amendment, Dunnet Bay must show that IDOT "acted with discriminatory intent." *Id.*

The court established the standard based on its previous ruling in the *Northern Contracting v. IDOT* case that in implementing its DBE Program, IDOT may properly rely on "the federal government's compelling interest in remedying the effects of past discrimination in the national construction market." *Id.*, at 697, quoting *Northern Contracting*, 473 F.3d at 720. Significantly, the court held following its *Northern Contracting* decision as follows: "[A] state is insulated from [a constitutional challenge as to whether its program is narrowly tailored to achieve this compelling interest], absent a showing that the state exceeded its federal authority." *Id.* quoting *Northern Contracting*, 473 F.3d at 721.

Dunnet Bay contends that IDOT exceeded its federal authority by effectively creating racial quotas by designing the Eisenhower project to meet a pre-determined DBE goal and eliminating waivers. *Id.* at 697. Dunnet Bay asserts that IDOT exceeds its authority by: (1) setting the contract's DBE participation goal at 22 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 698. The court stated Dunnet Bay did not identify any regulation or other authority that suggests political motivations matter, provided IDOT did not exceed its federal authority in setting the contract goal. *Id.* Dunnet Bay does not actually challenge how IDOT went about setting its DBE goal on the contract. *Id.* Dunnet Bay did not point to any evidence to show that IDOT failed to comply with the applicable regulation providing only general guidance on contract goal setting. *Id.*

The FHWA approved IDOT’s methodology to establish its statewide DBE goal and approved the individual contract goals for the Eisenhower project. *Id.* at 698. Dunnet Bay did not identify any part of the regulation that IDOT allegedly violated by reevaluating and then increasing its DBE contract goal, by expanding the geographic area used to determine DBE availability, by adding pavement patching and landscaping work into the contract goal, by including items that had been set aside for small business enterprises, or by any other means by which it increased the DBE contract goal. *Id.*

The court agreed with the district court’s conclusion that because the federal regulations do not specify a procedure for arriving at contract goals, it is not apparent how IDOT could have exceeded its federal authority. *Id.* at 698.

The court found Dunnet Bay did not present sufficient evidence to raise a reasonable inference that IDOT had actually implemented a no-waiver policy. *Id.* at 698. The court noted IDOT had granted waivers in 2009 and in 2010 that amounted to 60 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.* at 699.

The court did not agree with Dunnet Bay’s challenge that IDOT rejected its bid without determining whether it had made good faith efforts, pointing out that IDOT in fact determined that Dunnet Bay failed to document adequate good faith efforts, and thus it had complied with the federal regulations. *Id.* at 699. The court found IDOT’s determination that Dunnet Bay failed to show good faith efforts was supported in the record. *Id.* The court noted the reasons provided by IDOT, included Dunnet Bay did not utilize IDOT’s supportive services, and that the other bidders all met the DBE goal, whereas Dunnet Bay did not come close to the goal in its first bid. *Id.* at 699-700.

The court said the performance of other bidders in meeting the contract goal is listed in the federal regulations as a consideration when deciding whether a bidder has made good faith efforts to obtain DBE participation goals, and was a proper consideration. *Id.* at 700. The court said Dunnet Bay’s efforts to secure the DBE participation goal may have been hindered by the omission of Dunnet Bay from the For Bid List, but found the rebidding of the contract remedied that oversight. *Id.*

Conclusion. The court affirmed the district court’s grant of summary 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 Denied. Dunnet Bay filed a Petition for a Writ of Certiorari to the United States Supreme Court in January 2016. The Supreme Court denied the Petition on October 3, 2016.

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 contacting markets. *Id.* at 972.

Finally, Congress and DOT have taken significant steps, the court held, to minimize the race-based nature of the DBE Program. Its benefits are directed at all small businesses owned and controlled by the socially and economically disadvantaged. While TEA-21 creates a presumption that members of certain racial minorities fall within that class, the presumption is rebuttable, wealthy minority owners and wealthy minority-owned firms are excluded, and certification is

available to persons who are not presumptively disadvantaged that demonstrate actual social and economic disadvantage. Thus, race is made relevant in the Program, but it is not a determinative factor. 345 F.3d at 973. For these reasons, the court agreed with the district courts that the revised DBE Program is narrowly tailored on its face.

Sherbrooke and Gross Seed also argued that the DBE Program as applied in Minnesota and Nebraska is not narrowly tailored. Under the Federal Program, states set their own goals, based on local market conditions; their goals are not imposed by the federal government; nor do recipients have to tie them to any uniform national percentage. 345 F.3d at 973, *citing* 64 Fed. Reg. at 5102.

The court analyzed what Minnesota and Nebraska did in connection with their implementation of the Federal DBE Program. Minnesota DOT commissioned a disparity study of the highway contracting market in Minnesota. The study group determined that DBEs made up 11.4 percent of the prime contractors and subcontractors in a highway construction market. Of this number, 0.6 percent were minority-owned and 10.8 percent 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.

Following the Supreme Court's vacation of the Tenth Circuit's dismissal on mootness grounds, the court addressed the merits of this appeal, namely, the federal government's challenge to the district court's grant of summary judgment to plaintiff-appellee Adarand Constructors, Inc. In so doing, the court resolved the constitutionality of the use in federal subcontracting procurement of the Subcontractor Compensation Clause ("SCC"), which employs race-conscious presumptions designed to favor minority enterprises and other "disadvantaged business enterprises" ("DBEs"). The court's evaluation of the SCC program utilizes the "strict scrutiny" standard of constitutional review enunciated by the Supreme Court in an earlier decision in this case. *Id* at 1155.

The court addressed the constitutionality of the relevant statutory provisions *as applied* in the SCC program, as well as their *facial* constitutionality. *Id.* at 1160. It was the judgment of the court that the SCC program and the DBE certification programs as currently structured, though not as they were structured in 1997 when the district court last rendered judgment, passed constitutional muster: The court held they were narrowly tailored to serve a compelling governmental interest. *Id.*

“Compelling Interest” in race-conscious measures defined. The court stated that there may be a compelling interest that supports the enactment of race-conscious measures. Justice O’Connor explicitly states: “The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it.” *Adarand III*, 515 U.S. at 237; *see also Shaw v. Hunt*, 517 U.S. 899, 909, (1996) (stating that “remedying the effects of past or present racial discrimination may in the proper case justify a government’s use of racial distinctions” (citing *Croson*, 488 U.S. at 498–506)). Interpreting *Croson*, the court recognized that “the Fourteenth Amendment permits race-conscious programs that seek both to eradicate discrimination by the governmental entity itself and to prevent the public entity from acting as a ‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry’ by allowing tax dollars ‘to finance the evil of private prejudice.’” *Concrete Works of Colo., Inc. v. City & County of Denver*, 36 F.3d 1513, 1519 (10th Cir.1994) (quoting *Croson*, 488 U.S. at 492, 109 S.Ct. 706). *Id.* at 1164.

The government identified the compelling interest at stake in the use of racial presumptions in the SCC program as “remedying the effects of racial discrimination and opening up federal contracting opportunities to members of previously excluded minority groups.” *Id.*

Evidence required to show compelling interest. While the government’s articulated interest was compelling as a theoretical matter, the court determined whether the actual evidence proffered by the government supported the existence of past and present discrimination in the publicly-funded highway construction subcontracting market. *Id.* at 1166.

The “benchmark for judging the adequacy of the government’s factual predicate for affirmative action legislation [i]s whether there exists a ‘*strong basis in evidence* for [the government’s] conclusion that remedial action was necessary.’” *Concrete Works*, 36 F.3d at 1521 (quoting *Croson*, 488 U.S. at 500, (quoting (plurality))) (emphasis in *Concrete Works*). Both statistical and anecdotal evidence are appropriate in the strict scrutiny calculus, although anecdotal evidence by itself is not. *Id.* at 1166, *citing Concrete Works*, 36 F.3d at 1520–21.

After the government’s initial showing, the burden shifted to Adarand to rebut that showing: “Notwithstanding the burden of initial production that rests” with the government, “[t]he ultimate burden [of proof] remains with [the challenging party] to demonstrate the unconstitutionality of an affirmative-action program.” *Id.* (quoting *Wygant*, 476 U.S. at 277–78, (plurality)). “[T]he nonminority [challengers] ... continue to bear the ultimate burden of persuading the court that [the government entity’s] evidence did not support an inference of prior discrimination and thus a remedial purpose.” *Id.* at 1166, *quoting Concrete Works*, at 1522–23.

In addressing the question of what evidence of discrimination supports a compelling interest in providing a remedy, the court considered both direct and circumstantial evidence, including post-enactment evidence introduced by defendants as well as the evidence in the legislative history itself. *Id.* at 1166, *citing, Concrete Works*, 36 F.3d at 1521, 1529 n. 23 (considering post-enactment evidence). The court stated it may consider public and private discrimination not only in the specific area of government procurement contracts but also in the construction industry generally; thus, any findings Congress has made as to the entire construction industry are relevant. *Id.* at 1166-67 *citing, Concrete Works*, at 1523, 1529, and *Croson*, 488 U.S. at 492 (Op. of O'Connor, J.).

Evidence in the present case. There can be no doubt, the court found, that Congress repeatedly has considered the issue of discrimination in government construction procurement contracts, finding that racial discrimination and its continuing effects have distorted the market for public contracts—especially construction contracts—necessitating a race-conscious remedy. *Id.* at 1167, *citing, Appendix—The Compelling Interest for Affirmative Action in Federal Procurement*, 61 Fed.Reg. 26,050, 26,051-52 & nn. 12-21 (1996) (“*The Compelling Interest*”) (citing approximately thirty congressional hearings since 1980 concerning minority-owned businesses). But, the court said, the question is not merely *whether* the government has considered evidence, but rather the *nature and extent* of the evidence it has considered. *Id.*

In *Concrete Works*, the court noted that:

Neither *Croson* nor its progeny clearly state whether private discrimination that is in no way funded with public tax dollars can, by itself, provide the requisite strong basis in evidence necessary to justify a municipality’s affirmative action program. A plurality in *Croson* simply suggested that remedial measures could be justified upon a municipality’s showing that “it had essentially become a ‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry.” *Croson*, 488 U.S. at 492, 109 S.Ct. 706. Although we do not read *Croson* as requiring the municipality to identify an exact linkage between its award of public contracts and private discrimination, such evidence would at least enhance the municipality’s factual predicate for a race- and gender-conscious program.

Id. at 1167, *quoting, Concrete Works*, 36 F.3d at 1529. Unlike *Concrete Works*, the evidence presented by the government in the present case demonstrated the existence of two kinds of discriminatory barriers to minority subcontracting enterprises, both of which show a strong link between racial disparities in the federal government’s disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination. *Id.* at 1168. The first discriminatory barriers are to the formation of qualified minority subcontracting enterprises due to private discrimination, precluding from the outset competition for public construction contracts by minority enterprises. The second discriminatory barriers are to fair competition between minority and non-minority subcontracting enterprises, again due to private discrimination, precluding existing minority firms from effectively competing for public construction contracts. The government also presented further evidence in the form of local

disparity studies of minority subcontracting and studies of local subcontracting markets after the removal of affirmative action programs. *Id.* at 1168.

a. Barriers to minority business formation in construction subcontracting. As to the first kind of barrier, the government’s evidence consisted of numerous congressional investigations and hearings as well as outside studies of statistical and anecdotal evidence—cited and discussed in *The Compelling Interest*, 61 Fed.Reg. 26,054–58—and demonstrated that discrimination by prime contractors, unions, and lenders has woefully impeded the formation of qualified minority business enterprises in the subcontracting market nationwide. *Id.* at 1168. The evidence demonstrated that prime contractors in the construction industry often refuse to employ minority subcontractors due to “old boy” networks—based on a familial history of participation in the subcontracting market—from which minority firms have traditionally been excluded. *Id.*

Also, the court found, subcontractors’ unions placed before minority firms a plethora of barriers to membership, thereby effectively blocking them from participation in a subcontracting market in which union membership is an important condition for success. *Id.* at 1169. The court stated that the government’s evidence was particularly striking in the area of the race-based denial of access to capital, without which the formation of minority subcontracting enterprises is stymied. *Id.* at 1169.

b. Barriers to competition by existing minority enterprises. With regard to barriers faced by existing minority enterprises, the government presented evidence tending to show that discrimination by prime contractors, private sector customers, business networks, suppliers, and bonding companies fosters a decidedly uneven playing field for minority subcontracting enterprises seeking to compete in the area of federal construction subcontracts. *Id.* at 1170. The court said it was clear that Congress devoted considerable energy to investigating and considering this systematic exclusion of existing minority enterprises from opportunities to bid on construction projects resulting from the insularity and sometimes outright racism of non-minority firms in the construction industry. *Id.* at 1171.

The government’s evidence, the court found, strongly supported the thesis that informal, racially exclusionary business networks dominate the subcontracting construction industry, shutting out competition from minority firms. *Id.* Minority subcontracting enterprises in the construction industry, the court pointed out, found themselves unable to compete with non-minority firms on an equal playing field due to racial discrimination by bonding companies, without whom those minority enterprises cannot obtain subcontracting opportunities. The government presented evidence that bonding is an essential requirement of participation in federal subcontracting procurement. *Id.* Finally, the government presented evidence of discrimination by suppliers, the result of which was that nonminority subcontractors received special prices and discounts from suppliers not available to minority subcontractors, driving up “anticipated costs, and therefore the bid, for minority-owned businesses.” *Id.* at 1172.

Contrary to Adarand’s contentions, on the basis of the foregoing survey of evidence regarding minority business formation and competition in the subcontracting industry, the court found the government’s evidence as to the kinds of obstacles minority subcontracting businesses face

constituted a strong basis for the conclusion that those obstacles are not “the same problems faced by any new business, regardless of the race of the owners.” *Id.* at 1172.

c. Local disparity studies. The court noted that following the Supreme Court’s decision in *Croson*, numerous state and local governments undertook statistical studies to assess the disparity, if any, between availability and utilization of minority-owned businesses in government contracting. *Id.* at 1172. The government’s review of those studies revealed that although such disparity was least glaring in the category of construction subcontracting, even in that area “minority firms still receive only 87 cents for every dollar they would be expected to receive” based on their availability. *The Compelling Interest*, 61 Fed.Reg. at 26,062. *Id.* In that regard, the *Croson* majority stated that “[w]here there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the [government] or the [government’s] prime contractors, an inference of discriminatory exclusion could arise.” *Id.* quoting, 488 U.S. at 509 (Op. of O’Connor, J.) (citations omitted).

The court said that it was mindful that “where special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task.” *Id.* at 1172, quoting, *Croson* at 501–02. But the court found that here, it was unaware of such “special qualifications” aside from the general qualifications necessary to operate a construction subcontracting business. *Id.* At a minimum, the disparity indicated that there had been under-utilization of the existing pool of minority subcontractors; and there is no evidence either in the record on appeal or in the legislative history before the court that those minority subcontractors who *have* been utilized have performed inadequately or otherwise demonstrated a lack of necessary qualifications. *Id.* at 1173.

The court found the disparity between minority DBE availability and market utilization in the subcontracting industry raised an inference that the various discriminatory factors the government cites have created that disparity. *Id.* at 1173. In *Concrete Works*, the court stated that “[w]e agree with the other circuits which have interpreted *Croson* impliedly to permit a municipality to rely ... on general data reflecting the number of MBEs and WBEs in the marketplace to defeat the challenger’s summary judgment motion,” and the court here said it did not see any different standard in the case of an analogous suit against the federal government. *Id.* at 1173, citing, *Concrete Works*, 36 F.3d at 1528. Although the government’s aggregate figure of a 13 percent disparity between minority enterprise availability and utilization was not overwhelming evidence, the court stated it was significant. *Id.*

It was made more significant by the evidence showing that discriminatory factors discourage both enterprise formation of minority businesses and utilization of existing minority enterprises in public contracting. *Id.* at 1173. The court said that it would be “sheer speculation” to even attempt to attach a particular figure to the hypothetical number of minority enterprises that would exist without discriminatory barriers to minority DBE formation. *Id.* at 1173, quoting, *Croson*, 488 U.S. at 499. However, the existence of evidence indicating that the number of minority DBEs would be significantly (but unquantifiably) higher but for such barriers, the court

found was nevertheless relevant to the assessment of whether a disparity was sufficiently significant to give rise to an inference of discriminatory exclusion. *Id.* at 1174.

d. Results of removing affirmative action programs. The court took notice of an additional source of evidence of the link between compelling interest and remedy. There was ample evidence that when race-conscious public contracting programs are struck down or discontinued, minority business participation in the relevant market drops sharply or even disappears. *Id.* at 1174. Although that evidence standing alone the court found was not dispositive, it strongly supported the government’s claim that there are significant barriers to minority competition in the public subcontracting market, raising the specter of racial discrimination. *Id.* “Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality’s prime contractors, an inference of discriminatory exclusion could arise.” *Id.* at 1174, quoting, *Croson*, 488 U.S. at 509 (Op. of O’Connor, J.) (citations omitted).

In sum, on the basis of the foregoing body of evidence, the court concluded that the government had met its initial burden of presenting a “strong basis in evidence” sufficient to support its articulated, constitutionally valid, compelling interest. *Id.* at 1175, citing, *Croson*, 488 U.S. at 500 (quoting *Wygant*, 476 U.S. at 277).

Adarand’s rebuttal failed to meet their burden. Adarand, the court found utterly failed to meet their “ultimate burden” of introducing credible, particularized evidence to rebut the government’s initial showing of the existence of a compelling interest in remedying the nationwide effects of past and present discrimination in the federal construction procurement subcontracting market. *Id.* at 1175. The court rejected Adarand’s characterization of various congressional reports and findings as conclusory and its highly general criticism of the methodology of numerous “disparity studies” cited by the government and its amici curiae as supplemental evidence of discrimination. *Id.* The evidence cited by the government and its amici curiae and examined by the court only reinforced the conclusion that “racial discrimination and its effects continue to impair the ability of minority-owned businesses to compete in the nation’s contracting markets.” *Id.*

The government’s evidence permitted a finding that as a matter of law Congress had the requisite strong basis in evidence to take action to remedy racial discrimination and its lingering effects in the construction industry. *Id.* at 1175. This evidence demonstrated that both the race-based barriers to entry and the ongoing race-based impediments to success faced by minority subcontracting enterprises—both discussed above—were caused either by continuing discrimination or the lingering effects of past discrimination on the relevant market. *Id.* at 1176. Congress was not limited to simply proscribing federal discrimination against minority contractors, as it had already done. The court held that the Constitution does not obligate Congress to stand idly by and continue to pour money into an industry so shaped by the effects of discrimination that the profits to be derived from congressional appropriations accrue exclusively to the beneficiaries, however personally innocent, of the effects of racial prejudice. *Id.* at 1176.

The court also rejected Adarand’s contention that Congress must make specific findings regarding discrimination against every single sub-category of individuals within the broad racial and ethnic categories designated by statute and addressed by the relevant legislative findings. *Id.* at 1176. If Congress had valid evidence, for example that Asian-American individuals are subject to discrimination because of their status as Asian-Americans, the court noted it makes no sense to require sub-findings that subcategories of that class experience particularized discrimination because of their status as, for example, Americans from Bhutan. *Id.* “Race” the court said is often a classification of dubious validity—scientifically, legally, and morally. The court did not impart excess legitimacy to racial classifications by taking notice of the harsh fact that racial discrimination commonly occurs along the lines of the broad categories identified: “Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities.” *Id.* at 1176, note 18, *citing*, 15 U.S.C. § 637(d)(3)(C).

The court stated that it was not suggesting that the evidence cited by the government was un rebuttable. *Id.* at 1176. Rather, the court indicated it was pointing out that under precedent it is for Adarand to rebut that evidence, and it has not done so to the extent required to raise a genuine issue of material fact as to whether the government has met its evidentiary burden. *Id.* The court reiterated that “[t]he ultimate burden [of proof] remains with [the challenging party] to demonstrate the unconstitutionality of an affirmative-action program.” *Id.* at 1522 (quoting *Wygant*, 476 U.S. at 277–78, 106 S.Ct. 1842 (plurality)). “[T]he nonminority [challengers] ... continue to bear the ultimate burden of persuading the court that [the government entity’s] evidence did not support an inference of prior discrimination and thus a remedial purpose.” *Id.* (quoting *Wygant*, 476 U.S. at 293, 106 S.Ct. 1842 (O’Connor, J., concurring)). Because Adarand had failed utterly to meet its burden, the court held the government’s initial showing stands. *Id.*

In sum, guided by *Concrete Works*, the court concluded that the evidence cited by the government and its amici, particularly that contained in *The Compelling Interest*, 61 Fed.Reg. 26,050, more than satisfied the government’s burden of production regarding the compelling interest for a race-conscious remedy. *Id.* at 1176. Congress had a compelling interest in eradicating the economic roots of racial discrimination in highway transportation programs funded by federal monies. *Id.* The court therefore affirmed the district court’s finding of a compelling interest. *Id.*

Narrow Tailoring. The court stated it was guided in its inquiry by the Supreme Court cases that have applied the narrow-tailoring analysis to government affirmative action programs. *Id.* at 1177. In applying strict scrutiny to a court-ordered program remedying the failure to promote black police officers, a plurality of the Court stated that

[i]n determining whether race-conscious remedies are appropriate, we look to several factors, including the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties.

Id. at 1177, *quoting*, *Paradise*, 480 U.S. at 171 (1986) (plurality op. of Brennan, J.) (citations omitted).

Regarding flexibility, “the availability of waiver” is of particular importance. *Id.* As for numerical proportionality, *Croson* admonished the courts to beware of the completely unrealistic assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population.” *Id.*, quoting, *Croson*, 488 U.S. at 507 (quoting *Sheet Metal Workers’*, 478 U.S. at 494 (O’Connor, J., concurring in part and dissenting in part)). In that context, a “rigid numerical quota,” the court noted particularly disserves the cause of narrow tailoring. *Id.* at 1177, citing, *Croson*, 508. As for burdens imposed on third parties, the court pointed to a plurality of the Court in *Wygant* that stated:

As part of this Nation’s dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy. “When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such a ‘sharing of the burden’ by innocent parties is not impermissible.” 476 U.S. at 280–81 (Op. of Powell, J.) (quoting *Fullilove*, 448 U.S. at 484 (plurality)) (further quotations and footnote omitted). We are guided by that benchmark.

Id. at 1177.

Justice O’Connor’s majority opinion in *Croson* added a further factor to the court’s analysis: under- or over-inclusiveness of the DBE classification. *Id.* at 1177. In *Croson*, the Supreme Court struck down an affirmative action program as insufficiently narrowly tailored in part because “there is no inquiry into whether or not the particular MBE seeking a racial preference has suffered from the effects of past discrimination.... [T]he interest in avoiding the bureaucratic effort necessary to tailor remedial relief to those who truly have suffered from the effects of prior discrimination cannot justify a rigid line drawn on the basis of a suspect classification.” *Id.*, quoting, *Croson*, 488 U.S. at 508 (citation omitted). Thus, the court said it must be especially careful to inquire into whether there has been an effort to identify worthy participants in DBE programs or whether the programs in question paint with too broad—or too narrow—a brush. *Id.*

The court stated more specific guidance was found in *Adarand III*, where in remanding for strict scrutiny, the Supreme Court identified two questions apparently of particular importance in the instant case: (1) “[c]onsideration of the use of race-neutral means;” and (2) “whether the program [is] appropriately limited [so as] not to last longer than the discriminatory effects it is designed to eliminate.” *Id.* at 1177, quoting, *Adarand III*, 515 U.S. at 237–38 (internal quotations and citations omitted). The court thus engaged in a thorough analysis of the federal program in light of *Adarand III*’s specific questions on remand, and the foregoing narrow-tailoring factors: (1) the availability of race-neutral alternative remedies; (2) limits on the duration of the SCC and DBE certification programs; (3) flexibility; (4) numerical proportionality; (5) the burden on third parties; and (6) over- or under-inclusiveness. *Id.* at 1178.

It is significant to note that the court in determining the Federal DBE Program is “narrowly tailored” focused on the federal regulations, 49 CFR Part 26, and in particular § 26.1(a), (b), and (f). The court pointed out that the federal regulations instruct recipients as follows:

[y]ou must meet the maximum feasible portion of your overall goal by using race-neutral means of facilitating DBE participation, 49 CFR § 26.51(a)(2000); *see also* 49 CFR § 26.51(f)(2000) (if a recipient can meet its overall goal through race-neutral means, it must implement its program without the use of race-conscious contracting measures), and enumerate a list of race-neutral measures, *see* 49 CFR § 26.51(b)(2000). The current regulations also outline several race-neutral means available to program recipients including assistance in overcoming bonding and financing obstacles, providing technical assistance, establishing programs to assist start-up firms, and other methods. *See* 49 CFR § 26.51(b). We therefore are dealing here with revisions that emphasize the continuing need to employ non-race-conscious methods even as the need for race-conscious remedies is recognized. 228 F.3d at 1178-1179.

In considering whether the Federal DBE Program is narrowly tailored, the court also addressed the argument made by the contractor that the program is over- and under-inclusive for several reasons, including that Congress did not inquire into discrimination against each particular minority racial or ethnic group. The court held that insofar as the scope of inquiry suggested was a particular state's construction industry alone, this would be at odds with its holding regarding the compelling interest in Congress's power to enact nationwide legislation. *Id.* at 1185-1186.

The court stated that because of the "unreliability of racial and ethnic categories and the fact that discrimination commonly occurs based on much broader racial classifications," extrapolating findings of discrimination against the various ethnic groups "is more a question of nomenclature than of narrow tailoring." *Id.* The court found that the "Constitution does not erect a barrier to the government's effort to combat discrimination based on broad racial classifications that might prevent it from enumerating particular ethnic origins falling within such classifications." *Id.*

Holding. Mindful of the Supreme Court's mandate to exercise particular care in examining governmental racial classifications, the court concluded that the 1996 SCC was insufficiently narrowly tailored as applied in this case, and was thus unconstitutional under *Adarand III*'s strict standard of scrutiny. Nonetheless, after examining the current (post 1996) SCC and DBE certification programs, the court held that the 1996 defects have been remedied, and the current federal DBE programs now met the requirements of narrow tailoring. *Id.* at 1178.

Finally, the Tenth Circuit did not specifically address a challenge to the letting of federally-funded construction contracts by state departments of transportation. The court pointed out that plaintiff *Adarand* "conceded that its challenge in the instant case is to 'the federal program, implemented by federal officials,' and not to the letting of federally-funded construction contracts by state agencies." 228 F.3d at 1187. The court held that it did not have before it a sufficient record to enable it to evaluate the separate question of Colorado DOT's implementation of race-conscious policies. *Id.* at 1187-1188. Therefore, the court did not address the constitutionality of an as applied attack on the implementation of the federal program by the Colorado DOT or other local or state governments implementing the Federal DBE Program.

The court thus reversed the district court and remanded the case.

Recent District Court Decisions

6. Midwest Fence Corporation v. United States DOT and Federal Highway Administration, the Illinois DOT, the Illinois State Toll Highway Authority, et al., 84 F. Supp. 3d 705, 2015 WL 1396376 (N.D. Ill, 2015), affirmed, 840 F.3d 932 (7th Cir. 2016).²²⁶

In *Midwest Fence Corporation v. USDOT, the FHWA, the Illinois DOT and the Illinois State Toll Highway Authority*, Case No. 1:10-3-CV-5627, United States District Court for the Northern District of Illinois, Eastern Division, Plaintiff Midwest Fence Corporation, which is a guardrail, bridge rail and fencing contractor owned and controlled by white males challenged the constitutionality and the application of the USDOT, Disadvantaged Business Enterprise (“DBE”) Program. In addition, Midwest Fence similarly challenged the Illinois Department of Transportation’s (“IDOT”) implementation of the Federal DBE Program for federally-funded projects, IDOT’s implementation of its own DBE Program for state-funded projects and the Illinois State Tollway Highway Authority’s (“Tollway”) separate DBE Program.

The federal district court in 2011 issued an Opinion and Order denying the Defendants’ Motion to Dismiss for lack of standing, denying the Federal Defendants’ Motion to Dismiss certain Counts of the Complaint as a matter of law, granting IDOT Defendants’ Motion to Dismiss certain Counts and granting the Tollway Defendants’ Motion to Dismiss certain Counts, but giving leave to Midwest to replead subsequent to this Order. *Midwest Fence Corp. v. United States DOT, Illinois DOT, et al.*, 2011 WL 2551179 (N.D. Ill. June 27, 2011).

Midwest Fence in its Third Amended Complaint challenged the constitutionality of the Federal DBE Program on its face and as applied, and challenged the IDOT’s implementation of the Federal DBE Program. Midwest Fence also sought a declaration that the USDOT regulations have not been properly authorized by Congress and a declaration that SAFETEA-LU is unconstitutional. Midwest Fence sought relief from the IDOT Defendants, including a declaration that state statutes authorizing IDOT’s DBE Program for State-funded contracts are unconstitutional; a declaration that IDOT does not follow the USDOT regulations; a declaration that the IDOT DBE Program is unconstitutional and other relief against the IDOT. The remaining Counts sought relief against the Tollway Defendants, including that the Tollway’s DBE Program is unconstitutional, and a request for punitive damages against the Tollway Defendants. The court in 2012 granted the Tollway Defendants’ Motion to Dismiss Midwest Fence’s request for punitive damages.

Equal protection framework, strict scrutiny and burden of proof. The court held that under a strict scrutiny analysis, the burden is on the government to show both a compelling interest and narrowly tailoring. 84 F. Supp. 3d at 720. The government must demonstrate a strong basis in evidence for its conclusion that remedial action is necessary. *Id.* Since the Supreme Court

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

decision in *Croson*, numerous courts have recognized that disparity studies provide probative evidence of discrimination. *Id.* The court stated that an inference of discrimination may be made with empirical evidence that demonstrates a significant statistical disparity between the number of qualified minority contractors and the number of such contractors actually engaged by the locality or the locality's prime contractors. *Id.* The court said that anecdotal evidence may be used in combination with statistical evidence to establish a compelling governmental interest. *Id.*

In addition to providing "hard proof" to back its compelling interest, the court stated that the government must also show that the challenged program is narrowly tailored. *Id.* at 720. While narrow tailoring requires "serious, good faith consideration of workable race-neutral alternatives," the court said it does not require "exhaustion of every conceivable race-neutral alternative." *Id.*, citing *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003); *Fischer v. Univ. of Texas at Austin*, 133 S.Ct. 2411, 2420 (2013).

Once the governmental entity has shown acceptable proof of a compelling interest in remedying past discrimination and illustrated that its plan is narrowly tailored to achieve this goal, the party challenging the affirmative action plan bears the ultimate burden of proving that the plan is unconstitutional. 84 F. Supp. 3d at 721. To successfully rebut the government's evidence, a challenger must introduce "credible, particularized evidence" of its own. *Id.*

This can be accomplished, according to the court, by providing a neutral explanation for the disparity between DBE utilization and availability, showing that the government's data is flawed, demonstrating that the observed disparities are statistically insignificant, or presenting contrasting statistical data. *Id.* Conjecture and unsupported criticisms of the government's methodology are insufficient. *Id.*

Standing. The court found that Midwest had standing to challenge the Federal DBE Program, IDOT's implementation of it, and the Tollway Program. *Id.* at 722. The court, however, did not find that Midwest had presented any facts suggesting its inability to compete on an equal footing for the Target Market Program contracts. The Target Market Program identified a variety of remedial actions that IDOT was authorized to take in certain Districts, which included individual contract goals, DBE participation incentives, as well as set-asides. *Id.* at 722-723.

The court noted that Midwest did not identify any contracts that were subject to the Target Market Program, nor identify any set-asides that were in place in these districts that would have hindered its ability to compete for fencing and guardrails work. *Id.* at 723. Midwest did not allege that it would have bid on contracts set aside pursuant to the Target Market Program had it not been prevented from doing so. *Id.* Because nothing in the record Midwest provided suggested that the Target Market Program impeded Midwest's ability to compete for work in these Districts, the court dismissed Midwest's claim relating to the Target Market Program for lack of standing. *Id.*

Facial challenge to the Federal DBE Program. The court found that remedying the effects of race and gender discrimination within the road construction industry is a compelling governmental interest. The court also found that the Federal Defendants have supported their compelling interest with a strong basis in evidence. *Id.* at 725. The Federal Defendants, the court said,

presented an extensive body of testimony, reports, and studies that they claim provided the strong basis in evidence for their conclusion that race and gender-based classifications are necessary. *Id.* The court took judicial notice of the existence of Congressional hearings and reports and the collection of evidence presented to Congress in support of the Federal DBE Program's 2012 reauthorization under MAP-21, including both statistical and anecdotal evidence. *Id.*

The court also considered a report from a consultant who reviewed 95 disparity and availability studies concerning minority- and women-owned businesses, as well as anecdotal evidence, that were completed from 2000 to 2012. *Id.* at 726. Sixty-four of the studies had previously been presented to Congress. *Id.* The studies examine procurement for over 100 public entities and funding sources across 32 states. *Id.* The consultant's report opined that metrics such as firm revenue, number of employees, and bonding limits should not be considered when determining DBE availability because they are all "likely to be influenced by the presence of discrimination if it exists" and could potentially result in a built-in downward bias in the availability measure. *Id.*

To measure disparity, the consultant divided DBE utilization by availability and multiplied by 100 to calculate a "disparity index" for each study. *Id.* at 726. The report found 66 percent of the studies showed a disparity index of 80 or below, that is, significantly underutilized relative to their availability. *Id.* The report also examined data that showed lower earnings and business formation rates among women and minorities, even when variables such as age and education were held constant. *Id.* The report concluded that the disparities were not attributable to factors other than race and sex and were consistent with the presence of discrimination in construction and related professional services. *Id.*

The court distinguished the Federal Circuit decision in *Rothe Dev. Corp. v. Dep't. of Def.*, 545 F.3d 1023 (Fed. Cir. 2008) where the Federal Circuit Court held insufficient the reliance on only six disparity studies to support the government's compelling interest in implementing a national program. *Id.* at 727, citing *Rothe*, 545 F.3d at 1046. The court here noted the consultant report supplements the testimony and reports presented to Congress in support of the Federal DBE Program, which courts have found to establish a "strong basis in evidence" to support the conclusion that race- and gender-conscious action is necessary. *Id.*

The court found through the evidence presented by the Federal Defendants satisfied their burden in showing that the Federal DBE Program stands on a strong basis in evidence. *Id.* at 727. The Midwest expert's suggestion that the studies used in consultant's report do not properly account for capacity, the court stated, does not compel the court to find otherwise. The court quoting *Adarand VII*, 228 F.3d at 1173 (10th Cir. 2000) said that general criticism of disparity studies, as opposed to particular evidence undermining the reliability of the particular disparity studies relied upon by the government, is of little persuasive value and does not compel the court to discount the disparity evidence. *Id.* Midwest failed to present "affirmative evidence" that no remedial action was necessary. *Id.*

Federal DBE Program is narrowly tailored. Once the government has established a compelling interest for implementing a race-conscious program, it must show that the program is narrowly tailored to achieve this interest. *Id.* at 727. In determining whether a program is narrowly

tailored, courts examine several factors, including (a) the necessity for the relief and efficacy of alternative race-neutral measures, (b) the flexibility and duration of the relief, including the availability of waiver provisions, (c) the relationship of the numerical goals to the relevant labor market, and (d) the impact of the relief on the rights of third parties. *Id.* The court stated that courts may also assess whether a program is “overinclusive.” *Id.* at 728. The court found that each of the above factors supports the conclusion that the Federal DBE Program is narrowly tailored. *Id.*

First, the court said that under the federal regulations, recipients of federal funds can only turn to race- and gender-conscious measures after they have attempted to meet their DBE participation goal through race-neutral means. *Id.* at 728. The court noted that race-neutral means include making contracting opportunities more accessible to small businesses, providing assistance in obtaining bonding and financing, and offering technical and other support services. *Id.* The court found that the regulations require serious, good faith consideration of workable race-neutral alternatives. *Id.*

Second, the federal regulations contain provisions that limit the Federal DBE Program’s duration and ensure its flexibility. *Id.* at 728. The court found that the Federal DBE Program lasts only as long as its current authorizing act allows, noting that with each reauthorization, Congress must reevaluate the Federal DBE Program in light of supporting evidence. *Id.* The court also found that the Federal DBE Program affords recipients of federal funds and prime contractors substantial flexibility. *Id.* at 728. Recipients may apply for exemptions or waivers, releasing them from program requirements. *Id.* Prime contractors can apply to IDOT for a “good faith efforts waiver” on an individual contract goal. *Id.*

The court stated the availability of waivers is particularly important in establishing flexibility. *Id.* at 728. The court rejected Midwest’s argument that the federal regulations impose a quota in light of the Program’s explicit waiver provision. *Id.* Based on the availability of waivers, coupled with regular congressional review, the court found that the Federal DBE Program is sufficiently limited and flexible. *Id.*

Third, the court said that the Federal DBE Program employs a two-step goal-setting process that ties DBE participation goals by recipients of federal funds to local market conditions. *Id.* at 728. The court pointed out that the regulations delegate goal setting to recipients of federal funds who tailor DBE participation to local DBE availability. *Id.* The court found that the Federal DBE Program’s goal-setting process requires states to focus on establishing realistic goals for DBE participation that are closely tied to the relevant labor market. *Id.*

Fourth, the federal regulations, according to the court, contain provisions that seek to minimize the Program’s burden on non-DBEs. *Id.* at 729. The court pointed out the following provisions aim to keep the burden on non-DBEs minimal: the Federal DBE Program’s presumption of social and economic disadvantage is rebuttable; race is not a determinative factor; in the event DBEs become “overconcentrated” in a particular area of contract work, recipients must take appropriate measures to address the overconcentration; the use of race-neutral measures; and the availability of good faith efforts waivers. *Id.*

The court said Midwest's primary argument is that the practice of states to award prime contracts to the lowest bidder, and the fact the federal regulations prescribe that DBE participation goals be applied to the value of the entire contract, unduly burdens non-DBE subcontractors. *Id.* at 729. Midwest argued that because most DBEs are small subcontractors, setting goals as a percentage of all contract dollars, while requiring a remedy to come only from subcontracting dollars, unduly burdens smaller, specialized non-DBEs. *Id.* The court found that the fact innocent parties may bear some of the burden of a DBE program is itself insufficient to warrant the conclusion that a program is not narrowly tailored. *Id.* The court also found that strong policy reasons support the Federal DBE Program's approach. *Id.*

The court stated that congressional testimony and the expert report from the Federal Defendants provide evidence that the Federal DBE Program is not overly inclusive. *Id.* at 729. The court noted the report observed statistically significant disparities in business formation and earnings rates in all 50 states for all minority groups and for non-minority women. *Id.*

The court said that Midwest did not attempt to rebut the Federal Defendants' evidence. *Id.* at 729. Therefore, because the Federal DBE Program stands on a strong basis in evidence and is narrowly tailored to achieve the goal of remedying discrimination, the court found the Program is constitutional on its face. *Id.* at 729. The court thus granted summary judgment in favor of the Federal Defendants. *Id.*

As-applied challenge to IDOT's implementation of the Federal DBE Program. In addition to challenging the Federal DBE Program on its face, Midwest also argued that it is unconstitutional as applied. *Id.* at 730. The court stated because the Federal DBE Program is applied to Midwest through IDOT, the court must examine IDOT's implementation of the Federal DBE Program. *Id.* Following the Seventh Circuit's decision in *Northern Contracting v. Illinois DOT*, the court said that whether the Federal DBE Program is unconstitutional as applied is a question of whether IDOT exceeded its authority in implementing it. *Id.* at 730, citing *Northern Contracting, Inc. v. Illinois*, 473 F.3d 715 at 722 (7th Cir. 2007). The court, quoting *Northern Contracting*, held that a challenge to a state's application of a federally mandated program must be limited to the question of whether the state exceeded its authority. *Id.*

IDOT not only applies the Federal DBE Program to USDOT-assisted projects, but it also applies the Federal DBE Program to state-funded projects. *Id.* at 730. The court, therefore, held it must determine whether the IDOT Defendants have established a compelling reason to apply the IDOT Program to state-funded projects in Illinois. *Id.*

The court pointed out that the Federal DBE Program delegates the narrow tailoring function to the state, and thus, IDOT must demonstrate that there is a demonstrable need for the implementation of the Federal DBE Program within its jurisdiction. *Id.* at 730. Accordingly, the court assessed whether IDOT has established evidence of discrimination in Illinois sufficient to (1) support its application of the Federal DBE Program to state-funded contracts, and (2) demonstrate that IDOT's implementation of the Federal DBE Program is limited to a place where race-based measures are demonstrably needed. *Id.*

IDOT's evidence of discrimination and DBE availability in Illinois. The evidence that IDOT has presented to establish the existence of discrimination in Illinois included two studies, one that was done in 2004 and the other in 2011. *Id.* at 730. The court said that the 2004 study uncovered disparities in earnings and business formation rates among women and minorities in the construction and engineering fields that the study concluded were consistent with discrimination. IDOT maintained that the 2004 study and the 2011 study must be read in conjunction with one another. *Id.* The court found that the 2011 study provided evidence to establish the disparity from which IDOT's inference of discrimination primarily arises. *Id.*

The 2011 study compared the proportion of contracting dollars awarded to DBEs (utilization) with the availability of DBEs. *Id.* at 730. The study determined availability through multiple sources, including bidders lists, prequalified business lists, and other methods recommended in the federal regulations. *Id.* The study applied NAICS codes to different types of contract work, assigning greater weight to categories of work in which IDOT had expended the most money. *Id.* at 731. This resulted in a "weighted" DBE availability calculation. *Id.*

The 2011 study examined prime and subcontracts and anecdotal evidence concerning race and gender discrimination in the Illinois road construction industry, including one-on-one interviews and a survey of more than 5,000 contractors. *Id.* at 731. The 2011 study, the court said, contained a regression analysis of private sector data and found disparities in earnings and business ownership rates among minorities and women, even when controlling for race- and gender-neutral variables. *Id.*

The study concluded that there was a statistically significant underutilization of DBEs in the award of both prime and subcontracts in Illinois. *Id.* at 731. For example, the court noted the difference the study found in the percentage of available prime construction contractors to the percentage of prime construction contracts under \$500,000, and the percentage of available construction subcontractors to the amount of percentage of dollars received of construction subcontracts. *Id.*

IDOT presented certain evidence to measure DBE availability in Illinois. The court pointed out that the 2004 study and two subsequent Goal-Setting Reports were used in establishing IDOT's DBE participation goal. *Id.* at 731. The 2004 study arrived at IDOT's 22.77 percent DBE participation goal in accordance with the two-step process defined in the federal regulations. *Id.* The court stated the 2004 study employed a seven-step "custom census" approach to calculate baseline DBE availability under step one of the regulations. *Id.*

The process begins by identifying the relevant markets in which IDOT operates and the categories of businesses that account for the bulk of IDOT spending. *Id.* at 731. The industries and counties in which IDOT expends relatively more contract dollars receive proportionately higher weights in the ultimate calculation of statewide DBE availability. *Id.* The study then counts the number of businesses in the relevant markets, and identifies which are minority- and women-owned. *Id.* To ensure the accuracy of this information, the study provides that it takes additional steps to verify the ownership status of each business. *Id.* Under step two of the regulations, the study adjusted this figure to 27.51 percent based on Census Bureau data. *Id.*

According to the study, the adjustment takes into account its conclusion that baseline numbers are artificially lower than what would be expected in a race-neutral marketplace. *Id.*

IDOT used separate Goal-Setting Reports that calculated IDOT's DBE participation goal pursuant to the two-step process in the federal regulations, drawing from bidders lists, DBE directories, and the 2011 study to calculate baseline DBE availability. *Id.* at 731. The study and the Goal-Setting Reports gave greater weight to the types of contract work in which IDOT had expended relatively more money. *Id.* at 732.

Court rejected Midwest arguments as to the data and evidence. The court rejected the challenges by Midwest to the accuracy of IDOT's data. For example, Midwest argued that the anecdotal evidence contained in the 2011 study does not prove discrimination. *Id.* at 732. The court stated, however, where anecdotal evidence has been offered in conjunction with statistical evidence, it may lend support to the government's determination that remedial action is necessary. *Id.* The court noted that anecdotal evidence on its own could not be used to show a general policy of discrimination. *Id.*

The court rejected another argument by Midwest that the data collected after IDOT's implementation of the Federal DBE Program may be biased because anything observed about the public sector may be affected by the DBE Program. *Id.* at 732. The court rejected that argument finding post-enactment evidence of discrimination permissible. *Id.*

Midwest's main objection to the IDOT evidence, according to the court, is that it failed to account for capacity when measuring DBE availability and underutilization. *Id.* at 732. Midwest argued that IDOT's disparity studies failed to rule out capacity as a possible explanation for the observed disparities. *Id.*

IDOT argued that on prime contracts under \$500,000, capacity is a variable that makes little difference. *Id.* at 732-733. Prime contracts of varying sizes under \$500,000 were distributed to DBEs and non-DBEs alike at approximately the same rate. *Id.* at 733. IDOT also argued that through regression analysis, the 2011 study demonstrated factors other than discrimination did not account for the disparity between DBE utilization and availability. *Id.*

The court stated that despite Midwest's argument that the 2011 study took insufficient measures to rule out capacity as a race-neutral explanation for the underutilization of DBEs, the Supreme Court has indicated that a regression analysis need not take into account "all measurable variables" to rule out race-neutral explanations for observed disparities. *Id.* at 733, quoting *Bazemore v. Friday*, 478 U.S. 385, 400 (1986).

Midwest criticisms insufficient, speculative and conjecture – no independent statistical analysis; IDOT followed Northern Contracting and did not exceed the federal regulations. The court found Midwest's criticisms insufficient to rebut IDOT's evidence of discrimination or discredit IDOT's methods of calculating DBE availability. *Id.* at 733. First, the court said, the "evidence" offered by Midwest's expert reports "is speculative at best." *Id.* The court found that for a reasonable jury to find in favor of Midwest, Midwest would have to come forward with "credible, particularized evidence" of its own, such as a neutral explanation for the disparity, or

contrasting statistical data. *Id.* The court held that Midwest failed to make the showing in this case. *Id.*

Second, the court stated that IDOT's method of calculating DBE availability is consistent with the federal regulations and has been endorsed by the Seventh Circuit. *Id.* at 733. The federal regulations, the court said, approve a variety of methods for accurately measuring ready, willing, and available DBEs, such as the use of DBE directories, Census Bureau data, and bidders lists. *Id.* The court found that these are the methods the 2011 study adopted in calculating DBE availability. *Id.*

The court said that the Seventh Circuit Court of Appeals approved the "custom census" approach as consistent with the federal regulations. *Id.* at 733, *citing* to *Northern Contracting v. Illinois DOT*, 473 F.3d at 723. The court noted the Seventh Circuit rejected the argument that availability should be based on a simple count of registered and prequalified DBEs under Illinois law, finding no requirement in the federal regulations that a recipient must so narrowly define the scope of ready, willing, and available firms. *Id.* The court also rejected the notion that an availability measure should distinguish between prime and subcontractors. *Id.* at 733-734.

The court held that through the 2004 and 2011 studies, and Goal-Setting Reports, IDOT provided evidence of discrimination in the Illinois road construction industry and a method of DBE availability calculation that is consistent with both the federal regulations and the Seventh Circuit decision in *Northern Contract v. Illinois DOT*. *Id.* at 734. The court said that in response to the Seventh Circuit decision and IDOT's evidence, Midwest offered only conjecture about how these studies supposed failure to account for capacity may or may not have impacted the studies' result. *Id.*

The court pointed out that although Midwest's expert's reports "cast doubt on the validity of IDOT's methodology, they failed to provide any independent statistical analysis or other evidence demonstrating actual bias." *Id.* at 734. Without this showing, the court stated, the record fails to demonstrate a lack of evidence of discrimination or actual flaws in IDOT's availability calculations. *Id.*

Burden on non-DBE subcontractors; overconcentration. The court addressed the narrow tailoring factor concerning whether a program's burden on third parties is undue or unreasonable. The parties disagreed about whether the IDOT program resulted in an overconcentration of DBEs in the fencing and guardrail industry. *Id.* at 734-735. IDOT prepared an overconcentration study comparing the total number of prequalified fencing and guardrail contractors to the number of DBEs that also perform that type of work and determined that no overconcentration problem existed. Midwest presented its evidence relating to overconcentration. *Id.* at 735. The court found that Midwest did not show IDOT's determination that overconcentration does not exist among fencing and guardrail contractors to be unreasonable. *Id.* at 735.

The court stated the fact IDOT sets contract goals as a percentage of total contract dollars does not demonstrate that IDOT imposes an undue burden on non-DBE subcontractors, but to the contrary, IDOT is acting within the scope of the federal regulations that requires goals to be set

in this manner. *Id.* at 735. The court noted that it recognizes setting goals as a percentage of total contract value addresses the widespread, indirect effects of discrimination that may prevent DBEs from competing as primes in the first place, and that a sharing of the burden by innocent parties, here non-DBE subcontractors, is permissible. *Id.* The court held that IDOT carried its burden in providing persuasive evidence of discrimination in Illinois, and found that such sharing of the burden is permissible here. *Id.*

Use of race-neutral alternatives. The court found that IDOT identified several race-neutral programs it used to increase DBE participation, including its Supportive Services, Mentor-Protégé, and Model Contractor Programs. *Id.* at 735. The programs provide workshops and training that help small businesses build bonding capacity, gain access to financial and project management resources, and learn about specific procurement opportunities. *Id.* IDOT conducted several studies including zero-participation goals contracts in which there was no DBE participation goal, and found that DBEs received only 0.84 percent of the total dollar value awarded. *Id.*

The court held IDOT was compliant with the federal regulations, noting that in the *Northern Contracting v. Illinois DOT* case, the Seventh Circuit found IDOT employed almost all of the methods suggested in the regulations to maximize DBE participation without resorting to race, including providing assistance in obtaining bonding and financing, implementing a supportive services program, and providing technical assistance. *Id.* at 735. The court agreed with the Seventh Circuit, and found that IDOT has made serious, good faith consideration of workable race-neutral alternatives. *Id.*

Duration and flexibility. The court pointed out that the state statute through which the Federal DBE Program is implemented is limited in duration and must be reauthorized every two to five years. *Id.* at 736. The court reviewed evidence that IDOT granted 270 of the 362 good faith waiver requests that it received from 2006 to 2014, and that IDOT granted 1,002 post-award waivers on over \$36 million in contracting dollars. *Id.* The court noted that IDOT granted the only good faith efforts waiver that Midwest requested. *Id.*

The court held the undisputed facts established that IDOT did not have a “no-waiver policy.” *Id.* at 736. The court found that it could not conclude that the waiver provisions were impermissibly vague, and that IDOT took into consideration the substantial guidance provided in the federal regulations. *Id.* at 736-737. Because Midwest’s own experience demonstrated the flexibility of the Federal DBE Program in practice, the court said it could not conclude that the IDOT program amounts to an impermissible quota system that is unconstitutional on its face. *Id.* at 737.

The court again stated that Midwest had not presented any affirmative evidence showing that IDOT’s implementation of the Federal DBE Program imposes an undue burden on non-DBEs, fails to employ race-neutral measures, or lacks flexibility. *Id.* at 737. Accordingly, the court granted IDOT’s motion for summary judgment.

Facial and as-applied challenges to the Tollway program. The Illinois Tollway Program exists independently of the Federal DBE Program. Midwest challenged the Tollway Program as unconstitutional on its face and as applied. *Id.* at 737. Like the Federal and IDOT Defendants, the

Tollway was required to show that its compelling interest in remedying discrimination in the Illinois road construction industry rests on a strong basis in evidence. *Id.* The Tollway relied on a 2006 disparity study, which examined the disparity between the Tollway's utilization of DBEs and their availability. *Id.*

The study employed a "custom census" approach to calculate DBE availability, and examined the Tollway's contract data to determine utilization. *Id.* at 737. The 2006 study reported statistically significant disparities for all race and sex categories examined. *Id.* The study also conducted an "economy-wide analysis" examining other race and sex disparities in the wider construction economy from 1979 to 2002. *Id.* Controlling for race- and gender-neutral variables, the study showed a significant negative correlation between a person's race or sex and their earning power and ability to form a business. *Id.*

Midwest's challenges to the Tollway evidence insufficient and speculative. In 2013, the Tollway commissioned a new study, which the court noted was not complete, but there was an "economy-wide analysis" similar to the analysis done in 2006 that updated census data gathered from 2007 to 2011. *Id.* at 737-738. The updated census analysis, according to the court, controlled for variables such as education, age and occupation and found lower earnings and rates of business formation among women and minorities as compared to white men. *Id.* at 738.

Midwest attacked the Tollway's 2006 study similar to how it attacked the other studies with regard to IDOT's DBE Program. *Id.* at 738. For example, Midwest attacked the 2006 study as being biased because it failed to take into account capacity in determining the disparities. *Id.* The Tollway defended the 2006 study arguing that capacity metrics should not be taken into account because the Tollway asserted they are themselves a product of indirect discrimination, the construction industry is elastic in nature, and that firms can easily ramp up or ratchet down to accommodate the size of a project. *Id.* The Tollway also argued that the "economy-wide analysis" revealed a negative correlation between an individual's race and sex and their earning power and ability to own or form a business, showing that the underutilization of DBEs is consistent with discrimination. *Id.* at 738.

To successfully rebut the Tollway's evidence of discrimination, the court stated that Midwest must come forward with a neutral explanation for the disparity, show that the Tollway's statistics are flawed, demonstrate that the observed disparities are insignificant, or present contrasting data of its own. *Id.* at 738-739. Again, the court found that Midwest failed to make this showing, and that the evidence offered through the expert reports for Midwest was far too speculative to create a disputed issue of fact suitable for trial. *Id.* at 739. Accordingly, the court found the Tollway Defendants established a strong basis in evidence for the Tollway Program. *Id.*

Tollway Program is narrowly tailored. As to determining whether the Tollway Program is narrowly tailored, Midwest also argued that the Tollway Program imposed an undue burden on non-DBE subcontractors. Like IDOT, the Tollway sets individual contract goals as a percentage of the value of the entire contract based on the availability of DBEs to perform particular line items. *Id.* at 739.

The court reiterated that setting goals as a percentage of total contract dollars does not demonstrate an undue burden on non-DBE subcontractors, and that the Tollway's method of goal setting is identical to that prescribed by the federal regulations, which the court already found to be supported by strong policy reasons. *Id.* at 739. The court stated that the sharing of a remedial program's burden is itself insufficient to warrant the conclusion that the program is not narrowly tailored. *Id.* at 739. The court held the Tollway Program's burden on non-DBE subcontractors to be permissible. *Id.*

In addressing the efficacy of race-neutral measures, the court found the Tollway implemented race-neutral programs to increase DBE participation, including a program that allows smaller contracts to be unbundled from larger ones, a Small Business Initiative that sets aside contracts for small businesses on a race-neutral basis, partnerships with agencies that provide support services to small businesses, and other programs designed to make it easier for smaller contractors to do business with the Tollway in general. *Id.* at 739-740. The court held the Tollway's race-neutral measures are consistent with those suggested under the federal regulations and found that the availability of these programs, which mirror IDOT's, demonstrates serious, good faith consideration of workable race-neutral alternatives. *Id.* at 740.

In considering the issue of flexibility, the court found the Tollway Program, like the Federal DBE Program, provides for waivers where prime contractors are unable to meet DBE participation goals, but have made good faith efforts to do so. *Id.* at 740. Like IDOT, the court said the Tollway adheres to the federal regulations in determining whether a bidder has made good faith efforts. *Id.* As under the Federal DBE Program, the Tollway Program also allows bidders who have been denied waivers to appeal. *Id.*

From 2006 to 2011, the court stated, the Tollway granted waivers on approximately 20 percent of the 200 prime construction contracts it awarded. *Id.* at 740. Because the Tollway demonstrated that waivers are available, routinely granted, and awarded or denied based on guidance found in the federal regulations, the court found the Tollway Program sufficiently flexible. *Id.*

Midwest presented no affirmative evidence. The court held the Tollway Defendants provided a strong basis in evidence for their DBE Program, whereas Midwest, did not come forward with any concrete, affirmative evidence to shake this foundation. *Id.* at 740. The court thus held the Tollway Program was narrowly tailored and granted the Tollway Defendants' motion for summary judgment. *Id.*

Notice of Appeal. Midwest Fence Corporation filed a Notice of Appeal to the United States Court of Appeals for the Seventh Circuit, which appeal is discussed above in the Seventh Circuit decision in 2016.

7. Geyer Signal, Inc. v. Minnesota, DOT, 2014 WL 1309092 (D. Minn. March 31, 2014)

In *Geyer Signal, Inc., et al. v. Minnesota DOT, USDOT, Federal Highway Administration, et al.*, Case No. 11-CV-321, United States District Court for the District Court of Minnesota, the plaintiffs

Geyer Signal, Inc. and its owner filed this lawsuit against the Minnesota DOT (MnDOT) seeking a permanent injunction against enforcement and a declaration of unconstitutionality of the Federal DBE Program and Minnesota DOT's implementation of the DBE Program on its face and as applied. Geyer Signal sought an injunction against the Minnesota DOT prohibiting it from enforcing the DBE Program or, alternatively, from implementing the Program improperly; a declaratory judgment declaring that the DBE Program violates the Equal protection element of the Fifth Amendment of the United States Constitution and/or the Equal Protection clause of the Fourteenth Amendment to the United States Constitution and is unconstitutional, or, in the alternative that Minnesota DOT's implementation of the Program is an unconstitutional violation of the Equal Protection Clause, and/or that the Program is void for vagueness; and other relief.

Procedural background. Plaintiff Geyer Signal is a small, family-owned business that performs traffic control work generally on road construction projects. Geyer Signal is a firm owned by a Caucasian male, who also is a named plaintiff.

Subsequent to the lawsuit filed by Geyer Signal, the USDOT and the Federal Highway Administration filed their Motion to permit them to intervene as defendants in this case. The Federal Defendant-Intervenors requested intervention on the case in order to defend the constitutionality of the Federal DBE Program and the federal regulations at issue. The Federal Defendant-Intervenors and the plaintiffs filed a Stipulation that the Federal Defendant-Intervenors have the right to intervene and should be permitted to intervene in the matter, and consequently the plaintiffs did not contest the Federal Defendant-Intervenor's Motion for Intervention. The Court issued an Order that the Stipulation of Intervention, agreeing that the Federal Defendant-Intervenors may intervene in this lawsuit, be approved and that the Federal Defendant-Intervenors are permitted to intervene in this case.

The Federal Defendants moved for summary judgment and the State defendants moved to dismiss, or in the alternative for summary judgment, arguing that the DBE Program on its face and as implemented by MnDOT is constitutional. The Court concluded that the plaintiffs, Geyer Signal and its white male owner, Kevin Kissner, raised no genuine issue of material fact with respect to the constitutionality of the DBE Program facially or as applied. Therefore, the Court granted the Federal Defendants and the State defendants' motions for summary judgment in their entirety.

Plaintiffs alleged that there is insufficient evidence of a compelling governmental interest to support a race-based program for DBE use in the fields of traffic control or landscaping. (2014 WL 1309092 at *10) Additionally, plaintiffs alleged that the DBE Program is not narrowly tailored because it (1) treats the construction industry as monolithic, leading to an overconcentration of DBE participation in the areas of traffic signal and landscaping work; (2) allows recipients to set contract goals; and (3) sets goals based on the number of DBEs there are, not the amount of work those DBEs can actually perform. *Id.* *10. Plaintiffs also alleged that the DBE Program is unconstitutionally vague because it allows prime contractors to use bids from DBEs that are higher than the bids of non-DBEs, provided the increase in price is not unreasonable, without defining what increased costs are "reasonable." *Id.*

Constitutional claims. The Court states that the “heart of plaintiffs’ claims is that the DBE Program and MnDOT’s implementation of it are unconstitutional because the impact of curing discrimination in the construction industry is overconcentrated in particular sub-categories of work.” *Id.* at *11. The Court noted that because DBEs are, by definition, small businesses, plaintiffs contend they “simply cannot perform the vast majority of the types of work required for federally-funded MnDOT projects because they lack the financial resources and equipment necessary to conduct such work. *Id.*

As a result, plaintiffs claimed that DBEs only compete in certain small areas of MnDOT work, such as traffic control, trucking, and supply, but the DBE goals that prime contractors must meet are spread out over the entire contract. *Id.* Plaintiffs asserted that prime contractors are forced to disproportionately use DBEs in those small areas of work, and that non-DBEs in those areas of work are forced to bear the entire burden of “correcting discrimination”, while the vast majority of non-DBEs in MnDOT contracting have essentially no DBE competition. *Id.*

Plaintiffs therefore argued that the DBE Program is not narrowly tailored because it means that any DBE goals are only being met through a few areas of work on construction projects, which burden non-DBEs in those sectors and do not alleviate any problems in other sectors. *Id.* at #11.

Plaintiffs brought two facial challenges to the Federal DBE Program. *Id.* Plaintiffs allege that the DBE Program is facially unconstitutional because it is “fatally prone to overconcentration” where DBE goals are met disproportionately in areas of work that require little overhead and capital. *Id.* at 11. Second, plaintiffs alleged that the DBE Program is unconstitutionally vague because it requires prime contractors to accept DBE bids even if the DBE bids are higher than those from non-DBEs, provided the increased cost is “reasonable” without defining a reasonable increase in cost. *Id.*

Plaintiffs also brought three as-applied challenges based on MnDOT’s implementation of the DBE Program. *Id.* at 12. First, plaintiffs contended that MnDOT has unconstitutionally applied the DBE Program to its contracting because there is no evidence of discrimination against DBEs in government contracting in Minnesota. *Id.* Second, they contended that MnDOT has set impermissibly high goals for DBE participation. Finally, plaintiffs argued that to the extent the DBE Federal Program allows MnDOT to correct for overconcentration, it has failed to do so, rendering its implementation of the Program unconstitutional. *Id.*

A. Strict scrutiny. It is undisputed that strict scrutiny applied to the Court’s evaluation of the Federal DBE Program, whether the challenge is facial or as - applied. *Id.* at *12. Under strict scrutiny, a “statute’s race-based measures ‘are constitutional only if they are narrowly tailored to further compelling governmental interests.’” *Id.* at *12, quoting *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

The Court notes that the DBE Program also contains a gender conscious provision, a classification the Court says that would be subject to intermediate scrutiny. *Id.* at *12, at n.4. Because race is also used by the Federal DBE Program, however, the Program must ultimately meet strict scrutiny, and the Court therefore analyzes the entire Program for its compliance with strict scrutiny. *Id.*

B. Facial challenge based on overconcentration. The Court says that in order to prevail on a facial challenge, the plaintiff must establish that no set of circumstances exist under which the Federal DBE Program would be valid. *Id.* at *12. The Court states that plaintiffs bear the ultimate burden to prove that the DBE Program is unconstitutional. *Id.* at *.

1. Compelling governmental interest. The Court points out that the Eighth Circuit Court of Appeals has already held the federal government has a compelling interest in not perpetuating the effects of racial discrimination in its own distribution of federal funds and in remediating the effects of past discrimination in the government contracting markets created by its disbursements. *Id.* *13, quoting *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1165 (10th Cir. 2000). The plaintiffs did not dispute that remedying discrimination in federal transportation contracting is a compelling governmental interest. *Id.* at *13. In accessing the evidence offered in support of a finding of discrimination, the Court concluded that defendants have articulated a compelling interest underlying enactment of the DBE Program. *Id.*

Second, the Court states that the government must demonstrate a strong basis in the evidence supporting its conclusion that race-based remedial action was necessary to further the compelling interest. *Id.* at *13. In assessing the evidence offered in support of a finding of discrimination, the Court considers both direct and circumstantial evidence, including post-enactment evidence introduced by defendants as well as the evidence in the legislative history itself. *Id.* The party challenging the constitutionality of the DBE Program bears the burden of demonstrating that the government's evidence did not support an inference of prior discrimination. *Id.*

Congressional evidence of discrimination: disparity studies and barriers. Plaintiffs argued that the evidence relied upon by Congress in reauthorizing the DBE Program is insufficient and generally critique the reports, studies, and evidence from the Congressional record produced by the Federal Defendants. *Id.* at *13. But, the Court found that plaintiffs did not raise any specific issues with respect to the Federal Defendants' proffered evidence of discrimination. *Id.* *14. Plaintiffs had argued that no party could ever afford to retain an expert to analyze the numerous studies submitted as evidence by the Federal Defendants and find all of the flaws. *Id.* *14. Federal Defendants had proffered disparity studies from throughout the United States over a period of years in support of the Federal DBE Program. *Id.* at *14. Based on these studies, the Federal Defendants' consultant concluded that minorities and women formed businesses at disproportionately lower rates and their businesses earn statistically less than businesses owned by men or non-minorities. *Id.* at *6.

The Federal Defendants' consultant also described studies supporting the conclusion that there is credit discrimination against minority- and women-owned businesses, concluded that there is a consistent and statistically significant underutilization of minority- and women-owned businesses in public contracting, and specifically found that discrimination existed in MnDOT contracting when no race-conscious efforts were utilized. *Id.* *6. The Court notes that Congress had considered a plethora of evidence documenting the continued presence of discrimination in transportation projects utilizing Federal dollars. *Id.* at *5.

The Court concluded that neither of the plaintiffs' contentions established that Congress lacked a substantial basis in the evidence to support its conclusion that race-based remedial action was necessary to address discrimination in public construction contracting. *Id.* at *14. The Court rejected plaintiffs' argument that because Congress found multiple forms of discrimination against minority- and women-owned business, that evidence showed Congress failed to also find that such businesses specifically face discrimination in public contracting, or that such discrimination is not relevant to the effect that discrimination has on public contracting. *Id.*

The Court referenced the decision in *Adarand Constructors, Inc.* 228 F.3d at 1175-1176. In *Adarand*, the Court found evidence relevant to Congressional enactment of the DBE Program to include that both race-based barriers to entry and the ongoing race-based impediments to success faced by minority subcontracting enterprises are caused either by continuing discrimination or the lingering effects of past discrimination on the relevant market. *Id.* at *14.

The Court, citing again with approval the decision in *Adarand Constructors, Inc.*, found the evidence presented by the federal government demonstrates the existence of two kinds of discriminatory barriers to minority subcontracting enterprises, both of which show a strong link between racial disparities in the federal government's disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination. *Id.* at *14, quoting, *Adarand Constructors, Inc.* 228 F.3d at 1167-68. The first discriminatory barriers are to the formation of qualified minority subcontracting enterprises due to private discrimination. *Id.* The second discriminatory barriers are to fair competition between minority and non-minority subcontracting enterprises, again due to private discrimination. *Id.* Both kinds of discriminatory barriers preclude existing minority firms from effectively competing for public construction contracts. *Id.*

Accordingly, the Court found that Congress' consideration of discriminatory barriers to entry for DBEs as well as discrimination in existing public contracting establish a strong basis in the evidence for reauthorization of the Federal DBE Program. *Id.* at *14.

Court rejects Plaintiffs' general critique of evidence as failing to meet their burden of proof.

The Court held that plaintiffs' general critique of the methodology of the studies relied upon by the Federal Defendants is similarly insufficient to demonstrate that Congress lacked a substantial basis in the evidence. *Id.* at *14. The Court stated that the Eighth Circuit Court of Appeals has already rejected plaintiffs' argument that Congress was required to find specific evidence of discrimination in Minnesota in order to enact the national Program. *Id.* at *14.

Finally, the Court pointed out that plaintiffs have failed to present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to and participation in highway contracts. *Id.* at *15. Thus, the Court concluded that plaintiffs failed to meet their ultimate burden to prove that the Federal DBE Program is unconstitutional on this ground. *Id.* at *15, quoting *Sherbrooke Turf, Inc.*, 345 F.3d at 971-73.

Therefore, the Court held that plaintiffs did not meet their burden of raising a genuine issue of material fact as to whether the government met its evidentiary burden in reauthorizing the DBE

Federal Program, and granted summary judgment in favor of the Federal Defendants with respect to the government's compelling interest. *Id.* at *15.

2. Narrowly tailored. The Court states that several factors are examined in determining whether race-conscious remedies are narrowly tailored, and that numerous Federal Courts have already concluded that the DBE Federal Program is narrowly tailored. *Id.* at *15. Plaintiffs in this case did not dispute the various aspects of the Federal DBE Program that courts have previously found to demonstrate narrowly tailoring. *Id.* Instead, plaintiffs argue only that the Federal DBE Program is not narrowly tailored on its face because of overconcentration.

Overconcentration. Plaintiffs argued that if the recipients of federal funds use overall industry participation of minorities to set goals, yet limit actual DBE participation to only defined small businesses that are limited in the work they can perform, there is no way to avoid overconcentration of DBE participation in a few, limited areas of MnDOT work. *Id.* at *15. Plaintiffs asserted that small businesses cannot perform most of the types of work needed or necessary for large highway projects, and if they had the capital to do it, they would not be small businesses. *Id.* at *16. Therefore, plaintiffs argued the DBE Program will always be overconcentrated. *Id.*

The Court states that in order for plaintiffs to prevail on this facial challenge, plaintiffs must establish that the overconcentration it identifies is unconstitutional, and that there are no circumstances under which the Federal DBE Program could be operated without overconcentration. *Id.* The Court concludes that plaintiffs' claim fails on the basis that there are circumstances under which the Federal DBE Program could be operated without overconcentration. *Id.*

First, the Court found that plaintiffs fail to establish that the DBE Program goals will always be fulfilled in a manner that creates overconcentration, because they misapprehend the nature of the goal setting mandated by the DBE Program. *Id.* at *16. The Court states that recipients set goals for DBE participation based on evidence of the availability of ready, willing and able DBEs to participate on DOT-assisted contracts. *Id.* The DBE Program, according to the Court, necessarily takes into account, when determining goals, that there are certain types of work that DBEs may never be able to perform because of the capital requirements. *Id.* In other words, if there is a type of work that no DBE can perform, there will be no demonstrable evidence of the availability of ready, willing and able DBEs in that type of work, and those non-existent DBEs will not be factored into the level of DBE participation that a locality would expect absent the effects of discrimination. *Id.*

Second, the Court found that even if the DBE Program could have the incidental effect of overconcentration in particular areas, the DBE Program facially provides ample mechanisms for a recipient of federal funds to address such a problem. *Id.* at *16. The Court notes that a recipient retains substantial flexibility in setting individual contract goals and specifically may consider the type of work involved, the location of the work, and the availability of DBEs for the work of the particular contract. *Id.* If overconcentration presents itself as a problem, the Court points out that a recipient can alter contract goals to focus less on contracts that require work in an already

overconcentrated area and instead involve other types of work where overconcentration of DBEs is not present. *Id.*

The federal regulations also require contractors to engage in good faith efforts that require breaking out the contract work items into economically feasible units to facilitate DBE participation. *Id.* Therefore, the Court found, the regulations anticipate the possible issue identified by plaintiffs and require prime contractors to subdivide projects that would otherwise typically require more capital or equipment than a single DBE can acquire. *Id.* Also, the Court, states that recipients may obtain waivers of the DBE Program's provisions pertaining to overall goals, contract goals, or good faith efforts, if, for example, local conditions of overconcentration threaten operation of the DBE Program. *Id.*

The Court also rejects plaintiffs claim that 49 CFR § 26.45(h), which provides that recipients are not allowed to subdivide their annual goals into "group-specific goals", but rather must provide for participation by all certified DBEs, as evidence that the DBE Program leads to overconcentration. *Id.* at *16. The Court notes that other courts have interpreted this provision to mean that recipients cannot apportion its DBE goal among different minority groups, and therefore the provision does not appear to prohibit recipients from identifying particular overconcentrated areas and remedying overconcentration in those areas. *Id.* at *16. And, even if the provision operated as plaintiffs suggested, that provision is subject to waiver and does not affect a recipient's ability to tailor specific contract goals to combat overconcentration. *Id.* at *16, n. 5.

The Court states with respect to overconcentration specifically, the federal regulations provide that recipients may use incentives, technical assistance, business development programs, mentor-protégé programs, and other appropriate measures designed to assist DBEs in performing work outside of the specific field in which the recipient has determined that non-DBEs are unduly burdened. *Id.* at *17. All of these measures could be used by recipients to shift DBEs from areas in which they are overconcentrated to other areas of work. *Id.* at *17.

Therefore, the Court held that because the DBE Program provides numerous avenues for recipients of federal funds to combat overconcentration, the Court concluded that plaintiffs' facial challenge to the Program fails, and granted the Federal Defendants' motion for summary judgment. *Id.*

C. Facial challenged based on vagueness. The Court held that plaintiffs could not maintain a facial challenge against the Federal DBE Program for vagueness, as their constitutional challenges to the Program are not based in the First Amendment. *Id.* at *17. The Court states that the Eighth Circuit Court of Appeals has held that courts need not consider facial vagueness challenges based upon constitutional grounds other than the First Amendment. *Id.*

The Court thus granted Federal Defendants' motion for summary judgment with respect to plaintiffs' facial claim for vagueness based on the allegation that the Federal DBE Program does not define "reasonable" for purposes of when a prime contractor is entitled to reject a DBEs' bid on the basis of price alone. *Id.*

D. As-Applied Challenges to MnDOT’s DBE Program: MnDOT’s program held narrowly tailored.

Plaintiffs brought three as-applied challenges against MnDOT’s implementation of the Federal DBE Program, alleging that MnDOT has failed to support its implementation of the Program with evidence of discrimination in its contracting, sets inappropriate goals for DBE participation, and has failed to respond to overconcentration in the traffic control industry. *Id.* at *17.

1. Alleged failure to find evidence of discrimination. The Court held that a state’s implementation of the Federal DBE Program must be narrowly tailored. *Id.* at *18. To show that a state has violated the narrow tailoring requirement of the Federal DBE Program, the Court says a challenger must demonstrate that “better data was available” and the recipient of federal funds “was otherwise unreasonable in undertaking [its] thorough analysis and in relying on its results.” *Id.*, quoting *Sherbrook Turf, Inc.* at 973.

Plaintiffs’ expert critiqued the statistical methods used and conclusions drawn by the consultant for MnDOT in finding that discrimination against DBEs exists in MnDOT contracting sufficient to support operation of the DBE Program. *Id.* at *18. Plaintiffs’ expert also critiqued the measures of DBE availability employed by the MnDOT consultant and the fact he measured discrimination in both prime and subcontracting markets, instead of solely in subcontracting markets. *Id.*

Plaintiffs present no affirmative evidence that discrimination does not exist. The Court held that plaintiffs’ disputes with MnDOT’s conclusion that discrimination exists in public contracting are insufficient to establish that MnDOT’s implementation of the Federal DBE Program is not narrowly tailored. *Id.* at *18. First, the Court found that it is insufficient to show that “data was susceptible to multiple interpretations,” instead, plaintiffs must “present affirmative evidence that no remedial action was necessary because minority-owned small businesses enjoy non-discriminatory access to and participation in highway contracts.” *Id.* at *18, quoting *Sherbrooke Turf, Inc.*, 345 F.3d at 970. Here, the Court found, plaintiffs’ expert has not presented affirmative evidence upon which the Court could conclude that no discrimination exists in Minnesota’s public contracting. *Id.* at *18.

As for the measures of availability and measurement of discrimination in both prime and subcontracting markets, both of these practices are included in the federal regulations as part of the mechanisms for goal setting. *Id.* at *18. The Court found that it would make little sense to separate prime contractor and subcontractor availability, when DBEs will also compete for prime contracts and any success will be reflected in the recipient’s calculation of success in meeting the overall goal. *Id.* at *18, quoting *Northern Contracting, Inc. v. Illinois*, 473 F.3d 715, 723 (7th Cir. 2007). Because these factors are part of the federal regulations defining state goal setting that the Eighth Circuit Court of Appeals has already approved in assessing MnDOT’s compliance with narrow tailoring in *Sherbrooke Turf*, the Court concluded these criticisms do not establish that MnDOT has violated the narrow tailoring requirement. *Id.* at *18.

In addition, the Court held these criticisms fail to establish that MnDOT was unreasonable in undertaking its thorough analysis and relying on its results, and consequently do not show lack of narrow tailoring. *Id.* at *18. Accordingly, the Court granted the State defendants’ motion for summary judgment with respect to this claim.

2. Alleged inappropriate goal setting. Plaintiffs second challenge was to the aspirational goals MnDOT has set for DBE performance between 2009 and 2015. *Id.* at *19. The Court found that the goal setting violations the plaintiffs alleged are not the types of violations that could reasonably be expected to recur. *Id.* Plaintiffs raised numerous arguments regarding the data and methodology used by MnDOT in setting its earlier goals. *Id.* But, plaintiffs did not dispute that every three years MnDOT conducts an entirely new analysis of discrimination in the relevant market and establishes new goals. *Id.* Therefore, disputes over the data collection and calculations used to support goals that are no longer in effect are moot. *Id.* Thus, the Court only considered plaintiffs' challenges to the 2013–2015 goals. *Id.*

Plaintiffs raised the same challenges to the 2013–2015 goals as it did to MnDOT's finding of discrimination, namely that the goals rely on multiple approaches to ascertain the availability of DBEs and rely on a measurement of discrimination that accounts for both prime and subcontracting markets. *Id.* at *19. Because these challenges identify only a different interpretation of the data and do not establish that MnDOT was unreasonable in relying on the outcome of the consultants' studies, plaintiffs have failed to demonstrate a material issue of fact related to MnDOT's narrow tailoring as it relates to goal setting. *Id.*

3. Alleged overconcentration in the traffic control market. Plaintiffs' final argument was that MnDOT's implementation of the DBE Program violates the Equal Protection Clause because MnDOT has failed to find overconcentration in the traffic control market and correct for such overconcentration. *Id.* at *20. MnDOT presented an expert report that reviewed four different industries into which plaintiffs' work falls based on NAICs codes that firms conducting traffic control-type work identify themselves by. *Id.* After conducting a disproportionality comparison, the consultant concluded that there was not statistically significant overconcentration of DBEs in plaintiffs' type of work.

Plaintiffs' expert found that there is overconcentration, but relied upon six other contractors that have previously bid on MnDOT contracts, which plaintiffs believe perform the same type of work as plaintiff. *Id.* at *20. But, the Court found plaintiffs have provided no authority for the proposition that the government must conform its implementation of the DBE Program to every individual business' self-assessment of what industry group they fall into and what other businesses are similar. *Id.*

The Court held that to require the State to respond to and adjust its calculations on account of such a challenge by a single business would place an impossible burden on the government because an individual business could always make an argument that some of the other entities in the work area the government has grouped it into are not alike. *Id.* at *20. This, the Court states, would require the government to run endless iterations of overconcentration analyses to satisfy each business that non-DBEs are not being unduly burdened in its self-defined group, which would be quite burdensome. *Id.*

Because plaintiffs did not show that MnDOT's reliance on its overconcentration analysis using NAICs codes was unreasonable or that overconcentration exists in its type of work as defined by MnDOT, it has not established that MnDOT has violated narrow tailoring by failing to identify

overconcentration or failing to address it. *Id.* at *20. Therefore, the Court granted the State defendants' motion for summary judgment with respect to this claim.

III. Claims Under 42 U.S.C. § 1981 and 42 U.S.C. § 2000. Because the Court concluded that MnDOT's actions are in compliance with the Federal DBE Program, its adherence to that Program cannot constitute a basis for a violation of § 1981. *Id.* at *21. In addition, because the Court concluded that plaintiffs failed to establish a violation of the Equal Protection Clause, it granted the defendants' motions for summary judgment on the 42 U.S.C. § 2000d claim.

Holding. Therefore, the Court granted the Federal Defendants' motion for summary judgment and the States' defendants' motion to dismiss/motion for summary judgment, and dismissed all the claims asserted by the plaintiffs.

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. M.K. Weeden Construction v. State of Montana, Montana Department of Transportation, et al., 2013 WL 4774517 (D. Mont.) (September 4, 2013)

This case involved a challenge by a prime contractor, M.K. Weeden Construction, Inc. (“Weeden”) against the State of Montana, Montana Department of Transportation and others, to the DBE Program adopted by MDT implementing the Federal DBE Program at 49 CFR Part 26. Weeden

sought an application for Temporary Restraining Order and Preliminary Injunction against the State of Montana and the MDT.

Factual background and claims. Weeden was the low dollar bidder with a bid of \$14,770,163.01 on the Arrow Creek Slide Project. The project received federal funding, and as such, was required to comply with the USDOT's DBE Program. 2013 WL 4774517 at *1. MDT had established an overall goal of 5.83 percent DBE participation in Montana's highway construction projects. On the Arrow Creek Slide Project, MDT established a DBE goal of 2 percent. *Id.*

Plaintiff Weeden, although it submitted the low dollar bid, did not meet the 2 percent DBE requirement. 2013 WL 4774517 at *1. Weeden claimed that its bid relied upon only 1.87 percent DBE subcontractors (although the court points out that Weeden's bid actually identified only .81 percent DBE subcontractors). Weeden was the only bidder out of the six bidders who did not meet the 2 percent DBE goal. The other five bidders exceeded the 2 percent goal, with bids ranging from 2.19 percent DBE participation to 6.98 percent DBE participation. *Id.* at *2.

Weeden attempted to utilize a good faith exception to the DBE requirement under the Federal DBE Program and Montana's DBE Program. MDT's DBE Participation Review Committee considered Weeden's good faith documentation and found that Weeden's bid was non-compliant as to the DBE requirement, and that Weeden failed to demonstrate good faith efforts to solicit DBE subcontractor participation in the contract. 2013 WL 4774517 at *2. Weeden appealed that decision to the MDT DBE Review Board and appeared before the Board at a hearing. The DBE Review Board affirmed the Committee decision finding that Weeden's bid was not in compliance with the contract DBE goal and that Weeden had failed to make a good faith effort to comply with the goal. *Id.* at *2. The DBE Review Board found that Weeden had received a DBE bid for traffic control, but Weeden decided to perform that work itself in order to lower its bid amount. *Id.* at *2. Additionally, the DBE Review Board found that Weeden's mass email to 158 DBE subcontractors without any follow up was a *pro forma* effort not credited by the Review Board as an active and aggressive effort to obtain DBE participation. *Id.*

Plaintiff Weeden sought an injunction in federal district court against MDT to prevent it from letting the contract to another bidder. Weeden claimed that MDT's DBE Program violated the Equal Protection Clause of the U.S. Constitution and the Montana Constitution, asserting that there was no supporting evidence of discrimination in the Montana highway construction industry, and therefore, there was no government interest that would justify favoring DBE entities. 2013 WL 4774517 at *2. Weeden also claimed that its right to Due Process under the U.S. Constitution and Montana Constitution had been violated. Specifically, Weeden claimed that MDT did not provide reasonable notice of the good faith effort requirements. *Id.*

No proof of irreparable harm and balance of equities favor MDT. First, the Court found that Weeden did not prove for a certainty that it would suffer irreparable harm based on the Court's conclusion that in the past four years, Weeden had obtained six state highway construction contracts valued at approximately \$26 million, and that MDT had \$50 million more in highway construction projects to be let during the remainder of 2013 alone. 2013 WL 4774517 at *3. Thus, the Court concluded that as demonstrated by its past performance, Weeden has the

capacity to obtain other highway construction contracts and thus there is little risk of irreparable injury in the event MDT awards the Project to another bidder. *Id.*

Second, the Court found the balance of the equities did not tip in Weeden's favor. 2013 WL 4774517 at *3. Weeden had asserted that MDT and USDOT rules regarding good faith efforts to obtain DBE subcontractor participation are confusing, non-specific and contradictory. *Id.* The Court held that it is obvious the other five bidders were able to meet and exceed the 2 percent DBE requirement without any difficulty whatsoever. *Id.* The Court found that Weeden's bid is not responsive to the requirements, therefore is not and cannot be the lowest responsible bid. *Id.* The balance of the equities, according to the Court, do not tilt in favor of Weeden, who did not meet the requirements of the contract, especially when numerous other bidders ably demonstrated an ability to meet those requirements. *Id.*

No standing. The Court also questioned whether Weeden raised any serious issues on the merits of its equal protection claim because Weeden is a prime contractor and not a subcontractor. Since Weeden is a prime contractor, the Court held it is clear that Weeden lacks Article III standing to assert its equal protection claim. *Id.* at *3. The Court held that a prime contractor, such as Weeden, is not permitted to challenge MDT's DBE Project as if it were a non-DBE subcontractor because Weeden cannot show that *it* was subjected to a racial or gender-based barrier in its competition for the prime contract. *Id.* at *3. Because Weeden was not deprived of the ability to compete on equal footing with the other bidders, the Court found Weeden suffered no equal protection injury and lacks standing to assert an equal protection claim as it were a non-DBE subcontractor. *Id.*

Court applies *AGC v. California DOT* case; evidence supports narrowly tailored DBE program. Significantly, the Court found that even if Weeden had standing to present an equal protection claim, MDT presented significant evidence of underutilization of DBE's generally, evidence that supports a narrowly tailored race and gender preference program. 2013 WL 4774517 at *4. Moreover, the Court noted that although Weeden points out that some business categories in Montana's highway construction industry do not have a history of discrimination (namely, the category of construction businesses in contrast to the category of professional businesses), the Ninth Circuit "has recently rejected a similar argument requiring the evidence of discrimination in every single segment of the highway construction industry before a preference program can be implemented." *Id.*, citing *Associated General Contractors v. California Dept. of Transportation*, 713 F.3d 1187 (9th Cir. 2013)(holding that Caltrans' DBE program survived strict scrutiny, was narrowly tailored, did not violate equal protection, and was supported by substantial statistical and anecdotal evidence of discrimination).

The Court stated that particularly relevant in this case, "the Ninth Circuit held that California's DBE program need not isolate construction from engineering contracts or prime from subcontracts to determine whether the evidence in each and every category gives rise to an inference of discrimination." *Id.* at 4, citing *Associated General Contractors v. California DOT*, 713 F.3d at 1197. Instead, according to the Court, California – and, by extension, Montana – "is entitled to look at the evidence 'in its entirety' to determine whether there are 'substantial disparities in utilization of minority firms' practiced by some elements of the construction industry." 2013 WL 4774517 at *4, quoting *AGC v. California DOT*, 713 F.3d at 1197. The Court,

also quoting the decision in *AGC v. California DOT*, said: “It is enough that the anecdotal evidence supports Caltrans’ statistical data showing a pervasive pattern of discrimination.” *Id.* at *4, quoting *AGC v. California DOT*, 713 F.3d at 1197.

The Court pointed out that there is no allegation that MDT has exceeded any federal requirement or done other than complied with USDOT regulations. 2013 WL 4774517 at *4. Therefore, the Court concluded that given the similarities between Weeden’s claim and AGC’s equal protection claim against California DOT in the *AGC v. California DOT* case, it does not appear likely that Weeden will succeed on the merits of its equal protection claim. *Id.* at *4.

Due Process claim. The Court also rejected Weeden’s bald assertion that it has a protected property right in the contract that has not been awarded to it where the government agency retains discretion to determine the responsiveness of the bid. The Court found that Montana law requires that an award of a public contract for construction must be made to the lowest *responsible* bidder and that the applicable Montana statute confers upon the government agency broad discretion in the award of a public works contract. Thus, a lower bidder such as Weeden requires no vested property right in a contract until the contract has been awarded, which here obviously had not yet occurred. 2013 WL 4774517 at *5. In any event, the Court noted that Weeden was granted notice, hearing and appeal for MDT’s decision denying the good faith exception to the DBE contract requirement, and therefore it does not appear likely that Weeden would succeed on its due process claim. *Id.* at *5.

Holding and Voluntary Dismissal. The Court denied plaintiff Weeden’s application for Temporary Restraining Order and Preliminary Injunction. Subsequently, Weeden filed a Notice of Voluntary Dismissal Without Prejudice on September 10, 2013.

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 market place for NJT contracts included New Jersey, New York and Pennsylvania. *Id.* at 649. The consultant used contract files obtained from NJT and data obtained from Dun & Bradstreet to identify the industries with which NJT contracts in these geographical areas. *Id.* The consultant then used existing and estimated expenditures in these particular industries to determine weights corresponding to NJT contracting patterns in the different industries for use in the availability analysis. *Id.*

The availability of DBEs was calculated by using the following data: Unified Certification Program Business Directories for the states of New Jersey, New York and Pennsylvania; NJT Vendor List; Dun & Bradstreet database; 2002 Survey of Small Business Owners; and NJT Pre-Qualification List. *Id.* at 649-650. The availability rates were then “calculated by comparing the number of ready, willing, and able minority and women-owned firms in the defined geographic marketplace to the total number of ready, willing, and able firms in the same geographic marketplace. *Id.* The availability rates in each industry were weighed in accordance with NJT expenditures to determine a base figure. *Id.*

Second, the consultant adjusted the base figure due to evidence of discrimination against DBE prime contractors and disparities in small purchases and construction pre-qualification. *Id.* at 650. The discrimination analysis examined discrimination in small purchases, discrimination in pre-qualification, two regression analyses, an Essex County disparity study, market discrimination, and previous utilization. *Id.* at 650.

The Final Recommendations Report noted that there were sizeable differences in the small purchases awards to DBEs and non-DBEs with the awards to DBEs being significantly smaller. *Id.* at 650. DBEs were also found to be less likely to be pre-qualified for contracts over \$1 million in comparison to similarly situated non-DBEs. *Id.* The regression analysis using the dummy

variable method yielded an average estimate of a discriminatory effect of -28.80 percent. *Id.* The discrimination regression analysis using the residual difference method showed that on average 12.2 percent of the contract amount disparity awarded to DBEs and non-DBEs was unexplained. *Id.*

The consultant also considered evidence of discrimination in the local market in accordance with 49 CFR § 26.45(d). The Final Recommendations Report cited in the 2005 Essex County Disparity Study suggested that discrimination in the labor market contributed to the unexplained portion of the self-employment, employment, unemployment, and wage gaps in Essex County, New Jersey. *Id.* at 650.

The consultant recommended that NJT focus on increasing the number of DBE prime contractors. Because qualitative evidence is difficult to quantify, according to the consultant, only the results from the regression analyses were used to adjust the base goal. *Id.* The base goal was then adjusted from 19.74 percent to 23.79 percent. *Id.*

Third, in order to partition the DBE goal by race-neutral and race-conscious methods, the consultant analyzed the share of all DBE contract dollars won with no goals. *Id.* at 650. He also performed two different regression analyses: one involving predicted DBE contract dollars and DBE receipts if the goal was set at zero. *Id.* at 651. The second method utilized predicted DBE contract dollars with goals and predicted DBE contract dollars without goals to forecast how much firms with goals would receive had they not included the goals. *Id.* The consultant averaged his results from all three methods to conclude that the fiscal year 2010 NJT a portion of the race-neutral DBE goal should be 11.94 percent and a portion of the race-conscious DBE goal should be 11.84 percent. *Id.* at 651.

The district court applied the strict scrutiny standard of review. The district court already decided, in the course of the motions for summary judgment, that compelling interest was satisfied as New Jersey was entitled to adopt the federal government's compelling interest in enacting TEA-21 and its implementing regulations. *Id.* at 652, *citing Geod v. N.J. Transit Corp.*, 678 F.Supp.2d 276, 282 (D.N.J. 2009). Therefore, the court limited its analysis to whether NJT's DBE program was narrowly tailored to further that compelling interest in accordance with "its grant of authority under federal law." *Id.* at 652 *citing Northern Contracting, Inc. v. Illinois Department of Transportation*, 473 F.3d 715, 722 (7th Cir. 2007).

Applying *Northern Contracting v. Illinois*. The district court clarified its prior ruling in 2009 (see 678 F.Supp.2d 276) regarding summary judgment, that the court agreed with the holding in *Northern Contracting, Inc. v. Illinois*, that "a challenge to a state's application of a federally mandated program must be limited to the question of whether the state exceeded its authority." *Id.* at 652 *quoting Northern Contracting*, 473 F.3d at 721. The district court in *Geod* followed the Seventh Circuit explanation that when a state department of transportation is acting as an instrument of federal policy, a plaintiff cannot collaterally attack the federal regulations through a challenge to a state's program. *Id.* at 652, *citing Northern Contracting*, 473 F.3d at 722. Therefore, the district court held that the inquiry is limited to the question of whether the state department of transportation "exceeded its grant of authority under federal law." *Id.* at 652-653,

quoting *Northern Contracting*, 473 F.3d at 722 and citing also *Tennessee Asphalt Co. v. Farris*, 942 F.2d 969, 975 (6th Cir. 1991).

The district court found that the holding and analysis in *Northern Contracting* does not contradict the Eighth Circuit's analysis in *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964, 970-71 (8th Cir. 2003). *Id.* at 653. The court held that the Eighth Circuit's discussion of whether the DBE programs as implemented by the State of Minnesota and the State of Nebraska were narrowly tailored focused on whether the states were following the USDOT regulations. *Id.* at 653 citing *Sherbrooke Turf*, 345 F.3d 973-74. Therefore, "only when the state exceeds its federal authority is it susceptible to an as-applied constitutional challenge." *Id.* at 653 quoting *Western States Paving Co., Inc. v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005)(McKay, C.J.)(concurring in part and dissenting in part) and citing *South Florida Chapter of the Associated General Contractors v. Broward County*, 544 F.Supp.2d 1336, 1341 (S.D.Fla.2008).

The court held the initial burden of proof falls on the government, but once the government has presented proof that its affirmative action plan is narrowly tailored, the party challenging the affirmative action plan bears the ultimate burden of proving that the plan is unconstitutional. *Id.* at 653.

In analyzing whether NJT's DBE program was constitutionally defective, the district court focused on the basis of plaintiffs' argument that it was not narrowly tailored because it includes in the category of DBEs racial or ethnic groups as to which the plaintiffs alleged NJT had no evidence of past discrimination. *Id.* at 653. The court found that most of plaintiffs' arguments could be summarized as questioning whether NJT presented demonstrable evidence of the availability of ready, willing and able DBEs as required by 49 CFR § 26.45. *Id.* The court held that NJT followed the goal setting process required by the federal regulations. *Id.* The court stated that NJT began this process with the 2002 disparity study that examined past discrimination and found that all of the groups listed in the regulations were underutilized with the exception of Asians. *Id.* at 654. In calculating the fiscal year 2010 goals, the consultant used contract files and data from Dun & Bradstreet to determine the geographical location corresponding to NJT contracts and then further focused that information by weighting the industries according to NJT's use. *Id.*

The consultant used various methods to calculate the availability of DBEs, including: the UCP Business Directories for the states of New Jersey, New York and Pennsylvania; NJT Vendor List; Dun & Bradstreet database; 2002 Survey of Small Business Owners; and NJT Pre-Qualification List. *Id.* at 654. The court stated that NJT only utilized one of the examples listed in 49 CFR § 26.45(c), the DBE directories method, in formulating the fiscal year 2010 goals. *Id.*

The district court pointed out, however, the regulations state that the "examples are provided as a starting point for your goal setting process and that the examples are not intended as an exhaustive list. *Id.* at 654, citing 46 CFR § 26.45(c). The court concluded the regulations clarify that other methods or combinations of methods to determine a base figure may be used. *Id.* at 654.

The court stated that NJT had used these methods in setting goals for prior years as demonstrated by the reports for 2006 and 2009. *Id.* at 654. In addition, the court noted that the Seventh Circuit held that a custom census, the Dun & Bradstreet database, and the IDOT's list of DBEs were an acceptable combination of methods with which to determine the base figure for TEA-21 purposes. *Id.* at 654, *citing Northern Contracting*, 473 F.3d at 718.

The district court found that the expert witness for plaintiffs had not convinced the court that the data were faulty, and the testimony at trial did not persuade the court that the data or regression analyses relied upon by NJT were unreliable or that another method would provide more accurate results. *Id.* at 654-655.

The court in discussing step two of the goals setting process pointed out that the data examined by the consultant is listed in the regulations as proper evidence to be used to adjust the base figure. *Id.* at 655, *citing* 49 CFR § 26.45(d). These data included evidence from disparity studies and statistical disparities in the ability of DBEs to get pre-qualification. *Id.* at 655. The consultant stated that evidence of societal discrimination was not used to adjust the base goal and that the adjustment to the goal was based on the discrimination analysis, which controls for size of firm and effect of having a DBE goal. *Id.* at 655.

The district court then analyzed NJT's division of the adjusted goal into race-conscious and race-neutral portions. *Id.* at 655. The court noted that narrowly tailoring does not require exhaustion of every conceivable race-neutral alternative, but instead requires serious, good faith consideration of workable race-neutral alternatives. *Id.* at 655. The court agreed with *Western States Paving* that only "when race-neutral efforts prove inadequate do these regulations authorize a State to resort to race-conscious measures to achieve the remainder of its DBE utilization goal." *Id.* at 655, *quoting Western States Paving*, 407 F.3d at 993-94.

The court found that the methods utilized by NJT had been used by it on previous occasions, which were approved by the USDOT. *Id.* at 655. The methods used by NJT, the court found, also complied with the examples listed in 49 CFR § 26.51, including arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate DBE participation; providing pre-qualification assistance; implementing supportive services programs; and ensuring distribution of DBE directories. *Id.* at 655. The court held that based on these reasons and following the *Northern Contracting, Inc. v. Illinois* line of cases, NJT's DBE program did not violate the Constitution as it did not exceed its federal authority. *Id.* at 655.

However, the district court also found that even under the *Western States Paving Co., Inc. v. Washington State DOT* standard, the NJT program still was constitutional. *Id.* at 655. Although the court found that the appropriate inquiry is whether NJT exceeded its federal authority as detailed in *Northern Contracting, Inc. v. Illinois*, the court also examined the NJT DBE program under *Western States Paving Co. v. Washington State DOT*. *Id.* at 655-656. The court stated that under *Western States Paving*, a Court must "undertake an as-applied inquiry into whether [the state's] DBE program is narrowly tailored." *Id.* at 656, *quoting Western States Paving*, 407 F.3d at 997.

Applying *Western States Paving*. The district court then analyzed whether the NJT program was narrowly tailored applying *Western States Paving*. Under the first prong of the narrowly tailoring analysis, a remedial program is only narrowly tailored if its application is limited to those minority groups that have actually suffered discrimination. *Id. at 656, citing Western States Paving*, 407 F.3d at 998. The court acknowledged that according to the 2002 Final Report, the ratios of DBE utilization to DBE availability was 1.31. *Id. at 656*. However, the court found that the plaintiffs' argument failed as the facts in *Western States Paving* were distinguishable from those of NJT, because NJT did receive complaints, i.e., anecdotal evidence, of the lack of opportunities for Asian firms. *Id. at 656*. NJT employees testified that Asian firms informally and formally complained of a lack of opportunity to grow and indicated that the DBE Program was assisting with this issue. *Id.* In addition, plaintiff's expert conceded that Asian firms have smaller average contract amounts in comparison to non-DBE firms. *Id.*

The plaintiff relied solely on the utilization rate as evidence that Asians are not discriminated against in NJT contracting. *Id. at 656*. The court held this was insufficient to overcome the consultant's determination that discrimination did exist against Asians, and thus this group was properly included in the DBE program. *Id. at 656*.

The district court rejected Plaintiffs' argument that the first step of the narrow tailoring analysis was not met because NJT focuses its program on sub-contractors when NJT's expert identified "prime contracting" as the area in which NJT procurements evidence discrimination. *Id. at 656*. The court held that narrow tailoring does not require exhaustion of every conceivable race-neutral alternative but it does require serious, good faith consideration of workable race-neutral alternatives. *Id. at 656, citing Sherbrook Turf*, 345 F.3d at 972 (*quoting Grutter v. Bollinger*, 539 U.S. 306, 339, (2003)). In its efforts to implement race-neutral alternatives, the court found NJT attempted to break larger contracts up in order to make them available to smaller contractors and continues to do so when logistically possible and feasible to the procurement department. *Id. at 656-657*.

The district court found NJT satisfied the third prong of the narrowly tailored analysis, the "relationship of the numerical goals to the relevant labor market." *Id. at 657*. Finally, under the fourth prong, the court addressed the impact on third-parties. *Id. at 657*. The court noted that placing a burden on third parties is not impermissible as long as that burden is minimized. *Id. at 657, citing Western States Paving*, 407 F.3d at 995. The court stated that instances will inevitably occur where non-DBEs will be bypassed for contracts that require DBE goals. However, TEA-21 and its implementing regulations contain provisions intended to minimize the burden on non-DBEs. *Id. at 657, citing Western States Paving*, 407 F.3d at 994-995.

The court pointed out the Ninth Circuit in *Western States Paving* found that inclusion of regulations allowing firms that were not presumed to be DBEs to demonstrate that they were socially and economically disadvantaged, and thus qualified for DBE programs, as well as the net worth limitations, were sufficient to minimize the burden on DBEs. *Id. at 657, citing Western States Paving*, 407 F.3d at 955. The court held that the plaintiffs did not provide evidence that NJT was not complying with implementing regulations designed to minimize harm to third parties. *Id.*

Therefore, even if the district court utilized the as-applied narrow tailoring inquiry set forth in *Western States Paving*, NJT's DBE program would not be found to violate the Constitution, as the court held it was narrowly tailored to further a compelling governmental interest. *Id.* at 657.

11. Geod Corporation v. New Jersey Transit Corporation, et seq. 678 F.Supp.2d 276, 2009 WL 2595607 (D.N.J. August 20, 2009)

Plaintiffs Geod and its officers, who are white males, sued the NJT and state officials seeking a declaration that NJT's DBE program was unconstitutional and in violation of the United States 5th and 14th Amendment to the United States Constitution and the Constitution of the State of New Jersey, and seeking a permanent injunction against NJT for enforcing or utilizing its DBE program. The NJT's DBE program was implemented in accordance with the Federal DBE Program and TEA-21 and 49 CFR Part 26.

The parties filed cross Motions for Summary Judgment. The plaintiff Geod challenged the constitutionality of NJT's DBE program for multiple reasons, including alleging NJT could not justify establishing a program using race- and sex-based preferences; the NJT's disparity study did not provide a sufficient factual predicate to justify the DBE Program; NJT's statistical evidence did not establish discrimination; NJT did not have anecdotal data evidencing a "strong basis in evidence" of discrimination which justified a race- and sex-based program; NJT's program was not narrowly tailored and over-inclusive; NJT could not show an exceedingly persuasive justification for gender preferences; and that NJT's program was not narrowly tailored because race-neutral alternatives existed. In opposition, NJT filed a Motion for Summary Judgment asserting that its DBE program was narrowly tailored because it fully complied with the requirements of the Federal DBE Program and TEA-21.

The district court held that states and their agencies are entitled to adopt the federal governments' compelling interest in enacting TEA-21 and its implementing regulations. 2009 WL 2595607 at *4. The court stated that plaintiff's argument that NJT cannot establish the need for its DBE program was a "red herring, which is unsupported." The plaintiff did not question the constitutionality of the compelling interest of the Federal DBE Program. The court held that all states "inherit the federal governments' compelling interest in establishing a DBE program." *Id.*

The court found that establishing a DBE program "is not contingent upon a state agency demonstrating a need for same, as the federal government has already done so." *Id.* The court concluded that this reasoning rendered plaintiff's assertions that NJT's disparity study did not have sufficient factual predicate for establishing its DBE program, and that no exceedingly persuasive justification was found to support gender based preferences, as without merit. *Id.* The court held that NJT does not need to justify establishing its DBE program, as it has already been justified by the legislature. *Id.*

The court noted that both plaintiff's and defendant's arguments were based on an alleged split in the Federal Circuit Courts of Appeal. Plaintiff Geod relies on *Western States Paving Company v. Washington State DOT*, 407 F.3d 983(9th Cir. 2005) for the proposition that an as-applied challenge to the constitutionality of a particular DBE program requires a demonstration by the recipient of federal funds that the program is narrowly tailored. *Id.* at *5. In contrast, the NJT

relied primarily on *Northern Contracting, Inc. v. State of Illinois*, 473 F.3d 715 (7th Cir. 2007) for the proposition that if a DBE program complies with TEA-21, it is narrowly tailored. *Id.*

The court viewed the various Federal Circuit Court of Appeals decisions as fact specific determinations which have led to the parties distinguishing cases without any substantive difference in the application of law. *Id.*

The court reviewed the decisions by the Ninth Circuit in *Western States Paving* and the Seventh Circuit of *Northern Contracting*. In *Western States Paving*, the district court stated that the Ninth Circuit held for a DBE program to pass constitutional muster, it must be narrowly tailored; specifically, the recipient of federal funds must evidence past discrimination in the relevant market in order to utilize race conscious DBE goals. *Id.* at *5. The Ninth Circuit, according to district court, made a fact specific determination as to whether the DBE program complied with TEA-21 in order to decide if the program was narrowly tailored to meet the federal regulation's requirements. The district court stated that the requirement that a recipient must evidence past discrimination "is nothing more than a requirement of the regulation." *Id.*

The court stated that the Seventh Circuit in *Northern Contracting* held a recipient must demonstrate that its program is narrowly tailored, and that generally a recipient is insulated from this sort of constitutional attack absent a showing that the state exceeded its federal authority. *Id.*, citing *Northern Contracting*, 473 F.3d at 721. The district court held that implicit in *Northern Contracting* is the fact one may challenge the constitutionality of a DBE program, as it is applied, to the extent that the program exceeds its federal authority. *Id.*

The court, therefore, concluded that it must determine first whether NJT's DBE program complies with TEA-21, then whether NJT exceeded its federal authority in its application of its DBE program. In other words, the district court stated it must determine whether the NJT DBE program complies with TEA-21 in order to determine whether the program, as implemented by NJT, is narrowly tailored. *Id.*

The court pointed out that the Eighth Circuit Court of Appeals in *Sherbrook Turf, Inc. v. Minnesota DOT*, 345 F.3d 964 (8th Cir. 2003) found Minnesota's DBE program was narrowly tailored because it was in compliance with TEA-21's requirements. The Eighth Circuit in *Sherbrook*, according to the district court, analyzed the application of Minnesota's DBE program to ensure compliance with TEA-21's requirements to ensure that the DBE program implemented by Minnesota DOT was narrowly tailored. *Id.* at *5.

The court held that TEA-21 delegates to each state that accepts federal transportation funds the responsibility of implementing a DBE program that comports with TEA-21. In order to comport with TEA-21, the district court stated a recipient must (1) determine an appropriate DBE participation goal, (2) examine all evidence and evaluate whether an adjustment, if any, is needed to arrive at their goal, and (3) if the adjustment is based on continuing effects of past discrimination, provide demonstrable evidence that is logically and directly related to the effect for which the adjustment is sought. *Id.* at *6, citing *Western States Paving Company*, 407 F.3d at 983, 988.

First, the district court stated a recipient of federal funds must determine, at the local level, the figure that would constitute an appropriate DBE involvement goal, based on their relative availability of DBEs. *Id.* at *6, citing 49 CFR § 26.45(c). In this case, the court found that NJT did determine a base figure for the relative availability of DBEs, which accounted for demonstrable evidence of local market conditions and was designed to be rationally related to the relative availability of DBEs. *Id.* The court pointed out that NJT conducted a disparity study, and the disparity study utilized NJT's DBE lists from fiscal years 1995-1999 and Census Data to determine its base DBE goal. The court noted that the plaintiffs' argument that the data used in the disparity study were stale was without merit and had no basis in law. The court found that the disparity study took into account the primary industries, primary geographic market, and race neutral alternatives, then adjusted its goal to encompass these characteristics. *Id.* at *6.

The court stated that the use of DBE directories and Census data are what the legislature intended for state agencies to utilize in making a base DBE goal determination. *Id.* Also, the court stated that "perhaps more importantly, NJT's DBE goal was approved by the USDOT every year from 2002 until 2008." *Id.* at *6. Thus, the court found NJT appropriately determined their DBE availability, which was approved by the USDOT, pursuant to 49 CFR § 26.45(c). *Id.* at *6. The court held that NJT demonstrated its overall DBE goal is based on demonstrable evidence of the availability of ready, willing, and able DBEs relative to all businesses ready, willing, and able to participate in DOT assisted contracts and reflects its determination of the level of DBE participation it would expect absent the effects of discrimination. *Id.*

Also of significance, the court pointed out that plaintiffs did not provide any evidence that NJT did not set a DBE goal based upon 49 C.F. § 26.45(c). The court thus held that genuine issues of material fact remain only as to whether a reasonable jury may find that the method used by NJT to determine its DBE goal was sufficiently narrowly tailored. *Id.* at *6.

The court pointed out that to determine what adjustment to make, the disparity study examined qualitative data such as focus groups on the pre-qualification status of DBEs, working with prime contractors, securing credit, and its effect on DBE participation, as well as procurement officer interviews to analyze, and compare and contrast their relationships with non-DBE vendors and DBE vendors. *Id.* at *7. This qualitative information was then compared to DBE bids and DBE goals for each year in question. NJT's adjustment to its DBE goal also included an analysis of the overall disparity ratio, as well as, DBE utilization based on race, gender and ethnicity. *Id.* A decomposition analysis was also performed. *Id.*

The court concluded that NJT provided evidence that it, at a minimum, examined the current capacity of DBEs to perform work in its DOT-assisted contracting program, as measured by the volume of work DBEs have performed in recent years, as well as utilizing the disparity study itself. The court pointed out there were two methods specifically approved by 49 CFR § 26.45(d). *Id.*

The court also found that NJT took into account race neutral measures to ensure that the greatest percentage of DBE participation was achieved through race and gender neutral means. The district court concluded that "critically," plaintiffs failed to provide evidence of another, more perfect, method that could have been utilized to adjust NJT's DBE goal. *Id.* at *7. The court

held that genuine issues of material fact remain only as to whether NJT's adjustment to its DBE goal is sufficiently narrowly tailored and thus constitutional. *Id.*

NJT, the court found, adjusted its DBE goal to account for the effects of past discrimination, noting the disparity study took into account the effects of past discrimination in the pre-qualification process of DBEs. *Id.* at *7. The court quoted the disparity study as stating that it found non-trivial and statistically significant measures of discrimination in contract amounts awarded during the study period. *Id.* at *8.

The court found, however, that what was "gravely critical" about the finding of the past effects of discrimination is that it only took into account six groups including American Indian, Hispanic, Asian, blacks, women and "unknown," but did not include an analysis of past discrimination for the ethnic group "Iraqi," which is now a group considered to be a DBE by the NJT. *Id.* Because the disparity report included a category entitled "unknown," the court held a genuine issue of material fact remains as to whether "Iraqi" is legitimately within NJT's defined DBE groups and whether a demonstrable finding of discrimination exists for Iraqis. Therefore, the court denied both plaintiffs' and defendants' Motions for Summary Judgment as to the constitutionality of NJT's DBE program.

The court also held that because the law was not clearly established at the time NJT established its DBE program to comply with TEA-21, the individual state defendants were entitled to qualified immunity and their Motion for Summary Judgment as to the state officials was granted. The court, in addition, held that plaintiff's Title VI claims were dismissed because the individual defendants were not recipients of federal funds, and that the NJT as an instrumentality of the State of New Jersey is entitled to sovereign immunity. Therefore, the court held that the plaintiff's claims based on the violation of 42 U.S.C. § 1983 were dismissed and NJT's Motion for Summary Judgment was granted as to that claim.

12. South Florida Chapter of the Associated General Contractors v. Broward County, Florida, 544 F. Supp.2d 1336 (S.D. Fla. 2008)

Plaintiff, the South Florida Chapter of the Associated General Contractors, brought suit against the Defendant, Broward County, Florida challenging Broward County's implementation of the Federal DBE Program and Broward County's issuance of contracts pursuant to the Federal DBE Program. Plaintiff filed a Motion for a Preliminary Injunction. The court considered only the threshold legal issue raised by plaintiff in the Motion, namely whether or not the decision in *Western States Paving Company v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005) should govern the Court's consideration of the merits of plaintiffs' claim. 544 F.Supp.2d at 1337. The court identified the threshold legal issue presented as essentially, "whether compliance with the federal regulations is all that is required of Defendant Broward County." *Id.* at 1338.

The Defendant County contended that as a recipient of federal funds implementing the Federal DBE Program, all that is required of the County is to comply with the federal regulations, relying on case law from the Seventh Circuit in support of its position. 544 F.Supp.2d at 1338, *citing Northern Contracting v. Illinois*, 473 F.3d 715 (7th Cir. 2007). The plaintiffs disagreed, and

contended that the County must take additional steps beyond those explicitly provided for in the federal regulations to ensure the constitutionality of the County's implementation of the Federal DBE Program, as administered in the County, *citing Western States Paving*, 407 F.3d 983. The court found that there was no case law on point in the Eleventh Circuit Court of Appeals. *Id.* at 1338.

Ninth Circuit Approach: *Western States*. The district court analyzed the Ninth Circuit Court of Appeals approach in *Western States Paving* and the Seventh Circuit approach in *Milwaukee County Pavers Association v. Fiedler*, 922 F.2d 419 (7th Cir. 1991) and *Northern Contracting*, 473 F.3d 715. The district court in Broward County concluded that the Ninth Circuit in *Western States Paving* held that whether Washington's DBE program is narrowly tailored to further Congress's remedial objective depends upon the presence or absence of discrimination in the State's transportation contracting industry, and that it was error for the district court in *Western States Paving* to uphold Washington's DBE program simply because the state had complied with the federal regulations. 544 F.Supp.2d at 1338-1339. The district court in Broward County pointed out that the Ninth Circuit in *Western States Paving* concluded it would be necessary to undertake an as-applied inquiry into whether the state's program is narrowly tailored. 544 F.Supp.2d at 1339, *citing Western States Paving*, 407 F.3d at 997.

In a footnote, the district court in *Broward County* noted that the USDOT "appears not to be of one mind on this issue, however." 544 F.Supp.2d at 1339, n. 3. The district court stated that the "United States DOT has, in analysis posted on its Web site, implicitly instructed states and localities outside of the Ninth Circuit to ignore the *Western States Paving* decision, which would tend to indicate that this agency may not concur with the 'opinion of the United States' as represented in *Western States*." 544 F.Supp.2d at 1339, n. 3. The district court noted that the United States took the position in the *Western States Paving* case that the "state would have to have evidence of past or current effects of discrimination to use race-conscious goals." 544 F.Supp.2d at 1338, *quoting Western States Paving*.

The Court also pointed out that the Eighth Circuit Court of Appeals in *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964 (8th Cir. 2003) reached a similar conclusion as in *Western States Paving*. 544 F.Supp.2d at 1339. The Eighth Circuit in *Sherbrooke*, like the court in *Western States Paving*, "concluded that the federal government had delegated the task of ensuring that the state programs are narrowly tailored, and looked to the underlying data to determine whether those programs were, in fact, narrowly tailored, rather than simply relying on the states' compliance with the federal regulations." 544 F.Supp.2d at 1339.

Seventh Circuit Approach: *Milwaukee County* and *Northern Contracting*. The district court in Broward County next considered the Seventh Circuit approach. The Defendants in Broward County agreed that the County must make a local finding of discrimination for its program to be constitutional. 544 F.Supp.2d at 1339. The County, however, took the position that it must make this finding through the process specified in the federal regulations, and should not be subject to a lawsuit if that process is found to be inadequate. *Id.* In support of this position, the County relied primarily on the Seventh Circuit's approach, first articulated in *Milwaukee County Pavers Association v. Fiedler*, 922 F.2d 419 (7th Cir. 1991), then *reaffirmed* in *Northern Contracting*, 473 F.3d 715 (7th Cir. 2007). 544 F.Supp.2d at 1339.

Based on the Seventh Circuit approach, insofar as the state is merely doing what the statute and federal regulations envisage and permit, the attack on the state is an impermissible collateral attack on the federal statute and regulations. 544 F.Supp.2d at 1339-1340. This approach concludes that a state's role in the federal program is simply as an agent, and insofar "as the state is merely complying with federal law it is acting as the agent of the federal government and is no more subject to being enjoined on equal protection grounds than the federal civil servants who drafted the regulations." 544 F.Supp.2d at 1340, quoting *Milwaukee County Pavers*, 922 F.2d at 423.

The Ninth Circuit addressed the *Milwaukee County Pavers* case in *Western States Paving*, and attempted to distinguish that case, concluding that the constitutionality of the federal statute and regulations were not at issue in *Milwaukee County Pavers*. 544 F.Supp.2d at 1340. In 2007, the Seventh Circuit followed up the critiques made in *Western States Paving* in the *Northern Contracting* decision. *Id.* The Seventh Circuit in *Northern Contracting* concluded that the majority in *Western States Paving* misread its decision in *Milwaukee County Pavers* as did the Eighth Circuit Court of Appeals in *Sherbrooke*. 544 F.Supp.2d at 1340, citing *Northern Contracting*, 473 F.3d at 722, n.5. The district court in Broward County pointed out that the Seventh Circuit in *Northern Contracting* emphasized again that the state DOT is acting as an instrument of federal policy, and a plaintiff cannot collaterally attack the federal regulations through a challenge to the state DOT's program. 544 F.Supp.2d at 1340, citing *Northern Contracting*, 473 F.3d at 722.

The district court in *Broward County* stated that other circuits have concurred with this approach, including the Sixth Circuit Court of Appeals decision in *Tennessee Asphalt Company v. Farris*, 942 F.2d 969 (6th Cir. 1991). 544 F.Supp.2d at 1340. The district court in *Broward County* held that the Tenth Circuit Court of Appeals took a similar approach in *Ellis v. Skinner*, 961 F.2d 912 (10th Cir. 1992). 544 F.Supp.2d at 1340. The district court in *Broward County* held that these Circuit Courts of Appeal have concluded that "where a state or county fully complies with the federal regulations, it cannot be enjoined from carrying out its DBE program, because any such attack would simply constitute an improper collateral attack on the constitutionality of the regulations." 544 F.Supp.2d at 1340-41.

The district court in *Broward County* held that it agreed with the approach taken by the Seventh Circuit Court of Appeals in *Milwaukee County Pavers* and *Northern Contracting* and concluded that "the appropriate factual inquiry in the instant case is whether or not Broward County has fully complied with the federal regulations in implementing its DBE program." 544 F.Supp.2d at 1341. It is significant to note that the plaintiffs did not challenge the as-applied constitutionality of the federal regulations themselves, but rather focused their challenge on the constitutionality of Broward County's actions in carrying out the DBE program. 544 F.Supp.2d at 1341. The district court in *Broward County* held that this type of challenge is "simply an impermissible collateral attack on the constitutionality of the statute and implementing regulations." *Id.*

The district court concluded that it would apply the case law as set out in the Seventh Circuit Court of Appeals and concurring circuits, and that the trial in this case would be conducted solely for the purpose of establishing whether or not the County has complied fully with the federal regulations in implementing its DBE program. 544 F.Supp.2d at 1341.

Subsequently, there was a Stipulation of Dismissal filed by all parties in the district court, and an Order of Dismissal was filed without a trial of the case in November 2008.

13. Northern Contracting, Inc. v. Illinois, 2005 WL 2230195 (N.D. Ill., 2005), affirmed, 473 F.3d 715 (7th Cir. 2007)

This decision is the district court's order that was affirmed by the Seventh Circuit Court of Appeals. This decision is instructive in that it is one of the recent cases to address the validity of the Federal DBE Program and local and state governments' implementation of the program as recipients of federal funds. The case also is instructive in that the court set forth a detailed analysis of race-, ethnicity-, and gender-neutral measures as well as evidentiary data required to satisfy constitutional scrutiny.

The district court conducted a trial after denying the parties' Motions for Summary Judgment in *Northern Contracting, Inc. v. State of Illinois, Illinois DOT, and USDOT*, 2004 WL 422704 (N.D. Ill. March 3, 2004), discussed *infra*. The following summarizes the opinion of the district court.

Northern Contracting, Inc. (the "plaintiff"), an Illinois highway contractor, sued the State of Illinois, the Illinois DOT, the United States DOT, and federal and state officials seeking a declaration that federal statutory provisions, the federal implementing regulations ("TEA-21"), the state statute authorizing the DBE program, and the Illinois DBE program itself were unlawful and unconstitutional. 2005 WL 2230195 at *1 (N.D. Ill. Sept, 8, 2005).

Under TEA-21, a recipient of federal funds is required to meet the "maximum feasible portion" of its DBE goal through race-neutral means. *Id.* at *4 (citing regulations). If a recipient projects that it cannot meet its overall DBE goal through race-neutral means, it must establish contract goals to the extent necessary to achieve the overall DBE goal. *Id.* (citing regulation). [The court provided an overview of the pertinent regulations including compliance requirements and qualifications for DBE status.]

Statistical evidence. To calculate its 2005 DBE participation goals, IDOT followed the two-step process set forth in TEA-21: (1) calculation of a base figure for the relative availability of DBEs, and (2) consideration of a possible adjustment of the base figure to reflect the effects of the DBE program and the level of participation that would be expected but for the effects of past and present discrimination. *Id.* at *6. IDOT engaged in a study to calculate its base figure and conduct a custom census to determine whether a more reliable method of calculation existed as opposed to its previous method of reviewing a bidder's list. *Id.*

In compliance with TEA-21, IDOT used a study to evaluate the base figure using a six-part analysis: (1) the study identified the appropriate and relevant geographic market for its contracting activity and its prime contractors; (2) the study identified the relevant product markets in which IDOT and its prime contractors contract; (3) the study sought to identify all available contractors and subcontractors in the relevant industries within Illinois using Dun & Bradstreet's *Marketplace*; (4) the study collected lists of DBEs from IDOT and 20 other public and private agencies; (5) the study attempted to correct for the possibility that certain businesses listed as DBEs were no longer qualified or, alternatively, businesses not listed as

DBEs but qualified as such under the federal regulations; and (6) the study attempted to correct for the possibility that not all DBE businesses were listed in the various directories. *Id.* at *6-7. The study utilized a standard statistical sampling procedure to correct for the latter two biases. *Id.* at *7. The study thus calculated a weighted average base figure of 22.7 percent. *Id.*

IDOT then adjusted the base figure based upon two disparity studies and some reports considering whether the DBE availability figures were artificially low due to the effects of past discrimination. *Id.* at *8. One study examined disparities in earnings and business formation rates as between DBEs and their white male-owned counterparts. *Id.* Another study included a survey reporting that DBEs are rarely utilized in non-goals projects. *Id.*

IDOT considered three reports prepared by expert witnesses. *Id.* at *9. The first report concluded that minority- and women-owned businesses were underutilized relative to their capacity and that such underutilization was due to discrimination. *Id.* The second report concluded, after controlling for relevant variables such as credit worthiness, “that minorities and women are less likely to form businesses, and that when they do form businesses, those businesses achieve lower earnings than did businesses owned by white males.” *Id.* The third report, again controlling for relevant variables (education, age, marital status, industry and wealth), concluded that minority- and female-owned businesses’ formation rates are lower than those of their white male counterparts, and that such businesses engage in a disproportionate amount of government work and contracts as a result of their inability to obtain private sector work. *Id.*

IDOT also conducted a series of public hearings in which a number of DBE owners who testified that they “were rarely, if ever, solicited to bid on projects not subject to disadvantaged-firm hiring goals.” *Id.* Additionally, witnesses identified 20 prime contractors in IDOT District 1 alone who rarely or never solicited bids from DBEs on non-goals projects. *Id.* The prime contractors did not respond to IDOT’s requests for information concerning their utilization of DBEs. *Id.*

Finally, IDOT reviewed unremediated market data from four different markets (the Illinois State Toll Highway Authority, the Missouri DOT, Cook County’s public construction contracts, and a “non-goals” experiment conducted by IDOT between 2001 and 2002), and considered past utilization of DBEs on IDOT projects. *Id.* at *11. After analyzing all of the data, the study recommended an upward adjustment to 27.51 percent. However, IDOT decided to maintain its figure at 22.77 percent. *Id.*

IDOT’s representative testified that the DBE program was administered on a “contract-by-contract basis.” *Id.* She testified that DBE goals have no effect on the award of prime contracts but that contracts are awarded exclusively to the “lowest responsible bidder.” IDOT also allowed contractors to petition for a waiver of individual contract goals in certain situations (*e.g.*, where the contractor has been unable to meet the goal despite having made reasonable good faith efforts). *Id.* at *12. Between 2001 and 2004, IDOT received waiver requests on 8.53 percent of its contracts and granted three out of four; IDOT also provided an appeal procedure for a denial from a waiver request. *Id.*

IDOT implemented a number of race- and gender-neutral measures both in its fiscal year 2005 plan and in response to the district court's earlier summary judgment order, including:

1. A "prompt payment provision" in its contracts, requiring that subcontractors be paid promptly after they complete their work, and prohibiting prime contractors from delaying such payments;
2. An extensive outreach program seeking to attract and assist DBE and other small firms enter and achieve success in the industry (including retaining a network of consultants to provide management, technical and financial assistance to small businesses, and sponsoring networking sessions throughout the state to acquaint small firms with larger contractors and to encourage the involvement of small firms in major construction projects);
3. Reviewing the criteria for prequalification to reduce any unnecessary burdens;
4. "Unbundling" large contracts; and
5. Allocating some contracts for bidding only by firms meeting the SBA's definition of small businesses.

Id. (internal citations omitted). IDOT was also in the process of implementing bonding and financing initiatives to assist emerging contractors obtain guaranteed bonding and lines of credit, and establishing a mentor-protégé program. *Id.*

The court found that IDOT attempted to achieve the "maximum feasible portion" of its overall DBE goal through race- and gender-neutral measures. *Id.* at *13. The court found that IDOT determined that race- and gender-neutral measures would account for 6.43 percent of its DBE goal, leaving 16.34 percent to be reached using race- and gender-conscious measures. *Id.*

Anecdotal evidence. A number of DBE owners testified to instances of perceived discrimination and to the barriers they face. *Id.* The DBE owners also testified to difficulties in obtaining work in the private sector and "unanimously reported that they were rarely invited to bid on such contracts." *Id.* The DBE owners testified to a reluctance to submit unsolicited bids due to the expense involved and identified specific firms that solicited bids from DBEs for goals projects but not for non-goals projects. *Id.* A number of the witnesses also testified to specific instances of discrimination in bidding, on specific contracts, and in the financing and insurance markets. *Id.* at *13-14. One witness acknowledged that all small firms face difficulties in the financing and insurance markets, but testified that it is especially burdensome for DBEs who "frequently are forced to pay higher insurance rates due to racial and gender discrimination." *Id.* at *14. The DBE witnesses also testified they have obstacles in obtaining prompt payment. *Id.*

The plaintiff called a number of non-DBE business owners who unanimously testified that they solicit business equally from DBEs and non-DBEs on non-goals projects. *Id.* Some non-DBE firm owners testified that they solicit bids from DBEs on a goals project for work they would otherwise complete themselves absent the goals; others testified that they "occasionally award work to a DBE that was not the low bidder in order to avoid scrutiny from IDOT." *Id.* A number of

non-DBE firm owners accused of failing to solicit bids from DBEs on non-goals projects testified and denied the allegations. *Id.* at *15.

Strict scrutiny. The court applied strict scrutiny to the program as a whole (including the gender-based preferences). *Id.* at *16. The court, however, set forth a different burden of proof, finding that the government must demonstrate identified discrimination with specificity and must have a “‘strong basis in evidence’ to conclude that remedial action was necessary, before it embarks on an affirmative action program ... If the government makes such a showing, the party challenging the affirmative action plan bears the ‘ultimate burden’ of demonstrating the unconstitutionality of the program.” *Id.* The court held that challenging party’s burden “can only be met by presenting credible evidence to rebut the government’s proffered data.” *Id.* at *17.

To satisfy strict scrutiny, the court found that IDOT did not need to demonstrate an independent compelling interest; however, as part of the narrowly tailored prong, IDOT needed to show “that there is a demonstrable need for the implementation of the Federal DBE Program within its jurisdiction.” *Id.* at *16.

The court found that IDOT presented “an abundance” of evidence documenting the disparities between DBEs and non-DBEs in the construction industry. *Id.* at *17. The plaintiff argued that the study was “erroneous because it failed to limit its DBE availability figures to those firms ... registered and pre-qualified with IDOT.” *Id.* The plaintiff also alleged the calculations of the DBE utilization rate were incorrect because the data included IDOT subcontracts and prime contracts, despite the fact that the latter are awarded to the lowest bidder as a matter of law. *Id.* Accordingly, the plaintiff alleged that IDOT’s calculation of DBE availability and utilization rates was incorrect. *Id.*

The court found that other jurisdictions had utilized the custom census approach without successful challenge. *Id.* at *18. Additionally, the court found “that the remedial nature of the federal statutes counsels for the casting of a broader net when measuring DBE availability.” *Id.* at *19. The court found that IDOT presented “an array of statistical studies concluding that DBEs face disproportionate hurdles in the credit, insurance, and bonding markets.” *Id.* at *21. The court also found that the statistical studies were consistent with the anecdotal evidence. *Id.* The court did find, however, that “there was no evidence of even a single instance in which a prime contractor failed to award a job to a DBE that offered the low bid. This ... is [also] supported by the statistical data ... which shows that at least at the level of subcontracting, DBEs are generally utilized at a rate in line with their ability.” *Id.* at *21, n. 31. Additionally, IDOT did not verify the anecdotal testimony of DBE firm owners who testified to barriers in financing and bonding. However, the court found that such verification was unnecessary. *Id.* at *21, n. 32.

The court further found:

That such discrimination indirectly affects the ability of DBEs to compete for prime contracts, despite the fact that they are awarded solely on the basis of low bid, cannot be doubted: ‘[E]xperience and size are not race- and gender-neutral variables ... [DBE] construction firms are generally smaller and less experienced because of industry discrimination.’

Id. at *21, citing *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003).

The parties stipulated to the fact that DBE utilization goals exceed DBE availability for 2003 and 2004. *Id.* at *22. IDOT alleged, and the court so found, that the high utilization on goals projects was due to the success of the DBE program, and not to an absence of discrimination. *Id.* The court found that the statistical disparities coupled with the anecdotal evidence indicated that IDOT's fiscal year 2005 goal was a "plausible lower-bound estimate" of DBE participation in the absence of discrimination." *Id.* The court found that the plaintiff did not present persuasive evidence to contradict or explain IDOT's data. *Id.*

The plaintiff argued that even if accepted at face value, IDOT's marketplace data did not support the imposition of race- and gender-conscious remedies because there was no evidence of direct discrimination by prime contractors. *Id.* The court found first that IDOT's indirect evidence of discrimination in the bonding, financing, and insurance markets was sufficient to establish a compelling purpose. *Id.* Second, the court found:

[M]ore importantly, plaintiff fails to acknowledge that, in enacting its DBE program, IDOT acted not to remedy its own prior discriminatory practices, but pursuant to federal law, which both authorized and required IDOT to remediate the effects of *private* discrimination on federally-funded highway contracts. This is a fundamental distinction ... [A] state or local government need not independently identify a compelling interest when its actions come in the course of enforcing a federal statute.

Id. at *23. The court distinguished *Builders Ass'n of Greater Chicago v. County of Cook*, 123 F. Supp.2d 1087 (N.D. Ill. 2000), *aff'd* 256 F.3d 642 (7th Cir. 2001), noting that the program in that case was not federally-funded. *Id.* at *23, n. 34.

The court also found that "IDOT has done its best to maximize the portion of its DBE goal" through race- and gender-neutral measures, including anti-discrimination enforcement and small business initiatives. *Id.* at *24. The anti-discrimination efforts included: an internet website where a DBE can file an administrative complaint if it believes that a prime contractor is discriminating on the basis of race or gender in the award of sub-contracts; and requiring contractors seeking prequalification to maintain and produce solicitation records on all projects, both public and private, with and without goals, as well as records of the bids received and accepted. *Id.* The small business initiative included: "unbundling" large contracts; allocating some contracts for bidding only by firms meeting the SBA's definition of small businesses; a "prompt payment provision" in its contracts, requiring that subcontractors be paid promptly after they complete their work, and prohibiting prime contractors from delaying such payments; and an extensive outreach program seeking to attract and assist DBE and other small firms DBE and other small firms enter and achieve success in the industry (including retaining a network of consultants to provide management, technical and financial assistance to small businesses, and sponsoring networking sessions throughout the state to acquaint small firms with larger contractors and to encourage the involvement of small firms in major construction projects). *Id.*

The court found “[s]ignificantly, plaintiff did not question the efficacy or sincerity of these race- and gender-neutral measures.” *Id.* at *25. Additionally, the court found the DBE program had significant flexibility in that utilized contract-by-contract goal setting (without a fixed DBE participation minimum) and contained waiver provisions. *Id.* The court found that IDOT approved 70 percent of waiver requests although waivers were requested on only 8 percent of all contracts. *Id.*, citing *Adarand Constructors, Inc. v. Slater “Adarand VII”*, 228 F.3d 1147, 1177 (10th Cir. 2000) (citing for the proposition that flexibility and waiver are critically important).

The court held that IDOT’s DBE plan was narrowly tailored to the goal of remedying the effects of racial and gender discrimination in the construction industry, and was therefore constitutional.

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), affirmed 345 F.3d 964 (8th Cir. 2003)

Sherbrooke involved a landscaping service contractor owned and operated by Caucasian males. The contractor sued the Minnesota DOT claiming the Federal DBE provisions of the TEA-21 are unconstitutional. *Sherbrooke* challenged the “federal affirmative action programs,” the USDOT implementing regulations, and the Minnesota DOT’s participation in the DBE Program. The USDOT and the FHWA intervened as Federal defendants in the case. *Sherbrooke*, 2001 WL 1502841 at *1.

The United States District Court in *Sherbrooke* relied substantially on the Tenth Circuit Court of Appeals decision in *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000), in holding that the Federal DBE Program is constitutional. The district court addressed the issue of “random inclusion” of various groups as being within the Program in connection with whether the Federal DBE Program is “narrowly tailored.” The court held that Congress cannot enact a national program to remedy discrimination without recognizing classes of people whose history has shown them to be subject to discrimination and allowing states to include those people in its DBE Program.

The court held that the Federal DBE Program attempts to avoid the “potentially invidious effects of providing blanket benefits to minorities” in part,

by restricting a state’s DBE preference to identified groups actually appearing in the target state. In practice, this means Minnesota can only certify members of one or another group as potential DBEs if they are present in the local market. This minimizes the chance that individuals — simply on the basis of their birth — will benefit from Minnesota’s DBE program. If a group is not present in the local market, or if they are found in such small numbers that they cannot be expected to be able to participate in the kinds of construction work TEA-21 covers, that group will not be included in the accounting used to set Minnesota’s overall DBE contracting goal.

Sherbrooke, 2001 WL 1502841 at *10 (D. Minn.).

The court rejected plaintiff’s claim that the Minnesota DOT must independently demonstrate how its program comports with *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), affirmed 345 F.3d 964 (8th Cir. 2003)

The United States District Court for the District of Nebraska held in *Gross Seed Co. v. Nebraska* (with the USDOT and FHWA as Interveners), that the Federal DBE Program (codified at 49 CFR Part 26) is constitutional. The court also held that the Nebraska Department of Roads (“Nebraska DOR”) DBE Program adopted and implemented solely to comply with the Federal DBE Program is “approved” by the court because the court found that 49 CFR Part 26 and TEA-21 were constitutional.

The court concluded, similar to the court in *Sherbrooke Turf*, that the State of Nebraska did not need to independently establish that its program met the strict scrutiny requirement because the Federal DBE Program satisfied that requirement, and was therefore constitutional. The court did not engage in a thorough analysis or evaluation of the Nebraska DOR Program or its implementation of the Federal DBE Program. The court points out that the Nebraska DOR Program is adopted in compliance with the Federal DBE Program, and that the USDOT approved the use of Nebraska DOR’s proposed DBE goals for fiscal year 2001, pending completion of USDOT’s review of those goals. Significantly, however, the court in its findings does note that the Nebraska DOR established its overall goals for fiscal year 2001 based upon an independent availability/disparity study.

The court upheld the constitutionality of the Federal DBE Program by finding the evidence presented by the federal government and the history of the federal legislation are sufficient to demonstrate that past discrimination does exist “in the construction industry” and that racial and gender discrimination “within the construction industry” is sufficient to demonstrate a compelling interest in individual areas, such as highway construction. The court held that the Federal DBE Program was sufficiently “narrowly tailored” to satisfy a strict scrutiny analysis based again on the evidence submitted by the federal government as to the Federal DBE Program.

G. Recent Decisions and Authorities Involving Federal Procurement That May Impact DBE and MBE/WBE Programs

1. Rothe Development, Inc. v. U.S. Dept. of Defense, U.S. Small Business Administration, et al., 836 F3d 57, 2016 WL 4719049 (D.C. Cir. 2016), cert. denied, 2017 WL 1375832 (2017), affirming on other grounds, Rothe Development, Inc. v. U.S. Dept. of Defense, U.S. Small Business Administration, et al., 107 F.Supp. 3d 183 (D.D.C. 2015)

In a split decision, the majority of a three judge panel of the United States Court of Appeals for the District of Columbia Circuit upheld the constitutionality of section 8(a) of the Small Business Act, which was challenged by Plaintiff-Appellant Rothe Development Inc. (Rothe). Rothe alleged that the statutory basis of the United States Small Business Administration's 8(a) business development program (codified at 15 U.S.C. § 637), violated its right to equal protection under the Due Process Clause of the Fifth Amendment. 836 F.3d 57, 2016 WL 4719049, at *1. Rothe contends the statute contains a racial classification that presumes certain racial minorities are eligible for the program. *Id.* The court held, however, that Congress considered and rejected statutory language that included a racial presumption. *Id.* Congress, according to the court, chose instead to hinge participation in the program on the facially race-neutral criterion of social disadvantage, which it defined as having suffered racial, ethnic, or cultural bias. *Id.*

The challenged statute authorizes the Small Business Administration (SBA) to enter into contracts with other federal agencies, which the SBA then subcontracts to eligible small businesses that compete for the subcontracts in a sheltered market. *Id.* *1. Businesses owned by "socially and economically disadvantaged" individuals are eligible to participate in the 8(a) program. *Id.* The statute defines socially disadvantaged individuals as persons "who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities." *Id.*, quoting 15 U.S.C. § 627(a)(5).

The Section 8(a) statute is race-neutral. The court rejected Rothe's allegations, finding instead that the provisions of the Small Business Act that Rothe challenges do not on their face classify individuals by race. *Id.* *1. The court stated that Section 8(a) uses facially race-neutral terms of eligibility to identify individual victims of discrimination, prejudice, or bias, without presuming that members of certain racial, ethnic, or cultural groups qualify as such. *Id.* The court said that makes this statute different from other statutes, which expressly limit participation in contracting programs to racial or ethnic minorities or specifically direct third parties to presume that members of certain racial or ethnic groups, or minorities generally, are eligible. *Id.*

In contrast to the *statute*, the court found that the SBA's *regulation* implementing the 8(a) program does contain a racial classification in the form of a presumption that an individual who is a member of one of five designated racial groups is socially disadvantaged. *Id.* *2, citing 13 C.F.R. § 124.103(b). This case, the court held, does not permit it to decide whether the race-based regulatory presumption is constitutionally sound, because Rothe has elected to challenge only the statute. *Id.* Rothe's definition of the racial classification it attacks in this case, according to the court, does not include the SBA's regulation. *Id.*

Because the court held the statute, unlike the regulation, lacks a racial classification, and because Rothe has not alleged that the statute is otherwise subject to strict scrutiny, the court applied rational-basis review. *Id* at *2. The court stated the statute “readily survives” the rational basis scrutiny standards. *Id* *2. The court, therefore, affirmed the judgment of the district court granting summary judgment to the SBA and the Department of Defense, albeit on different grounds. *Id*.

Thus, the court held the central question on appeal is whether Section 8(a) warrants strict judicial scrutiny, which the court noted the parties and the district court believe that it did. *Id* *2. Rothe, the court said, advanced only the theory that the statute, on its face, Section 8(a) of the Small Business Act, contains a racial classification. *Id* *2.

The court found that the definition of the term “socially disadvantaged” does not contain a racial classification because it does not distribute burdens or benefits on the basis of individual classifications, it is race-neutral on its face, and it speaks of individual victims of discrimination. *Id* *3. On its face, the court stated the term envisions a individual-based approach that focuses on experience rather than on a group characteristic, and the statute recognizes that not all members of a minority group have necessarily been subjected to racial or ethnic prejudice or cultural bias. *Id*. The court said that the statute definition of the term “social disadvantaged” does not provide for preferential treatment based on an applicant’s race, but rather on an individual applicant’s experience of discrimination. *Id* *3.

The court distinguished cases involving situations in which disadvantaged non-minority applicants could not participate, but the court said the plain terms of the statute permit individuals in any race to be considered “socially disadvantaged.” *Id* *3. The court noted its key point is that the statute is easily read not to require any group-based racial or ethnic classification, stating the statute defines socially disadvantaged *individuals* as those individuals who have been subjected to racial or ethnic prejudice or cultural bias, not those individuals who are *members or groups* that have been subjected to prejudice or bias. *Id*.

The court pointed out that the SBA’s implementation of the statute’s definition may be based on a racial classification if the regulations carry it out in a manner that gives preference based on race instead of individual experience. *Id* *4. But, the court found, Rothe has expressly disclaimed any challenge to the SBA’s implementation of the statute, and as a result, the only question before them is whether the statute itself classifies based on race, which the court held makes no such classification. *Id* *4. The court determined the statutory language does not create a presumption that a member of a particular racial or ethnic group is necessarily socially disadvantaged, nor that a white person is not. *Id* *5.

The definition of social disadvantage, according to the court, does not amount to a racial classification, for it ultimately turns on a business owner’s experience of discrimination. *Id* *6. The statute does not instruct the agency to limit the field to certain racial groups, or to racial groups in general, nor does it tell the agency to presume that anyone who is a member of any particular group is, by that membership alone, socially disadvantaged. *Id*.

The court noted that the Supreme Court and this court's discussions of the 8(a) program have identified the regulations, not the statute, as the source of its racial presumption. *Id* *8. The court distinguished Section 8(d) of the Small Business Act as containing a race-based presumption, but found in the 8(a) program the Supreme Court has explained that the agency (not Congress) presumes that certain racial groups are socially disadvantaged. *Id.* at *7.

The SBA statute does not trigger strict scrutiny. The court held that the statute does not trigger strict scrutiny because it is race-neutral. *Id* *10. The court pointed out that Rothe does not argue that the statute could be subjected to strict scrutiny, even if it is facially neutral, on the basis that Congress enacted it with a discriminatory purpose. *Id* *9. In the absence of such a claim by Rothe, the court determined it would not subject a facially race-neutral statute to strict scrutiny. *Id.* The foreseeability of racially disparate impact, without invidious purpose, the court stated, does not trigger strict constitutional scrutiny. *Id.*

Because the statute does not trigger strict scrutiny, the court found that it need not and does not decide whether the district court correctly concluded that the statute is narrowly tailored to meet a compelling interest. *Id* *10. Instead, the court considered whether the statute is supported by a rational basis. *Id.* The court held that it plainly is supported by a rational basis, because it bears a rational relation to some legitimate end. *Id* *10.

The statute, the court stated, aims to remedy the effects of prejudice and bias that impede business formation and development and suppress fair competition for government contracts. *Id.* Counteracting discrimination, the court found, is a legitimate interest, and in certain circumstances qualifies as compelling. *Id* *11. The statutory scheme, the court said, is rationally related to that end. *Id.*

The court declined to review the district court's admissibility determinations as to the expert witnesses because it stated that it would affirm the district court's grant of summary judgment even if the district court abused its discretion in making those determinations. *Id* *11. The court noted the expert witness testimony is not necessary to, nor in conflict with, its conclusion that Section 8(a) is subject to and survives rational-basis review. *Id.*

Other issues. The court declined to review the district court's admissibility determinations as to the expert witnesses because it stated that it would affirm the district court's grant of summary judgment even if the district court abused its discretion in making those determinations. *Id* *11. The court noted the expert witness testimony is not necessary to, nor in conflict with, its conclusion that Section 8(a) is subject to and survives rational-basis review. *Id.*

In addition, the court rejected Rothe's contention that Section 8(a) is an unconstitutional delegation of legislative power. *Id* *11. Because the argument is premised on the idea that Congress created a racial classification, which the court has held it did not, Rothe's alternative argument on delegation also fails. *Id.*

Dissenting Opinion. There was a dissenting opinion by one of the three members of the court. The dissenting judge stated in her view that the provisions of the Small Business Act at issue are not facially race-neutral, but contain a racial classification. *Id* *12. The dissenting judge said that

the act provides members of certain racial groups an advantage in qualifying for Section 8(a)'s contract preference by virtue of their race. *Id* *13.

The dissenting opinion pointed out that all the parties and the district court found that strict scrutiny should be applied in determining whether the Section 8(a) program violates Rothe's right to equal protection of the laws. *Id* *16. In the view of the dissenting opinion the statutory language includes a racial classification, and therefore, the statute should be subject to strict scrutiny. *Id* *22.

2. Rothe Development Corp. v. U.S. Dept. of Defense, et al., 545 F.3d 1023 (Fed. Cir. 2008)

Although this case does not involve the Federal DBE Program (49 CFR Part 26), it is an analogous case that may impact the legal analysis and law related to the validity of programs implemented by recipients of federal funds, including the Federal DBE Program. Additionally, it underscores the requirement that race-, ethnic- and gender-based programs of any nature must be supported by substantial evidence. In *Rothe*, an unsuccessful bidder on a federal defense contract brought suit alleging that the application of an evaluation preference, pursuant to a federal statute, to a small disadvantaged bidder (SDB) to whom a contract was awarded, violated the Equal Protection clause of the U.S. Constitution. The federal statute challenged is Section 1207 of the National Defense Authorization Act of 1987 and as reauthorized in 2003. The statute provides a goal that 5 percent of the total dollar amount of defense contracts for each fiscal year would be awarded to small businesses owned and controlled by socially and economically disadvantaged individuals. 10 U.S.C. § 2323. Congress authorized the Department of Defense ("DOD") to adjust bids submitted by non-socially and economically disadvantaged firms upwards by 10 percent (the "Price Evaluation Adjustment Program" or "PEA").

The district court held the federal statute, as reauthorized in 2003, was constitutional on its face. The court held the 5 percent goal and the PEA program as reauthorized in 1992 and applied in 1998 was unconstitutional. The basis of the decision was that Congress considered statistical evidence of discrimination that established a compelling governmental interest in the reauthorization of the statute and PEA program in 2003. Congress had not documented or considered substantial statistical evidence that the DOD discriminated against minority small businesses when it enacted the statute in 1992 and reauthorized it in 1998. The plaintiff appealed the decision.

The Federal Circuit found that the "analysis of the facial constitutionality of an act is limited to evidence before Congress prior to the date of reauthorization." 413 F.3d 1327 (Fed. Cir. 2005)(affirming in part, vacating in part, and remanding 324 F. Supp.2d 840 (W.D. Tex. 2004). The court limited its review to whether Congress had sufficient evidence in 1992 to reauthorize the provisions in 1207. The court held that for evidence to be relevant to a strict scrutiny analysis, "the evidence must be proven to have been before Congress prior to enactment of the racial classification." The Federal Circuit held that the district court erred in relying on the statistical studies without first determining whether the studies were before Congress when it reauthorized section 1207. The Federal Circuit remanded the case and directed the district court

to consider whether the data presented was so outdated that it did not provide the requisite strong basis in evidence to support the reauthorization of section 1207.

On August 10, 2007 the Federal District Court for the Western District of Texas in *Rothe Development Corp. v. U.S. Dept. of Defense*, 499 F.Supp.2d 775 (W.D.Tex. Aug 10, 2007) issued its Order on remand from the Federal Circuit Court of Appeals decision in *Rothe*, 413 F.3d 1327 (Fed Cir. 2005). The district court upheld the constitutionality of the 2006 Reauthorization of Section 1207 of the National Defense Authorization Act of 1987 (10 USC § 2323), which permits the U.S. Department of Defense to provide preferences in selecting bids submitted by small businesses owned by socially and economically disadvantaged individuals (“SDBs”). The district court found the 2006 Reauthorization of the 1207 Program satisfied strict scrutiny, holding that Congress had a compelling interest when it reauthorized the 1207 Program in 2006, that there was sufficient statistical and anecdotal evidence before Congress to establish a compelling interest, and that the reauthorization in 2006 was narrowly tailored.

The district court, among its many findings, found certain evidence before Congress was “stale,” that the plaintiff (*Rothe*) failed to rebut other evidence which was not stale, and that the decisions by the Eighth, Ninth and Tenth Circuits in the decisions in *Concrete Works*, *Adarand Constructors*, *Sherbrooke Turf* and *Western States Paving* (discussed above and below) were relevant to the evaluation of the facial constitutionality of the 2006 Reauthorization.

2007 Order of the District Court (499 F.Supp.2d 775). In the Section 1207 Act, Congress set a goal that 5 percent of the total dollar amount of defense contracts for each fiscal year would be awarded to small businesses owned and controlled by socially and economically disadvantaged individuals. In order to achieve that goal, Congress authorized the DOD to adjust bids submitted by non-socially and economically disadvantaged firms up to 10 percent. 10 U.S.C. § 2323(e)(3). *Rothe*, 499 F.Supp.2d. at 782. Plaintiff *Rothe* did not qualify as an SDB because it was owned by a Caucasian female. Although *Rothe* was technically the lowest bidder on a DOD contract, its bid was adjusted upward by 10 percent, and a third party, who qualified as a SDB, became the “lowest” bidder and was awarded the contract. *Id.* *Rothe* claims that the 1207 Program is facially unconstitutional because it takes race into consideration in violation of the Equal Protection component of the Due Process Clause of the Fifth Amendment. *Id.* at 782-83. The district court’s decision only reviewed the facial constitutionality of the 2006 Reauthorization of the 2007 Program.

The district court initially rejected six legal arguments made by *Rothe* regarding strict scrutiny review based on the rejection of the same arguments by the Eighth, Ninth, and Tenth Circuit Courts of Appeal in the *Sherbrooke Turf*, *Western States Paving*, *Concrete Works*, *Adarand VII* cases, and the Federal Circuit Court of Appeal in *Rothe*. *Rothe* at 825-833.

The district court discussed and cited the decisions in *Adarand VII* (2000), *Sherbrooke Turf* (2003), and *Western States Paving* (2005), as holding that Congress had a compelling interest in eradicating the economic roots of racial discrimination in highway transportation programs funded by federal monies, and concluding that the evidence cited by the government, particularly that contained in *The Compelling Interest* (a.k.a. the Appendix), more than satisfied the government’s burden of production regarding the compelling interest for a race-conscious

remedy. *Rothe* at 827. Because the Urban Institute Report, which presented its analysis of 39 state and local disparity studies, was cross-referenced in the Appendix, the district court found the courts in *Adarand VII*, *Sherbrooke Turf*, and *Western States Paving*, also relied on it in support of their compelling interest holding. *Id.* at 827.

The district court also found that the Tenth Circuit decision in *Concrete Works IV*, 321 F.3d 950 (10th Cir. 2003), established legal principles that are relevant to the court's strict scrutiny analysis. First, *Rothe's* claims for declaratory judgment on the racial constitutionality of the earlier 1999 and 2002 Reauthorizations were moot. Second, the government can meet its burden of production without conclusively proving the existence of past or present racial discrimination. Third, the government may establish its own compelling interest by presenting evidence of its own direct participation in racial discrimination or its passive participation in private discrimination. Fourth, once the government meets its burden of production, *Rothe* must introduce "credible, particularized" evidence to rebut the government's initial showing of the existence of a compelling interest. Fifth, *Rothe* may rebut the government's statistical evidence by giving a race-neutral explanation for the statistical disparities, showing that the statistics are flawed, demonstrating that the disparities shown are not significant or actionable, or presenting contrasting statistical data. Sixth, the government may rely on disparity studies to support its compelling interest, and those studies may control for the effect that pre-existing affirmative action programs have on the statistical analysis. *Id.* at 829-32.

Based on *Concrete Works IV*, the district court did not require the government to conclusively prove that there is pervasive discrimination in the relevant market, that each presumptively disadvantaged group suffered equally from discrimination, or that private firms intentionally and purposefully discriminated against minorities. The court found that the inference of discriminatory exclusion can arise from statistical disparities. *Id.* at 830-31.

The district court held that Congress had a compelling interest in the 2006 Reauthorization of the 1207 Program, which was supported by a strong basis in the evidence. The court relied in significant part upon six state and local disparity studies that were before Congress prior to the 2006 Reauthorization of the 1207 Program. The court based this evidence on its finding that Senator Kennedy had referenced these disparity studies, discussed and summarized findings of the disparity studies, and Representative Cynthia McKinney also cited the same six disparity studies that Senator Kennedy referenced. The court stated that based on the content of the floor debate, it found that these studies were put before Congress prior to the date of the Reauthorization of Section 1207. *Id.* at 838.

The district court found that these six state and local disparity studies analyzed evidence of discrimination from a diverse cross-section of jurisdictions across the United States, and "they constitute prima facie evidence of a nation-wide pattern or practice of discrimination in public and private contracting." *Id.* at 838-39. The court found that the data used in these six disparity studies is not "stale" for purposes of strict scrutiny review. *Id.* at 839. The court disagreed with *Rothe's* argument that all the data were stale (data in the studies from 1997 through 2002), "because this data was the most current data available at the time that these studies were performed." *Id.* The court found that the governmental entities should be able to rely on the most

recently available data so long as those data are reasonably up-to-date. *Id.* The court declined to adopt a “bright-line rule for determining staleness.” *Id.*

The court referred to the reliance by the Ninth Circuit and the Eighth Circuit on the *Appendix* to affirm the constitutionality of the USDOT MBE [now DBE] Program, and rejected five years as a bright-line rule for considering whether data are “stale.” *Id.* at n.86. The court also stated that it “accepts the reasoning of the *Appendix*, which the court found stated that for the most part “the federal government does business in the same contracting markets as state and local governments. Therefore, the evidence in state and local studies of the impact of discriminatory barriers to minority opportunity in contracting markets throughout the country is relevant to the question of whether the federal government has a compelling interest to take remedial action in its own procurement activities.” *Id.* at 839, quoting 61 *Fed.Reg.* 26042-01, 26061 (1996).

The district court also discussed additional evidence before Congress that it found in Congressional Committee Reports and Hearing Records. *Id.* at 865-71. The court noted SBA Reports that were before Congress prior to the 2006 Reauthorization. *Id.* at 871.

The district court found that the data contained in the *Appendix*, the Benchmark Study, and the Urban Institute Report were “stale,” and the court did not consider those reports as evidence of a compelling interest for the 2006 Reauthorization. *Id.* at 872-75. The court stated that the Eighth, Ninth and Tenth Circuits relied on the *Appendix* to uphold the constitutionality of the Federal DBE Program, citing to the decisions in *Sherbrooke Turf*, *Adarand VII*, and *Western States Paving*. *Id.* at 872. The court pointed out that although it does not rely on the data contained in the *Appendix* to support the 2006 Reauthorization, the fact the Eighth, Ninth, and Tenth Circuits relied on these data to uphold the constitutionality of the Federal DBE Program as recently as 2005, convinced the court that a bright-line staleness rule is inappropriate. *Id.* at 874.

Although the court found that the data contained in the *Appendix*, the Urban Institute Report, and the Benchmark Study were stale for purposes of strict scrutiny review regarding the 2006 Reauthorization, the court found that Rothe introduced no concrete, particularized evidence challenging the reliability of the methodology or the data contained in the six state and local disparity studies, and other evidence before Congress. The court found that Rothe failed to rebut the data, methodology or anecdotal evidence with “concrete, particularized” evidence to the contrary. *Id.* at 875. The district court held that based on the studies, the government had satisfied its burden of producing evidence of discrimination against African Americans, Asian Americans, Hispanic Americans, and Native Americans in the relevant industry sectors. *Id.* at 876.

The district court found that Congress had a compelling interest in reauthorizing the 1207 Program in 2006, which was supported by a strong basis of evidence for remedial action. *Id.* at 877. The court held that the evidence constituted prima facie proof of a nationwide pattern or practice of discrimination in both public and private contracting, that Congress had sufficient evidence of discrimination throughout the United States to justify a nationwide program, and the evidence of discrimination was sufficiently pervasive across racial lines to justify granting a preference to all five purportedly disadvantaged racial groups. *Id.*

The district court also found that the 2006 Reauthorization of the 1207 Program was narrowly tailored and designed to correct present discrimination and to counter the lingering effects of past discrimination. The court held that the government's involvement in both present discrimination and the lingering effects of past discrimination was so pervasive that the DOD and the Department of Air Force had become passive participants in perpetuating it. *Id.* The court stated it was law of the case and could not be disturbed on remand that the Federal Circuit in *Rothe III* had held that the 1207 Program was flexible in application, limited in duration and it did not unduly impact on the rights of third parties. *Id.*, quoting *Rothe III*, 262 F.3d at 1331.

The district court thus conducted a narrowly tailored analysis that reviewed three factors:

1. The efficacy of race-neutral alternatives;
2. Evidence detailing the relationship between the stated numerical goal of 5 percent and the relevant market; and
3. Over- and under-inclusiveness.

Id. The court found that Congress examined the efficacy of race-neutral alternatives prior to the enactment of the 1207 Program in 1986 and that these programs were unsuccessful in remedying the effects of past and present discrimination in federal procurement. *Id.* The court concluded that Congress had attempted to address the issues through race-neutral measures, discussed those measures, and found that Congress' adoption of race-conscious provisions were justified by the ineffectiveness of such race-neutral measures in helping minority-owned firms overcome barriers. *Id.* The court found that the government seriously considered and enacted race-neutral alternatives, but these race-neutral programs did not remedy the widespread discrimination that affected the federal procurement sector, and that Congress was not required to implement or exhaust every conceivable race-neutral alternative. *Id.* at 880. Rather, the court found that narrow tailoring requires only "serious, good faith consideration of workable race-neutral alternatives." *Id.*

The district court also found that the 5 percent goal was related to the minority business availability identified in the six state and local disparity studies. *Id.* at 881. The court concluded that the 5 percent goal was aspirational, not mandatory. *Id.* at 882. The court then examined and found that the regulations implementing the 1207 Program were not over-inclusive for several reasons.

November 4, 2008 decision by the Federal Circuit Court of Appeals. On November 4, 2008, the Federal Circuit Court of Appeals reversed the judgment of the district court in part, and remanded with instructions to enter a judgment (1) denying Rothe any relief regarding the facial constitutionality of Section 1207 as enacted in 1999 or 2002, (2) declaring that Section 1207 as enacted in 2006 (10 U.S.C. § 2323) is facially unconstitutional, and (3) enjoining application of Section 1207 (10 U.S.C. § 2323).

The Federal Circuit Court of Appeals held that Section 1207, on its face, as reenacted in 2006, violated the Equal Protection component of the Fifth Amendment right to due process. The court

found that because the statute authorized the DOD to afford preferential treatment on the basis of race, the court applied strict scrutiny, and because Congress did not have a “strong basis in evidence” upon which to conclude that the DOD was a passive participant in pervasive, nationwide racial discrimination — at least not on the evidence produced by the DOD and relied on by the district court in this case — Section 1207 failed to meet this strict scrutiny test. 545 F.3d at 1050.

Strict scrutiny framework. The Federal Circuit Court of Appeals recognized that the Supreme Court has held a government may have a compelling interest in remedying the effects of past or present racial discrimination. 545 F.3d at 1036. The court cited the decision in *Croson*, 488 U.S. at 492, that it is “beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.” 545 F.3d. at 1036, *quoting Croson*, 488 U.S. at 492.

The court held that before resorting to race-conscious measures, the government must identify the discrimination to be remedied, public or private, with some specificity, and must have a strong basis of evidence upon which to conclude that remedial action is necessary. 545 F.3d at 1036, *quoting Croson*, 488 U.S. at 500, 504. Although the party challenging the statute bears the ultimate burden of persuading the court that it is unconstitutional, the Federal Circuit stated that the government first bears a burden to produce strong evidence supporting the legislature’s decision to employ race-conscious action. 545 F.3d at 1036.

Even where there is a compelling interest supported by strong basis in evidence, the court held the statute must be narrowly tailored to further that interest. *Id.* The court noted that a narrow tailoring analysis commonly involves six factors: (1) the necessity of relief; (2) the efficacy of alternative, race-neutral remedies; (3) the flexibility of relief, including the availability of waiver provisions; (4) the relationship with the stated numerical goal to the relevant labor market; (5) the impact of relief on the rights of third parties; and (6) the overinclusiveness or underinclusiveness of the racial classification. *Id.*

Compelling interest – strong basis in evidence. The Federal Circuit pointed out that the statistical and anecdotal evidence relied upon by the district court in its ruling below included six disparity studies of state or local contracting. The Federal Circuit also pointed out that the district court found that the data contained in the Appendix, the Urban Institute Report, and the Benchmark Study were stale for purposes of strict scrutiny review of the 2006 Authorization, and therefore, the district court concluded that it would not rely on those three reports as evidence of a compelling interest for the 2006 reauthorization of the 1207 Program. 545 F.3d 1023, *citing to Rothe VI*, 499 F.Supp.2d at 875. Since the DOD did not challenge this finding on appeal, the Federal Circuit stated that it would not consider the Appendix, the Urban Institute Report, or the Department of Commerce Benchmark Study, and instead determined whether the evidence relied on by the district court was sufficient to demonstrate a compelling interest. *Id.*

Six state and local disparity studies. The Federal Circuit found that disparity studies can be relevant to the compelling interest analysis because, as explained by the Supreme Court in *Croson*, “[w]here there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such

contractors actually engaged by [a] locality or the locality's prime contractors, an inference of discriminatory exclusion could arise." 545 F.3d at 1037-1038, *quoting Croson*, 488 U.S.C. at 509. The Federal Circuit also cited to the decision by the Fifth Circuit Court of Appeals in *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206 (5th Cir. 1999) that given *Croson's* emphasis on statistical evidence, other courts considering equal protection challenges to minority-participation programs have looked to disparity indices, or to computations of disparity percentages, in determining whether *Croson's* evidentiary burden is satisfied. 545 F.3d at 1038, *quoting W.H. Scott*, 199 F.3d at 218.

The Federal Circuit noted that a disparity study is a study attempting to measure the difference- or disparity- between the number of contracts or contract dollars actually awarded minority-owned businesses in a particular contract market, on the one hand, and the number of contracts or contract dollars that one would expect to be awarded to minority-owned businesses given their presence in that particular contract market, on the other hand. 545 F.3d at 1037.

Staleness. The Federal Circuit declined to adopt a per se rule that data more than five years old are stale per se, which rejected the argument put forth by *Rothe*. 545 F.3d at 1038. The court pointed out that the district court noted other circuit courts have relied on studies containing data more than five years old when conducting compelling interest analyses, *citing to Western States Paving v. Washington State Department of Transportation*, 407 F.3d 983, 992 (9th Cir. 2005) and *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964, 970 (8th Cir. 2003)(relying on the Appendix, published in 1996).

The Federal Circuit agreed with the district court that Congress "should be able to rely on the most recently available data so long as that data is reasonably up-to-date." 545 F.3d at 1039. The Federal Circuit affirmed the district court's conclusion that the data analyzed in the six disparity studies were not stale at the relevant time because the disparity studies analyzed data pertained to contracts awarded as recently as 2000 or even 2003, and because *Rothe* did not point to more recent, available data. *Id.*

Before Congress. The Federal Circuit found that for evidence to be relevant in the strict scrutiny analysis, it "must be proven to have been before Congress prior to enactment of the racial classification." 545 F.3d at 1039, *quoting Rothe V*, 413 F.3d at 1338. The Federal Circuit had issues with determining whether the six disparity studies were actually before Congress for several reasons, including that there was no indication that these studies were debated or reviewed by members of Congress or by any witnesses, and because Congress made no findings concerning these studies. 545 F.3d at 1039-1040. However, the court determined it need not decide whether the six studies were put before Congress, because the court held in any event that the studies did not provide a substantially probative and broad-based statistical foundation necessary for the strong basis in evidence that must be the predicate for nation-wide, race-conscious action. *Id.* at 1040.

The court did note that findings regarding disparity studies are to be distinguished from formal findings of discrimination by the DOD "which Congress was emphatically not required to make." *Id.* at 1040, footnote 11 (emphasis in original). The Federal Circuit cited the *Dean v. City of Shreveport* case that the "government need not incriminate itself with a formal finding of

discrimination prior to using a race-conscious remedy.” 545 F.3d at 1040, footnote 11 quoting *Dean v. City of Shreveport*, 438 F.3d 448, 445 (5th Cir. 2006).

Methodology. The Federal Circuit found that there were methodological defects in the six disparity studies. The court found that the objections to the parameters used to select the relevant pool of contractors was one of the major defects in the studies. 545 F.3d at 1040-1041.

The court stated that in general, “[a] disparity ratio less than 0.80” — *i.e.*, a finding that a given minority group received less than 80 percent of the expected amount — “indicates a relevant degree of disparity,” and “might support an inference of discrimination.” 545 F.3d at 1041, quoting the district court opinion in *Rothe VI*, 499 F.Supp.2d at 842; and citing *Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895, 914 (11th Cir. 1997). The court noted that this disparity ratio attempts to calculate a ratio between the expected contract amount of a given race/gender group and the actual contract amount received by that group. 545 F.3d at 1041.

The court considered the availability analysis, or benchmark analysis, which is utilized to ensure that only those minority-owned contractors who are qualified, willing and able to perform the prime contracts at issue are considered when performing the denominator of a disparity ratio. 545 F.3d at 1041. The court cited to an expert used in the case that a “crucial question” in disparity studies is to develop a credible methodology to estimate this benchmark share of contracts minorities would receive in the absence of discrimination and the touchstone for measuring the benchmark is to determine whether the firm is ready, willing, and able to do business with the government. 545 F.3d at 1041-1042.

The court concluded the contention by Rothe, that the six studies misapplied this “touchstone” of *Croson* and erroneously included minority-owned firms that were deemed willing or potentially willing and able, without regard to whether the firm was qualified, was not a defect that substantially undercut the results of four of the six studies, because “the bulk of the businesses considered in these studies were identified in ways that would tend to establish their qualifications, such as by their presence on city contract records and bidder lists.” 545 F.3d at 1042. The court noted that with regard to these studies available prime contractors were identified via certification lists, willingness survey of chamber membership and trade association membership lists, public agency and certification lists, utilized prime contractor, bidder lists, county and other government records and other type lists. *Id.*

The court stated it was less confident in the determination of qualified minority-owned businesses by the two other studies because the availability methodology employed in those studies, the court found, appeared less likely to have weeded out unqualified businesses. *Id.* However, the court stated it was more troubled by the failure of five of the studies to account officially for potential differences in size, or “relative capacity,” of the business included in those studies. 545 F.3d at 1042-1043.

The court noted that qualified firms may have substantially different capacities and thus might be expected to bring in substantially different amounts of business even in the absence of discrimination. 545 F.3d at 1043. The Federal Circuit referred to the Eleventh Circuit

explanation similarly that because firms are bigger, bigger firms have a bigger chance to win bigger contracts, and thus one would expect the bigger (on average) non-MWBE firms to get a disproportionately higher percentage of total construction dollars awarded than the smaller MWBE firms. 545 F.3d at 1043 *quoting Engineering Contractors Association*, 122 F.3d at 917. The court pointed out its issues with the studies accounting for the relative sizes of contracts awarded to minority-owned businesses, but not considering the relative sizes of the businesses themselves. *Id.* at 1043.

The court noted that the studies measured the availability of minority-owned businesses by the percentage of firms in the market owned by minorities, instead of by the percentage of total marketplace capacity those firms could provide. *Id.* The court said that for a disparity ratio to have a significant probative value, the same time period and metric (dollars or numbers) should be used in measuring the utilization and availability shares. 545 F.3d at 1044, n. 12.

The court stated that while these parameters relating to the firm size may have ensured that each minority-owned business in the studies met a capacity threshold, these parameters did not account for the relative capacities of businesses to bid for more than one contract at a time, which failure rendered the disparity ratios calculated by the studies substantially less probative on their own, of the likelihood of discrimination. *Id.* at 1044. The court pointed out that the studies could have accounted for firm size even without changing the disparity ratio methodologies by employing regression analysis to determine whether there was a statistically significant correlation between the size of a firm and the share of contract dollars awarded to it. 545 F.3d at 1044 *citing to Engineering Contractors Association*, 122 F.3d at 917. The court noted that only one of the studies conducted this type of regression analysis, which included the independent variables of a firm-age of a company, owner education level, number of employees, percent of revenue from the private sector and owner experience for industry groupings. *Id.* at 1044-1045.

The court stated, to “be clear,” that it did not hold that the defects in the availability and capacity analyses in these six disparity studies render the studies wholly unreliable for any purpose. *Id.* at 1045. The court said that where the calculated disparity ratios are low enough, the court does not foreclose the possibility that an inference of discrimination might still be permissible for some of the minority groups in some of the studied industries in some of the jurisdictions. *Id.* The court recognized that a minority-owned firm’s capacity and qualifications may themselves be affected by discrimination. *Id.* The court held, however, that the defects it noted detracted dramatically from the probative value of the six studies, and in conjunction with their limited geographic coverage, rendered the studies insufficient to form the statistical core of the strong basis and evidence required to uphold the statute. *Id.*

Geographic coverage. The court pointed out that whereas municipalities must necessarily identify discrimination in the immediate locality to justify a race-based program, the court does not think that Congress needs to have had evidence before it of discrimination in all 50 states in order to justify the 1207 program. *Id.* The court stressed, however, that in holding the six studies insufficient in this particular case, “we do not necessarily disapprove of decisions by other circuit courts that have relied, directly or indirectly, on municipal disparity studies to establish a federal compelling interest.” 545 F.3d at 1046. The court stated in particular, the Appendix relied

on by the Ninth and Tenth Circuits in the context of certain race-conscious measures pertaining to federal highway construction, references the Urban Institute Report, which itself analyzed over 50 disparity studies and relied for its conclusions on over 30 of those studies, a far broader basis than the six studies provided in this case. *Id.*

Anecdotal evidence. The court held that given its holding regarding statistical evidence, it did not review the anecdotal evidence before Congress. The court did point out, however, that there was not evidence presented of a single instance of alleged discrimination by the DOD in the course of awarding a prime contract, or to a single instance of alleged discrimination by a private contractor identified as the recipient of a prime defense contract. 545 F.3d at 1049. The court noted this lack of evidence in the context of the opinion in *Croson* that if a government has become a passive participant in a system of racial exclusion practiced by elements of the local construction industry, then that government may take affirmative steps to dismantle the exclusionary system. 545 F.3d at 1048, *citing Croson*, 488 U.S. at 492.

The Federal Circuit pointed out that the Tenth Circuit in *Concrete Works* noted the City of Denver offered more than dollar amounts to link its spending to private discrimination, but instead provided testimony from minority business owners that general contractors who use them in city construction projects refuse to use them on private projects, with the result that Denver had paid tax dollars to support firms that discriminated against other firms because of their race, ethnicity and gender. 545 F.3d at 1049, *quoting Concrete Works*, 321 F.3d at 976-977.

In concluding, the court stated that it stressed its holding was grounded in the particular items of evidence offered by the DOD, and “should not be construed as stating blanket rules, for example about the reliability of disparity studies. As the Fifth Circuit has explained, there is no ‘precise mathematical formula’ to assess the quantum of evidence that rises to the *Croson* ‘strong basis in evidence’ benchmark.” 545 F.3d at 1049, *quoting W.H. Scott Constr. Co.*, 199 F.3d at 218 n. 11.

Narrowly tailoring. The Federal Circuit only made two observations about narrowly tailoring, because it held that Congress lacked the evidentiary predicate for a compelling interest. First, it noted that the 1207 Program was flexible in application, limited in duration, and that it did not unduly impact on the rights of third parties. 545 F.3d at 1049. Second, the court held that the absence of strongly probative statistical evidence makes it impossible to evaluate at least one of the other narrowly tailoring factors. Without solid benchmarks for the minority groups covered by the Section 1207, the court said it could not determine whether the 5 percent goal is reasonably related to the capacity of firms owned by members of those minority groups — i.e., whether that goal is comparable to the share of contracts minorities would receive in the absence of discrimination.” 545 F.3d at 1049-1050.

3. *Rothe Development, Inc. v. U.S. Dept. of Defense and Small Business Administration*, 107 F. Supp. 3d 183, 2015 WL 3536271 (D.D.C. 2015), affirmed on other grounds, 836 F.3d 57, 2016 WL 4719049 (D.C. Cir. 2016).

Plaintiff *Rothe Development, Inc.* is a small business that filed this action against the U.S. Department of Defense (“DOD”) and the U.S. Small Business Administration (“SBA”) (collectively, “Defendants”) challenging the constitutionality of the Section 8(a) Program on its face.

The constitutional challenge that Rothe brings in this case is nearly identical to the challenge brought in the case of *DynaLantic Corp. v. United States Department of Defense*, 885 F.Supp.2d 237 (D.D.C. 2012). The plaintiff in *DynaLantic* sued the DOD, the SBA, and the Department of Navy alleging that Section 8(a) was unconstitutional both on its face and as applied to the military simulation and training industry. *See DynaLantic*, 885 F.Supp.2d at 242. *DynaLantic's* court disagreed with the plaintiff's facial attack and held the Section 8(a) Program as facially constitutional. *See DynaLantic*, 885 F.Supp.2d at 248-280, 283-291. (*See also* discussion of *DynaLantic* in this Appendix below.)

The court in *Rothe* states that the plaintiff Rothe relies on substantially the same record evidence and nearly identical legal arguments as in the *DynaLantic* case, and urges the court to strike down the race-conscious provisions of Section 8(a) on their face, and thus to depart from *DynaLantic's* holding in the context of this case. 2015 WL 3536271 at *1. Both the plaintiff Rothe and the Defendants filed cross-motions for summary judgment as well as motions to limit or exclude testimony of each other's expert witnesses. The court concludes that Defendants' experts meet the relevant qualification standards under the Federal Rules, and therefore denies plaintiff Rothe's motion to exclude Defendants' expert testimony. *Id.* By contrast, the court found sufficient reason to doubt the qualifications of one of plaintiff's experts and to question the reliability of the testimony of the other; consequently, the court grants the Defendants' motions to exclude plaintiff's expert testimony.

In addition, the court in *Rothe* agrees with the court's reasoning in *DynaLantic*, and thus the court in *Rothe* also concludes that Section 8(a) is constitutional on its face. Accordingly, the court denies plaintiff's motion for summary judgment and grants Defendants' cross-motion for summary judgment.

DynaLantic Corp. v. Department of Defense. The court in *Rothe* analyzed the *DynaLantic* case, and agreed with the findings, holding and conclusions of the court in *DynaLantic*. *See* 2015 WL 3536271 at *4-5. The court in *Rothe* noted that the court in *DynaLantic* engaged in a detailed examination of Section 8(a) and the extensive record evidence, including disparity studies on racial discrimination in federal contracting across various industries. *Id.* at *5. The court in *DynaLantic* concluded that Congress had a compelling interest in eliminating the roots of racial discrimination in federal contracting, funded by federal money, and also that the government had established a strong basis in evidence to support its conclusion that remedial action was necessary to remedy that discrimination. *Id.* at *5. This conclusion was based on the finding the government provided extensive evidence of discriminatory barriers to minority business formation and minority business development, as well as significant evidence that, even when minority businesses are qualified and eligible to perform contracts in both public and private sectors, they are awarded these contracts far less often than their similarly situated non-minority counterparts. *Id.* at *5, *citing DynaLantic*, 885 F.Supp.2d at 279.

The court in *DynaLantic* also found that *DynaLantic* had failed to present credible, particularized evidence that undermined the government's compelling interest or that demonstrated that the government's evidence did not support an inference of prior discrimination and thus a remedial purpose. 2015 WL 3536271 at *5, *citing DynaLantic*, at 279.

With respect to narrow tailoring, the court in *DynaLantic* concluded that the Section 8(a) Program is narrowly tailored on its face, and that since Section 8(a) race-conscious provisions were narrowly tailored to further a compelling state interest, strict scrutiny was satisfied in the context of the construction industry and in other industries such as architecture and engineering, and professional services as well. *Id.* The court in *Rothe* also noted that the court in *DynaLantic* found that DynaLantic had thus failed to meet its burden to show that the challenge provisions were unconstitutional in all circumstances and held that Section 8(a) was constitutional on its face. *Id.*

Defendants’ expert evidence. One of Defendants’ experts used regression analysis, claiming to have isolated the effect in minority ownership on the likelihood of a small business receiving government contracts, specifically using a “logit model” to examine government contracting data in order to determine whether the data show any difference in the odds of contracts being won by minority-owned small businesses relative to other small businesses. 2015 WL 3536271 at *9. The expert controlled for other variables that could influence the odds of whether or not a given firm wins a contract, such as business size, age, and level of security clearance, and concluded that the odds of minority-owned small firms and non-8(a) SDB firms winning contracts were lower than small non-minority and non-SDB firms. *Id.* In addition, the Defendants’ expert found that non-8(a) minority-owned SDBs are statistically significantly less likely to win a contract in industries accounting for 94.0 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 non-minority counterparts. *Id.* at *17. The court held that Rothe has failed to rebut the evidence of the government with credible and particularized evidence of its own. *Id.* at *17. Furthermore, the court found that the government defendants established that the Section 8(a) Program is narrowly tailored to achieve the established compelling interest. *Id.* at *18.

The court found, citing agreement with the *DynaLantic* court, that the Section 8(a) Program satisfies all six factors of narrow tailoring. *Id.* First, alternative race-neutral remedies have proved unsuccessful in addressing the discrimination targeted with the Program. *Id.* Second, the Section 8(a) Program is appropriately flexible. *Id.* Third, Section 8(a) is neither over nor under-inclusive. *Id.* Fourth, the Section 8(a) Program imposes temporal limits on every individual's participation that fulfilled the durational aspect of narrow tailoring. *Id.* Fifth, the relevant aspirational goals for SDB contracting participation are numerically proportionate, in part because the evidence presented established that minority firms are ready, willing and able to perform work equal to 2-5 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.

4. DynaLantic Corp. v. United States Dept. of Defense, et al., 885 F.Supp.2d 237, 2012 WL 3356813 (D.D.C., 2012), appeals voluntarily dismissed, United States Court of Appeals, District of Columbia, Docket Numbers 12-5329 and 12-5330 (2014)

Plaintiff, the DynaLantic Corporation ("DynaLantic"), is a small business that designs and manufactures aircraft, submarine, ship, and other simulators and training equipment. DynaLantic sued the United States Department of Defense ("DoD"), the Department of the Navy, and the Small Business Administration ("SBA") challenging the constitutionality of Section 8(a) of the Small Business Act (the "Section 8(a) program"), on its face and as applied: namely, the SBA's determination that it is necessary or appropriate to set aside contracts in the military simulation and training industry. 2012 WL 3356813, at *1, *37.

The Section 8(a) program authorizes the federal government to limit the issuance of certain contracts to socially and economically disadvantaged businesses. *Id.* at *1. DynaLantic claimed that the Section 8(a) is unconstitutional on its face because the DoD's use of the program, which is reserved for "socially and economically disadvantaged individuals," constitutes an illegal racial preference in violation of the equal protection in violating its right to equal protection under the Due Process Clause of the Fifth Amendment to the Constitution and other rights. *Id.* at *1. DynaLantic also claimed the Section 8(a) program is unconstitutional as applied by the federal defendants in DynaLantic's specific industry, defined as the military simulation and training industry. *Id.*

As described in *DynaLantic Corp. v. United States Department of Defense*, 503 F.Supp. 2d 262 (D.D.C. 2007) (*see below*), the court previously had denied Motions for Summary Judgment by the parties and directed them to propose future proceedings in order to supplement the record with additional evidence subsequent to 2007 before Congress. 503 F.Supp. 2d at 267.

The Section 8(a) Program. The Section 8(a) program is a business development program for small businesses owned by individuals who are both socially and economically disadvantaged as defined by the specific criteria set forth in the congressional statute and federal regulations at 15 U.S.C. §§ 632, 636 and 637; *see* 13 CFR § 124. “Socially disadvantaged” individuals are persons who have been “subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups without regard to their individual qualities.” 13 CFR § 124.103(a); *see also* 15 U.S.C. § 637(a)(5). “Economically disadvantaged” individuals are those socially disadvantaged individuals “whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged.” 13 CFR § 124.104(a); *see also* 15 U.S.C. § 637(a)(6)(A). *DynaLantic Corp.*, 2012WL 3356813 at *2.

Individuals who are members of certain racial and ethnic groups are presumptively socially disadvantaged; such groups include, but are not limited to, Black Americans, Hispanic Americans, Native Americans, Indian tribes, Asian Pacific Americans, Native Hawaiian Organizations, and other minorities. *Id.* at *2 *quoting* 15 U.S.C. § 631(f)(1)(B)-(c); *see also* 13 CFR § 124.103(b)(1). All prospective program participants must show that they are economically disadvantaged, which requires an individual to show a net worth of less than \$250,000 upon entering the program, and a showing that the individual’s income for three years prior to the application and the fair market value of all assets do not exceed a certain threshold. 2012 WL 3356813 at *3; *see* 13 CFR § 124.104(c)(2).

Congress has established an “aspirational goal” for procurement from socially and economically disadvantaged individuals, which includes but is not limited to the Section 8(a) program, of 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 non-minority enterprises ... precluding existing minority firms from effectively competing for public construction contracts.” *DynaLantic*, at *11, quoting *Adarand VII*, 228 F.3d at 1168.

Thus, the Court concluded that the government may implement race-conscious programs not only for the purpose of correcting its own discrimination, but also to prevent itself from acting as a “passive participant” in private discrimination in the relevant industries or markets. *DynaLantic*, at *11, citing *Concrete Works IV*, 321 F.3d at 958.

Evidence before Congress. The Court analyzed the legislative history of the Section 8(a) program, and then addressed the issue as to whether the Court is limited to the evidence before Congress when it enacted Section 8(a) in 1978 and revised it in 1988, or whether it could consider post-enactment evidence. *DynaLantic*, at *16-17. The Court found that nearly every circuit court to consider the question has held that reviewing courts may consider post-enactment evidence in addition to evidence that was before Congress when it embarked on the program. *DynaLantic*, at *17. The Court noted that post-enactment evidence is particularly relevant when the statute is over thirty years old, and evidence used to justify Section 8(a) is stale for purposes of determining a compelling interest in the present. *Id.* The Court then followed the 10th Circuit Court of Appeals' approach in *Adarand VII*, and reviewed the post-enactment evidence in three broad categories: (1) evidence of barriers to the formation of qualified minority contractors due to discrimination, (2) evidence of discriminatory barriers to fair competition between minority and non-minority contractors, and (3) evidence of discrimination in state and local disparity studies. *DynaLantic*, at *17.

The Court found that the government presented sufficient evidence of barriers to minority business formation, including evidence on race-based denial of access to capital and credit, lending discrimination, routine exclusion of minorities from critical business relationships, particularly through closed or "old boy" business networks that make it especially difficult for minority-owned businesses to obtain work, and that minorities continue to experience barriers to business networks. *DynaLantic*, at *17-21. The Court considered as part of the evidentiary basis before Congress multiple disparity studies conducted throughout the United States and submitted to Congress, and qualitative and quantitative testimony submitted at Congressional hearings. *Id.*

The Court also found that the government submitted substantial evidence of barriers to minority business development, including evidence of discrimination by prime contractors, private sector customers, suppliers, and bonding companies. *DynaLantic*, at *21-23. The Court again based this finding on recent evidence submitted before Congress in the form of disparity studies, reports and Congressional hearings. *Id.*

State and local disparity studies. Although the Court noted there have been hundreds of disparity studies placed before Congress, the Court considers in particular studies submitted by the federal Defendants of 50 disparity studies, encompassing evidence from 28 states and the District of Columbia, which have been before Congress since 2006. *DynaLantic*, at *25-29. The Court stated it reviewed the studies with a focus on two indicators that other courts have found relevant in analyzing disparity studies. First, the Court considered the disparity indices calculated, which was a disparity index, calculated by dividing the percentage of MBE, WBE, and/or DBE firms *utilized* in the contracting market by the percentage of M/W/DBE firms *available* in the same market. *DynaLantic*, at *26. The Court said that normally, a disparity index of 100 demonstrates full M/W/DBE participation; the closer the index is to zero, the greater the M/W/DBE disparity due to underutilization. *DynaLantic*, at *26.

Second, the Court reviewed the method by which studies calculated the *availability* and *capacity* of minority firms. *DynaLantic*, at *26. The Court noted that some courts have looked closely at these factors to evaluate the reliability of the disparity indices, reasoning that the indices are not

probative unless they are restricted to firms of significant size and with significant government contracting experience. *DynaLantic*, at *26. The Court pointed out that although discriminatory barriers to formation and development would impact capacity, the Supreme Court decision in *Croson* and the Court of Appeals decision in *O'Donnell Construction Co. v. District of Columbia, et al.*, 963 F.2d 420 (D.C. Cir. 1992) “require the additional showing that eligible minority firms experience disparities, notwithstanding their abilities, in order to give rise to an inference of discrimination.” *DynaLantic*, at *26, n. 10.

Analysis: Strong basis in evidence. Based on an analysis of the disparity studies and other evidence, the Court concluded that the government articulated a compelling interest for the Section 8(a) program and satisfied its initial burden establishing that Congress had a strong basis in evidence permitting race-conscious measures to be used under the Section 8(a) program. *DynaLantic*, at *29-37. The Court held that DynaLantic did not meet its burden to establish that the Section 8(a) program is unconstitutional on its face, finding that DynaLantic could not show that Congress did not have a strong basis in evidence for permitting race-conscious measures to be used under any circumstances, in any sector or industry in the economy. *DynaLantic*, at *29.

The Court discussed and analyzed the evidence before Congress, which included extensive statistical analysis, qualitative and quantitative consideration of the unique challenges facing minorities from all businesses, and an examination of their race-neutral measures that have been enacted by previous Congresses, but had failed to reach the minority owned firms. *DynaLantic*, at *31. The Court said Congress had spent decades compiling evidence of race discrimination in a variety of industries, including but not limited to construction. *DynaLantic*, at *31. The Court also found that the federal government produced significant evidence related to professional services, architecture and engineering, and other industries. *DynaLantic*, at *31. The Court stated that the government has therefore “established that there are at least some circumstances where it would be ‘necessary or appropriate’ for the SBA to award contracts to businesses under the Section 8(a) program. *DynaLantic*, at *31, citing 15 U.S.C. § 637(a)(1).

Therefore, the Court concluded that in response to plaintiff’s facial challenge, the government met its initial burden to present a strong basis in evidence sufficient to support its articulated, constitutionally valid, compelling interest. *DynaLantic*, at *31. The Court also found that the evidence from around the country is sufficient for Congress to authorize a nationwide remedy. *DynaLantic*, at *31, n. 13.

Rejection of DynaLantic’s rebuttal arguments. The Court held that since the federal Defendants made the initial showing of a compelling interest, the burden shifted to the plaintiff to show why the evidence relied on by Defendants fails to demonstrate a compelling governmental interest. *DynaLantic*, at *32. The Court rejected each of the challenges by DynaLantic, including holding that: the legislative history is sufficient; the government compiled substantial evidence that identified private racial discrimination which affected minority utilization in specific industries of government contracting, both before and after the enactment of the Section 8(a) program; any flaws in the evidence, including the disparity studies, DynaLantic has identified in the data do not rise to the level of credible, particularized evidence necessary to rebut the government’s initial showing of a compelling interest; DynaLantic cited no authority in support of its claim that

fraud in the administration of race-conscious programs is sufficient to invalidate Section 8(a) program on its face; and Congress had strong evidence that the discrimination is sufficiently pervasive across racial lines to justify granting a preference for all five groups included in Section 8(a). *DynaLantic*, at *32-36.

In this connection, the Court stated it agreed with *Croson* and its progeny that the government may properly be deemed a “passive participant” when it fails to adjust its procurement practices to account for the effects of identified private discrimination on the availability and utilization of minority-owned businesses in government contracting. *DynaLantic*, at *34. In terms of flaws in the evidence, the Court pointed out that the proponent of the race-conscious remedial program is not required to unequivocally establish the existence of discrimination, nor is it required to negate all evidence of non-discrimination. *DynaLantic*, at *35, citing *Concrete Work IV*, 321 F.3d at 991. Rather, a strong basis in evidence exists, the Court stated, when there is evidence approaching a *prima facie* case of a constitutional or statutory violation, not irrefutable or definitive proof of discrimination. *Id.*, citing *Croson*, 488 U.S. 500. Accordingly, the Court stated that DynaLantic’s claim that the government must independently verify the evidence presented to it is unavailing. *Id.* *DynaLantic*, at *35.

Also in terms of DynaLantic’s arguments about flaws in the evidence, the Court noted that Defendants placed in the record approximately 50 disparity studies which had been introduced or discussed in Congressional Hearings since 2006, which DynaLantic did not rebut or even discuss any of the studies individually. *DynaLantic*, at *35. DynaLantic asserted generally that the studies did not control for the capacity of the firms at issue, and were therefore unreliable. *Id.* The Court pointed out that Congress need not have evidence of discrimination in all 50 states to demonstrate a compelling interest, and that in this case, the federal Defendants presented recent evidence of discrimination in a significant number of states and localities which, taken together, represents a broad cross-section of the nation. *DynaLantic*, at *35, n. 15. The Court stated that while not all of the disparity studies accounted for the capacity of the firms, many of them did control for capacity and still found significant disparities between minority and non-minority owned firms. *DynaLantic*, at *35. In short, the Court found that DynaLantic’s “general criticism” of the multitude of disparity studies does not constitute particular evidence undermining the reliability of the particular disparity studies and therefore is of little persuasive value. *DynaLantic*, at *35.

In terms of the argument by DynaLantic as to requiring proof of evidence of discrimination against each minority group, the Court stated that Congress has a strong basis in evidence if it finds evidence of discrimination is sufficiently pervasive across racial lines to justify granting a preference to all five disadvantaged groups included in Section 8(a). The Court found Congress had strong evidence that the discrimination is sufficiently pervasive across racial lines to justify a preference to all five groups. *DynaLantic*, at *36. The fact that specific evidence varies, to some extent, within and between minority groups, was not a basis to declare this statute facially invalid. *DynaLantic*, at *36.

Facial challenge: Conclusion. The Court concluded Congress had a compelling interest in eliminating the roots of racial discrimination in federal contracting and had established a strong basis of evidence to support its conclusion that remedial action was necessary to remedy that

discrimination by providing significant evidence in three different areas. First, it provided extensive evidence of discriminatory barriers to minority business formation. *DynaLantic*, at *37. Second, it provided “forceful” evidence of discriminatory barriers to minority business development. *Id.* Third, it provided significant evidence that, even when minority businesses are qualified and eligible to perform contracts in both the public and private sectors, they are awarded these contracts far less often than their similarly situated non-minority counterparts. *Id.* The Court found the evidence was particularly strong, nationwide, in the construction industry, and that there was substantial evidence of widespread disparities in other industries such as architecture and engineering, and professional services. *Id.*

As-applied challenge. *DynaLantic* also challenged the SBA and DoD’s use of the Section 8(a) program as applied: namely, the agencies’ determination that it is necessary or appropriate to set aside contracts in the military simulation and training industry. *DynaLantic*, at *37. Significantly, the Court points out that the federal Defendants “concede that they do not have evidence of discrimination in this industry.” *Id.* Moreover, the Court points out that the federal Defendants admitted that there “is no Congressional report, hearing or finding that references, discusses or mentions the simulation and training industry.” *DynaLantic*, at *38. The federal Defendants also admit that they are “unaware of any discrimination in the simulation and training industry.” *Id.* In addition, the federal Defendants admit that none of the documents they have submitted as justification for the Section 8(a) program mentions or identifies instances of past or present discrimination in the simulation and training industry. *DynaLantic*, at *38.

The federal Defendants maintain that the government need not tie evidence of discriminatory barriers to minority business formation and development to evidence of discrimination in any particular industry. *DynaLantic*, at *38. The Court concludes that the federal Defendants’ position is irreconcilable with binding authority upon the Court, specifically, the United States Supreme Court’s decision in *Croson*, as well as the Federal Circuit’s decision in *O’Donnell Construction Company*, which adopted *Croson’s* reasoning. *DynaLantic*, at *38. The Court holds that *Croson* made clear the government must provide evidence demonstrating there were eligible minorities in the relevant market. *DynaLantic*, at *38. The Court held that absent an evidentiary showing that, in a highly skilled industry such as the military simulation and training industry, there are eligible minorities who are qualified to undertake particular tasks and are nevertheless denied the opportunity to thrive there, the government cannot comply with *Croson’s* evidentiary requirement to show an inference of discrimination. *DynaLantic*, at *39, citing *Croson*, 488 U.S. 501. The Court rejects the federal government’s position that it does not have to make an industry-based showing in order to show strong evidence of discrimination. *DynaLantic*, at *40.

The Court notes that the Department of Justice has recognized that the federal government must take an industry-based approach to demonstrating compelling interest. *DynaLantic*, at *40, citing *Cortez III Service Corp. v. National Aeronautics & Space Administration*, 950 F.Supp. 357 (D.D.C. 1996). In *Cortez*, the Court found the Section 8(a) program constitutional on its face, but found the program unconstitutional as applied to the NASA contract at issue because the government had provided no evidence of discrimination in the industry in which the NASA contract would be performed. *DynaLantic*, at *40. The Court pointed out that the Department of Justice had advised federal agencies to make industry-specific determinations before offering set-aside contracts

and specifically cautioned them that without such particularized evidence, set-aside programs may not survive *Croson* and *Adarand*. *DynaLantic*, at *40.

The Court recognized that legislation considered in *Croson*, *Adarand* and *O'Donnell* were all restricted to one industry, whereas this case presents a different factual scenario, because Section 8(a) is not industry-specific. *DynaLantic*, at *40, n. 17. The Court noted that the government did not propose an alternative framework to *Croson* within which the Court can analyze the evidence, and that in fact, the evidence the government presented in the case is industry specific. *Id.*

The Court concluded that agencies have a responsibility to decide if there has been a history of discrimination in the particular industry at issue. *DynaLantic*, at *40. According to the Court, it need not take a party's definition of "industry" at face value, and may determine the appropriate industry to consider is broader or narrower than that proposed by the parties. *Id.* However, the Court stated, in this case the government did not argue with plaintiff's industry definition, and more significantly, it provided no evidence whatsoever from which an inference of discrimination in that industry could be made. *DynaLantic*, at *40.

Narrowly tailoring. In addition to showing strong evidence that a race-conscious program serves a compelling interest, the government is required to show that the means chosen to accomplish the government's asserted purpose are specifically and narrowly framed to accomplish that purpose. *DynaLantic*, at *41. The Court considered several factors in the narrowly tailoring analysis: the efficacy of alternative, race-neutral remedies, flexibility, over- or under-inclusiveness of the program, duration, the relationship between numerical goals and the relevant labor market, and the impact of the remedy on third parties. *Id.*

The Court analyzed each of these factors and found that the federal government satisfied all six factors. *DynaLantic*, at *41-48. The Court found that the federal government presented sufficient evidence that Congress attempted to use race-neutral measures to foster and assist minority owned businesses relating to the race-conscious component in Section 8(a), and that these race-neutral measures failed to remedy the effects of discrimination on minority small business owners. *DynaLantic*, at *42. The Court found that the Section 8(a) program is sufficiently flexible in granting race-conscious relief because race is made relevant in the program, but it is not a determinative factor or a rigid racial quota system. *DynaLantic*, at *43. The Court noted that the Section 8(a) program contains a waiver provision and that the SBA will not accept a procurement for award as an 8(a) contract if it determines that acceptance of the procurement would have an adverse impact on small businesses operating outside the Section 8(a) program. *DynaLantic*, at *44.

The Court found that the Section 8(a) program was not over- and under-inclusive because the government had strong evidence of discrimination which is sufficiently pervasive across racial lines to all five disadvantaged groups, and Section 8(a) does not provide that every member of a minority group is disadvantaged. *DynaLantic*, at *44. In addition, the program is narrowly tailored because it is based not only on social disadvantage, but also on an individualized inquiry into economic disadvantage, and that a firm owned by a non-minority may qualify as socially and economically disadvantaged. *DynaLantic*, at *44.

The Court also found that the Section 8(a) program places a number of strict durational limits on a particular firm's participation in the program, places temporal limits on every individual's participation in the program, and that a participant's eligibility is continually reassessed and must be maintained throughout its program term. *DynaLantic*, at *45. Section 8(a)'s inherent time limit and graduation provisions ensure that it is carefully designed to endure only until the discriminatory impact has been eliminated, and thus it is narrowly tailored. *DynaLantic*, at *46.

In light of the government's evidence, the Court concluded that the aspirational goals at issue, all of which were less than 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 2-5 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 non-minorities in order to survive strict scrutiny, but a limited and properly tailored remedy to cure the effects of prior discrimination is permissible even when it burdens third parties. *Id.* The Court points to a number of provisions designed to minimize the burden on non-minority firms, including the presumption that a minority applicant is socially disadvantaged may be rebutted, an individual who is not presumptively disadvantaged may qualify for such status, the 8(a) program requires an individualized determination of economic disadvantage, and it is not open to individuals whose net worth exceeds \$250,000 regardless of race. *Id.*

Conclusion. The Court concluded that the Section 8(a) program is constitutional on its face. The Court also held that it is unable to conclude that the federal Defendants have produced evidence of discrimination in the military simulation and training industry sufficient to demonstrate a compelling interest. Therefore, *DynaLantic* prevailed on its as-applied challenge. *DynaLantic*, at *51. Accordingly, the Court granted the federal Defendants' Motion for Summary Judgment in part (holding the Section 8(a) program is valid on its face) and denied it in part, and granted the plaintiff's Motion for Summary Judgment in part (holding the program is invalid as applied to the military simulation and training industry) and denied it in part. The Court held that the SBA and the DoD are enjoined from awarding procurements for military simulators under the Section 8(a) program without first articulating a strong basis in evidence for doing so.

Appeals voluntarily dismissed, and Stipulation and Agreement of Settlement Approved and Ordered by District Court. A Notice of Appeal and Notice of Cross Appeal were filed in this case to the United States Court of Appeals for the District of Columbia by the United States and DynaLantic: Docket Numbers 12-5329 and 12-5330. Subsequently, the appeals were voluntarily dismissed, and the parties entered into a Stipulation and Agreement of Settlement, which was approved by the District Court (Jan. 30, 2014). The parties stipulated and agreed *inter alia*, as follows: (1) the Federal Defendants were enjoined from awarding prime contracts under the Section 8(a) program for the purchase of military simulation and military simulation training contracts without first articulating a strong basis in evidence for doing so; (2) the Federal

Defendants agreed to pay plaintiff the sum of \$1,000,000.00; and (3) the Federal Defendants agreed they shall refrain from seeking to vacate the injunction entered by the Court for at least two years.

The District Court on January 30, 2014 approved the Stipulation and Agreement of Settlement, and So Ordered the terms of the original 2012 injunction modified as provided in the Stipulation and Agreement of Settlement.

5. DynaLantic Corp. v. United States Dept. of Defense, et al., 503 F. Supp.2d 262 (D.D.C. 2007)

DynaLantic Corp. involved a challenge to the DOD's utilization of the Small Business Administration's ("SBA") 8(a) Business Development Program ("8(a) Program"). In its Order of August 23, 2007, the district court denied both parties' Motions for Summary Judgment because there was no information in the record regarding the evidence before Congress supporting its 2006 reauthorization of the program in question; the court directed the parties to propose future proceedings to supplement the record. 503 F. Supp.2d 262, 263 (D.D.C. 2007).

The court first explained that the 8(a) Program sets a goal that no less than 5 percent of total prime federal contract and subcontract awards for each fiscal year be awarded to socially and economically disadvantaged individuals. *Id.* Each federal government agency is required to establish its own goal for contracting but the goals are not mandatory and there is no sanction for failing to meet the goal. Upon application and admission into the 8(a) Program, small businesses owned and controlled by disadvantaged individuals are eligible to receive technological, financial, and practical assistance, and support through preferential award of government contracts. For the past few years, the 8(a) Program was the primary preferential treatment program the DOD used to meet its 5 percent goal. *Id.* at 264.

This case arose from a Navy contract that the DOD decided to award exclusively through the 8(a) Program. The plaintiff owned a small company that would have bid on the contract but for the fact it was not a participant in the 8(a) Program. After multiple judicial proceedings the D.C. Circuit dismissed the plaintiff's action for lack of standing but granted the plaintiff's motion to enjoin the contract procurement pending the appeal of the dismissal order. The Navy cancelled the proposed procurement but the D.C. Circuit allowed the plaintiff to circumvent the mootness argument by amending its pleadings to raise a facial challenge to the 8(a) program as administered by the SBA and utilized by the DOD. The D.C. Circuit held the plaintiff had standing because of the plaintiff's inability to compete for DOD contracts reserved to 8(a) firms, the injury was traceable to the race-conscious component of the 8(a) Program, and the plaintiff's injury was imminent due to the likelihood the government would in the future try to procure another contract under the 8(a) Program for which the plaintiff was ready, willing, and able to bid. *Id.* at 264-65.

On remand, the plaintiff amended its complaint to challenge the constitutionality of the 8(a) Program and sought an injunction to prevent the military from awarding any contract for military simulators based upon the race of the contractors. *Id.* at 265. The district court first held that the plaintiff's complaint could be read only as a challenge to the DOD's implementation of

the 8(a) Program [pursuant to 10 U.S.C. § 2323] as opposed to a challenge to the program as a whole. *Id.* at 266. The parties agreed that the 8(a) Program uses race-conscious criteria so the district court concluded it must be analyzed under the strict scrutiny constitutional standard. The court found that in order to evaluate the government’s proffered “compelling government interest,” the court must consider the evidence that Congress considered at the point of authorization or reauthorization to ensure that it had a strong basis in evidence of discrimination requiring remedial action. The court cited to *Western States Paving* in support of this proposition. *Id.* The court concluded that because the DOD program was reauthorized in 2006, the court must consider the evidence before Congress in 2006.

The court cited to the recent *Rothe* decision as demonstrating that Congress considered significant evidentiary materials in its reauthorization of the DOD program in 2006, including six recently published disparity studies. The court held that because the record before it in the present case did not contain information regarding this 2006 evidence before Congress, it could not rule on the parties’ Motions for Summary Judgment. The court denied both motions and directed the parties to propose future proceedings in order to supplement the record. *Id.* at 267.

APPENDIX C.

Quantitative Analyses of Marketplace Conditions

APPENDIX C.

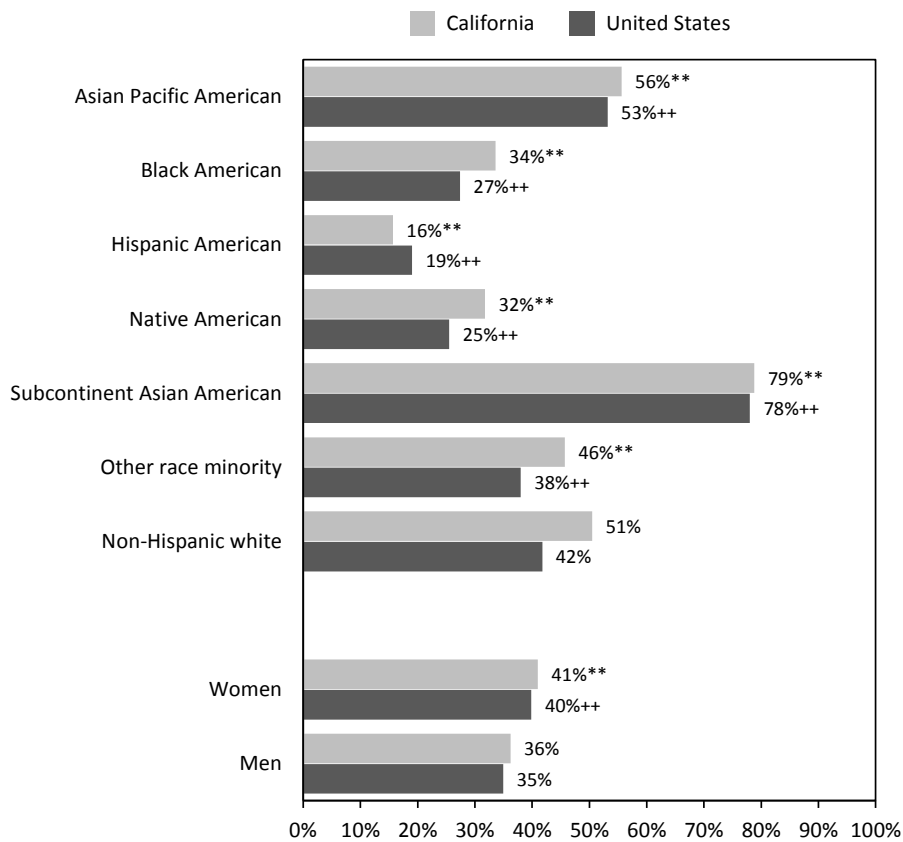
Quantitative Analyses of Marketplace Conditions

BBC Research & Consulting (BBC) conducted quantitative analyses of marketplace conditions in California to assess whether minorities, women, and minority- and woman-owned businesses face any barriers in the transportation-related construction and professional services industries. BBC examined local marketplace conditions in four primary areas:

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

Appendix C presents a series of figures that show results from those analyses. Key results along with information from secondary research are presented in Chapter 3.

Figure C-1.
Percentage of all workers 25 and older with at least a
four-year college degree in California and the United States

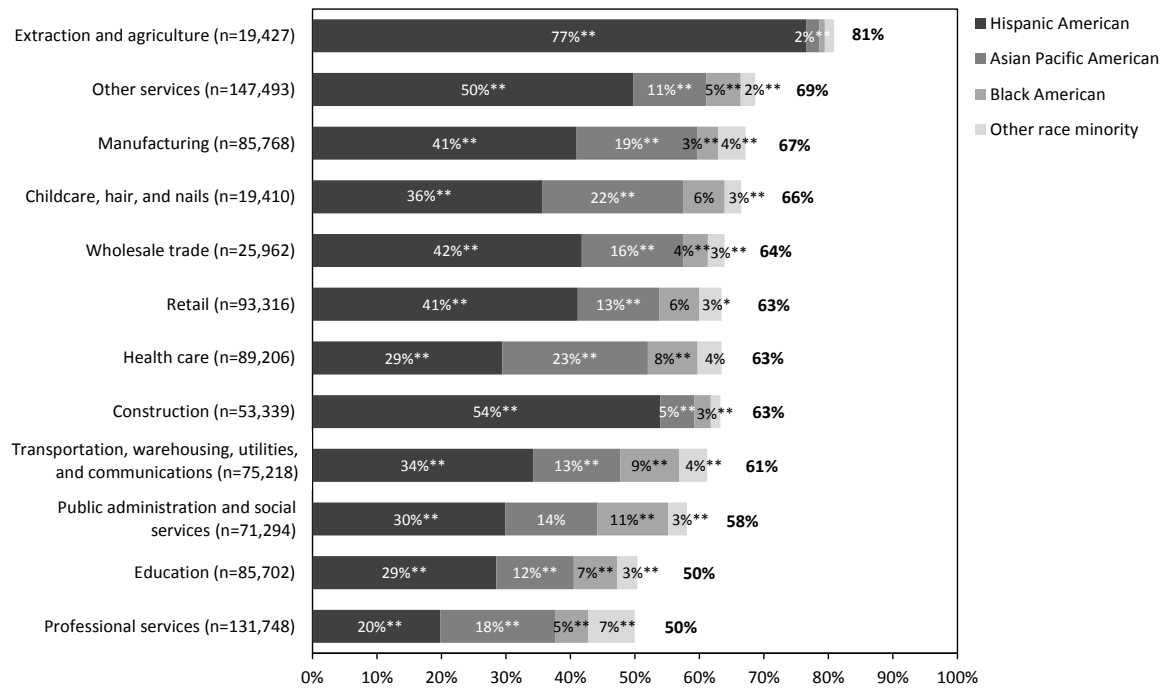


Note: *, ** Denotes that the difference in proportions between the minority group and non-Hispanic whites or between women and men is statistically significant at the 90% and 95% confidence levels, respectively.

Source: BBC Research & Consulting from 2015-2019 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the Minnesota Population Center: <http://usa.ipums.org/usa/>.

Figure C-1 indicates that smaller percentages of Black American, Hispanic American, Native American, and other race minority workers in California have four-year college degrees than non-Hispanic whites.

Figure C-2.
Percent representation of minorities in various California industries



Notes: *, ** Denotes that the difference in proportions between minority workers in the specified industry and all industries is statistically significant at the 90% and 95% confidence level, respectively.

The representation of minorities among all California workers is 14% for Asian Pacific Americans, 6% for Black Americans, 38% for Hispanic Americans, 3.6% for Other race minorities and 61% for all minorities considered together.

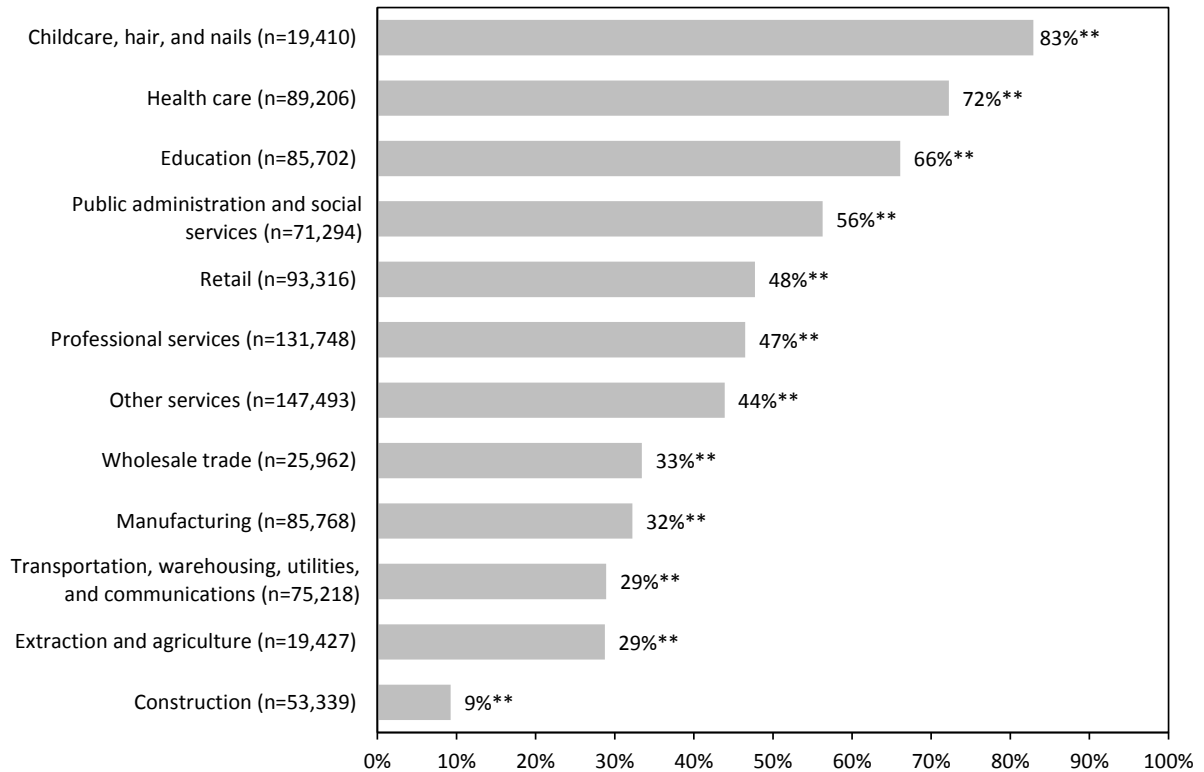
"Other race minority" includes Native Americans, Subcontinent Asian Americans, and other races.

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

Source: BBC Research & Consulting from 2015-2019 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Figure C-2 indicates that the California industries with the highest representations of minority workers are extraction and agriculture, other services, and manufacturing. The California industries with the lowest representations of minority workers are public administration and social services, education, and professional services.

Figure C-3.
Percent representation of women in various California industries



Notes: *, ** Denotes that the difference in proportions between women workers in the specified industry and all industries is statistically significant at the 90% and 95% confidence level, respectively.

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

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

Source: BBC Research & Consulting from 2015-2019 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Figure C-3 indicates that the California industries with the highest representations of women workers are childcare, hair, and nails; health care; and education. The industries with the lowest representations of women are transportation, warehousing, utilities, and communications; extraction and architecture; and construction.

Figure C-4.
Demographic characteristics of workers in study-related industries and all industries in California and the United States

California	All Industries (n=935,956)	Construction (n=53,339)	Professional Services (n=10,180)
Race/ethnicity			
Asian Pacific American	14.2 %	5.3 % **	18.9 % **
Black American	6.1 %	2.6 % **	3.0 % **
Hispanic American	37.5 %	53.9 % **	17.5 % **
Native American	0.9 %	1.0 %	0.9 %
Subcontinent Asian American	2.4 %	0.3 % **	3.1 % **
Other race minority	0.3 %	0.2 % **	0.2 % **
Total minority	61.4 %	63.2 %	43.6 %
Non-Hispanic white	38.6 %	36.8 % **	56.4 % **
Total	100.0 %	100.0 %	100.0 %
Gender			
Women	45.8 %	9.3 % **	27.5 % **
Men	54.2 %	90.7 % **	72.5 % **
Total	100.0 %	100.0 %	100.0 %
United States	All Industries (n=7,818,941)	Construction (n=485,217)	Professional Services (n=81,687)
Race/ethnicity			
Asian Pacific American	5.0 %	1.8 % **	6.2 % **
Black American	12.6 %	5.9 % **	5.3 % **
Hispanic American	17.3 %	28.6 % **	9.5 % **
Native American	1.2 %	1.3 % **	0.8 % **
Subcontinent Asian American	1.6 %	0.3 % **	2.1 % **
Other race minority	0.2 %	0.3 %	0.2 % **
Total minority	37.9 %	38.3 %	24.0 %
Non-Hispanic white	62.1 %	61.7 % **	76.0 % **
Total	100.0 %	100.0 %	100.0 %
Gender			
Women	47.2 %	9.7 % **	25.9 % **
Men	52.8 %	90.3 % **	74.1 % **
Total	100.0 %	100.0 %	100.0 %

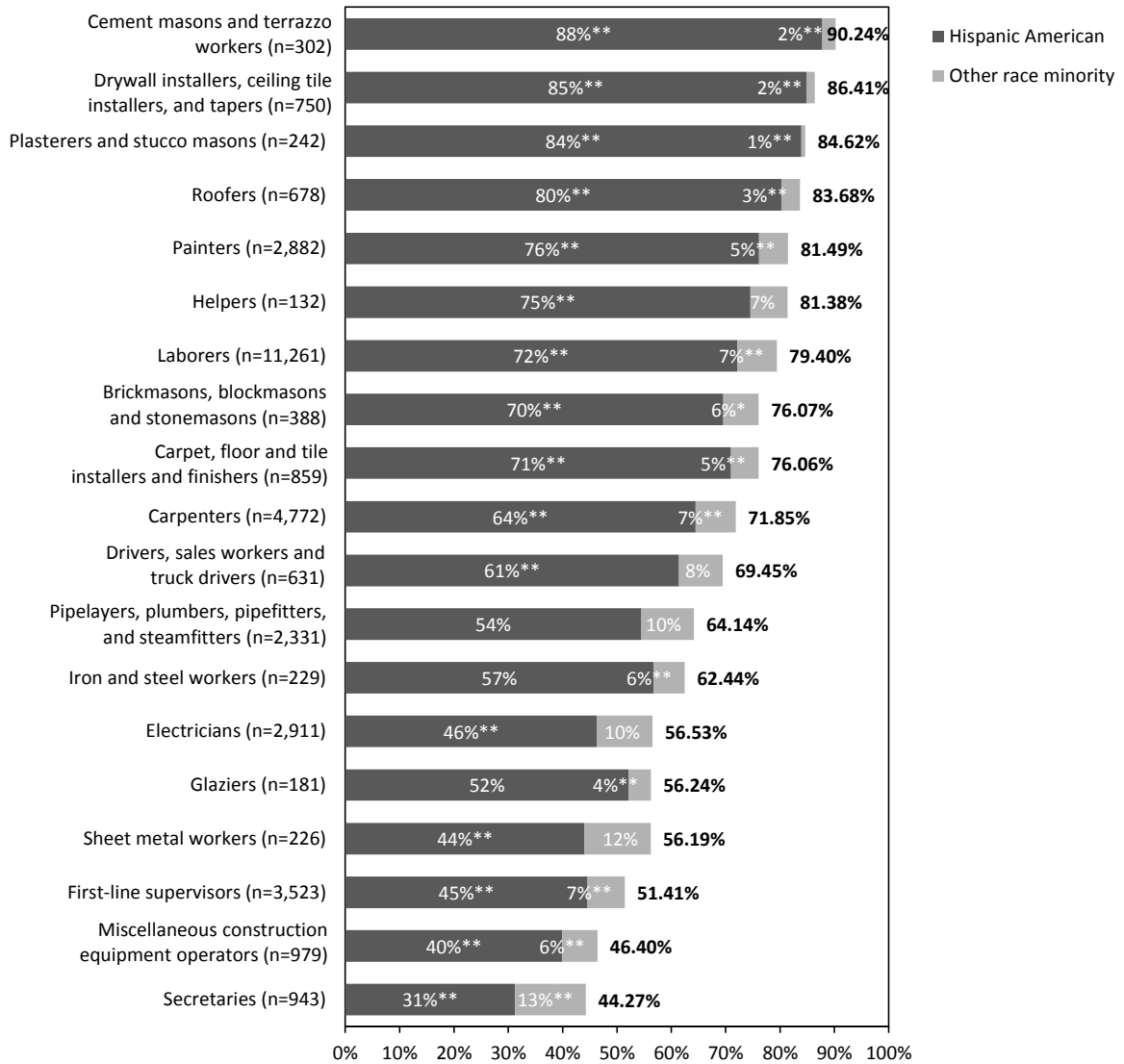
Note: *, ** Denotes that the difference in proportions between workers in each study-related industry and workers in all industries is statistically significant at the 90% and 95% confidence level, respectively.

Source: BBC Research & Consulting from 2015-2019 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the Minnesota Population Center: <http://usa.ipums.org/usa/>.

Figure C-4 indicates that compared to all industries considered together:

- Smaller percentages of Asian Pacific Americans, Black Americans, Subcontinent Asian Americans, and other race minorities work in the California construction industry. In addition, a smaller percentage of women work in the California construction industry.
- Smaller percentages of Black Americans, Hispanic Americans, and other race minorities work in the California professional services industry. In addition, a smaller percentage of women work in the California professional services industry.

Figure C-5.
Percent representation of minority workers
in selected construction occupations in California



Notes: *, ** Denotes that the difference in proportions between minority workers in the specified occupation and all construction occupations considered together is statistically significant at the 90% and 95% confidence level, respectively.

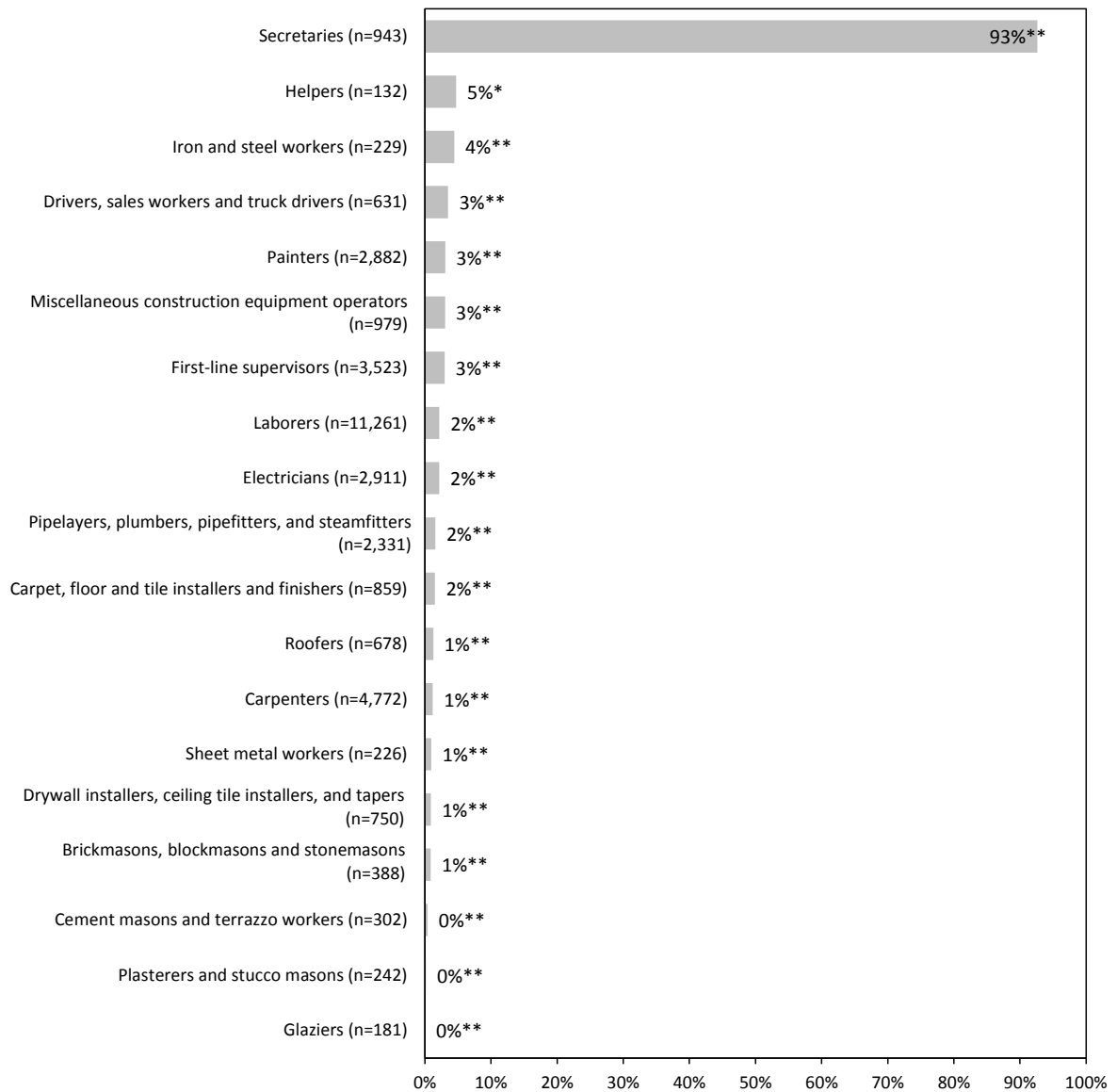
The representation of minorities among all California construction workers is 54% for Hispanic Americans, 9.3% for Other race minorities and 63% for all minorities considered together.

"Other race minority" includes Asian Pacific Americans, Black Americans, Native Americans, Subcontinent Asian Americans, and other races. Crane and tower operators, dredge, excavating and loading machine and dragline operators, paving, surfacing and tamping equipment operators and miscellaneous construction equipment operators were combined into the single category of machine operators.

Source: BBC Research & Consulting from 2015-2019 ACS 5% sample. The raw data extract was obtained through the IPUMS program of the Minnesota Population Center: <http://usa.ipums.org/usa/>.

Figure C-5 indicates that the construction occupations with the highest representations of minority workers in California are cement masons and terrazzo workers; drywall installers, ceiling tile installers, and tapers; and plasterers and stucco masons. The construction occupations with the lowest representations of minority workers are first-line supervisors, miscellaneous construction equipment operators, and secretaries.

Figure C-6.
Percent representation of women workers
in selected construction occupations in California



Notes: *, ** Denotes that the difference in proportions between women workers in the specified occupation and all construction occupations considered together is statistically significant at the 90% and 95% confidence level, respectively.

The representation of women among all California construction workers is 9%.

Crane and tower operators, dredge, excavating and loading machine and dragline operators, paving, surfacing and tamping equipment operators and miscellaneous construction equipment operators were combined into the single category of machine operators.

Source: BBC Research & Consulting from 2015-2019 ACS 5% sample. The raw data extract was obtained through the IPUMS program of the Minnesota Population Center: <http://usa.ipums.org/usa/>.

Figure C-6 indicates that the construction occupations in California with the highest representations of women workers are secretaries, helpers, and iron steel workers. The construction occupations with the lowest representations of women workers are cement masons and terrazzo workers, plasterers and stucco masons, and glaziers.

Figure C-7.
Percentage of workers who work as a manager in
study-related industries in California and the United States

	Construction	Professional Services
Race/ethnicity		
Asian Pacific American	12.0 % **	2.5 % **
Black American	7.3 % **	5.4 %
Hispanic American	3.4 % **	1.9 % **
Native American	14.0 %	7.1 %
Subcontinent Asian American	14.0 %	3.2 %
Other race minority	9.1 % *	0.0 % †
Non-Hispanic white	15.9 %	4.2 %
Gender		
Women	9.2 %	2.1 % **
Men	8.6 %	4.0 %
United States	Construction	Professional Services
Race/ethnicity		
Asian Pacific American	9.8 % **	2.4 % **
Black American	4.5 % **	2.0 % **
Hispanic American	3.4 % **	2.1 % **
Native American	6.1 % **	3.5 %
Subcontinent Asian American	10.9 %	4.6 %
Other race minority	5.4 % **	2.7 %
Non-Hispanic white	10.5 %	3.7 %
Gender		
Women	7.4 % **	1.9 % **
Men	8.1 %	3.9 %

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

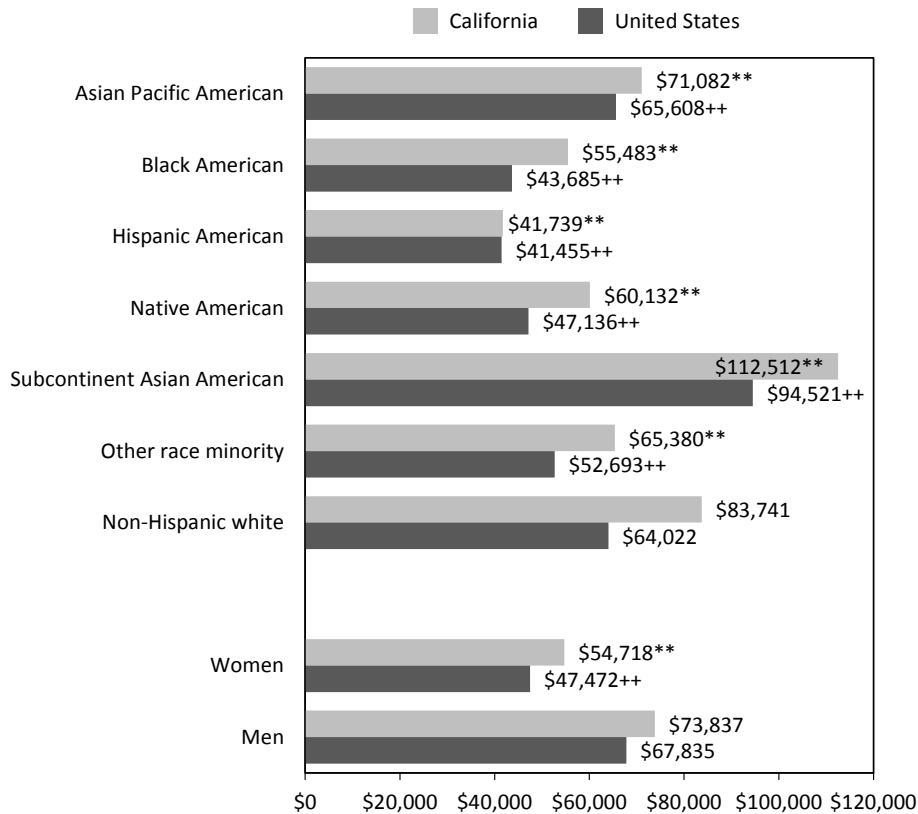
† Denotes significant differences in proportions not reported due to small sample size.

Source: BBC Research & Consulting from 2015-2019 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Figure C-7 indicates that:

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

Figure C-8.
Mean annual wages in California and the United States



Note:

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

**/++ Denotes statistically significant differences from non-Hispanic whites (for minority groups) and from men (for women) at the 95% confidence level for California and the United States as a whole, respectively.

Source:

BBC Research & Consulting from 2015-2019 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Figure C-8 indicates that, compared to non-Hispanic whites, Asian Pacific Americans, Black Americans, Hispanic Americans, and Native Americans in California earn substantially less in wages. In addition, compared to men, women earn less in wages.

**Figure C-9.
Predictors of annual
wages in California**

Notes:

The regression includes 472,279 observations.

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

For ease of interpretation, the exponentiated form of the coefficients is displayed in the figure.

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

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

Source:

BBC Research & Consulting from 2015-2019 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the Minnesota Population Center:
<http://usa.ipums.org/usa/>.

Variable	Exponentiated Coefficient
Constant	6868.755 **
Asian Pacific American	0.889 **
Black American	0.825 **
Hispanic American	0.843 **
Native American	0.899 **
Subcontinent Asian American	0.990
Other minority group	0.887 **
Women	0.801 **
Less than high school education	0.872 **
Some college	1.205 **
Four-year degree	1.701 **
Advanced degree	2.334 **
Disabled	0.787 **
Military experience	1.016 **
Speaks English well	1.371 **
Age	1.069 **
Age-squared	0.999 **
Married	1.120 **
Children	1.003 **
Number of people over 65 in household	0.910 **
Public sector worker	1.132 **
Manager	1.294 **
Part time worker	0.379 **
Extraction and agriculture	0.761 **
Construction	0.987 **
Wholesale trade	0.934 **
Retail trade	0.778 **
Transportation, warehouse, & information	1.055 **
Professional services	1.131 **
Education	0.688 **
Health care	1.054 **
Other services	0.755 **
Public administration and social services	0.809 **

Figure C-9 indicates that, compared to being a non-Hispanic white American in California, being Asian Pacific American, Black American, Hispanic American, Native American, or other race minority is related to lower annual wages, even after accounting for various other personal characteristics. (For example, the model indicates that being Black American is associated with making approximately \$0.83 for every dollar that a non-Hispanic white American makes, all else being equal.) In addition, compared to being a man in California, being a woman is related to lower annual wages.

Figure C-10.
Home ownership rates in
California and the United
States

Note:

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

**/++ Denotes statistically significant differences from non-Hispanic whites (for minority groups) and from men (for women) at the 95% confidence level for California and the United States as a whole, respectively.

Source:

BBC Research & Consulting from 2015-2019 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the Minnesota Population Center: <http://usa.ipums.org/usa/>.

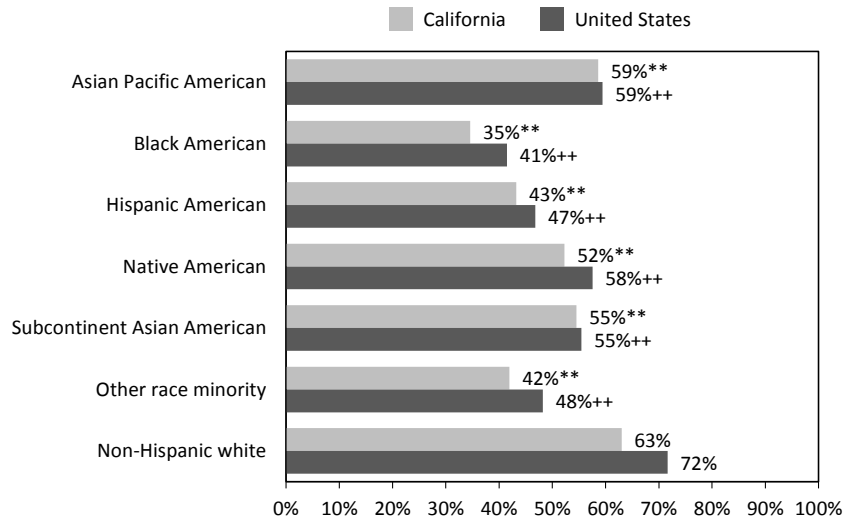
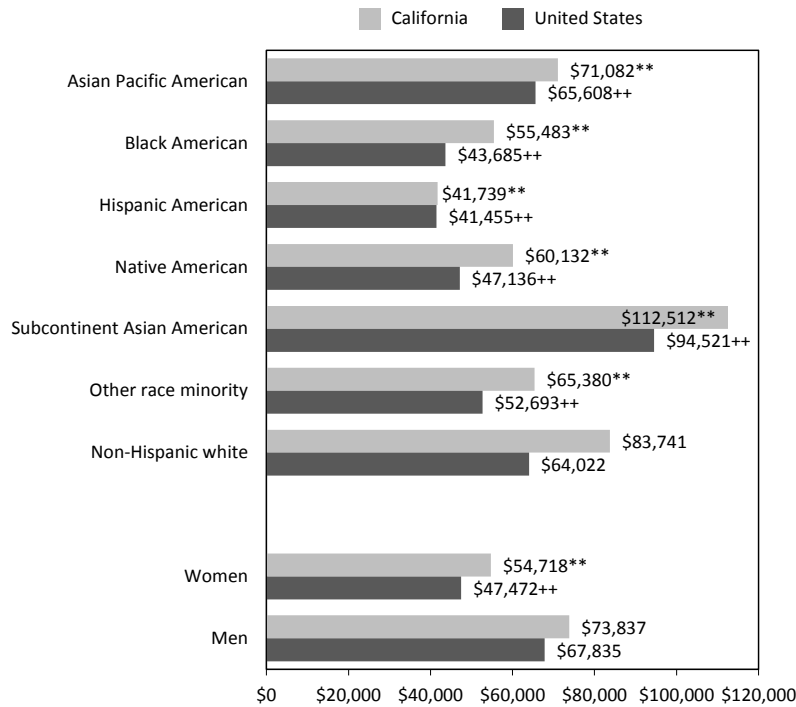


Figure C-10 indicates that all relevant minority groups in California exhibit homeownership rates lower than that of non-Hispanic whites.

Figure C-11.
Median home values in California and the United States



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

Source: BBC Research & Consulting from 2015-2019 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the Minnesota Population Center: <http://usa.ipums.org/usa/>.

Figure C-11 indicates that homeowners of all relevant minority groups except Subcontinent Asian Americans in California own homes that, on average, are worth less than those of non-Hispanic white homeowners. In addition, women homeowners in California own homes that, on average, are worth less than those of men homeowners.

Figure C-12.
Denial rates of conventional purchase loans for high-income households in California and the United States

Note:

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

For 2012 and forward, the MFI data are calculated by the FFIEC. For years 1998 through 2011, the MFI data were calculated by HUD.

Source:

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

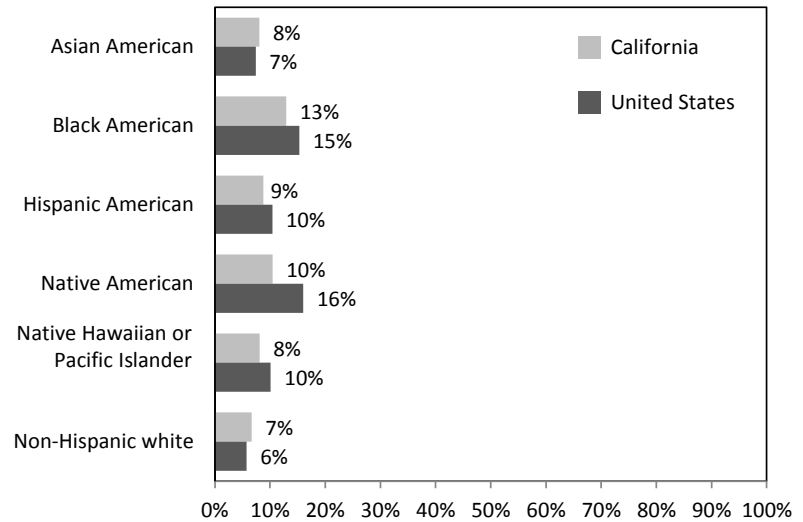


Figure C-12 indicates that Black Americans and Native Americans in California appear to be denied home loans at higher rates than non-Hispanic whites.

Figure C-13.
Percent of
conventional home
purchase loans that
were subprime in
California and the
United States

Note:

Subprime loans are those with a rate spread of 1.5 or more. Rate spread is the difference between the covered loan's annual percentage rate (APR) and the average prime offer rate (APOR) for a comparable transaction as of the date the interest rate is set.

Source:

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

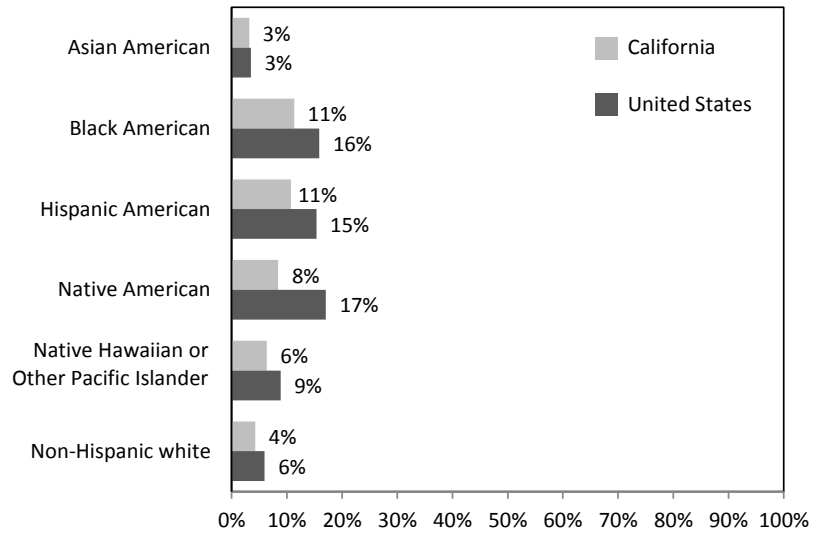


Figure C-13 indicates that Black Americans, Hispanic Americans, and Native Americans in California are awarded subprime conventional home purchase loans at greater rates than non-Hispanic whites.

**Figure C-14
Business loan denial
rates in the Pacific
Division and the
United States**

Notes:

** Denotes that the difference in proportions from businesses owned by non-Hispanic white men is statistically significant at the 95% confidence level.

The Pacific Division consists of Alaska, California, Hawaii, Oregon, and Washington.

Source:

BBC Research & Consulting from 2003 Survey of Small Business Finance.

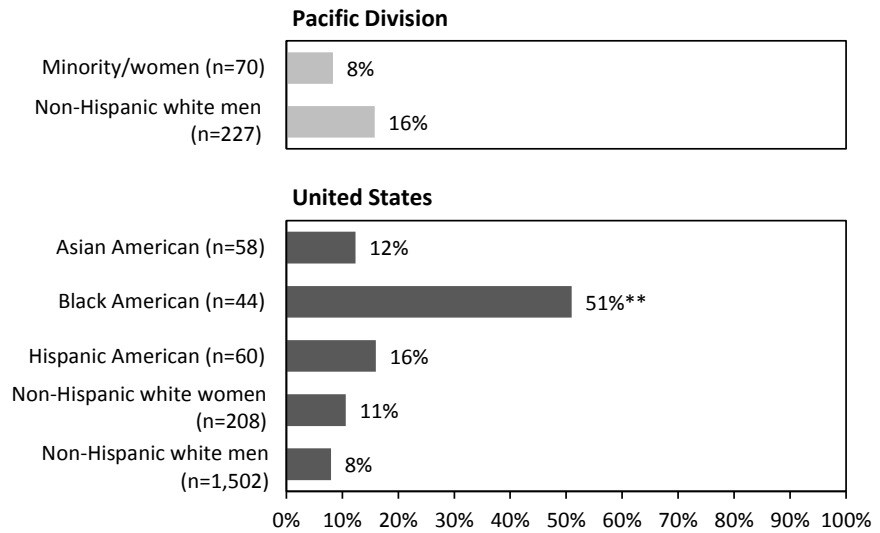


Figure C-14 indicates that in 2003 in the United States as a whole Black American-owned businesses were denied business loans at greater rates than businesses owned by non-Hispanic white men.

**Figure C-15.
Businesses that did not apply for loans due to fear of denial in the Pacific Division and the United States**

Notes:

** Denotes that the difference in proportions from businesses owned by non-Hispanic white men is statistically significant at the 95% confidence level.

The Pacific Division consists of Alaska, California, Hawaii, Oregon, and Washington.

Source:

BBC Research & Consulting from 2003 Survey of Small Business Finance.

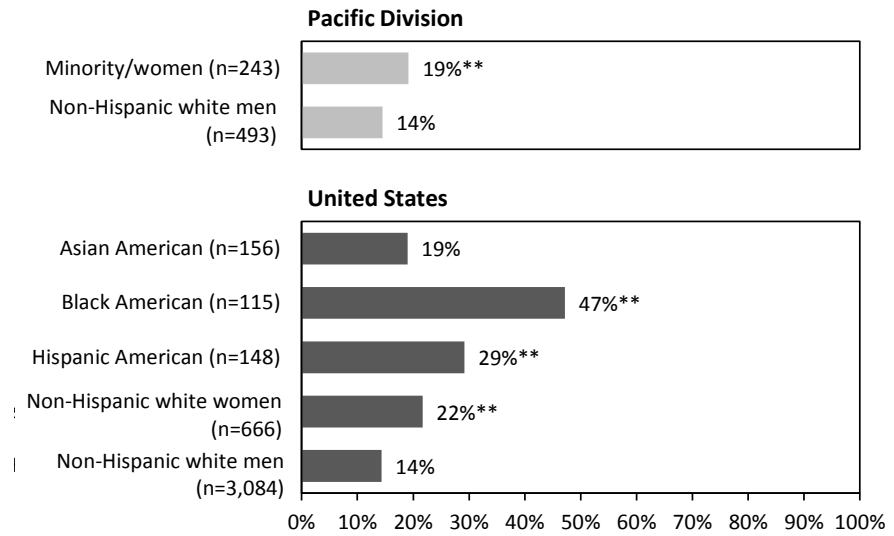


Figure C-15 indicates that in 2003 minority- and woman-owned businesses in the Pacific Division were more likely than businesses owned by non-Hispanic white men to not apply for business loans due to a fear of denial. In addition, Black American-owned businesses, Hispanic American-owned businesses, and non-Hispanic white woman-owned businesses in the United States were more likely than businesses owned by non-Hispanic white men to not apply for business loans due to a fear of denial.

Figure C-16.
Mean values of approved
business loans, Pacific
Division and the United
States

Note:

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

The Pacific Division consists of Alaska, California, Hawaii, Oregon, and Washington.

Source:

BBC Research & Consulting from 2003 Survey of Small Business Finance.

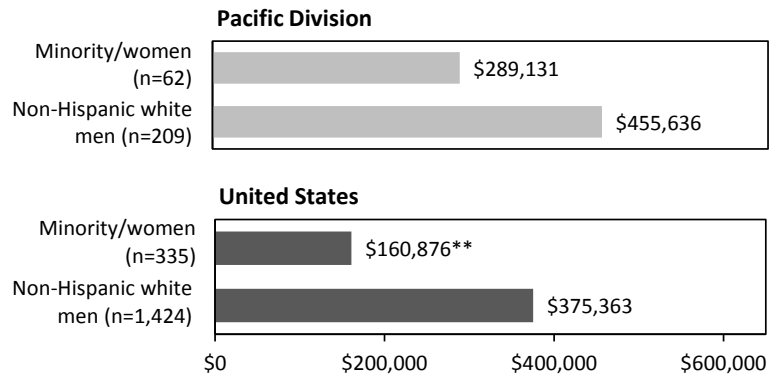


Figure C-16 indicates that in 2003 minority- and woman-owned businesses in the United States as a whole that received business loans were approved for loans that were worth less than loans that businesses owned by non-Hispanic white men received.

Figure C-17.
Business ownership rates in study-related industries in California and the United States

California	Construction	Professional Services
Race/ethnicity		
Asian Pacific American	28.9 %	9.5 % **
Black American	16.1 % **	7.6 % **
Hispanic American	18.2 % **	9.4 % **
Native American	22.0 % **	11.1 % **
Subcontinent Asian American	22.3 % **	6.3 % **
Other Race Minority	16.4 % **	9.6 % †
Non-Hispanic white	29.8 %	18.6 %
Gender		
Women	14.3 % **	11.5 % **
Men	23.9 %	15.6 %
All individuals	23.0 %	14.5 %
United States	Construction	Professional Services
Race/ethnicity		
Asian Pacific American	22.5 % **	7.3 % **
Black American	16.4 % **	6.4 % **
Hispanic American	17.8 % **	9.2 % **
Native American	19.6 % **	9.0 % **
Subcontinent Asian American	20.9 % **	7.6 % **
Other Race Minority	26.3 %	7.4 % **
Non-Hispanic white	25.3 %	12.5 %
Gender		
Women	16.0 % **	7.6 % **
Men	23.2 %	12.7 %
All individuals	22.5 %	11.4 %

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

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

Source: BBC Research & Consulting from 2015-2019 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the Minnesota Population Center: <http://usa.ipums.org/usa/>.

Figure C-17 indicates that:

- Compared to non-Hispanic whites, individuals of all relevant racial/ethnic groups working in the California construction industry own businesses at a lower rate. In addition, compared to men, women working in the California construction industry own businesses at a lower rate.
- Compared to non-Hispanic whites, individuals of all relevant racial/ethnic groups except for other race minorities working in the California professional services industry own businesses at a lower rate. In addition, compared to men, women working in the California professional services industry own businesses at a lower rate.

Figure C-18.
Predictors of business ownership in
the California construction industry

Note:

The regression included 45,609 observations.

*, ** Denotes statistical significance at the 90% and 95% confidence level, respectively.

The referent was high school diploma for education and non-Hispanic whites for race.

Source:

BBC Research & Consulting from 2015-2019 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa>.

Variable	Coefficient
Constant	-2.0153 **
Age	0.0416 **
Age-squared	-0.0001 **
Married	-0.0031
Disabled	-0.0131
Number of children in household	-0.0076
Number of people over 65 in household	0.0097
Owns home	-0.2083 **
Home value (\$000s)	0.0001 **
Monthly mortgage payment (\$000s)	0.0193 **
Interest and dividend income (\$000s)	0.0018 **
Income of spouse or partner (\$000s)	0.0003
Speaks English well	-0.0211
Less than high school education	0.0569 **
Some college	0.0122
Four-year degree	-0.0217
Advanced degree	-0.1334 **
Asian Pacific American	-0.0044
Black American	-0.4021 **
Hispanic American	-0.2671 **
Native American	-0.1713 **
Subcontinent Asian American	-0.0883
Other minority group	-0.3177
Women	-0.4658 **

Figure C-18 indicates that being Black American, Hispanic American, or Native American is associated with a lower likelihood of owning a construction business in California compared to being non-Hispanic white. In addition, being a woman is associated with a lower likelihood of owning a construction business in California compared to being a man.

Figure C-19.
Simulated business ownership rates for California construction workers

Group	Business ownership rate		Disparity Index (100 = Parity)
	Actual	Benchmark	
Black American	16.2%	26.1%	62
Hispanic American	18.2%	25.8%	71
Native American	21.8%	26.5%	82
Non-Hispanic white women	18.1%	32.7%	55

Note: The benchmark figure can only be estimated for records with observed (rather than imputed) dependent variable. Thus, the study team made comparisons between actual and benchmark self-employment rates only for the subset of the sample for which the dependent variable was observed. Analyses are limited to those groups that showed negative coefficients that were statistically significant in the regression model.

Source: BBC Research & Consulting from 2015-2019 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the Minnesota Population Center: <http://usa.ipums.org/usa/>.

Figure C-19 indicates that:

- Black Americans own construction businesses in California at a rate that is 62 percent that of similarly-situated non-Hispanic white men (i.e., non-Hispanic white men who share the same personal characteristics).
- Hispanic Americans own construction businesses in California at a rate that is 71 percent that of similarly situated non-Hispanic white men.
- Native Americans own construction businesses in California at a rate that is 82 percent that of similarly situated non-Hispanic white men.
- Women own construction businesses in California at a rate that is 55 percent that of similarly situated non-Hispanic white men.

**Figure C-20.
Predictors of business
ownership in the California
professional services industry**

Note:

The regression included 9,075 observations.

*, ** Denotes statistical significance at the 90% and 95% confidence level, respectively.

The referent was high school diploma for education and non-Hispanic whites for race.

Source:

BBC Research & Consulting from 2015-2019 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa>.

Variable	Coefficient
Constant	-3.1462 **
Age	0.0497 **
Age-squared	-0.0002
Married	0.0488
Disabled	-0.0582
Number of children in household	0.0015
Number of people over 65 in household	0.0978 **
Owns home	-0.2795 **
Home value (\$000s)	0.0002 **
Monthly mortgage payment (\$000s)	0.0145
Interest and dividend income (\$000s)	0.0004
Income of spouse or partner (\$000s)	0.0009 **
Speaks English well	0.0415
Less than high school education	-0.0371
Some college	0.1362
Four-year degree	0.1703 *
Advanced degree	0.1697 *
Asian Pacific American	-0.2815 **
Black American	-0.3875 **
Hispanic American	-0.0985 *
Native American	-0.0394
Subcontinent Asian American	-0.5522 **
Other minority group	-0.4861
Women	-0.1508 **

Figure C-20 indicates that being Asian Pacific American, Black American, Hispanic American, or Subcontinent Asian American is associated with a lower likelihood of owning a professional services business in California compared to being non-Hispanic white. In addition, being a woman is associated with a lower likelihood of owning a professional services business in California compared to being a man.

Figure C-21.
Simulated business ownership rates for California professional services workers

Group	Business ownership rate		Disparity Index (100 = Parity)
	Actual	Benchmark	
Asian Pacific American	9.6%	15.7%	61
Black American	7.8%	14.7%	53
Hispanic American	9.7%	13.8%	71
Subcontinent Asian American	5.8%	13.1%	44
Non-Hispanic white women	15.2%	19.4%	78

Note: The benchmark figure can only be estimated for records with observed (rather than imputed) dependent variable. Thus, the study team made comparisons between actual and benchmark self-employment rates only for the subset of the sample for which the dependent variable was observed.

Analyses are limited to those groups that showed negative coefficients that were statistically significant in the regression model.

Source: BBC Research & Consulting from 2015-2019 ACS 5% Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the Minnesota Population Center: <http://usa.ipums.org/usa/>.

Figure C-21 indicates that:

- Asian Pacific Americans own professional services businesses in California at a rate that is 61 percent that of similarly situated non-Hispanic white men (i.e., non-Hispanic white men who share the same personal characteristics).
- Black Americans own professional services businesses in California at a rate that is 53 percent that of similarly situated non-Hispanic white men.
- Hispanic Americans own professional services businesses in California at a rate that is 71 percent that of similarly situated non-Hispanic white men.
- Subcontinent Asian Americans own professional services businesses in California at a rate that is 44 percent that of similarly situated non-Hispanic white men.
- Women own professional businesses in California at a rate that is 78 percent that of similarly situated non-Hispanic white men.

Figure C-22.
Rates of business
closure and expansion,
California and the
United States

Note:

Data include only non-publicly held businesses.

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

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

Source:

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

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

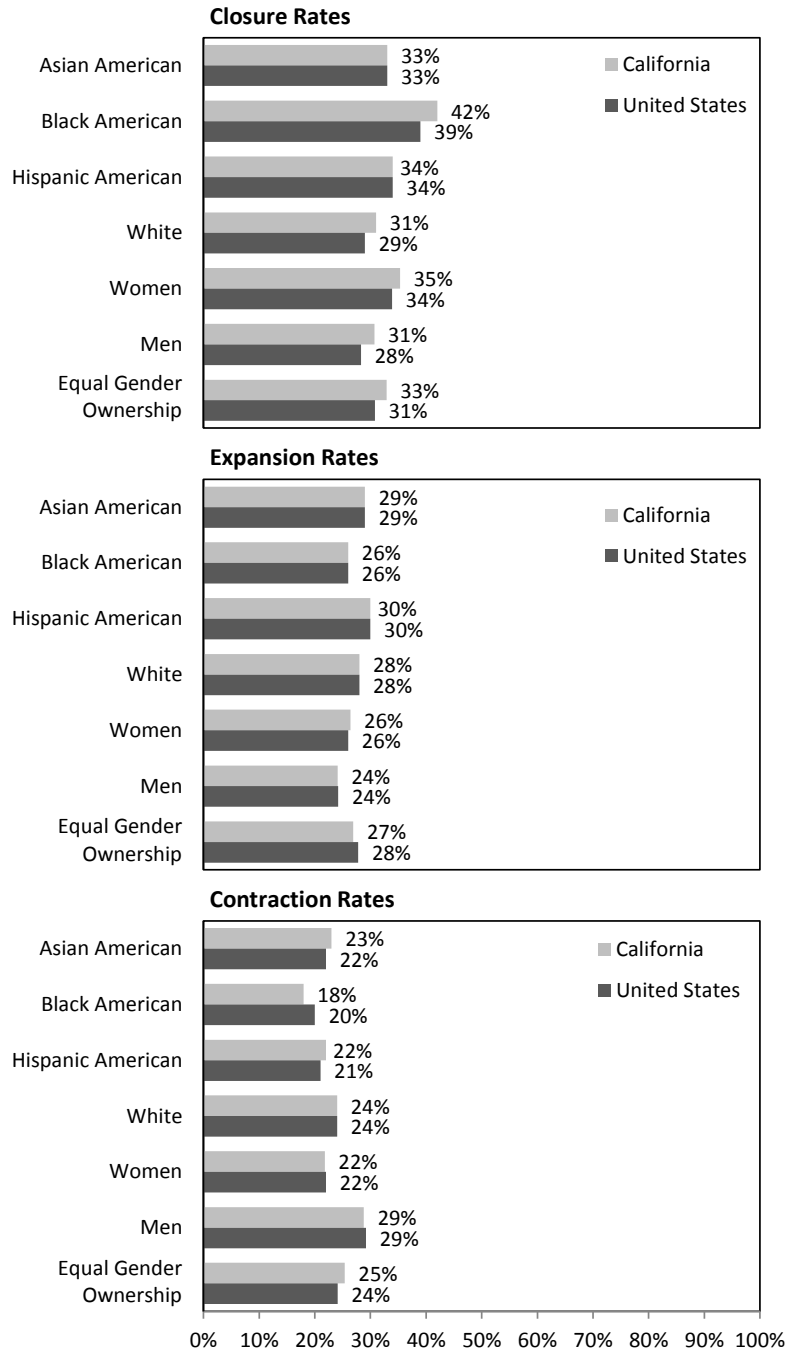
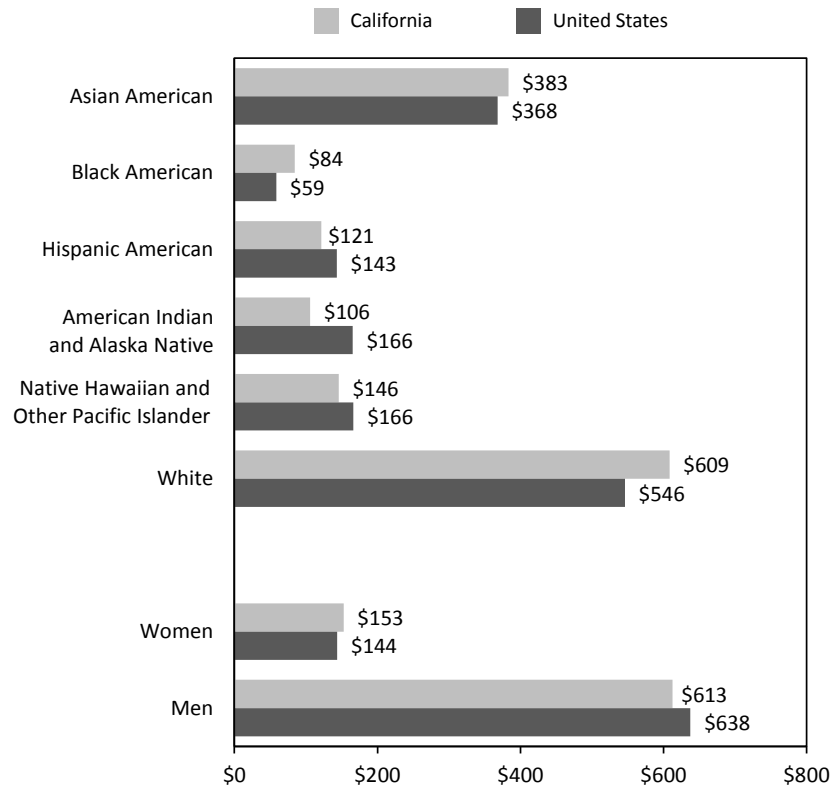


Figure C-22 indicates that Black American- and Hispanic American-owned businesses in California appear to close at higher rates than non-Hispanic white-owned businesses. In addition, woman-owned businesses appear to close at higher rates than businesses owned by men. With regard to expansion rates, Black American-owned businesses in California appear to expand at lower rates than non-Hispanic white-owned businesses. With regard to contraction rates, Black American-owned businesses in California appear to contract at lower rates than non-Hispanic white-owned businesses, and woman-owned businesses appear to contract at lower rates than businesses owned by men.

Figure C-23.
Mean annual business receipts (in thousands)
in California and the United States

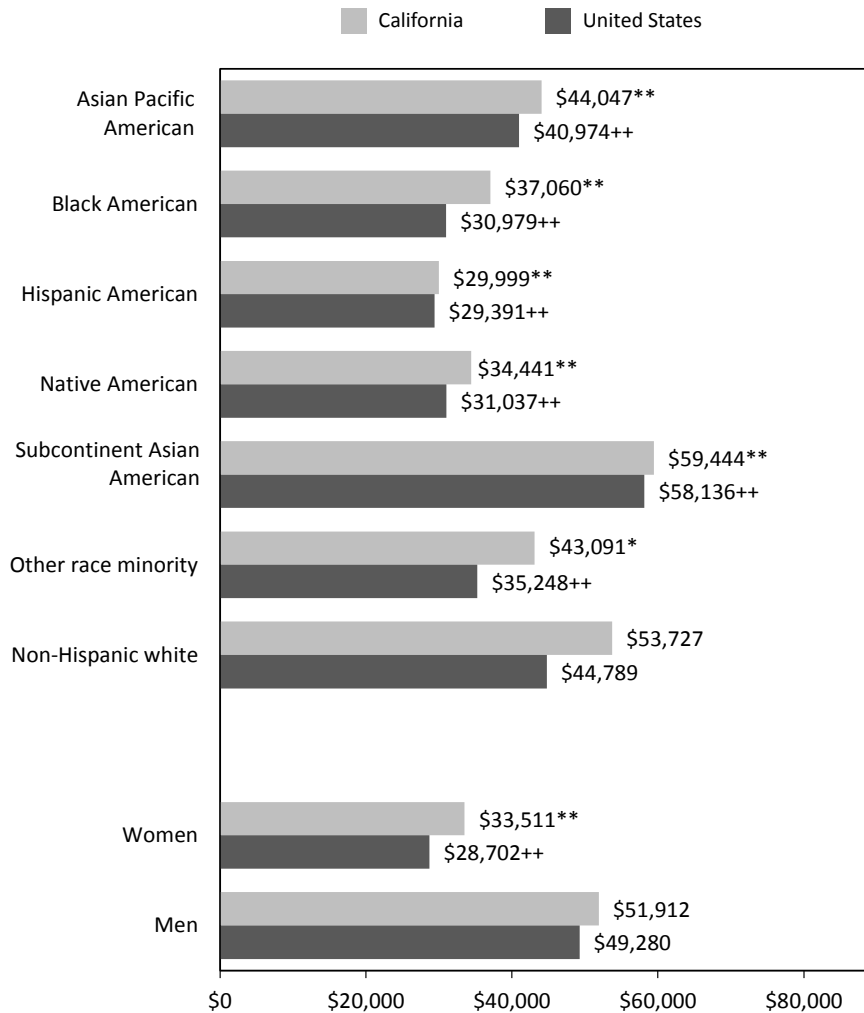


Note: Includes employer and non-employer firms.
 Does not include publicly traded companies or other firms not classifiable by race/ethnicity and gender.

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

Figure C-23 indicates that in 2012 all relevant minority groups in California showed lower mean annual business receipts than businesses owned by whites. In addition, woman-owned businesses in California showed lower mean annual business receipts than businesses owned by men.

Figure C-24.
Mean annual business owner earnings in California and the United States



Note: The sample universe is business owners aged 16 and over who reported positive earnings. All amounts in 2019 dollars.

**, ++ Denotes statistically significant differences from non-Hispanic whites (for minority groups) and from men (for women) at the 95% confidence level for California and the United States as a whole, respectively.

Source: BBC Research & Consulting from 2015-2019 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the Minnesota Population Center: <http://usa.ipums.org/usa/>.

Figure C-24 indicates that the owners of Asian Pacific-, Black American-, Hispanic American-, Native American-owned businesses, and businesses owned by other race minorities in California earn less on average than the owners of non-Hispanic white American-owned businesses. In addition, the owners of woman-owned businesses in California earn less on average than businesses owned by men.

**Figure C-25.
Predictors of business owner
earnings in California**

Notes:

The regression includes 66,034 observations.

For ease of interpretation, the exponentiated form of the coefficients is displayed in the figure.

The sample universe is business owners aged 16 and over who reported positive earnings.

*, ** Denotes statistical significance at the 90% and 95% confidence level, respectively.

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

Source:

BBC Research & Consulting from 2015-2019 ACS 5% Public Use Microdata sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Variable	Exponentiated Coefficient
Constant	1,027.946 **
Age	1.124 **
Age-squared	0.999 **
Married	1.196 **
Speaks English well	1.273 **
Disabled	0.640 **
Less than high school	0.816 **
Some college	1.045 **
Four-year degree	1.334 **
Advanced degree	1.776 **
Asian Pacific American	0.918 **
Black American	0.794 **
Hispanic American	0.971
Native American	0.693 **
Subcontinent Asian American	1.144 **
Other race minority	0.887
Women	0.585 **

Figure C-25 indicates that, compared to a non-Hispanic white owned business owner in California, being an Asian Pacific American, Black American, or Native American business owner is related to lower business earnings. Similarly, compared to being a male business owner, being a woman business owner is related to lower business earnings.

APPENDIX D.

Anecdotal Information about Marketplace Conditions

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Anecdotal Information about Marketplace Conditions

Appendix D presents anecdotal information BBC Research & Consulting (BBC) collected from business owners and other stakeholders as part of the 2021 California Department of Transportation (Caltrans) Disparity Study. Appendix D summarizes the key themes that emerged from their insights, organized into the following sections:

- A. **Introduction** describes the process for gathering and analyzing the anecdotal information summarized in Appendix D;
- B. **Background on the construction, professional services, and goods and other services industries** summarizes information about how businesses become established, what products and services they provide, business growth, and marketing efforts;
- C. **Ownership and certification** presents information about businesses' statuses as minority- and woman-owned businesses, certification processes, and business owners' experiences with Caltrans' and the State of California's certification programs;
- D. **Experiences in the private and public sectors** presents business owners' experiences pursuing private and public sector work;
- E. **Doing business as a prime contractor or subcontractor** summarizes information about businesses' experiences working as prime contractors and subcontractors, how they obtain that work, and experiences working with minority- and woman-owned businesses;
- F. **Doing business with public agencies** describes business owners' experiences working with or attempting to work with Caltrans and local agencies and identifies potential barriers to doing work for them;
- G. **Marketplace conditions** presents information about business owners' current perceptions of economic conditions in California and what it takes for businesses to be successful;
- H. **Potential barriers to business success** describes barriers and challenges businesses face in the local marketplace;
- I. **Information regarding effects of race and gender** presents information about any experiences business owners have with discrimination in the local marketplace and how it affects minority- or woman-owned businesses;
- J. **Insights regarding business assistance programs** describes business owners' awareness of, and opinions about, business assistance programs and other steps to remove barriers for businesses in California;
- K. **Insights regarding race- and gender-based measures** includes business owners' comments about current or potential race- or gender-based programs; and

- L. **Other insights and recommendations** presents additional comments and recommendations for Caltrans to consider.

A. Introduction

Throughout the study business owners, trade association representatives, and other stakeholders had the opportunity to discuss their experiences working with Caltrans and other organizations in the region. The study team collected that information between October 2020 and June 2021 through one of the following methods:

- In-depth interviews (62 participants);
- Availability surveys (971 participants who submitted anecdotal information);
- Focus groups (5 focus groups, 29 total participants);
- Oral or written testimony during a public forum (85 participants); and
- Written testimony via fax or e-mail (7 participants).

1. In-depth interviews. From October 2020 to June 2021, the study team conducted 62 in-depth interviews with owners and other representatives of California businesses. The interviews included discussions about interviewees' perceptions of and experiences with the California contracting industry, Caltrans' and the State of California's certification programs, and their experiences working or attempting to work with government organizations in California.

Interviewees included individuals representing construction businesses, professional services businesses, and goods and other services suppliers. BBC identified interview participants primarily from a random sample of businesses stratified by business type, location, and the race/ethnicity and gender of the business owners. All of the businesses that participated in the interviews conduct work in California.

All interviewees are identified by random interviewee numbers (i.e., #1, #2, #3, etc.). In order to protect the anonymity of individuals or businesses mentioned in interviews, BBC has generalized any comments that could potentially identify specific individuals or businesses. In addition, the study team indicates whether each interviewee represents a Small Business Enterprise- (SBE-), Disadvantaged Business Enterprise- (DBE-), Woman-owned Business Enterprise- (WBE-), Minority-owned Business Enterprise- (MBE-), Veteran-owned Business Enterprise- (VBE-), or other certified business.

2. Availability surveys. The study team conducted availability surveys for the disparity study from March 2021 to May 2021. As a part of the availability surveys, the study team asked business owners and managers whether their companies have experienced barriers or difficulties starting or expanding businesses in their industries or with obtaining work in the California marketplace. A total of 971 businesses provided anecdotal information as part of the surveys. Availability survey comments are denoted by the prefix "AV".

3. Focus groups. The study team conducted five focus groups with prime contractors, representatives of the Small Business Council for Caltrans, and minority chambers of commerce and trade associations in October 2020 and March 2021. During the focus groups, the study team

asked participants to share their insights about working in the California marketplace with public sector and private sector organizations. Comments from the focus groups are denoted by the prefix “FG.”

4. Public testimony. Caltrans and the study team solicited written and verbal testimony at 12 public forums held virtually via Zoom. The meetings were held on October 8, 2020; October 15, 2020; October 20, 2020; November 12, 2020; November 17, 2020; November 19, 2020; January 14, 2021; January 21, 2021; January 26, 2021; February 4, 2021; February 9, 2021; and February 16, 2021. The study team reviewed and analyzed all public comments from the meetings and included many of those comments in Appendix D. Those comments are denoted by the prefix “PT.”

5. Written testimony. Throughout the study, interested parties had the opportunity to submit written testimony directly to BBC via fax or email. Written testimony is denoted by the prefix “WT”.

B. Background on the Construction, Professional Services, and Goods and Other Services Industries

Part B includes the following information:

1. Business characteristics;
2. Business formation and establishment;
3. Types, locations, and sizes of contracts;
4. Employment size of businesses;
5. Growth of the firm; and
6. Marketing.

1. Business characteristics. The business owners interviewed for the study represented a variety of different business types and business histories, from well-established firms to newly established firms, and worked on small-to-large contracts in the California marketplace. Interviewees described the types of work that their firm performs.

Industry. The study team interviewed 30 construction firms, 24 firms providing professional services, and 1 firm supplying goods and services.

Thirty firms worked in the construction industry [#2, #3, #4, #5, #6, #11, #13, #14, #18, #21, #24, #25, #26, #28, #35, #37, #38, #42, #43, #44, #47, #48, #49, #50, #52, #53, #54, #59, #62, #PT9]. For example:

- The non-Hispanic white male co-owner of a majority-owned construction company stated, “We’re a general engineering contractor. So we self-perform paving, grading, concrete, and underground work. And we do that as a general contractor to Caltrans and other public agencies, as well as private work.” [#2]

- The non-Hispanic white male co-owner of an SB-certified professional services firm stated, "We do public works. We do civil and structural work. So, roadway repairs, structural concrete, grading small paving, underground." [#3]
- The Hispanic American male owner of an uncertified MBE construction company stated, "I'm a concrete contractor. We do pretty much anything and everything is concrete, from retaining walls, to foundations for houses, public sidewalks and curbs. We do a little bit everything. Also, we do decorating concrete too." [#4]
- The non-Hispanic white male representative of a majority-owned construction firm stated, "I usually tell people that we are in a heavy civil general contracting we do mostly general contracting and subcontracting of different works in a civil works arena. So, we self-perform earthwork, concrete structures, landscape and irrigation, underground wet utilities, material recycling and environmental services for contaminated solar radiation." [#6]
- The non-Hispanic white male representative of a Native American-owned MBE-, SB-, and Micro-BE certified professional services firm stated, "Land surveying. And if you have something underground, utility location." [#11]
- The Hispanic American male owner of an uncertified MBE construction firm stated, "Hauling, general freight via trucks." [#13]
- The Subcontinent Asian American male owner of an uncertified MBE construction firm stated, "Our service is anything got to do with electrical. Whether it's a residential or commercial or it's anything got to do with electrical, we do work. The panel box, for instance, on the streetlights, highways, freeways. Everything got to do with electrical, including changing the posts, large panel box, underground cables, small lighting, security lights, and even the signal lights. That's what we do." [#14]
- The non-Hispanic white female owner of a DBE-, SWBE-, and CBE-certified professional services firm stated, "We've branched out to do concrete paving, LCB paving, and also airport concrete paving. Anything that they call it white paving." [#18]
- The Hispanic American male owner of a DBE-certified and uncertified MBE construction company stated, "We provide traffic control. So, we provide the lane closures so that the construction work can be done. We provide rentals of certain types of equipment that's kind of tailored to the traffic control industry: arrow boards, message boards, and other type of related equipment." [#21]
- The Hispanic and Native American male owner of a DBE-, 8(a)-, SB-, and MBE-certified construction company stated, "We do heavy construction precast concrete installation on the freeway." [#24]
- The non-Hispanic white male owner of a majority-owned SB-certified construction firm stated, "We're a heavy civil contractor. We're also in the aggregate mining business/trucking. Well, we're construction aggregate. Delivery, trucking, and materials. We're an equipment mover as well. Then, everything else is related to construction projects." [#25]
- The Middle Eastern American male owner of a construction company stated, "I started the business in 2009 as a solar contractor. Quickly went to becoming a general contractor and

after I took the class A certification, classes in bond certification to be able to do public works. Originally when I first started the business, I started it to be a solar panel like photovoltaic installer. But quickly within months, within maybe a quarter of the year I shifted to a general contracting. It was a lot more opportunity in general construction than just limiting myself in solar and photovoltaic.” [#26]

- The Hispanic American male owner of an uncertified MBE construction company stated, "We do excavating, we do asphalt work, we do concrete, grading on the ground, like water, sewer; we do all that stuff.” [#28]
- The Black American male owner of an uncertified MBE construction firm stated, "Additions and remodels, [is] what I do now, and primarily as a consultant, not performing the work myself. I'm subbing it out.” [#37]
- The non-Hispanic white male representative of a DBE-certified and uncertified WBE construction firm stated, "We're water distribution. So, we don't bring the water. They - the prime has a facility or a meter of water, so we will our tanks up and we distribute it throughout the construction site, and we mix it with the soil so they can compact and harden enough to build roads on.” [#43]
- The Hispanic and Indian American female co-owner of an SB-certified and uncertified WBE construction firm stated, "Our specialty scope of work is horizontal auger boring, pipe jacking, and tunneling.” [#47]
- The Hispanic American male representative of a construction union stated, "This union covers work like landscape and irrigation.” [#48]
- The Hispanic American female representative of a DBE-, MBE-, and WBE-certified construction firm stated, "Steel fabrication and erection. We also do concrete. We have, the same company has a concrete division. But it's like when they start getting new buildings, we do all the columns, the beams and if there's any concrete involved, they also bid that part of the project.” [#49]
- The Hispanic American male owner of an uncertified MBE construction firm stated, "I haul dirt, asphalt, concrete and like base material to construction job sites.” [#50]
- The Asian Pacific American female owner of a SB-, DBE-, and WBE-certified construction company stated, "We are fire alarm security system contractor.” [#59]
- The non-Hispanic white male owner of a majority-owned construction company stated, "Construction, sewer, water, storm drain.” [#62]
- The male owner of an LBE-certified construction company stated, "We are a general contractor. We do civil work, grading, paving, structures, underground work, that kind of thing.” [#PT9]

Twenty-four firms worked in the engineering and professional services industry [#1, #7, #8, #9, #10, #12, #16, #19, #22, #23, #27, #30, #31, #32, #34, #36, #39, #40, #41, #45, #46, #51, #55, #61]. For example:

- The non-Hispanic white female owner of a WBE-, DBE-, UDBE-, and SB-certified professional services firm stated, "We write technical document for different lead agencies

and provide construction monitoring services, which we've done for Caltrans many times and we are considered environmental consultants." [#1]

- The Black American male owner of an MBE-certified professional services firm stated, "We're a professional service organization. Cyber security, program management, logistics, engineering, systems engineering... those are our core competencies." [#7]
- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "We sparked a business due to there being a need for a detail-oriented design, especially regarding the bicycle pedestrian transit space. We provide professional engineering services and construction management services." [#8]
- The Asian Pacific American owner of a DBE-, MBE-, and SB-certified professional services firm stated, "[We do] civil engineering consulting, so we design, and grading improvement plans, and then get permits for them, stuff like that." [#9]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "I do consulting on streets, highways and parking lots specifically asphalt." [#10]
- The Black American male representative of a DBE-, WBE-, MBE-, SB-, and Micro-PW-certified small business development association stated, "I work as a small business consultant. So, when an individuals interested in starting a business, I work with them. Quite often, people are interested in getting a business, but they don't have an idea of how to go about it and I work with them on the steps to go about it and helping them get up and running." [#16]
- The Black American male owner of a DBE- and SB-certified and uncertified MBE professional services firm stated, "We are civil common structural and environmental engineers and construction managers." [#19]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "It's mostly true consulting. It's information because I don't have a product that I sell. I've tried to stick with that as much as possible, but that was more difficult than I thought, and I ended up doing a bit more services in the field of like field surveys, biological surveys. Almost all my work falls under that broad envelope, somehow collecting information about the environment." [#22]
- The Subcontinent Asian American male owner of a Micro- and SB-certified and uncertified MBE construction firm stated, "[Our firm] primarily specializes in earth retention in civil engineering business, so we try to provide solutions - or engineering solutions to any earth retention problems or landslide solutions as well as soil nails and side stability solutions." [#23]
- The Middle Eastern American female representative of a majority-owned professional services firm stated, "[We are a] company providing architectural engineering planning and technology consulting and solutions. Everything." [#27]
- The non-Hispanic white male co-owner of a majority-owned professional services firm stated, "I would say 75 percent is engineering, and about 25 percent is the planning part, which is working for cities on housing elements and things like that." [#30]

- The non-Hispanic white female owner of a DBE- and SB-certified and uncertified WBE professional services firm stated, "So I do traffic signals, striping and signage designs." [#32]
- The non-Hispanic white male co-owner of an MBE-, SB-, and DBE-certified professional services firm stated, "Engineering consulting. Civil engineering. Our current business is really split up between water resources, support for electrical, and like, electrical utilities, and the third one is, like, public works, streets, and roads infrastructure." [#34]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "We are civil engineers and land surveyors." [#39]
- The non-Hispanic white male co-owner of an SBA-certified micro- and WBE professional services firm stated, "I do offshore or near-shore rather pipeline systems, near-shore structures, seawall piers, pipeline systems. I do structural engineering, primarily foundations." [#40]
- The Black American male owner of an SB- and MBE-certified professional services firm stated, "We're an electrical engineering consulting firm." [#41]
- The non-Hispanic white male representative of an SB-certified professional services firm stated, "We're a full-service civil and surveying engineering firm. Most of our business is within the residential realm, but we also do work on both sides of being single-family residential developments, multifamily residential developments, senior housing. We have also done commercial. We've done basically the gamut of the different types of design work, including working with public works on infrastructure projects, and we also are in the renewable energies doing solar farms and wind farms." [#45]
- The Hispanic American male owner of a DBE-, SB-, and DVBE-certified and uncertified MBE professional services firm stated, "I'm a registered civil engineer in California. My specialization, with the company, is in energy. So, I've been pursuing utility-scale solar projects." [#51]
- The Hispanic American male owner of a DBE-certified construction firm stated, "We do consulting and secret rider programs." [#55]

One firm worked in the goods and services industry [#17]. For example:

- The Hispanic American female owner of a WBE-, MBE-, SCMSDC-, and DBE-certified goods and services firm stated, "[We do] commercial janitorial service. We provide cleaning service solutions throughout California. Anything when it comes to the umbrella of cleaning we provide. We're 24 hours, 7 days a week. Our goal is to provide a clean, healthy environment for our clients." [#17]

Years in business. Fifty-six businesses reported their date of establishment. The majority of firms (40 out of 56 that provided years in business) reported that they were well-established businesses; they had been in business for more than ten years. Eight out of the 56 businesses had been in business for between five and ten years. Eight firms were newly established, having been in business for less than four years.

Eight firms reported they had been in business for fewer than four years [#8, #13, #23, #42, #47, #50, #52, #55]. For example:

- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "We started the firm in May 2017." [#8]
- The Hispanic American male owner of an uncertified MBE construction firm stated, "I've been in business three years." [#13]
- The Subcontinent Asian American male owner of a Micro- and SB-certified and uncertified MBE construction firm stated, "I started the business as a sole proprietor in December 2018. However, seeing the market I converted it to a US corporation in May 2019. Overall I would say about two and a half years I've been in this business." [#23]
- The Hispanic American male owner of an uncertified MBE construction firm stated, "About eight months; I'm barely started." [#50]
- The Asian Pacific American male owner of an uncertified MBE construction firm stated, "I'm going on my fourth year in January." [#52]
- The Hispanic American male owner of a DBE-certified construction firm stated, "We've been in business since 2017." [#55]

Eight firms reported they had been in business for five to ten years [#9, #12, #21, #24, #31, #34, #44, #51]. For example:

- The Asian Pacific American owner of a DBE-, MBE-, and SB-certified professional services firm stated, "We started business a little bit over five years ago." [#9]
- The Hispanic American female owner of an MBE-, WBE-, and SB-certified professional services firm stated, "Almost 10 [years], so since 2012." [#12]
- The Hispanic American male owner of a DBE-certified and uncertified MBE construction company stated, "We incorporated back in 2014, and that's how long we've been in business under the corporation's name. But I was in business before that for several years as a sole prop." [#21]
- The Hispanic and Native American male owner of a DBE-, 8(a)-, SB-, and MBE-certified construction company stated, "I didn't start this business until 2015." [#24]
- The male co-owner of an uncertified WBE professional services firm stated, "We started the business in 2016." [#31]
- The non-Hispanic white male owner of an SB-, DVBE- and Micro-BE-certified construction firm stated, "We started in 2014, but it - I should say we - we started the firm in 2014, but really didn't get any work until 2016." [#44]
- The Hispanic American male owner of a DBE-, SB-, and DVBE-certified and uncertified MBE professional services firm stated, "I founded the company in December of 2011." [#51]

Forty firms reported they had been in business for more than ten years [#1, #2, #3, #4, #5, #6, #7, #10, #11, #14, #16, #17, #18, #19, #22, #25, #26, #27, #28, #29, #30, #32, #33, #35, #36, #37, #38, #39, #40, #41, #43, #45, #46, #48, #49, #53, #54, #59, #61, #62]. For example:

- The non-Hispanic white female owner of a WBE-, DBE-, UDBE-, and SB-certified professional services firm stated, "I've actually been doing my kind of services for over 35 years, but I've owned other companies. The one I have now, I've had for 18 years." [#1]
- The non-Hispanic white male co-owner of a majority-owned construction company stated, "107 years." [#2]
- The non-Hispanic white male co-owner of an SB-certified professional services firm stated, "Right around 42 to 45 [years]." [#3]
- The Black American male co-owner of a WBE-, MBE-, and DVBE-certified construction company stated, "We've had this company in some way, shape, or form, under different names for about 20 years." [#5]
- The non-Hispanic white male representative of a majority-owned construction firm stated, "We've been in business now for 119 years." [#6]
- The Black American male owner of an MBE-certified professional services firm stated, "[We've been in business] since November 2007." [#7]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "I formed it in 2008, that'd make it about 13 years." [#10]
- The Subcontinent Asian American male owner of an uncertified MBE construction firm stated, "I say about 19 years." [#14]
- The Black American male representative of a DBE-, WBE-, MBE-, SB-, and Micro-PW-certified small business development association stated, "She started the business in 2009 as a sole proprietorship." [#16]
- The Hispanic American female owner of a WBE-, MBE-, SCMSDC-, and DBE-certified goods and services firm stated, "We've been in business for 25 years." [#17]
- The non-Hispanic white female owner of a DBE-, SWBE-, and CBE-certified professional services firm stated, "We've been in business for over 30 years, about 33 years." [#18]
- The Black American male owner of a DBE- and SB-certified and uncertified MBE professional services firm stated, "Over 35 years." [#19]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "Since about 1995, so 25 years." [#22]
- The non-Hispanic white male owner of a majority-owned SB-certified construction firm stated, "It was formed in 1969." [#25]
- The Middle Eastern American male owner of a construction company stated, "I started the business in 2009." [#26]
- The non-Hispanic white female co-owner of a majority-owned construction company stated, "We started the business in 1990." [#29]
- The non-Hispanic white male co-owner of a majority-owned professional services firm stated, "We started our firm in 1985." [#30]
- The non-Hispanic white female owner of a DBE- and SB-certified and uncertified WBE professional services firm stated, "It's my company and I started it in 2010." [#32]

- The non-Hispanic male owner of a majority-owned SB-certified construction firm stated, "I started my business in 2007 so, I think that's 13-14 years or so." [#33]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "The company [has] existed for 40 years." [#36]
- The Black American male owner of an uncertified MBE construction firm stated, "I've been in business in the State of California since 2009." [#37]
- The Black American female co-owner of a DBE- and DVBE-certified and uncertified MBE construction company stated, "We've been in business for 12 years." [#38]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "I think it was 1964 [when we opened], roughly." [#39]
- The Black American male owner of an SB- and MBE-certified professional services firm stated, "I founded it in 2000 as a sole proprietorship and incorporated in 2005 and actually went full time with the business in 2006." [#41]
- The non-Hispanic white male representative of a DBE-certified and uncertified WBE construction firm stated, "It was probably over ten years ago now. Over ten. It must have been in like 2009." [#43]
- The non-Hispanic white male representative of an SB-certified professional services firm stated, "Just over 40 years now." [#45]
- The Hispanic American male representative of a construction union stated, "This union was created in April 1989." [#48]
- The Asian Pacific American male owner of an MBE-, DBE-, and SB-certified construction firm stated, "I founded the business in September, 2007." [#53]

2. Business formation and establishment. Most interviewees reported that their companies were started (or purchased) by individuals with connections in their respective industries.

The majority of business owners and founders had worked in the industry or a related industry before starting their own businesses. This experience helped founders build up industry contacts and expertise. Businesspeople were often motivated to start their own firms by the prospects of self-sufficiency and business improvement [#3, #4, #5, #7, #9, #10, #11, #14, #18, #19, #21, #22, #23, #24, #26, #27, #28, #29, #30, #31, #32, #33, #37, #38, #39, #40, #41, #42, #43, #44, #46, #47, #49, #50, #51, #52, #55, #59, #62]. Here are some of the founder stories from interviews:

- The non-Hispanic white male co-owner of an SB-certified professional services firm stated, "Well, this is a family business, so I grew up in construction. I actually out of school went to work for [an engineering firm] overseas. My father owned the company with two other partners. They retired. He called me back or called me and said, 'When you come on back and we'll run this through the family.' Within six years I became president of the company." [#3]

- The Hispanic American male owner of an uncertified MBE construction company stated, "I was working for everyone else, and sometimes the market crash, getting slow, and I stay home. And I feel responsible to take care of my family, so I decide to take the state test and become a contractor. Maybe I could control better when I work when I don't, make sure I could take care of my family welfare." [#4]
- The Black American male co-owner of a WBE-, MBE-, and DVBE-certified construction company stated, "The company was actually started by my father in the late 70s. And so, this is how we grew up. And then as you go from one career to the next, you look at what fed you. And so, I, not saying inherited it, but I had to work my way up. So, I guess it's two answers in one, but I had to work my way up. In military terms, we call it a grunt, which is the very bottom. You do all the work that nobody wants to do. My first job, I crawled through, it was like almost six inches of sewage, and it was roaches. I will never forget it. Roaches, frogs, water bugs, you name it, all over you. We're from New Orleans, Louisiana Richmond. And in New Orleans, if you're not a doctor and a lawyer or whatever, then everybody does some carpentry work, some handyman work or something like that. And so that's what my father did. And then when he came out here, when we came out here, he decided he didn't want to work for other people in that capacity. So, he got his contractor's license and opened his own business." [#5]
- The Black American male owner of an MBE-certified professional services firm stated, "Frustration. I was a former federal employee and just frustrated with the way the government operated. So, I felt that I could service the government better as being a support to them as opposed to being a friend." [#7]
- The Asian Pacific American owner of a DBE-, MBE-, and SB-certified professional services firm stated, "It's more of, I guess for me, it's more of kind of controlling your own destiny. I worked with big firms before like the AECOM of the world, and sometimes it's not based on your performance, it's based on the sector. So, if somebody pressed a button and the whole team might be gone because a project, whether a project was on hold, or was taken away, or whatever the case may be. So, there's a little bit more control, and a little bit more freedom of a work balance, if you will, where you could work a lot of hours and in four or five days, but then you can also take time off and go to your kid's baseball game, and nobody will give you a stink face about it and stuff like that. So, a little bit more freedom and control basically. I've always wanted to own a company, ever since I graduated from college in 1996, but it's more being able to do it. I mean I had to have enough experience, and I had to find a partner where everybody had enough seed money to kind of start the business, because it is a big risk." [#9]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "The company was started by my father in 1943 and I took over management in the mid 60's and became President and bought out my parents and operated it as President up until around 2010, when I moved another fellow into the position of President. Until it closed in '17." [#10]
- The Subcontinent Asian American male owner of an uncertified MBE construction firm stated, "My brother and I used to own a general contract. We were general contract and building custom houses. In actually 2004, we split. I moved from Bay Area to Sacramento and then started my own business. Then I got a job offer oversea from the Defense

Department in Afghanistan. So, myself and my crew moved to Afghanistan, and then we were there for almost 10 years. So that's what inspired me because it was my... I was a licensed electrician, and I thought I can use it, this license, for my own career and build a business. That's how it inspired me because that was my dream to become a business owner for electrical and help the community and help the people that surround me if I can use my skills and knowledge." [#14]

- The non-Hispanic white female owner of a DBE-, SWBE-, and CBE-certified professional services firm stated, "Well, my husband and I originally, we ran a heavy equipment rental business out of our home. He was a general contractor at the time, a general A contractor. I was a partner with him. It was 49/51. That went on for a good number of years until our kids grew up. I was always working within the business, overseeing all aspects of everything, even including some of the bidding and out-in-the-field organization. Then, like I said, about seven years ago, we had somewhat of a health scare crisis here. My kids were grown up, and I was worried about what was going to happen to myself if something was to happen to him. So, I worked it out so that I could get - I went to the CSLB, talked to them, took the right courses that I needed to take, and had got myself as the RMO on the license, meaning the license is in my name so that if something was to happen. From there, we just did what we needed to do so that I could get certified. I mean, I was basically doing everything anyway. We just needed to prove it out so that they realized it wasn't just a shell company of some sort. So, that's how we did it. We went from heavy equipment rental to doing small projects from city, state, counties, some Caltrans to pretty much - we found our niche, which was - when we started building, we found our niche which was barrier, the concrete barrier going down the middle of the freeway. It's something that my husband had worked doing before we went into business for ourselves. He worked for a company that did it." [#18]
- The Black American male owner of a DBE- and SB-certified and uncertified MBE professional services firm stated, "I came here from Boston, and I worked for [a large corporation] in whatever, and it was so discriminatory at some of the big companies that we - a bunch of Black engineers, five of us got together and said we were just tired of being discriminated against, we were going to open up our own business. And that's where we - it first started in redevelopment, with the redevelopment agencies, because they were developing the interior cities and we could go to churches who would be sympathetic to us, Black church. And so, we basically started off doing redevelopment work, housing, and of course we were civil engineers, and I had partners who were great highway engineers. And so it wasn't long after that we opened an office in Seattle and we did a lot of work on bridges and highways out in Seattle. Not so much in California, we did small roadwork. And then we had an office in Chicago later. But much of our work was out of the Pacific Northwest because it was very discriminatory right here in California. And so long before Caltrans really began to retain minority firms, we took all the African American firms, we had been doing roads and bridges all over the state of Washington and Oregon. So that's how we began. We began basically not here, but up in Washington in the transportation field." [#19]
- The Hispanic American male owner of a DBE-certified and uncertified MBE construction company stated, "I started off as a sole proprietor, just with a couple of machines. I was extremely small, y'know. Only two message boards, that's what I started with. And as I

would get requests for rental equipment, when I would get requests for more than two machines, which was pretty often, I would have to go rent the equipment from other competitors in the industry, and then me rent them to my customer, along with my two machines. And so little by little, as I was able to establish the business, I was able to buy more equipment and stop renting as much equipment from my competitors to fill my orders. Eventually I earned my contractor's license, and then I started to provide some of the traffic control services itself, not just the equipment rental but actually provide the traffic control." [#21]

- The non-Hispanic white male owner of a majority-owned professional services firm stated, "I always thought I might want to be self-employed as even undergraduate college. And I went into graduate school thinking that there'd be an option to do consulting work. And so, I started doing research, soft money research for a while. And then eventually I decided I'd like to try the consulting. I figured that there was a disconnect between the research information we were finding out and the application to real world problems, and that somebody like myself might be able to bridge that gap and make a living doing it. It always was a desire or dream of mine. I sort of looked for this opportunity of combining information about the environment with the desire of the public or society to have management or regulation of the environment. And the actual inciting event was I was getting research funded through universities. And then we lost - well, our funding just ran out and I wasn't able to get more funding at the time. It was becoming harder, you know, more competitive and I thought, 'Well, if I'm going to have to compete why don't I just - instead of giving overhead money to universities why don't I just do it on my own and I could keep the overhead and run a business?' So, I decided to do that after about, I'd say maybe ten years or so in the research field. I decided to go private as a consulting company." [#22]
- The Subcontinent Asian American male owner of a Micro- and SB-certified and uncertified MBE construction firm stated, "I would say when I was working for somebody else, I saw the market - as someone really good in civil engineering back in 2018-19 when I decided this is something I wanted to do on my own. And primarily trying to look into the entrepreneurship and the skills and abilities, if I could do something, then that was the primary reason for me to start on my own." [#23]
- The Hispanic and Native American male owner of a DBE-, 8(a)-, SB-, and MBE-certified construction company stated, "I mean, it's just one of those things where it felt like it might be something that was beneficial, and things had turned around a little bit from previous market conditions. And so, it seemed like - and I never did really kind of - I never did really move away from the whole DBE world and it kind of felt like there might be some opportunity there because, I mean, in my experience there's a lot of companies but there's not a lot of capable companies. I know that didn't sound very humble, but I think it's hard to find people with the skills." [#24]
- The Middle Eastern American male owner of a construction company stated, "It was time. It was time for growth, just as a personal growth opportunity that I saw the limitations in working for the company I was working for, the companies I was working for. I thought it was time to branch on my own. started construction 20 years ago working for companies in public. My first clients in that sector was LASD. And then I changed and worked for another

company. They were doing only Caltrans. So, I got my experience in schools. I got my experience in roads and freeway and transportation facilities for example. And then I branched on my own. Then I started to do the commercial because I'm used to the commercial work but not public, private. I started as a foreman, then a superintendent, then went to a project manager, became a vice president of a construction company as well. Then went on my own and started and continued on my own from that point on." [#26]

- The Hispanic American male owner of an uncertified MBE construction company stated, "Well, I did work for another excavating company, and I worked for that company about 17 years. And that's before I did my own. So, I took my license and that's how we keep going, and so far, we've been doing okay. We've been successful in our work, and our clients are happy, and so, we've been doing good on that part." [#28]
- The non-Hispanic white female co-owner of a majority-owned construction company stated, "His grandfather from his mother's side actually got him into the paving business. His father came from Portugal, in '64, he came over here as a legal citizen, and he was a gardener, he was into landscaping. he worked for a couple of companies, you know, through high school, and after high school, you know, learned the trade, so to speak, and had knowledge of it because he had been in it for so long, even at that time. We decided to break off on our own and start our own company; back then, we were sole proprietor. And we started off with a wheelbarrow and a shovel, nothing more, just doing little potholes. We were licensed, of course, you know, he was working until he passed the state contractor's license, and once we got that, we started. And it started small. We rented some equipment, at first, you know, what we needed from other contractors or, you know, Big Four Rents - that was a company back then; I think it's now Hertz. But we would rent whatever equipment that we needed to get the job done, and then, you know, whatever you have left after overhead, we would invest that into equipment." [#29]
- The non-Hispanic white male co-owner of a majority-owned professional services firm stated, "Well, both of us had been working for other firms for a salary, decided if they can do it, we can do it. So, I had one client from one of the previous jobs that I had, and when I told them I was gonna start my own business, that client decided to adopt me in 1985. And it's just gone that way since then, with just mostly repeat clients or people we know or have come in contact with." [#30]
- The non-Hispanic white female owner of a DBE- and SB-certified and uncertified WBE professional services firm stated, "Well, I worked for another company for 15 years and the last 10 years of that 15 I was working from home telecommuting for that company. And then in 2010 the economy wasn't the greatest and so I wasn't getting work since I was a telecommuter. Basically, I wasn't guaranteed work. And so, my husband just thought I should start my own company since I was doing traffic signal design for that company. But under that company I was doing it for a lot of other companies. Seems to be something a lot of civil engineers don't have that service within their company, so they hire it out for people who have it. I had a lot of contacts. And my husband is like just why don't you start your own company and be able to do this for all of your different contacts that you already have and others. You can do it for anyone. You don't have to just do it for one firm. So that's why I started because I wasn't getting work for the firm that I was working for. The goal was to

get my DBE to also help me get work. And because I have a specialty it helps also. So, like something that maybe another company doesn't already have." [#32]

- The non-Hispanic male owner of a majority-owned SB-certified construction firm stated, "I worked at previous paving companies and learned my skill working at other paving companies for quite a few years. I was in the paving industry for, I don't know, 15 years. And then, I decided to get my own license and go on my own. The owner of the company I worked for before was getting sick and he had lung transplants and he eventually - he passed away. So, I basically started on my own. I went out on my own. Got a license. And some of my clientele that I worked for at the previous company kind of wanted me to go on my own and they were happy to use me in the future if I could get my stuff together. And that's kind of how I started out." [#33]
- The Black American male owner of an uncertified MBE construction firm stated, "I came to California in 1990 and I started out as a laborer building factories in the South Bay Wilmington corridor. All over Los Angeles I was looking for a general engineering firm and we performed industrial maintenance and expansion. I did that for about nine years on and off - actually no, I did it for more like five years, then I branched off and did a couple of other things and then I moved to Florida and worked as an electrician for a number of years, and then I came back to California and got my license here, went back to Florida to live and I got hired by a general contractor to manage construction projects for Dade County. I got hired as a safety coordinator and then I was an assistant project manager. I did that for approximately six years and then I came out, came back out to California and worked as a project - first as a safety coordinator and then as a project engineer. And then I went back to Miami and continued to work as a project manager and then I came out here in 2008 and started my own - I activated my license and started my company doing residential repairs and remodels." [#37]
- The Black American female co-owner of a DBE- and DVBE-certified and uncertified MBE construction company stated, "My husband has been in traffic control since 1992 out of the military. He worked for a traffic control company. It's the only job he's actually ever had. He started off in the yard, just washing the cones, keeping the yard and the tracks clean, and moved up and learned how to do field setups, and then he eventually moved to the office to learn how to do traffic plans, accounting, and contracting. The company he worked for was a small business, and the owner sold to an investment group, and he decided at that time that it wasn't going in the direction that he wanted, and he resigned, and he started this business. And so, we started out of our garage in 2009, really with no equipment. His first setup, he rented a U-Haul truck, and he actually did work on the blueline. And we just started from there, and we just grew, doing a lot of the day-to-day work ourselves." [#38]
- The non-Hispanic white male co-owner of an SBA-certified micro- and WBE professional services firm stated, "I started working as an engineer in 1978. I became licensed in 1981. In 1982 - well, actually, in 1981, I went to work as an office manager for a company, which I ended up becoming one of the owners in January of 1982. I operated that company as a general partner until 1993 or '94, somewhere in there - '93, '94. That company then started - brought in architecture, landscape architecture, and planning. It became a much larger operation. At the end of 1994, I became aware that I was not a businessman. I was an engineer. In order for me to follow my path, I sold my share in that company and went out

on my own exclusively. I worked exclusively as sole proprietor until 2001. At that point, my wife said, 'You need help. It's either that or you're going on the back porch.' So, she took over the business and started taking care of all the finances, which was, as it turned out to be, a brilliant move for both of us. So, the lighthearted part of it is that I never see the paycheck. I get an allowance and I'm a happy camper. I get to do my work, and she takes care of all of the finances and runs the company with my daughter." [#40]

- The Black American male owner of an SB- and MBE-certified professional services firm stated, "And so, I tell them I've been interested in electricity and electrical and became really interested in electrical engineering after I got my first job as an electrical draftsman and started working with the ITE circuit breaker company, 'cause I learned so much about the protection of equipment in our industry. And so, when I - after I got my first job as an electrical engineer with [a power company] in 1973 after graduating from [university]...And it was rather strange, but after the Three Mile Island accident and the accident with Chernobyl in the Soviet Union, the nuclear power market took a nosedive and, at the same time, we were suffering with the emissions problems as far as plants, so, they were taking a beaten. And so, I decided, 'Well, this might be time to get out of the power plant design industry and move into another industry.' And so, I had an opportunity to join the Southern California Gas Company, and that's where I realized how important it was to have my license. And I took a cut in salary and joined a small engineering firm and focused on getting my license. So, I got my license in 1998 and went ahead and gained a lot of experience on facility design working with the company I worked with working on facilities at community colleges and universities in California. And after I got my license, I decided, 'Well, now's the time to - ' actually, in 2000, I hung my shingle on a part-time basis and thought, 'Well, I can do some work on the part-time basis.' I was actually 62, so, I was able to take early retirement. So, I got my wife's consent to start my own business and to give it a try." [#41]
- The non-Hispanic white male representative of a DBE-certified and uncertified WBE construction firm stated, "Okay, so years ago, I was in construction, and I got elected to a local board of directors for the water district for City Water. And a friend of mine called me who had a construction company, and he wanted somebody to come and run the water truck, and I couldn't do it, because I'd just got elected to that meeting. So, I said, okay, she [the owner of the firm] can do it. He's like, what? And so, I sent her down there. She worked the water truck for a couple of days, doing a small project, and he said she did great, and everybody loves her because she listens to what you want done. They put her on a grading crew. She went on a grading crew, and then all of a sudden, she was doing really well. She knows how to communicate with people and listen, to say, hey, I want you to go over here, I want you to wipe this down, I want you to do that. And sometimes you get these construction guys, and they get a little testosterone with this guy and that guy, and they really liked that she listened and can do the job really well. So then at that point, we bought her own truck. She started working, and kind of fell into kind of a little niche where she works on freeways a lot. And there was a lot of work there. And she got kind of the master at working on freeway projects and building bridges and roads and such. And then we bought her a second truck, because she was working so much, I wanted to be able to pull one down and maintenance one. And then pretty soon she had that truck working. And then she got - her son turned old enough. We got him working with her. And so - and then she

just kind of kept getting more trucks and more business and stuff like that. So, she really enjoys driving. She's out there everyday driving." [#43]

- The non-Hispanic white male owner of an SB-, DVBE- and Micro-BE-certified construction firm stated, "I was working for a large firm, and they asked me to be the resident engineer on some work in Hawaii, and they promised me a compensation support package when we won the work. And I spent quite a bit of my own time preparing for the interview. They retracted the package. So, I decided to start my own company, and quit about a year later, year and a half later." [#44]
- The Middle Eastern American male president of an WBE-certified professional services firm stated, "After working for 7-8 years for different firms, I got my engineering license from State of California and then, I met a few builders and contractors that told me if I were on my own, they would definitely bring more work to me. So, I started by opening a new office and the rest is history. I started getting work. Day after day, more work. So, I kept on working." [#46]
- The Hispanic and Indian American female co-owner of an SB-certified and uncertified WBE construction firm stated, "Well, it was just an idea. My husband went and decided he wanted to start, because he's been in that industry for so many years, he has the experience. I pulled my resources together and that's kind of how we started." [#47]
- The Hispanic American male owner of an uncertified MBE construction firm stated, "I started driving probably about five years ago doing long haul truck driving. And I really enjoyed truck driving. But I wanted something more local and around like the dirt and construction. I've always been like going off road and being in construction sites and whatnot, that atmosphere. So, I asked a couple friends of mine how to do get started in the dump truck industry. I quit my long-haul truck driving job and got in the industry as an employee and learned the trade and learned the business for about six months, seven months. And then I decided to buy my own truck and here we are." [#50]
- The Hispanic American male owner of a DBE-, SB-, and DVBE-certified and uncertified MBE professional services firm stated, "I got started by working on big utility projects through my employer, understanding some of the issues. I'm talking about solar type of developments. I understood some of the challenges that they were faced with these big projects using public land to develop energy-type projects. I decided to do my own smaller scale utility-scale solar projects by purchasing the land and then developing the projects in my own company. So, that's what I did. I don't have any investors, but I was able to secure the land for several projects. On my own, started doing all the permitting for the development of those projects. So, it's taken me, of course, a lot longer than what I had hoped, but it's coming pretty close to having those projects come online." [#51]
- The Asian Pacific American male owner of an uncertified MBE construction firm stated, "I started, I was driving, and one day I just got tired for working for someone I sold my pickup so I could go buy my truck. And that's pretty much how I got started. I saved what I could have from driving for other people, and all I can do is go sell my pickup, use it for a down payment, and finance the rest of it for a truck and trailer, and go to work." [#52]
- The Hispanic American male owner of a DBE-certified construction firm stated, "So I'd been in the transit industry since 2000. I've done everything from bus driver all the up to road

supervisor, safety supervisor and management. And then in 2017, I started [my company] because most of the transit providers, the big players in there are all required by the government agencies to do employee evaluations. And a lot of them can't really fulfill that part of the contract because they just don't have the employees, so that's how I got started." [#55]

- The Asian Pacific American female owner of a SB-, DBE-, and WBE-certified construction company stated, "Long story short, I worked for my husband. 1983 as an administration assistant, project managing secretary, coordinating, help inventory financing. So as a small company, just two of us and with a few technicians, I do a lot. [My husband left me] so I asked his employee at that time, what do you want to do? And they said, 'You start your own and we'll work for you.' I borrowed 20,000 dollars from my parents to cover the payroll for a few months. And since he's not here, all the projects will become my project. And I performed with the employee, and I invoiced a customer but before I start my business, I already have license." [#59]
- The non-Hispanic white male owner of a majority-owned construction company stated, "I used to be a superintendent for a company. And they closed down and I lost my job, and I couldn't find another job, so I just started doing it myself. And there's plenty of demand for it so..." [#62]

Other motivations. There were also other reasons and motivations for the establishment of the interviewee's firms [#2, #12, #13, #16, #17, #53]. For example:

- The non-Hispanic white male co-owner of a majority-owned construction company stated, "I started out as assistant to a grease truck driver. That's about the lowest chain that you can get as entry level, during the summers working. And then it became a laborer in the field. Out of college, became an Assistant Project Manager, then a Division Manager, and then a Vice President and then President. It's a generational business. So, my parents co-own the business. My business was started by my grandparent, so we're third generations." [#2]
- The Hispanic American female owner of an MBE-, WBE-, and SB-certified professional services firm stated, "I started this company officially about 10 years ago, I was doing a lot of... I was setting up programs at my son's preschool. I started a composting program there, a battery recycling program, and so after doing that for several years and having a lot of different parents, the organizations request assistance setting up similar programs, I just decided to make it official and launch it as a company and began consulting in 2012." [#12]
- The Hispanic American male owner of an uncertified MBE construction firm stated, "I have a business partner that's been a trucker for 10 plus years. And at the time, it was very difficult finding employment for myself, so I decided to get into this line of work. So, I got my CDL and that kind of thing." [#13]
- The Black American male representative of a DBE-, WBE-, MBE-, SB-, and Micro-PW-certified small business development association stated, "I always had kind of a passion for it. My professional background is in electrical engineering. I have an electrical engineering degree and worked in industry for many years, and I lived in - when I was living back in Ohio, I ended up going to a business conference and there were individuals there trying to

start a business and I just caught the bug. And from that point on, I've been in and out of different small businesses, but I just have developed a passion for small businesses - for trying to start 'em running. After years of going in and out of business, I started realizing that I would learn how to do it and other people I was talking to really was not following the right procedure. So, that's when I developed a business assistance firm." [#16]

- The Hispanic American female owner of a WBE-, MBE-, SCMSDC-, and DBE-certified goods and services firm stated, "I started out when I got laid off from a corporate organization. I needed something else to do. At the time I had two little ones. One was six months old and the other one was six years old, and so I needed something to continue providing a livelihood for my family. So, I decided on something that I had some training on, which was the cleaning industry. I was in food services and there was a lot of stuff that I felt needed to be worked on, so I took it one step further and I continued it in the janitorial arena. So, with \$700.00 and three vacuum cleaners I started up [my firm]. And my mission and my goal was to be a job provider throughout the communities that we serve. So, any of our clients that we provide services for, they know that what they are going to be doing is providing employment for people in their community." [#17]
- The Asian Pacific American male owner of an MBE-, DBE-, and SB-certified construction firm stated, "I made a decision in 2007 that I wanted to start a concrete business, and that was it. Zero experience. Yeah, I was in logistics, selling multi-function office equipment, and Hewlett-Packard toners. I managed a territory which was the western United States for this logistics company." [#53]

3. Types, locations, and sizes of contracts. Interviewees discussed the range of sizes and types of contracts their firms pursue and the locations where they work. Businesses reported working on contracts as small as several hundred dollars to contracts approaching one billion dollars. However, the majority of firms reported working on contracts worth between \$500,000 and five million dollars.

Fourteen firms reported working on contracts with an average value under \$100,000 [#12, #13, #16, #22, #23, #30, #32, #36, #39, #40, #41, #42, #59, #62]. For example:

- The Hispanic American female owner of an MBE-, WBE-, and SB-certified professional services firm stated, "The biggest until now is for 25,000 dollars. Average is about 6,000, 10,000?" [#12]
- The Hispanic American male owner of an uncertified MBE construction firm stated, "Let's see, for truck one, which is my business partner, anywhere from 3 to 8,000 dollars. And for truck two, myself, anywhere from 350 to 2,000 dollars." [#13]
- The Black American male representative of a DBE-, WBE-, MBE-, SB-, and Micro-PW-certified small business development association stated, "I did get a contract with the SBDC and that's when a person goes to SBDC and signs up for - gets some assistance. I was 1 of about 10 contractors or counselors that helped them, and I would make about \$55.00 an hour working with them. I wasn't making a lot of money. I mean, I was still working at the time, so, I was doing this on the side part-time. So, my business is really about maybe \$10,000.00 - between \$10,000.00-\$15,000.00 a year income. It's not intended to provide my living expenses." [#16]

- The non-Hispanic white male owner of a majority-owned professional services firm stated, "I've gone down to - I've been paid \$200 to do a wetland, telling people you would have to do a wetlands delineation up to - the biggest contract I have - I had a multiyear contract. It's usually around \$30,000 a year. The more typical contracts are usually in the \$1,000 to \$30,000 range." [#22]
- The Subcontinent Asian American male owner of a Micro- and SB-certified and uncertified MBE construction firm stated, "Typically the contract is from a few thousand dollars to anywhere in a few tens of thousands of dollars." [#23]
- The non-Hispanic white male co-owner of a majority-owned professional services firm stated, "We've had contracts up to \$200,000.00, but nowadays our average contract is about \$30,000.00 or \$40,000.00." [#30]
- The non-Hispanic white female owner of a DBE- and SB-certified and uncertified WBE professional services firm stated, "It can be as small as say \$2,000.00, around \$2,000.00 to some of the big ones - I mean the biggest one I think was like close to \$50,000.00 So usually it's more in the \$15,000.00 to \$20,000.00 - \$30,000.00 range." [#32]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "It can range from \$3,000.00 to \$80,000.00 usually." [#36]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "The surveying contracts are generally between \$3,000.00 and \$12,000.00. The engineering contracts are generally between let's say \$8,000.00 and \$16,000.00." [#39]
- The Black American male owner of an SB- and MBE-certified professional services firm stated, "most of my work over the last 20 years has been less than \$70,000.00. Most of my projects are really small - \$10,000.00-\$20,000.00. A large solar project might be \$10,000.00 to \$20,000.00, you know? But the projects are - it all depends on the scope of work." [#41]
- The non-Hispanic white male co-owner of an SB-, DBE-, and HUBZone certified construction firm stated, "It kind of depends on our ability to get a bond. So right now, you know, everything's below \$100,000.00 for us. It's slow process to grow our bonding." [#42]
- The Asian Pacific American female owner of a SB-, DBE-, and WBE-certified construction company stated, "From 500 to 5,000. I want you to do more bigger one, but I'm afraid of cashflow." [#59]
- The non-Hispanic white male owner of a majority-owned construction company stated, "Probably 100,000 dollars." [#62]

Nine firms reported working on contracts with an average value between \$100,000 and \$500,000 [#5, #29, #33, #43, #45, #46, #53, #54, #55]. For example:

- The Black American male co-owner of a WBE-, MBE-, and DVBE-certified construction company stated, "I'm going to say the typical size of our contracts, they range from, I'm going to say from 10,000 dollars and the highest we've ever had was 350,000 dollars." [#5]
- The non-Hispanic white female co-owner of a majority-owned construction company stated, "We do all sizes, I mean, we'll do something that, you know, that's worth, like,

\$2,000.00 up to - we just, you know, bid a job on a state level where the base bid was \$404,000.00, I believe is what it was, was our bid." [#29]

- The non-Hispanic male owner of a majority-owned SB-certified construction firm stated, "\$1,200.00 to \$250,000.00. So, that's pretty much my range." [#33]
- The non-Hispanic white male representative of a DBE-certified and uncertified WBE construction firm stated, "They range anywhere from about \$90,000.00 to upwards of \$550,000.00." [#43]
- The non-Hispanic white male representative of an SB-certified professional services firm stated, "We've ranged anything from around a quick survey job for \$10,000.00 to \$20,000.00 on up to large initial wind farm projects that run between \$400,000.00 to \$600,000." [#45]
- The Middle Eastern American male president of an WBE-certified professional services firm stated, "Usually, they are - it's under about \$200,000.00." [#46]
- The Asian Pacific American male owner of an MBE-, DBE-, and SB-certified construction firm stated, "Right now we're comfortable with bidding up to a quarter of a million dollars, 'cause I wanna grow slow and steady, but I foresee going beyond that next year. But right now, my comfort zone is between \$50,000.00 - actually, ___ \$20,000.00 to \$250,000.00 I'm comfortable with." [#53]
- The Asian Pacific American male owner of a DBE-certified construction firm stated, "Under 400K - our limited bonding capacity limits size of contracts." [#54]
- The Hispanic American male owner of a DBE-certified construction firm stated, "Usually they're the smaller ones. We have trouble getting into the bigger agencies. So, yeah, right now we're doing about \$120,000.00 a year." [#55]

Seventeen firms reported working on contracts with an average value between \$500,000 and \$5 million [#1, #4, #8, #9, #10, #11, #14, #17, #18, #21, #26, #28, #34, #37, #47, #51, #61]. For example:

- The non-Hispanic white female owner of a WBE-, DBE-, UDDBE-, and SB-certified professional services firm stated, "We can have a contract that on our side, not the contract side of the whole project, but our side, it could be anything from 10,000 dollars to half a million dollars." [#1]
- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "We bid on contracts anywhere between 20,000 dollars and a half a million-dollar contracts." [#8]
- The Asian Pacific American owner of a DBE-, MBE-, and SB-certified professional services firm stated, "It varies. The reason why I say it varies, there's a lot of subdivision work. It might be a master community where it's all broken up to different phases, so you might get a certain amount of money for each phase, but then it's a lot of phases. So that one's kind of hard to answer, but I would say anywhere from 250,000 dollars to 1 million dollars maybe, but then there's a whole bunch of phases." [#9]

- The non-Hispanic white male owner of a majority-owned professional services firm stated, "Typically, from 250,000 to a million." [#10]
- The non-Hispanic white male representative of a Native American-owned MBE-, SB-, and Micro-BE certified professional services firm stated, "Because there's low as 2,000 and there's high as two million. Well, here's how it works and maybe there's a box you can put in is, we get on-call contracts with public agencies, and they have a ceiling on them, let's say \$2 million. So, then the contracts are 10,000 here, maybe 100,000 there, 50,000 here. So, they range greatly. So, I don't know how you want to classify that." [#11]
- The Subcontinent Asian American male owner of an uncertified MBE construction firm stated, "Actually here in the States, I did not went over a half a million dollar because I worked for small companies, but when we were oversea in Afghanistan, our contract was over 2 million dollar contract." [#14]
- The Hispanic American female owner of a WBE-, MBE-, SCMSDC-, and DBE-certified goods and services firm stated, "Our size of contracts vary. We could say we're billing from a couple thousand dollars a month to over \$25,000.00, \$30,000.00, \$50,000.00 a month and up." [#17]
- The non-Hispanic white female owner of a DBE-, SWBE-, and CBE-certified professional services firm stated, "I would say I've seen a trend in the last ten years go from - we would be bidding stuff, anywhere between 300,000 to a couple million would be a big job for us. Now, our average jobs are way over a million dollars and somewhere between \$1 and \$5 million is pretty common for us to be bidding." [#18]
- The Hispanic American male owner of a DBE-certified and uncertified MBE construction company stated, "They kind of vary in size. Some of our smaller projects that we do like construction area signs for can range anywhere from \$20,000.00 to a couple hundred thousand. Whereas something that has traffic control or alternative crash cushions or some other type of service - The last project that we did, that was actually the largest one that we've ever done, was just shy of \$1 million." [#21]
- The Middle Eastern American male owner of a construction company stated, "[We're] capable of doing maybe up to a million dollar or million and a half at the most size projects comfortably." [#26]
- The Hispanic American male owner of an uncertified MBE construction company stated, "I've been doing lately, well, I just did last year, we, in one contract I did, like, a \$1.5 million contract. And it can go between 100, it can be 300, it can be a million." [#28]
- The non-Hispanic white male co-owner of an MBE-, SB-, and DBE-certified professional services firm stated, "Anywhere from, like, \$20,000 to about \$1 million." [#34]
- The Black American male owner of an uncertified MBE construction firm stated, "From \$60,000 the largest was \$1.238 million." [#37]
- The Hispanic and Indian American female co-owner of an SB-certified and uncertified WBE construction firm stated, "Oh, I see. Well, the last large contract was \$1.5 million. Our smallest contract was \$48,000.00." [#47]

- The Hispanic American male owner of a DBE-, SB-, and DVBE-certified and uncertified MBE professional services firm stated, "My projects, they're multi-million-dollar projects. So, the budget of the facility that was built was over two million dollars." [#51]
- The Hispanic American female co-owner of a WBE-, MBE-, Micro-, and SB-certified professional services company stated, "I think 1,000 is maybe the smallest, we do have boundary locates in the field, we've lived property corners for maybe 1,000 dollars or 1,500 dollars, and then we do public work contracts up to 2 million." [#61]

Three firms reported working on contracts with an average value between five and ten million dollars [#3, #38, #49]. For example:

- The non-Hispanic white male co-owner of an SB-certified professional services firm stated, "Let's say 5,000 dollars up to five to six million dollars per contract." [#3]
- The Black American female co-owner of a DBE- and DVBE-certified and uncertified MBE construction company stated, "We actually perform all. I mean, we'll perform a day of work for, you know, as small as, like, \$2,000, and our largest contract to date, we did about \$9 million with that over the course of three years." [#38]
- The Hispanic American female representative of a DBE-, MBE-, and WBE-certified construction firm stated, "We can go from \$2,5000.00 to \$5 million." [#49]

Five firms reported working on contracts with an average value between ten and fifty million dollars [#6, #24, #25, #27, #44]. For example:

- The non-Hispanic white male representative of a majority-owned construction firm stated, "Our average is probably 20 million dollars." [#6]
- The Hispanic and Native American male owner of a DBE-, 8(a)-, SB-, and MBE-certified construction company stated, "We had one job that was one day and it was a \$25,000.00 contract, and we're just finishing one that's a little over \$10 million. So, quite a range." [#24]
- The non-Hispanic white male owner of a majority-owned SB-certified construction firm stated, "Anything from small jobs to 10 to 20 million." [#25]
- The Middle Eastern American female representative of a majority-owned professional services firm stated, "We do anything from try to be like \$200,000.00 and above to \$200,000.00 to maybe \$10 million, \$15 million. Because over that it's a little bit harder to get bonds and things like that." [#27]
- The non-Hispanic white male owner of an SB-, DVBE- and Micro-BE-certified construction firm stated, "We have a prime contract at \$5 million with the Department of Energy, and we are a subconsultant to projects ranging from \$15 million to \$40 million." [#44]

Three firms reported working on contracts with an average value between fifty and five hundred million dollars [#2, #7, #35]. For example:

- The non-Hispanic white male co-owner of a majority-owned construction company stated, "We're unique in the sense that we'll go from doing airports and heavy highway projects of 60, 80 million dollars, down to currently still doing little sidewalk and driveway and patio

projects for residents around the County. So, we go from a 5,000-dollar contract to almost a hundred million.” [#2]

- The Black American male owner of an MBE-certified professional services firm stated, "There's no limit. The largest contract that we've won individually was a 99 million dollars multiple-award contract. Our contracts typically range from one through 30 million dollars.” [#7]
- The non-Hispanic white male representative of a majority-owned construction firm stated, "Anywhere from \$600,000.00 \$120 million.” [#35]

One firm reported working on a contract worth more than \$1 billion [#19]. For example:

- The Black American male owner of a DBE- and SB-certified and uncertified MBE professional services firm stated, "The Freeway was about \$40 million that we had as a joint venture. The range of projects were there, we used to have construction management for all of [one of the] Districts, I think our fees probably were somewhere around \$10 million to \$15 million, about \$15 million. Oh, those projects were about \$100 million. The projects were about, construction management, about \$100 million. For seven years we had construction management in [a city], near the airport out there. And that was worth about maybe \$175 million. We got [another city], but we did - that was even larger. Probably the largest transportation project on highways was with all the elevated roadways and bridges, ramps and bridges and everything at the airport, we were in charge of, that was about \$240 million. We had a joint venture with - two joint ventures down there. And the largest one we've ever done is we had a joint venture, did an airport expansion which was \$1.3 billion.” [#19]

Fifty-five firms reported working on contracts solely in California. Of these firms, the majority worked within the counties surrounding their headquarters [#1, #2, #3, #4, #5, #6, #8, #9, #11, #12, #14, #16, #17, #21, #23, #24, #25, #26, #28, #29, #30, #32, #33, #35, #36, #37, #38, #39, #40, #42, #43, #44, #46, #47, #49, #50, #53, #55, #59, #61, #62, #AV]. For example:

- The non-Hispanic white female owner of a WBE-, DBE-, UDBE-, and SB-certified professional services firm stated, "We stay in California and if possible, within 100 miles of our office.” [#1]
- The non-Hispanic white male co-owner of a majority-owned construction company stated, "We're pretty regionally focused. We only will do business typically in Northern California. And even then, we don't travel very far. We do about eleven counties in the Bay Area.” [#2]
- The non-Hispanic white male co-owner of an SB-certified professional services firm stated, "I would say as far as Gilroy headed South, San Rafael, Richmond headed North and then East probably Stockton, some Sacramento.” [#3]
- The Hispanic American male owner of an uncertified MBE construction company stated, "Well, I've been all over California. I ran again from below Bakersfield to Fort Bragg and by Eureka and Ukiah. So, I pretty much covered all the California ones if there's a job assignment.” [#4]

- The Black American male co-owner of a WBE-, MBE-, and DVBE-certified construction company stated, "we've done jobs from as far south as San Diego, Rancho Bernardo to as far north as Simi Valley, but we've looked into contracts that were as far north as Sacramento." [#5]
- The non-Hispanic white male representative of a majority-owned construction firm stated, "Typically within two to three hours of our office locations. So right now, we probably go about as north as Fresno. We go as south as the Mexican border. We go as west as the ocean and as east as Arizona border." [#6]
- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "Typically, we've been doing mostly in and around the Bay area, greater Bay area region. So up to Marin County all the way South down to Monterey County and East all the way to, Modesto, Merced area. We have not ventured into Southern California as much, but that's what we plan on doing." [#8]
- The Asian Pacific American owner of a DBE-, MBE-, and SB-certified professional services firm stated, "San Diego is our backyard so we try to stay within what we know, what we're comfortable. So, I would say San Diego all the way up to the Temecula/Riverside area let's say, if I have to draw a line." [#9]
- The non-Hispanic white male representative of a Native American-owned MBE-, SB-, and Micro-BE certified professional services firm stated, "We do work all throughout the state, but we like to stay within 100-mile radius." [#11]
- The Hispanic American female owner of an MBE-, WBE-, and SB-certified professional services firm stated, "All my work is based in Southern California." [#12]
- The Subcontinent Asian American male owner of an uncertified MBE construction firm stated, "We go any surrounding city in Northern California in Chico, for instance, Yuba City, Elk Grove City, Stockton City, the Sacramento itself, Auburn and Davis, Vallejo, and that's in about maybe about 100 nautical miles around." [#14]
- The Black American male representative of a DBE-, WBE-, MBE-, SB-, and Micro-PW-certified small business development association stated, "For most of the time, I was around Bakersfield, Kern County. I have gotten a little bit outside that. So, I have - mostly, I'm dealing with Central California now. So, there's like about - because I've learned how to be a little bit more flexible - especially with Covid - I've learned how to do things on Zoom and learned how to service clients longer distance because I had to if I wanted to keep clients." [#16]
- The Hispanic American female owner of a WBE-, MBE-, SCMSDC-, and DBE-certified goods and services firm stated, "Right now our concentration is Southern and Northern California." [#17]
- The Hispanic American male owner of a DBE-certified and uncertified MBE construction company stated, "Generally we look at District 8, District 7, District 11. And District 12." [#21]
- The Subcontinent Asian American male owner of a Micro- and SB-certified and uncertified MBE construction firm stated, "I've done projects all over California, from Southern California to Northern California." [#23]

- The Hispanic and Native American male owner of a DBE-, 8(a)-, SB-, and MBE-certified construction company stated, "We've been all the way down to Southern California. Certainly, the Central Valley is a common one. The Monterey area - that's where we've most recently been. All the Bay Area for sure, up to Sacramento and north a little bit. So, north of Sacramento, down to I'm going to say Salinas and maybe on 99 down to Bakersfield. But we really go - for the specific type of job that we do we will go geographically further away, like L.A." [#24]
- The non-Hispanic white male owner of a majority-owned SB-certified construction firm stated, "We try to stay in Northern California." [#25]
- The Middle Eastern American male owner of a construction company stated, "I can take business as far as maybe 80 miles depending on the size of the project. But 80 miles is the farthest in any direction that I'm able to be still competitive without it affecting my cost." [#26]
- The Hispanic American male owner of an uncertified MBE construction company stated, "Most of our works, we've been doing through Butte County and Lasslerle, Fairfield, Sacramento. The farthest I've been gone from home is, like, about I want to say, like, about 150 miles." [#28]
- The non-Hispanic white female co-owner of a majority-owned construction company stated, "We work in Sonoma County, we work Napa County, and Marin County." [#29]
- The non-Hispanic white male co-owner of a majority-owned professional services firm stated, "We work primarily in the central California - Monterey, Santa Cruz, San Benito, and Santa Clara counties, mostly, although we've worked in Marin and other counties also." [#30]
- The non-Hispanic white female owner of a DBE- and SB-certified and uncertified WBE professional services firm stated, "I work all over California. But typically northern California. And I don't work a lot close to home. Most of my work is like at least a half hour to 40 minutes away if not 3 hours away." [#32]
- The non-Hispanic male owner of a majority-owned SB-certified construction firm stated, "I've gone to Sacramento and down to San Diego." [#33]
- The non-Hispanic white male representative of a majority-owned construction firm stated, "From LA going north to the border." [#35]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "We're pretty much in Northern California." [#36]
- The Black American male owner of an uncertified MBE construction firm stated, "In Southern California, not necessarily in Los Angeles but Southern California, mostly in Los Angeles. Yeah, I think everything was done inside of Los Angeles County. I didn't go into Ventura County." [#37]
- The Black American female co-owner of a DBE- and DVBE-certified and uncertified MBE construction company stated, "We go up - so, we're based in Los Angeles, so we go up to Bakersfield, California, and we go down south towards San Diego, and we go out east towards the Arizona border. So, pretty much the Southern California area." [#38]

- The non-Hispanic white male representative of a majority-owned professional services firm stated, "I'll say 95 percent of our work is within Orange County." [#39]
- The non-Hispanic white male co-owner of an SBA-certified micro- and WBE professional services firm stated, "I work in all four corners in the state. There are not many that are as willing to be as flexible as I am, but you have to keep it in mind that I'm here in - I am halfway from roughly wherever you are to anywhere else. We're halfway from here to San Francisco, halfway to Los Angeles. There's the valley of Fresno, Bakersfield. All of the big economic centers are out there. In order for me to be, or for us rather, to be effective, we have to be able to reach out. I don't know many who are willing to do that or feel the need to do that because we want to live here." [#40]
- The non-Hispanic white male co-owner of an SB-, DBE-, and HUBZone certified construction firm stated, "Anywhere in the state that will give us work, where we find work." [#42]
- The non-Hispanic white male representative of a DBE-certified and uncertified WBE construction firm stated, "She likes to stay in the county, so we're in the County of San Diego. We don't take any work outside of Riverside, and we don't go to Riverside, and we don't go on some of these other - she just stays in the county, really. So, we're within 60 or 70 miles of the job." [#43]
- The non-Hispanic white male owner of an SB-, DVBE- and Micro-BE-certified construction firm stated, "We work all over the Bay Area, the nine counties" [#44]
- The Middle Eastern American male president of an WBE-certified professional services firm stated, "Usually, majority of my projects are in Southern California so, it would be like, Los Angeles County, Orange County, Riverside County, San Bernardino County, and also, in Ventura County, Santa Barbara County. Lately, I've had a couple of jobs in San Francisco area, but that comes very rarely. Very, very rarely. So, mostly, I'm in Southern California." [#46]
- The Hispanic and Indian American female co-owner of an SB-certified and uncertified WBE construction firm stated, "We did put some bids up in Fresno and Sacramento. Just wherever the application meets, we will put the bid in." [#47]
- The Hispanic American female representative of a DBE-, MBE-, and WBE-certified construction firm stated, "We prefer to stay in San Diego only sometimes we go to Orange County or Riverside." [#49]
- The Hispanic American male owner of an uncertified MBE construction firm stated, "Right now southern California. Mostly LA, San Bernardino and that's about it right now. I haven't gone any further than that, but I am definitely open to move to relocate if comes where the work is at." [#50]
- The Asian Pacific American male owner of an MBE-, DBE-, and SB-certified construction firm stated, "I focus on Los Angeles County and Orange County right now." [#53]
- The Hispanic American male owner of a DBE-certified construction firm stated, "The current contracts that I have are all in the Central Valley." [#55]
- The Asian Pacific American female owner of a SB-, DBE-, and WBE-certified construction company stated, "Oh, I try to stay within a 50 mile to 75 [mile radius] because the driving..."

It could take me three hours' drive. We only have five hours perform job. So, I'm an 8(a) graduate. So, at that time, when we do 8(a) job, it's few hundred mile away. I will have people live in the job site area and then finish the job and come home. But that kind of job, 8(a) job is paid all job and government to pay room and board. State job don't do that." [#59]

- The Hispanic American female co-owner of a WBE-, MBE-, Micro-, and SB-certified professional services company stated, "We pretty much stay in San Diego County, but we have an occasion gone all the way to Los Angeles, City of Los Angeles, to do some survey work because the client has just brought us to that area or Temecula area." [#61]
- A comment from a majority-owned construction firm stated, "Out of our bounds, cost too much [to travel]." [#AV8212]
- A comment from a majority-owned construction firm stated, "[We don't work in Districts 6 and 10 because] it's just kind of an outlier distance." [#AV8255]
- A comment from an uncertified WBE construction firm stated, "Depends on the type of work and origin of where the material comes. Having to drive to Salinas is not worth it at times." [#AV8259]
- A comment from a majority-owned construction firm stated, "We like to stay local within our 100-mile radius--If we worked up north it was for emergency purposes such as fire clean up and mud slides. If there was emergency work we would go wherever that is." [#AV8276]
- A comment from a majority-owned construction firm stated, "Usually the job size [is] not large enough. We stay more local because it's more profitable." [#AV8279]
- A comment from an uncertified WBE MBE Hispanic American-owned construction firm stated, "We're based out of Los Angeles. That drive is a killer, and our insurance does not cover more than 200 miles... if there is work we are willing to move the insurance policy." [#AV8504]
- A comment from a majority-owned construction firm stated, "We're not very large company. We are a signatory company, not signatory in those areas, we are signatory in southern CA... we're not opposed to working [in] those areas, we need to further status in signatory." [#AV854]
- A comment from a majority-owned construction firm stated, "We try to stay as local as possible in the Bay Area so we can keep our equipment and staff as close as possible [because] our jobs are daily jobs." [#AV8548]
- A comment from an uncertified MBE Black American-owned construction firm stated, "We're based in San Diego; we like to keep our fleet local to us. If we were able to open an office in that area [District 3] it would be comfortable to us." [#AV8558]
- A comment from a majority-owned construction firm stated, "There is so much work within the 100-mile radius close to home we don't venture that far." [#AV8571]
- A comment from a majority-owned professional services firm stated, "You go where the work is and if its lucrative and [you] need to consider family. You need to consider duration and per diem like food and hotel tax fees." [#AV8891]

- A comment from a majority-owned construction firm stated, “We have enough work. To try to go out of our area would be counterproductive. If we were contacted then we would do it, but we are not going to pursue bids [out of our range].” [#AV944]

Eleven firms reported working in the California marketplace and with clients outside of the state [#7, #10, #12, #13, #19, #22, #41, #45, #51, #52, #AV]. For example:

- The Black American male owner of an MBE-certified professional services firm stated, “We’re all over United States. We’re national.” [#7]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, “I have worked throughout the state of California, Seattle, Washington, and Phoenix, Arizona, and Western Nevada.” [#10]
- The Hispanic American female owner of an MBE-, WBE-, and SB-certified professional services firm stated, “I am based in Southern California, but I have traveled a lot for work, so just anywhere in the United States really.” [#12]
- The Hispanic American male owner of an uncertified MBE construction firm stated, “[We work] all over the US and then also particularly, in California.” [#13]
- The Black American male owner of a DBE- and SB-certified and uncertified MBE professional services firm stated, “We specialize in transportation projects throughout the West Coast, mostly in California, however.” [#19]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, “[We work] within the adjacent states. We started the business in Oregon, so we have return work up there. But now it’s mostly in the California area” [#22]
- The Black American male owner of an SB- and MBE-certified professional services firm stated, “I’m working on a project for a young lady that’s gonna be an RV park up in Alaska. I can work throughout the state of California and nationally.” [#41]
- The non-Hispanic white male representative of an SB-certified professional services firm stated, “Most of the civil engineering surveying for the projects are on the West Coast, primarily the Bay Area, but we do have some projects that extend up to Sacramento, and the wind farms and sola farms tend to take us pretty much from the Midwest to the West Coast.” [#45]
- The Hispanic American male owner of a DBE-, SB-, and DVBE-certified and uncertified MBE professional services firm stated, “My projects, I can do anywhere in the U.S., in the world, actually. I travel quite a bit.” [#51]
- The Asian Pacific American male owner of an uncertified MBE construction firm stated, “11 western states, but we do a lot of California, we’ve been going to Texas, Nebraska.” [#52]
- A comment from an uncertified WBE MBE Black American-owned professional services firm stated, “It’s been up and down, seems like I have more business from California to out of state than California to California, it’s up and down.” [#AV910]

4. Employment size of businesses. The study team asked business owners about the number of people that they employed and if firm size fluctuated. The majority of businesses (44

of 51 who reported employment numbers) had between one and 50 employees. The study team reviewed official size standards for small businesses but decided on the below categories because they are more reflective of the small businesses we interviewed for this study.

The majority (33 of 51) of businesses had 1-10 employees [#1, #4, #5, #9, #10, #12, #13, #14, #16, #21, #22, #23, #26, #28, #29, #30, #31, #32, #33, #36, #37, #41, #43, #46, #47, #50, #51, #52, #53, #54, #55, #59, #62]. For example:

- The non-Hispanic white female owner of a WBE-, DBE-, UDDBE-, and SB-certified professional services firm stated, "Due to COVID and some of the other issues, I'm under 10... I have the ability to pull in over 50 retired professors or museum individuals to help me with any like Caltrans project or any of my larger projects." [#1]
- The Hispanic American male owner of an uncertified MBE construction company stated, "At this time I only have three employees." [#4]
- The Black American male co-owner of a WBE-, MBE-, and DVBE-certified construction company stated, "On any given day, I'm going to say 10." [#5]
- The Asian Pacific American owner of a DBE-, MBE-, and SB-certified professional services firm stated, "Currently we have a total of five, so it's three owners and two staff. We started off with just the owners, the three, and then we started picking up people along the way. But ideally, I think with a small firm, five is a good number. I kind of want it to be eight, but it depends on the work out there, so between five and eight. So, it's slow, it's slow, but hopefully in the next couple of years we can get to eight." [#9]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "I have no employees." [#10]
- The Subcontinent Asian American male owner of an uncertified MBE construction firm stated, "We have four employees. Due to COVID-19, we just sized down our employees. Last year, after the COVID-19, our job is really limited and we kind of let some employee goes and because we cannot afford it. So, we are down to four employees and myself, five." [#14]
- The Black American male representative of a DBE-, WBE-, MBE-, SB-, and Micro-PW-certified small business development association stated, "It was just me until 2016. My daughter joined me in 2016 so, it's just her and I." [#16]
- The Hispanic American male owner of a DBE-certified and uncertified MBE construction company stated, "It varies. Anywhere from 2 to maybe, I'd say on a high side, 15 employees, maybe, just depending on the projects we have and how busy we are." [#21]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "Occasionally we hire a part-time seasonal. My wife helps me, but we don't officially pay her." [#22]
- The Subcontinent Asian American male owner of a Micro- and SB-certified and uncertified MBE construction firm stated, "Currently I'm the only employee of the company." [#23]
- The Middle Eastern American male owner of a construction company stated, "Right now I am the only employee of the company just because of pandemic. Definitely 2020 has been

one of the harshest years we've had. But usually about five employees on regular payroll. And then the rest of the employees are as needed." [#26]

- The Hispanic American male owner of an uncertified MBE construction company stated, "Right now, I have, like, about six, seven." [#28]
- The non-Hispanic white female co-owner of a majority-owned construction company stated, "Including [my co-owner] and myself, the company has six employees." [#29]
- The non-Hispanic white male co-owner of a majority-owned professional services firm stated, "We have four employees." [#30]
- The male co-owner of an uncertified WBE professional services firm stated, "We have five employees." [#31]
- The non-Hispanic white female owner of a DBE- and SB-certified and uncertified WBE professional services firm stated, "Just me and my husband really. My kids help a little bit but not really." [#32]
- The non-Hispanic male owner of a majority-owned SB-certified construction firm stated, "I have one full-time employee and I have part-time employees for jobs only. They work pretty per the job. If I don't have jobs, I can't work 'em." [#33]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "At present I think we're ten." [#36]
- The Black American male owner of an uncertified MBE construction firm stated, "At the moment the corporation only has me as the owner and an employee, so technically no employees at the moment. I've had up to four employees." [#37]
- The Black American male owner of an SB- and MBE-certified professional services firm stated, "I've got two right now." [#41]
- The Middle Eastern American male president of an WBE-certified professional services firm stated, "Currently, we have four." [#46]
- The Hispanic American male owner of an uncertified MBE construction firm stated, "Just me." [#50]
- The Hispanic American male owner of a DBE-, SB-, and DVBE-certified and uncertified MBE professional services firm stated, "My company's very small. It only has two. Myself, and then I also employ my wife to work." [#51]
- The Asian Pacific American male owner of an MBE-, DBE-, and SB-certified construction firm stated, "We have four employees, well, I guess five. But it expands; depends on the jobs. Our core employees are five, including myself." [#53]
- The non-Hispanic white male owner of a majority-owned construction company stated, "Two, including myself." [#62]

Six interviewees reported that their businesses had 11-25 employees [#11, #19, #34, #39, #45, #61]. For example:

- The non-Hispanic white male representative of a Native American-owned MBE-, SB-, and Micro-BE certified professional services firm stated, "Yes. I'm going to say there's 16 [employees] right now." [#11]
- The Black American male owner of a DBE- and SB-certified and uncertified MBE professional services firm stated, "Normally we run about 15 to 20 people. Normally. Not now..." [#19]
- The non-Hispanic white male representative of an SB-certified professional services firm stated, "There are currently 23 people at the firm, and that does include surveyors that are actually union, but we tend to have them, the same three surveyors on a regular basis." [#45]

Five businesses had 26-50 employees [#3, #18, #25, #38, #49]. For example:

- The non-Hispanic white male co-owner of an SB-certified professional services firm stated, "It fluctuates between 25 and 30 [employees]." [#3]
- The non-Hispanic white female owner of a DBE-, SWBE-, and CBE-certified professional services firm stated, "We have, depending on project sizes and time of year, we have anywhere between 35 and 55 [employees]." [#18]
- The non-Hispanic white male owner of a majority-owned SB-certified construction firm stated, "We're probably somewhere in the 25 to 50 [range]." [#25]
- The Hispanic American female representative of a DBE-, MBE-, and WBE-certified construction firm stated, "Right now we have around 40 [employees]." [#49]

One business had 51-100 employees [#7]. For example:

- The Black American male owner of an MBE-certified professional services firm stated, "We have about 90 [employees]." [#7]

Six interviewees indicated that their firm had more than 100 employees [#2, #6, #17, #27, #35, #48]. For example:

- The non-Hispanic white male co-owner of a majority-owned construction company stated, "It's a seasonal business, but 350 [employees]." [#2]
- The non-Hispanic white male representative of a majority-owned construction firm stated, "We have the 209 non-union employees, and we also have on average about 500 union employees." [#6]
- The Hispanic American female owner of a WBE-, MBE-, SCMSDC-, and DBE-certified goods and services firm stated, "Currently, we have about 160 employees." [#17]
- The Middle Eastern American female representative of a majority-owned professional services firm stated, "[There are] 100 in southern California but overall, the company has over 3,000 employees." [#27]
- The non-Hispanic white male representative of a majority-owned construction firm stated, "It ranges, but roughly 120 [employees]." [#35]

- The Hispanic American male representative of a construction union stated, "We have probably around 150 members." [#48]

5. Growth of the firm. Business owners and managers mentioned the growth of the firm over time [#1, #2, #3, #5, #6, #7, #8, #12, #13, #14, #21, #22, #25, #26, #27, #28, #32, #34, #35, #36, #39, #40, #42, #43, #44, #45, #47, #49, #51, #52, #55, #AV]. For example:

- The non-Hispanic white female owner of a WBE-, DBE-, UDBE-, and SB-certified professional services firm stated, "Prior to the 2007 recession, we were growing at about 1,000 percent a year, and then that hit, and it was kind of weak basically because some of the larger clients like Los Angeles Metro and California High-Speed Rail didn't pay their primes because they were scared, and the primes couldn't pay us. So, we had some issues with that. We're a little slow basically because of the mixture of the pandemic as well as the election that we just had. And that was based on fear on lead agencies not knowing what to do next." [#1]
- The non-Hispanic white male co-owner of a majority-owned construction company stated, "As far as growth with volume, I would say that it's probably a little bit above average. There's a lot of different metrics that enter into that category. Because we compete in a lot of different arenas when it comes to job size and stuff like that. But probably a little greater than most. We have a very strong management group. We have a lot of young entrepreneurial minded people that are coming into the business for us. I've got two sons that have joined in the last couple of years. So, they're growth minded, and there's a lot of opportunities. And so, diversification and growth are important to keeping a company strong and sustainable." [#2]
- The non-Hispanic white male co-owner of an SB-certified professional services firm stated, "I mean, we basically stayed pretty much within the percentages of contracts for the last three to four years and feel comfortable with that and I still have my same competitors that are bidding alongside of us." [#3]
- The Black American male co-owner of a WBE-, MBE-, and DVBE-certified construction company stated, "We're two words—a roller coaster. One thing about doing residential construction, which is the bulk of what we do, the economy determines how much you're going to work and when you're going to work. And the economy determines. Everybody has money, they would like to spend, but they're not so easy to spend it if the economy's bad. It's like a roller coaster. It's up and down. Is what I want? No, we'd love to get more consistency." [#5]
- The non-Hispanic white male representative of a majority-owned construction firm stated, "I think our growth is probably be considered a little slightly higher than average. I mean our multiple segmented of business units that we have. Our ability to work as a general contractor and a subcontractor and the mix that we have of public work and private work." [#6]
- The Black American male owner of an MBE-certified professional services firm stated, "Oh, we're certainly, we're way above average. We've done quite well for a company this young. So, when I started in November 2007, while I was still a federal employee, it remained dormant until July of 2009 is when I went fully active. So officially, from July of 2009 until

now, we had our first major contract in 2010. Didn't fill in any employees, but our first contract that we bought in January of 2014. So I would say in the past seven years, we've grown from just an idea to 90 employees, and we're growing rapidly as we speak." [#7]

- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "I would say our growth is slower than other businesses in the industry because other businesses are more established, larger and have more of a network than we do. So, our growth is a little bit stunted right now as just as a small firm, trying to deal with large government contracts and procurement and more. It's occupied a lot of our resources." [#8]
- The Hispanic American female owner of an MBE-, WBE-, and SB-certified professional services firm stated, "I feel that it's a bit slower only because I've never gotten alone or any funding, I've basically just been funding it myself. So, I feel that if I had a loan or some investment, I would have more employees, I would have a van and storage space. I think without initial... Having built it slowly with just, like I said, my own investment going into it, it's not rapid as I would like." [#12]
- The Hispanic American male owner of an uncertified MBE construction firm stated, "We've had some issues with breakdowns, and we've been hit with some fees and repairs and a lot of miscellaneous expenses that were not exactly in our budget. Yeah, we may get hit with a breakdown. We just got hit with a ticket at the California Highway Patrol Way Station. That was unexpected. We get toll fees, just little miscellaneous items, pretty often." [#13]
- The Subcontinent Asian American male owner of an uncertified MBE construction firm stated, "We did the best service for every customer, we treat every customer the same, with the dignity, with honesty, and also make sure that job is a hundred percent the customer satisfied. That's how we grew up slowly from two person, all the way to 20 employees one time we have before the coronavirus, our company was actually with... There was so much job. We cannot handle it." [#14]
- The Hispanic American male owner of a DBE-certified and uncertified MBE construction company stated, "It's a niche industry, and we have been able to grow over the years, but not the type of growth that I would have hoped for. We've had some difficulties just kind of in the market. I thought that the DBE status would provide more opportunities for us, and I would say probably that the largest one that we did get an opportunity on was the project I mentioned earlier that was just shy of \$1 million. But most of the other projects that we've picked up are the smaller amounts, \$20,000.00, \$50,000.00, \$100,000.00. And we don't have the opportunity to pick up too many all at the same time, y'know, when we bid." [#21]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "I'd say it's sort of flat. Hasn't really grown that much. I started out as a sole proprietor and I'm a sole business, and I still am. I looked at a friend of mine who they wanted to kind of build a partnership. We didn't do that. And if anything, it's gotten smaller, I think. It's declining. I think it's a combination of the work is changing, and I might not be marketing as rigorously as I used to. And maybe COVID too, a little bit." [#22]
- The non-Hispanic white male owner of a majority-owned SB-certified construction firm stated, "During the last, what some people are calling the recession, we downsized quite a bit, then we've grown ourselves back during the last ten years." [#25]

- The Middle Eastern American male owner of a construction company stated, "I think we've done pretty well in comparison. Of course, there's a few that skyrocketed. And the most, the majority that are still struggling with the \$10,000.00 jobs here and there. But I think we've done well enough we're able to have million-dollar projects. Not many contractors are able to do that." [#26]
- The Middle Eastern American female representative of a majority-owned professional services firm stated, "Actually not early on. But over the last couple of years a little bit more growth oriented. It was kind of a midsize company and they wanted to keep it like that. So, they kind of stayed a very, what do you call it, with the same clientele and the same product. But then just four, five years ago they started really growing inorganically. They bought a few companies and that's where this growth started. And now they plan even further growth. So, double up their revenue in five years, something like that." [#27]
- The Hispanic American male owner of an uncertified MBE construction company stated, "I'm going to say in 2004 to 2007, somewhere around there, I think, we did [grow]. On that time, we did have, like, about, well, about 25 employees. But economy went down and all this stuff, and so sometimes we get hurt because actually sometimes you feel like the company is blooming and blooming and you have another equipment, and you buy more equipment and very soon, I mean, I own my own equipment, basically, my own, right now free and clear. But in the past, I did make a mistake because the economy was going really good and we almost went into the hole, when a lot of people didn't. Finally, we came back, you know. We're still running, we're working up again, you know? But so, that's how we've been steady now." [#28]
- The non-Hispanic white female owner of a DBE- and SB-certified and uncertified WBE professional services firm stated, "It's very unpredictable. Like I can make X amount this year and then next year it can be half that amount." [#32]
- The non-Hispanic white male co-owner of an MBE-, SB-, and DBE-certified professional services firm stated, "I think our growth has been fairly steady, with the exception of the last year and COVID being the very kind of really steady growth period, right? So, we were typically averaging steady growth through the other years, and we kind of plateaued over the last year. We hired some people, and we lost some people, but we stayed pretty even over the last year. But, year over year growth has been pretty steady before that time." [#34]
- The non-Hispanic white male representative of a majority-owned construction firm stated, "We went from a small company that could maybe do a few-million-dollar jobs to now doing \$120 million jobs. I don't know how that compares with the rest of the industry." [#35]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "We've pretty much stayed the same all these years. Haven't really grown that much." [#36]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "Our growth, compared to competitors, has been abnormally stable. We maintain a philosophy that profits are shared amongst the full staff. In order to maintain that it's been a philosophy of actually quite low salaries that are made up with bonuses twice a year. What this allows is that during the slow times when there isn't much work, we're still able

to maintain our modest overhead, specifically our modest payroll, and not layoff individuals. But in the good times, there have been sizeable bonuses twice a year. So that's kind of a mechanical explanation as to how the books have worked to allow us to keep our staff. Over half of the staff are senior to me, so that's just a case in point that most of our employees have been around with us for their full career and I think they intend to stay until retirement." [#39]

- The non-Hispanic white male co-owner of an SBA-certified micro- and WBE professional services firm stated, "Right around '13 or '14, we brought in a partner and developed a below-water structural engineering inspection business as a part of our services. As it turned out, over a period of years, we were not - what's the right word? We were really, really successful, but we were not quite able to figure out how to make the leap from being just the three of us. So, our partner then, we split the business back up again so that it was just my wife and I." [#40]
- The non-Hispanic white male co-owner of an SB-, DBE-, and HUBZone certified construction firm stated, "Oh [our growth], it's been super-slow. Yeah, it's been really slow. And I think part of it is just we have trouble finding these contracts a lot of the times too. But also, we're kind of doing whatever we have to do to feed our families while we're trying to build this business, you know?" [#42]
- The non-Hispanic white male representative of a DBE-certified and uncertified WBE construction firm stated, "You know, it's difficult, because at first, you want to grow, and you want to be successful, and you want to have multiple trucks and multi - and it's a real challenge to have a number of employees. For five or six people, it gets a little different, and more challenging. And for the small businessperson that my wife is, it's a lot of learning stuff. At first, she was just an owner/operator, and the paperwork was easy, and the things were a lot simpler. Now there's certified payroll, things that you have to perform. Even when you don't - even though when you don't work on a project anymore, you have to still send paperwork in saying, we didn't work on that project. There's no compliance or whatever it is for - no work week or whatever. So, she's consistently doing a lot of paperwork besides the driving that she does, so it's really difficult to grow in effect where it's almost - she could probably stop driving and do paperwork all day long, but she enjoys driving so much that she wants to make sure she does that first, but it's a real challenge to do a lot of the paperwork afterwards. So, at one point, it's almost discouraging to grow too big, because it's so much responsibility, and there's so much insurance, and there's so much stuff, those kinds of things, that it'll overwhelm you at some point. She grew up until four, five, six, and seven employees before it was - sort of before it was DBE by herself, and then grew into those things. So, it has helped. But the reality is really - it's scary having so much liability for other people on the freeway work." [#43]
- The non-Hispanic white male owner of an SB-, DVBE- and Micro-BE-certified construction firm stated, "We're not growing as fast as we'd like, but we're paying our bills." [#44]
- The non-Hispanic white male representative of an SB-certified professional services firm stated, "I think the growth has been fairly steady." [#45]
- The Hispanic and Indian American female co-owner of an SB-certified and uncertified WBE construction firm stated, "The first two years, I'm going to say, were very slow only because

the industry didn't know who we were. They knew of us but didn't know us, if that makes sense, that we could provide the service that they were looking for. After the third year, then it became much easier to be awarded jobs. I would say that we're holding our own because our peers have been in business for over 15 to 20 years, some 30. I don't know of any other small company right now that's starting up in this industry. The other competitors, they're already set, but we're doing pretty good. I can't really compare that because it's like an orange and an apple." [#47]

- The Hispanic American female representative of a DBE-, MBE-, and WBE-certified construction firm stated, "I think we've been growing but slowly growing over the years." [#49]
- The Hispanic American male owner of a DBE-, SB-, and DVBE-certified and uncertified MBE professional services firm stated, "Usually, the firms would be much larger. So, as far as I know, I'm the only one of this size that does what I do." [#51]
- The Asian Pacific American male owner of an uncertified MBE construction firm stated, "I guess we're doing okay. I mean, we're not doing the best, but we're surviving." [#52]
- The Hispanic American male owner of a DBE-certified construction firm stated, "No growth, actually, so the issue comes in while we provide industry-trained evaluators, a lot of the transit providers are not willing to hire us. And so, they just leave that part of the contract open, and agencies really aren't calling them on it. So, it'll be part of the RFP that they have to do so many evaluations a month, but those aren't getting done, and nobody seems to care even they're taking DOT and federal transit dollars to provide those services." [#55]
- A comment from an uncertified WBE professional services firm stated, "It's difficult for small businesses to survive. [We] haven't been able to grow." [#AV8358]

6. Marketing. Business owners and managers mentioned how they marketed their firms, many noting the importance of online marketing and word-of-mouth referrals, especially in the private sector [#1, #2, #4, #6, #8, #9, #10, #11, #14, #16, #17, #21, #22, #23, #24, #26, #27, #28, #29, #30, #31, #32, #33, #36, #37, #39, #41, #42, #43, #44, #45, #47, #50, #51, #52, #53, #54, #55, #59, #61, #62]. For example:

- The non-Hispanic white female owner of a WBE-, DBE-, UDBE-, and SB-certified professional services firm stated, "I don't very much. The reason is because people know what I can do, and I have an amazing amount of repeat clients and they usually just... In fact, today, I just got an email that said, 'Hey, we've got you on this project, and I just thought you would want to know.' I was like, 'Okay. That was nice. Thank you.' So, I don't really do a lot of marketing. I'm trying to build my webpage a little bit more to add new things that have happened in the last few years. So, it's one of those things that I'm just doing internal changes." [#1]
- The non-Hispanic white male co-owner of a majority-owned construction company stated, "Well, on the Public Works side, right? Not any marketing is required. Just have a bond and some insurance and put a bid in, submit a bid. So, on the private side, the marketing is done through a number of ways. We belong to a Contractors Association; we get good exposure there. We do advertising in local papers and in regional construction periodicals. We

obviously have website that we promote, and we are on social media. So those are some of the ways that we market the company.” [#2]

- The Hispanic American male owner of an uncertified MBE construction company stated, "All my business get a referral and the repeating customers.” [#4]
- The non-Hispanic white male representative of a majority-owned construction firm stated, "We market ourselves through our website and through LinkedIn and other social media.” [#6]
- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "Yeah, so a lot of our marketing has been through word of mouth, from client to client, for us to be able to do most of our work till now.” [#8]
- The Asian Pacific American owner of a DBE-, MBE-, and SB-certified professional services firm stated, "Market mostly word of mouth, projects that we complete where people see our name then they'll give us a call. But right now, mainly we have one big client that's keeping us in the business for the past five and a half years, so there's one big client that feeds us the work mainly.” [#9]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "It comes to me via reference from someone I'm working for or off of my website or people contact me.” [#10]
- The non-Hispanic white male representative of a Native American-owned MBE-, SB-, and Micro-BE certified professional services firm stated, "We are selected through qualification-based selection, which is defined in the California Government Code.” [#11]
- The Subcontinent Asian American male owner of an uncertified MBE construction firm stated, "We go at Craigslist, and we go to local paper. We also advertise on our vehicles and also by word of mouth. That's like sure things we advertise, and then when people know us or we get the job done, they actually talk to others. You know, this company does a good job. This company, if you look at safety wise, quality of the job, and quality of material, they are standing by their job.” [#14]
- The Hispanic American female owner of a WBE-, MBE-, SCMSDC-, and DBE-certified goods and services firm stated, "All our advertisement, all our marketing has been just by what we provide in service. I had a client that was happy with the work we've done; they actually reached out to some of their alliances and told them this is a good organization to do work with. And that's how we've grown it. It hasn't been with a big marketing plan.” [#17]
- The Hispanic American male owner of a DBE-certified and uncertified MBE construction company stated, "Pretty much word of mouth. And we've put ourselves out there on the Caltrans website before, listing ourselves as available for contracts to be bid under. Flyers that we send, and emails, things like that.” [#21]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "Well I'm trained as a scientist, so marketing isn't my skill. And I kind of thought that my plan was I would do whatever I had to do for the first five years and after that I'll have moved into a bigger area, and I'm more trained in carbon, and I would market that way. And in fact, by that time, after I established myself - most businesses, if you have a good track record you get referrals and people will call you up. And I thought I would do that and I'd

start turning down work because I didn't want to work that hard. But that never happened. I always had to sort of like cast about and spend maybe even 20 to 30 percent of my time looking for jobs, as opposed to even just doing them. I eventually set up a website, I got business cards and at first I sent out a mass mailing of letters to all these industries but that didn't work very well. And I realized quite quickly that people weren't that interested in my service because it was interesting, maybe, but it wasn't necessary for their businesses unless they were being sued or they had to get a permit." [#22]

- The Subcontinent Asian American male owner of a Micro- and SB-certified and uncertified MBE construction firm stated, "The word of mouth of the people that I know who have spread - or who have talked about my services to their friends and their colleagues and so on. And that has been usually the successful method that I have come across." [#23]
- The Hispanic and Native American male owner of a DBE-, 8(a)-, SB-, and MBE-certified construction company stated, "There's not really a marketing component to our strategy. And there never has been, honestly. I know a lot of people because I've always been pretty active in the industry - and I mean, not just the DBE side but the non-DBE. When I was president of the associations that we belong to I got to know a lot of people that were the heads of big companies that are around the Bay Area. O.C. Jones to Ghilotti Brothers. There's a lot of construction in all the Bay cities, all the popular ones. And so, I - kind of through word of mouth they all know me, and they've known of me. So, that's kind of how we - I mean, honestly, all that's really not as relevant as your price." [#24]
- The Middle Eastern American male owner of a construction company stated, "So far we've been word of mouth. And to survive 12 years on word of mouth that's something to be proud of. But we had the website. We did the flyers and the business cards. We did all that we can to spread the word. But then again the word spread enough that we were just surviving on word of mouth." [#26]
- The Middle Eastern American female representative of a majority-owned professional services firm stated, "A lot of times we partner with bigger firms. In fact, we're not - I mean we're known in several areas especially transit. Everybody knows us. But then there are some other areas that we like to advertise. But they know us because we've done work here for a long time. We've been in this market. Mostly word of mouth. We don't really do any special marketing or anything like that." [#27]
- The non-Hispanic white female co-owner of a majority-owned construction company stated, "A lot of it is reputation, 31 years. We do advertisements, you know, on - you know, I pay a person who keeps up our website, sometimes Yelp, I'll, you know, jump into that and just do some clicks or something, to see if that could help us get a little bit more out there." [#29]
- The non-Hispanic white male co-owner of a majority-owned professional services firm stated, "Mostly it's repeat clients that we've had over the years." [#30]
- The male co-owner of an uncertified WBE professional services firm stated, "Large parts, website; I've gotten into some local magazines and newspapers. And then, just when I can, like, sponsoring events at local schools, fundraisers, get my name out that way in the community." [#31]

- The non-Hispanic white female owner of a DBE- and SB-certified and uncertified WBE professional services firm stated, "I really don't market myself anymore because I have plenty of return clients that keep me busy enough. But in the beginning, I would like cold call or send my flyer to people. But yeah, I haven't had to do that. I get a lot of return customers." [#32]
- The non-Hispanic male owner of a majority-owned SB-certified construction firm stated, "Word of mouth. References. I've done a lot of soliciting myself. I've had flyers mailed. I drop off flyers and business cards and shake people's hands. A lot of soliciting and also, referrals." [#33]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "We don't do that much marketing. We just mainly have a website. And it's pretty much word of mouth that people know about our company. And sometimes we participate in public opportunities like public jobs, county or the cities. We try to participate with those if possible." [#36]
- The Black American male owner of an uncertified MBE construction firm stated, "Word of mouth, website - I have a website. But mostly word of mouth." [#37]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "We've eliminated all marketing 'cause it only brought in bad clients. We're purely word of mouth." [#39]
- The Black American male owner of an SB- and MBE-certified professional services firm stated, "Well, generally, from word of mouth. I have my website. I've sent a lot of literature out - I mean, not literature, but I've responded to a number of RFPs and RFQs and I've been to a lot of meetings for various agencies. Metropolitan Water District in San Diego - San Diego has a couple of workshops - the Minority Business and Small Business Enterprises - I've been to those meetings in Long Beach and various other agencies." [#41]
- The non-Hispanic white male co-owner of an SB-, DBE-, and HUBZone certified construction firm stated, "In our area most people just - they just know us. You know, they know us from before, they know our reputation. But we don't really have any advertising that we do or anything like that." [#42]
- The non-Hispanic white male representative of a DBE-certified and uncertified WBE construction firm stated, "You know, now in a construction field, and as far as San Diego County, a lot of people know a lot of people. Everybody kind of knows everybody. So, she doesn't go out too much to bid with a lot of them, if you have multi-year work. I think after 18 years, she doesn't have to do as much advertising at all." [#43]
- The non-Hispanic white male owner of an SB-, DVBE- and Micro-BE-certified construction firm stated, "We've got a website. We've got a Facebook page. But basically, it's - and it's been tough the last year, but basically, it's face to face, trying to meet with primes, and letting them know what our capabilities are and what our specialties are." [#44]
- The non-Hispanic white male representative of an SB-certified professional services firm stated, "Obviously, during the pandemic it was a little difficult in that sense, but it's just keeping in contact with our current clients and working with them, and, a lot of times, new clients come from the relationships we have with our existing clients. But, when it's not

pandemic and there are conferences and/or meet-and-greets going on with the various BIA - Building Industry in America - and other industry functions, we like to go to those to get our name out.” [#45]

- The Hispanic and Indian American female co-owner of an SB-certified and uncertified WBE construction firm stated, "We have a website that needs to be curtailed a little bit better. We have been reaching out to primes and just sending them our history and experience. Any questions that they have, even if we're not on a job, we're just open to help assist them just to be remembered. It's just really word-of-mouth." [#47]
- The Hispanic American male owner of an uncertified MBE construction firm stated, "I do have a website. Nobody has contacted me off of that. Mostly in my industry it's word of mouth." [#50]
- The Hispanic American male owner of a DBE-, SB-, and DVBE-certified and uncertified MBE professional services firm stated, "For my big projects that I'm working on, the networking is usually how I establish my partners. So, people whom I've done business in the past. So, I don't advertise. I don't have any advertisements whatsoever. Usually, it's through networking. Then, prior contacts and specially when they change companies, we keep in touch. So, networking is really how I get my main core business going." [#51]
- The Asian Pacific American male owner of an MBE-, DBE-, and SB-certified construction firm stated, "Residential, I had to run ads with Angie's List. I was doing print ads. You're really out there, really waving your hand, trying to get business. It doesn't work that way in commercial and public. It'd advertised." [#53]
- The Asian Pacific American male owner of a DBE-certified construction firm stated, "Advertising and public work meetings, Caltrans emailed me invitations to bid. Internet." [#54]
- The Hispanic American male owner of a DBE-certified construction firm stated, "So I market it through digital marketing. We have a website. Obviously, we also try and get word of mouth out from the company that I do have. I go to tradeshow: Act, Cal Act, those kinds of things." [#55]
- The Hispanic American female co-owner of a WBE-, MBE-, Micro-, and SB-certified professional services company stated, "People in the community are like, we need you to do this, we need you to do that. And that's kind of how he got work through the door. And so up through the deep recession, in 2008, our company has really functioned in that capacity, by word of mouth and work being a local engineering firm, until the recession, and then in 2009 we branched into public works. Referrals, website, participation in local association like professional organization meetings online." [#61]

C. Ownership and Certification

Business owners and managers discussed their experiences with Caltrans', the State's, and other certification programs. This section captures their comments on the following topics:

1. Caltrans, State, and other certification statuses;
2. Advantages of certification;

3. Disadvantages of certification; and
4. Experiences with the certification process.

1. Caltrans, State, and other certification statuses. Business owners discussed their certification status with Caltrans' Office of Civil Rights, the State of California's Department of General Services, the California Unified Certification Program (CUCP), the California Public Utilities Commission (CPUC), and other certifying agencies and shared their opinions about why they did or did not seek certification. For example:

Thirty-three firms interviewed confirmed they were certified as DBE, MBE, or WBE with the Office of Civil Rights, the CPUC, or the CUCP [#3, #5, #7, #8, #9, #10, #12, #16, #17, #18, #19, #21, #23, #24, #25, #32, #33, #34, #38, #42, #43, #44, #45, #46, #47, #49, #51, #53, #54, #55, #59, #PT11, #PT5]. For example:

- The Black American male co-owner of a WBE-, MBE-, and DVBE-certified construction company stated, "We have a woman-owned business certificate and a minority-owned business certificate, and also disabled veteran. The female, the woman and minority for about three years now. The disabled vet for about a year." [#5]
- The Black American male owner of an MBE-certified professional services firm stated, "All the state and local stuff, we've been certified and it's currently certified." [#7]
- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "We have a minority business enterprise certification. We have a local business certification here in the County. We also have a small business certification in the County and I'm registered as a disadvantaged business enterprise with VTA, Valley Transit Agency. I had not transferred to Caltrans or to other agencies. But these things are things that we have to keep up to date constantly. So, it's work, keep up to date and keep registering for them. So that's what we have right now, but I have not checked on to see if they're all registrations are paid for and everything in the last two months. I have not checked to be honest with you. But I got to keep checking on them because they keep expiring. We knew about the programs, DVBE, MBE programs. We wanted to make sure that if we get certified and we at least get calls from the larger firms when they shop around for a minority business to be on their team, then we are on the list of folks. I believe we're only certified through VTA's supplier clearinghouse." [#8]
- The Asian Pacific American owner of a DBE-, MBE-, and SB-certified professional services firm stated, "Yes, a whole bunch of those [certifications]. So, we're DBE, and then we're DBE through Caltrans Small Business, and then SLBE through [our] city. I would say [we got certified] maybe four or four and a half years ago, almost five years ago. The CUCP is the DBE and the Caltrans, we got certification for MBE, and then for small business we went through California DGS, Department of General Services for small business." [#9]
- The non-Hispanic white male owner of a SB- and ELBE-certified professional services firm stated, "The business that I owned for 45 years was a small business and had small business preference." [#10]

- The Hispanic American female owner of an MBE-, WBE-, and SB-certified professional services firm stated, "[We have] a minority business enterprise certification and a woman owned business enterprise certification." [#12]
- The Black American male representative of a DBE-, WBE-, MBE-, SB-, and Micro-PW-certified small business development association stated, "We have [been] DBE certified." [#16]
- The Hispanic American female owner of a WBE-, MBE-, SCMSDC-, and DBE-certified goods and services firm stated, "A DBE, yeah. With CUCP. I stumbled on it." [#17]
- The non-Hispanic white female owner of a DBE-, SWBE-, and CBE-certified professional services firm stated, "We are a DBE, SWBE. That's at the state level. I believe I've been certified for three or four years with Caltrans." [#18]
- The Black American male owner of a DBE- and SB-certified and uncertified MBE professional services firm stated, "I hold certification as a DBE and that's for the state, for Caltrans. And I hold certification as an SB for state projects under Caltrans." [#19]
- The Hispanic American male owner of a DBE-certified and uncertified MBE construction company stated, "Yeah, we're certified as DBE, with the CUCP." [#21]
- The Subcontinent Asian American male owner of a Micro- and SB-certified and uncertified MBE construction firm stated, "I have a small business certification as well as a micro small business certification by the DGS California." [#23]
- The Hispanic and Native American male owner of a DBE-, 8(a)-, SB-, and MBE-certified construction company stated, "SB, DBE. I guess that's pretty much all of them. I've been in the AD program in the past. I've always been certified as a DBE at some juncture in those periods of time." [#24]
- The non-Hispanic white male owner of a majority-owned SB-certified construction firm stated, "Well, we are certified with Caltrans as small business and we're - so we're certified state small business and we're certified federal small business." [#25]
- The non-Hispanic white female owner of a DBE- and SB-certified and uncertified WBE professional services firm stated, "We got the DBE. Small business I got certified in 2010 with the DBE." [#32]
- The non-Hispanic male owner of a majority-owned SB-certified construction firm stated, "We're a small business for as long as I've been in business." [#33]
- The non-Hispanic white male co-owner of an MBE-, SB-, and DBE-certified professional services firm stated, "We are an MBE [and] DBE. we're also a small business enterprise. Seven years [certified]." [#34]
- The Black American female co-owner of a DBE- and DVBE-certified and uncertified MBE construction company stated, "The DBE, the DVBE for 12 [years]." [#38]
- The non-Hispanic white male co-owner of an SB-, DBE-, and HUBZone certified construction firm stated, "We have the small business enterprise for sure. disadvantaged business enterprise, and we're working on getting Hub Zone certification as well. Pretty much since we've registered. So, like three years." [#42]

- The non-Hispanic white male owner of an SB-, DVBE- and Micro-BE-certified construction firm stated, "We're registered as a small business, a micro small business, disabled veteran-owned business." [#44]
- The non-Hispanic white male representative of an SB-certified professional services firm stated, "We are a small business enterprise. Pretty much since the inception, which is just over 40 years now." [#45]
- The Hispanic and Indian American female co-owner of an SB-certified and uncertified WBE construction firm stated, "We're a small business enterprise." [#47]
- The Hispanic American female representative of a DBE-, MBE-, and WBE-certified construction firm stated, "We have the DBE, MBE and WBE for like five years." [#49]
- The Hispanic American male owner of a DBE-, SB-, and DVBE-certified and uncertified MBE professional services firm stated, "My company has certifications as a DBE with Metro and Caltrans. It has a certification with the state as a small business, as well as a service-disabled veteran business. Now, I have a federal service-disabled business through the VA. So, my business is certified in all of those categories Since I started, the first one was the state, both the small business and the disabled veteran from the state. Those were the first. Then the Metro was the next one. Then the VA, I believe, was the last one. Then those were - I pursued those right after founding the firm. Then, I've had them renewed ever since. So, pretty much from the beginning." [#51]
- The Asian Pacific American male owner of an MBE-, DBE-, and SB-certified construction firm stated, "We're certified DBE, SBE, MBE, and VSBE, very small business entity. [We got it at the] end of 2019 and 2020, and we just got our DBE and MBE two months ago." [#53]
- The Asian Pacific American male owner of a DBE-certified construction firm stated, "Certified DBE for 4 years." [#54]
- The Hispanic American male owner of a DBE-certified construction firm stated, "I'm a DBE. I'm a Hispanic-owned business." [#55]
- The Asian Pacific American female owner of a SB-, DBE-, and WBE-certified construction company stated, "SBE, WBE, DBE for at least 20 years." [#59]
- The male representative of a DBE-certified construction firm stated, "We have been a DBE since 1984." [#PT11]
- The Hispanic and Native American male owner of a DBE-, 8(a)-, SB-, and MBE-certified construction company stated, "Been in the DBE for 30 years. [We're an] 8a business." [#PT5]

Twenty firms interviewed indicated that they had were certified with another certifying agency [#1, #6, #11, #12, #16, #17, #18, #19, #38, #40, #41, #42, #56, #59, #61, #7, #9, #PT5, #PT9, #WT5]. For example:

- The non-Hispanic white male representative of a majority-owned construction firm stated, "We're a local business with the City of Los Angeles but that's about it." [#6]

- The non-Hispanic white male representative of a Native American-owned MBE-, SB-, and Micro-BE certified professional services firm stated, "We do through like the CPUC Small Business Enterprise, SBE and also, some agencies have what's called a micro business for a very small business, VBSE or VSBE or a micro business." [#11]
- The Hispanic American female owner of an MBE-, WBE-, and SB-certified professional services firm stated, "There were more specific ones, here we go. I'm pulling that up right now. So, I have SBE, EBE, BE and then BSBE EBE is Emerging Business Enterprise, so that's with the Department of General Services." [#12]
- The Black American male representative of a DBE-, WBE-, MBE-, SB-, and Micro-PW-certified small business development association stated, "About three years ago, my daughter joined with me and we got certified as a WMBE - Women Minority Business Entity. And I'm small business certified and certified as a micro-public works business. I'm certified with the - when I got SAM registered, at the end of the SAM registration, it had a link to Small Business Administration. And so, I linked there and got registered as a small business through SAM. And then, when we were looking at doing the MBE, I think the - I forget what website we were on, but WMBE was one of the choices so, we certified as a Woman Minority Business Entity. Got that certified. We're still in the process of doing the EDWOSB. We were certified as an EDWOSB, but they switched up on us because we were self-certified. So, we're in the process of trying to get third-party certified right now." [#16]
- The Hispanic American female owner of a WBE-, MBE-, SCMSDC-, and DBE-certified goods and services firm stated, "I have certification with SCMSDC and the Women Business Enterprise - WBENC. With women - with WBENC I've only been certified since 2015. With SCMSDC I would say I've been certified since 2006." [#17]
- The non-Hispanic white female owner of a DBE-, SWBE-, and CBE-certified professional services firm stated, "We also are certified with L.A. Metro with their DBE - not DBE. It's their small business certification, I believe. Meaning they don't actually utilize gender or ethnicity. They utilize, I think, dollar amount and revenue-type of thing." [#18]
- The Black American male owner of a DBE- and SB-certified and uncertified MBE professional services firm stated, "And I hold certification as an LBE for the City of San Francisco. And I hold some kind of certification, I have offices in San Francisco and Oakland, and so I hold some kind of - when I say I I'm talking about my office, we're a corporation. I hold certifications from the Port of Oakland and the City of Oakland and Alameda County, as well as LBE for the City and County of San Francisco." [#19]
- The Black American female co-owner of a DBE- and DVBE-certified and uncertified MBE construction company stated, "The DBVE was the easier certification, was definitely less paperwork. The DBE had - it was more robust paperwork. It was definitely more, but the good thing about the DBE is now we have all the cities and counties that kind of respect it, so to speak, and hold it as a gold standard. So, when you do go for the local certifications, it's easier to get because you've already been vetted through Metro." [#38]
- The non-Hispanic white male co-owner of an SBA-certified micro- and WBE professional services firm stated, "We are registered with the SBC as a micro-enterprise woman-owned business, but that's just with the Small Business Administration. We don't qualify - we qualify for a state except that we don't have the correct ethnic background. We are

registered with the Small Business Administration as a woman-owned microenterprise. We don't qualify with Caltrans or State Parks or any of the state agencies as a woman-owned business because we're not ethnically - we don't have the right ethnicity in order to qualify. The only ones that we're aware of are the disadvantaged designation. We don't qualify as a woman-owned business in California because my wife owns the business, but she is not similarly qualified in the way that I am. In other words, she could go away, and I could still be in business. But it was the issue of who's really in control. I'm not quite sure how that works." [#40]

- The Black American male owner of an SB- and MBE-certified professional services firm stated, "I'm certified as a small business enterprise with the federal entity as well as the state entity, and I'm a minority business enterprise with the Supplier Clearinghouse, which is the entity that certifies for the public utility. And I was hoping that would be accepted for all of them, but it's not. And it's a real quagmire, you know, to - it's really difficult for a really small business to develop the relationships with the various agencies and it's been a nightmare. Only for the Supplier Clearinghouse, 'cause with that one, there was so many questions associated with my being Black and being able to prove that I was Black, it was almost ironic. But I could understand it afterwards, because there's so many Black people here from other countries and they may never have been - their ancestry isn't based here, okay? And so, I can understand it, but it was a nightmare trying to get that paperwork to prove that I was Black. And also, even with the - well, that's about it. That was the only one I had a problem with. that was the only one I had a problem with. The other is a micro business, you know? You can look at my tax statement and my income and tell that I'm a micro business. If you don't have income - a greater income than \$75,000.00 in your business, that's not very much money." [#41]
- The non-Hispanic white male co-owner of an SB-, DBE-, and HUBZone certified construction firm stated, "Our company is placed in a - it's in a Hub Zone, so the majority ownership reside in a Hub Zone area. A Hub Zone is a set-aside for areas that face economic hardship because there's not a lot of industry there. [We have] the small business enterprise for sure. Disadvantaged Business Enterprise, and we're working on getting Hub Zone certification as well. So for that one [Hub Zone] we're saving up to pay a lawyer to do it, 'cause it's very difficult." [#42]
- The Black American female owner of a DBE-certified and uncertified WBE and MBE construction firm stated, "I'm certified with BART and they're going over my recertification as we speak." [#56]
- The Asian Pacific American female owner of a SB-, DBE-, and WBE-certified construction company stated, "I used to have everything. Los Angeles Small Business, LSB something. So, we go through... We spend a lot of money, go through certification. It's not worth it. Because it's... I'm not a big company and all our employee are part-time. But we spent so much time... We knew the mid of regional and then keep it renew. So, I dropped off from Wheat Bank. SBE, WBE, DBE." [#59]
- The Hispanic American female co-owner of a WBE-, MBE-, Micro-, and SB-certified professional services company stated, "We're a woman-owned small business We're all small business micro and we're women business enterprise and minority business enterprise. Since 2012, so nine years." [#61]

- The Black American male owner of an MBE-certified professional services firm stated, "[We've had our] minority-owned business certificate since about 2010. That's another way of getting small businesses started. That's one of the ways that I got started was through that 8a program." [#7]
- The Asian Pacific American owner of a DBE-, MBE-, and SB-certified professional services firm stated, "The CUCP is the DBE and the Caltrans, we got certification for SMBE, and then for small business we went through California DGS, Department of General Services for small business." [#9]
- The Hispanic and Native American male owner of a DBE-, 8(a)-, SB-, and MBE-certified construction company stated, "Been in the DBE for 30 years. 8a business." [#PT5]
- The male owner of an LBE-certified construction company stated, "We have a local business enterprise certification for Los Angeles." [#PT9]
- The female owner of a DBE- and WBE-certified construction firm stated, "I have chosen to be certified by the San Mateo County Transit Authority as the certification process within Caltrans is far too lengthy and cumbersome. San Mateo Transit runs a much more efficient DBE certification program." [#WT5]

Six firms interviewed were not certified but are in the process of applying [#11, #23, #29, #56, #AV, #PT12]. For example:

- The non-Hispanic white male representative of a Native American-owned MBE-, SB-, and Micro-BE certified professional services firm stated, "[The owner] wants to get the Caltrans certification." [#11]
- The Subcontinent Asian American male owner of a Micro- and SB-certified and uncertified MBE construction firm stated, "I thought about getting certified as a DBE. However, I'm - I have still only collected all the documents and I'm still in the process of - I haven't applied or done anything about that. And that's primarily because of the Covid market. I'm still trying to decide based on this." [#23]
- The non-Hispanic white female co-owner of a majority-owned construction company stated, "None of those, at this time. We did seek minority, last year. Right before Covid broke out, the corporation hired an attorney to help us navigate through the paperwork, and because of the shutdowns and everything that was going on, you know, it's a large amount of paperwork that has to go over. And if it's not turned in within a certain period of time, you almost have to start over again. So, I jumpstarted that twice." [#29]
- The Black American female owner of a DBE-certified and uncertified WBE and MBE construction firm stated, "I am DBE certified proof through BART and not through Caltrans, but I'm about to go through that process of paperwork with like the lady said." [#56]
- A comment from a majority-owned professional services firm stated, "[It's] hard to get certifications and working with the SBA it's very time consuming." [#AV3]
- The male representative of an uncertified DBE and MBE firm stated, "I was originally set as a sole proprietor, but due to AB5 and the Dynamex decision, we ended up incorporating, therefore lost our DBE and are in the process of renewing it. But seeing how I'm now having

a first time to deal with this transition, is there a specific individual that I can speak to that may be able to help me facilitate the application process or better explain to me what is needed so I can obtain my certifications? I was originally a small business, minority owned DBE, and I wish to reinstate those with my new corporation in order to continue the original standing, which I already had." [#PT12]

Sixteen business owners and managers explained why their firms had not pursued

certification. Many uncertified firms were unaware of the certification or its benefits [#4, #13, #14, #22, #26, #28, #30, #31, #32, #33, #35, #37, #47, #50, #52, #AV, #PT2]. For example:

- The Hispanic American male owner of an uncertified MBE construction company stated, "I don't have any of that stuff. I belong to what they call 'other'. The Portuguese people used to be considered part of the minority people and they decide to took it away. And I could bet that...white, male, I lose it. That could be 22 percent I haven't made; I still lose the contract." [#4]
- The Subcontinent Asian American male owner of an uncertified MBE construction firm stated, "To be honest with you, no, I don't have a such a thing because we worked for the US military for about 11 years oversea and our job was mainly overseas. So, since we came back from oversea in 2016, we're just doing a local work for small companies, some small residential and small commercial and non-profit organization companies." [#14]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "I may have applied for a small business certification some time ago. But I don't know the status of it today. Probably over ten years ago, though. I don't know if I completed it. Like I said, I never got a certificate or anything. How would I find out? Maybe I'll just do a search on the thing." [#22]
- The Middle Eastern American male owner of a construction company stated, "Just a small, it's a small business. Never applied for that certification." [#26]
- The Hispanic American male owner of an uncertified MBE construction company stated, "You know, I thought about getting certified, but I haven't done it yet. We always talk about that and minority preference and all this stuff. And I really thought about it. I mean, I'm more than eligible, you know? But I haven't done it. But who knows? I mean, I think it's probably good thing to have. You never know when you need it." [#28]
- The non-Hispanic white male co-owner of a majority-owned professional services firm stated, "We haven't categorized [ourselves] as any of those. We've had enough business over all these years from our previous clients and the people that we know that we haven't had to find, y'know, put that." [#30]
- The male co-owner of an uncertified WBE professional services firm stated, "We haven't [applied]. It's something that we've talked about doing, doing a DBE, but we just, we haven't got around to doing it. Like I said, it's, you know, with our current staffing, promoting ourselves as a DBE and trying to get more public works would not really be something we could take on a whole lot of right now, so we just haven't invested the time in doing that." [#31]

- The non-Hispanic white female owner of a DBE- and SB-certified and uncertified WBE professional services firm stated, "I didn't really see a reason. I haven't really had a lot of projects with that that need that if any. Like one I think was requested [that we have a certification]. And so, it's just more paperwork [to get certified as a WBE]. To me that DBE seems to be the most valuable. And then I have the SBE and then there's an SBE dash public works, PW. I have that as well." [#32]
- The non-Hispanic male owner of a majority-owned SB-certified construction firm stated, "You know, I haven't really thought about it 'cause I just don't feel like I - I just don't feel like, maybe, that I - my dad's Garcia. My dad has the last name of Garcia. My mom's last name is Mackey. I just - I'm not bilingual. I don't speak Spanish so, I just kind of feel like I'm more, I don't know, Caucasian than I am Mexican. That's my only thing about doing that [getting certified as an MBE]. And I don't know if it would be beneficial for me to do that anyway. I don't know. You know, being a minority versus a small business - is that - do I get a little bit better of an advantage as a minority business or a small business or are they kind of equal?" [#33]
- The Black American male owner of an uncertified MBE construction firm stated, "No, I considered that way back in 2009; it was just so much paperwork that I just said, boy, I'm so tiny, such a small company, I'm going to put all of this time into creating all this paperwork and then get me carrying worker's comp and all of these other expenses? I don't even have a contract yet. So, I was turned off by the amount of paperwork to become qualified - just to say that I'm a minority-owned business and anybody that looks at me can see I'm a minority and you want me to certify that I am a minority, so I was like, 'Forget it.'" [#37]
- The Hispanic and Indian American female co-owner of an SB-certified and uncertified WBE construction firm stated, "I tried for the WBE, I went through the application, but they denied me because I don't have a contract license. My husband carries the contract, so that was one of their reasonings for that." [#47]
- The Hispanic American male owner of an uncertified MBE construction firm stated, "We're willing to do it. We haven't done it yet." [#50]
- The Asian Pacific American male owner of an uncertified MBE construction firm stated, "I didn't know about it. as far as being labeled like that, minority, I didn't even know such a thing existed. I know the women-owned business existed, because from the lady I work with, but I didn't know you could do that, to be labeled." [#52]
- The CEO of a WBE- and MBE-certified goods and services firm stated, "I started with my DBE. I didn't finish it because I've heard, you know, you don't need to have certification in order to be working with Caltrans. But at the same time, I want to see if it's alright before I do it, because there is a lot of paperwork and I have to devote part of my team just to do that. I have to make sure at least there is something, because I have tried networking in this area for a long time and I didn't get any results, so I kind of hesitate to apply for it. " [#PT2]

2. Advantages of certification. Interviewees discussed how DBE/MBE/WBE certification is advantageous and has benefited their firms. Business owners and managers described the increased business opportunities brought by certification [#1, #5, #8, #9, #11, #12, #16, #17,

#24, #25, #32, #35, #38, #40, #42, #43, #45, #47, #51, #53, #59, #61, #AV, #FG2, #FG4, #PT2].
For example:

- The non-Hispanic white female owner of a WBE-, DBE-, UDBE-, and SB-certified professional services firm stated, "[My DBE certification through CUCP] was the only way to be able to have a somewhat level playing field with the big guys. Because of the requirement, and it depends on what agency it is, but because of the requirement, it gives us a chance to get work because it's a requirement." [#1]
- The Black American male co-owner of a WBE-, MBE-, and DVBE-certified construction company stated, "A lot more people are calling that ask us should be a part of a project, but it hasn't really paid off. I haven't secured a contract because of it." [#5]
- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "I see there's benefits. I think my experience has been a little difficult in getting the registrations and maintaining them. There's been a bit of difficulty. They expire and they require us to continuously provide a lot of information to it. Maybe that's just something we need to put out as a higher priority or have somebody assigned to it. But I think that's been a bit of difficulty. But I see the benefits of being certified and registered with the current system that we have. Our primes are looking for subs to bring on. So yes, I do see the benefits in that." [#8]
- The Asian Pacific American owner of a DBE-, MBE-, and SB-certified professional services firm stated, "I haven't seen the benefits yet, yet, no. It gets me in the door to... A couple of months ago, through SANDAG, a big firm came, and they asked me to be a part of the team and utilize my DBE to qualify for some of the percentage requirements for the project. So, I was able to get on a team because of my DBE, but no, I have not gotten any work because of my DBE." [#9]
- The non-Hispanic white male representative of a Native American-owned MBE-, SB-, and Micro-BE certified professional services firm stated, "Well, before we were being a DBE, they needed to fill... They wanted us on the team, but they had to hit their percentage of DBE allocation. And so, at that time we weren't a DBE. So, we were iced out of that opportunity, many opportunities." [#11]
- The Hispanic American female owner of an MBE-, WBE-, and SB-certified professional services firm stated, "Well the recognition, and also I think it opens up the, if there's ever any minority, not necessarily requirements in a contract, but I just think it gives me more opportunities to meet diversity requirements for certain jobs." [#12]
- The Black American male representative of a DBE-, WBE-, MBE-, SB-, and Micro-PW-certified small business development association stated, "When you have a contract - I'm familiar with the 5 percent or the 10 percent advantage on getting a contract. For me, it's two things. I want to be able to show my clients what it is and how to get there. I feel that as we go after a contract to help assist small businesses - and we're a small minority business - the fact that my business is minority certified should give me a wedge over another business that's coming in that doesn't have that same certification. So, I can't say that I've experienced - I'm not aware that I've experienced yet a clear advantage because I'm certified, but I'm aware of the advantage the certifications have." [#16]

- The Hispanic American female owner of a WBE-, MBE-, SCMSDC-, and DBE-certified goods and services firm stated, "I did that [become certified] because for my industry it was male-dominated at the beginning, and so I always felt that there was only one of me and I needed to concentrate where my clients were. And so, for me to be - to get certified as a woman I didn't have the time because I had little kids. I mean, when I started the business, my son was six months old and my daughter was six. So, I needed to concentrate in areas that I knew that I was going to be able to minimize my efforts. And so, I thought getting minority business could actually open my door to much more of a broader opportunity than just closing it only just to women. So, I went ahead and did minority first and that's - and then later, after that, when I had the time, when I was able to put more resources into it, then I did the women. Well, that's one of the bigger reasons how I've been able to get some of these contracts with MTA and stuff like that, because I am a DBE. So, it opens up a door, an opportunity. It gets you - you're able to get knowledge of some of the things that are coming down the pipeline." [#17]
- The Hispanic and Native American male owner of a DBE-, 8(a)-, SB-, and MBE-certified construction company stated, "We have so many solicitations every day. We have our own resources. But I mean, literally - because we're registered as a DBE, we literally get them from all directions all the time." [#24]
- The non-Hispanic white male owner of a majority-owned SB-certified construction firm stated, "Once in a while, if there's an emergency project, and it's an emergency bid where you just bid the markups and there's a tie, a lot of times they'll flip a coin, unless it's a tie between a small business certified and somebody that's not small business certified. They'll give it to the small business." [#25]
- The non-Hispanic white female owner of a DBE- and SB-certified and uncertified WBE professional services firm stated, "I appreciate the DBE thing and that's why I'm going this interview because so helpful in allowing me to work from home and be there for my family. I am so thankful for it. And I'm starting to get a lot more projects where I'm not using the DBE. But I still think it's a good 40 percent of my work is DBE, and it helps me get on teams and doing those bigger projects so without the DBE I don't, wouldn't nearly have as much work I don't think. Having the DBE is I think super important. I mean people can look at it differently and say it's like reverse discrimination. But honestly in the beginning I had a really hard time like checking the box when I first applied for DBE saying that I was at a disadvantage. But it became more clear to me through the years that I am, the expectation that women are supposed to do both and try to balance it all. We are definitely at a disadvantage because we want to be career women but it's hard. Like if you didn't have the DBE, I think I would be getting less work, not as successful at being a civil engineer from home." [#32]
- The non-Hispanic white male representative of a majority-owned construction firm stated, "If you're not a DBE and you're just a small business, no one uses you. Because we'll use a DBE company over a small business. Even if they're lower bid. We have a lotta small business companies that are struggling because the DBE goals are so high that you just skip over all those people." [#35]

- The Black American female co-owner of a DBE- and DVBE-certified and uncertified MBE construction company stated, "I think it definitely got us opportunity to do a lot of good business and meet a lot of great contractors that we still have relationships with, yes." [#38]
- The non-Hispanic white male co-owner of an SBA-certified micro- and WBE professional services firm stated, "For a number of years, we were real active going after and obtaining work on the - we call it MOTEMS, Marine Oil Terminal Engineering Maintenance Systems, where the oil companies owned piers over which they would deliver product, oil or gasoline or something like that. California has a requirement that they provide inspection and reporting. We got into sync on being repetitive with a number of the oil companies. The attraction to them was that we were a microenterprise. My wife owned the controlling interest and ran things. So, we would get included and we made them look good because they were hiring someone like us. So, we did have a competitive edge there because, when you go up against a multi-national or a nationwide company that provides a similar service and then, here we were able to provide equal or better than at our size. The better-than part was that we were much more personable about the way we would do the inspection work." [#40]
- The non-Hispanic white male co-owner of an SB-, DBE-, and HUBZone certified construction firm stated, "I believe SBE is a self-certification, and we're working on - on top of that we're working on the Hub Zone also, which is - I mean that's a federal thing. I guess that's probably why you don't have as much. But I know a lot of these agencies that get federal funding are required to use that. It's one of the least used. So even state agencies that have federal funding are required to do set-asides for that." [#42]
- The non-Hispanic white male representative of a DBE-certified and uncertified WBE construction firm stated, "It absolutely does [bring in more business]. She's built a reputation with a lot of these prime contractors, and so they know that she does a really good job, and shows up on time, and we know what we're doing. So, they invite - encourage and invite her to bid a lot. We were a rental for a while, and then the DBE actually really helped us kind of get in the category where we could actually participate in being the bid, you know, securing work. Right now, the rental business is really hard, because they'll just rent you the day they need you, or then they don't need you, they don't work you. But securing some work with contracts, it kind of helps them find work to keep you busy the whole time, which is super helpful. It's just - it lets you have a little more security about you're going to work, you're going to have work down the road, you can hire people, to promise them they could feed their families and what not, you know." [#43]
- The non-Hispanic white male representative of an SB-certified professional services firm stated, "I think it sets us apart a little bit, both in a good way and in a bad way, as I previously mentioned. In the bad way, I feel like some agencies or clients feel that being an SBE, 'Are they capable of getting the work done?' versus other times, there are some requirements on some public agency fees that require a certain percentage of SBE or DBE on there." [#45]
- The Hispanic and Indian American female co-owner of an SB-certified and uncertified WBE construction firm stated, "It's been beneficial because as time goes on, the percentage of the agencies give the prime a percentage to have smaller and disadvantaged businesses with

that certification, and we have been awarded a couple of jobs because of that, which is pretty awesome.” [#47]

- The Hispanic American male owner of a DBE-, SB-, and DVBE-certified and uncertified MBE professional services firm stated, "They have been useful in the sense that I can receive requests for bids. So, they have been useful from that perspective, which is fantastic. The certification with the State, again, under that program, it was very - it really didn't bring any advantage and they were not transparent. So, I don't know if when they were computing their prices if they were giving any type of real advantage. But regardless, it's been great in at least I get the invitations from contractors. My problem is that the majority of the invitations that I receive are for construction related, which at this point, I'm more of a professional service provider.” [#51]
- The Asian Pacific American male owner of an MBE-, DBE-, and SB-certified construction firm stated, "Those inclusion programs that a lot of these public work jobs have. For example, the job that we're bidding on right now for the California State Hospitals. Let's say I wasn't the lowest bidder, but let's say that I have a five percent advantage over the lowest bidder. So, they would take my price and lower it an additional five percent, and if I become the lowest bidder, I get the job, even though I was the highest bidder from the get-go. But because I'm DBE, I have a five-percent edge on this job. So, I can bid five percent higher but still get the job because I'm DBE certified.” [#53]
- The Hispanic American female co-owner of a WBE-, MBE-, Micro-, and SB-certified professional services company stated, "Because of the SANDAG program, the DBE certification actually has been very useful in getting work, in winning work. Because the DBE is a requirement for federally funded projects. For a good faith effort, you have to actually award... The prime has to award a certain percentage of the work to a DBE firm.” [#61]
- A comment from a non-Hispanic white DVBE-certified construction company stated, “It’s very hard to get started in construction. Appreciate that they honor being a Disabled Veteran Business Enterprise.” [#AV35]
- A comment from an uncertified MBE and DBE-certified Native American-owned construction firm stated, “Because of our special treatment as a DBE the doors are pretty open to us. Without that certification this industry is hard to crack.” [#AV257]
- A comment from an uncertified MBE and DBE-certified Subcontinent Asian American-owned professional services firm stated, “Being certified by DBE helps us.” [#AV36]
- A comment from a WBE- and DBE-certified professional services firm stated, “Because I have the DBE certification, that allows me to get work and has been helpful. Otherwise I think there would be barriers.” [#AV194]
- A comment from a majority-owned professional services firm stated, “California is a really good place for small and emerging businesses. We started 7 years ago as an emerging business and has outgrown the small business.” [#AV242]
- The non-Hispanic white female representative of a construction business advocacy association stated, "When I started, what it actually allowed for me was to bid contractors and they would waive like bonding requirements and things like that, because they wanted

to meet their DBE goals and so they wanted me to be on the job. And that was a huge help because I don't think I had to get a bond until I was five years into the business. And now mind you, when it starts out, you start with 40,000-dollar contracts, then you get a 250,000-dollar and that becomes huge, and it's a building block. You do baby steps. So, for me, that was like the biggest advantage, and also the fact that they would talk to me and were interested in actually bringing me on in their jobs, figuring out, carving out some work that we were able to do, if it wasn't the entire electrical project, it would be a portion of the electrical project that was separable, distinct. I think it was a really good program. I think it's those kinds of advantages that having that requirement gives women and minority-owned businesses at least the ability to get some contracts. And then of course once you start getting work, then you get experience, and once you start getting experience, then you can start getting work based on your experience. But it's that chicken and egg thing. So, I'm all in favor for it." [#FG2]

- The Black American male representative of a minority business advocacy organization stated, "We have applied. We do hold certifications, both on the engineering design side and the construction side. I've never had a contract, I reckon, with Caltrans. It's always been with Metro, the local agency, which is working with Caltrans. What has worked well with the DBE? Well, being that there are goals involved, and there's not too many Black-owned engineering firms, I guess we get looked at quite often. So, it has worked." [#FG4]
- A respondent from a virtual public meeting stated, "OCR has an SDBE/SWBE certification, however, since these are state funded certifications there are no participation goals, incentives, or preferences given to them. That's why you should apply for DBE. That certification helps you participate in federally funded contracts." [#PT2]

3. Disadvantages of certification. Interviewees discussed the downsides to certification [#1, #7, #38, #43, #44, #46, #49, #55, #AV, #PT3]. For example:

- The non-Hispanic white female owner of a WBE-, DBE-, UDBE-, and SB-certified professional services firm stated, "My SB certification through Metro and Caltrans hasn't done me any good at all. Nobody's ever asked for it. The problem is that there is now a thought that Caltrans wants to change the rules to make larger companies still be able to get the very small business certification. So, we'll be out of... We definitely will not get any more work because of that issue. So, it won't matter to me because I won't work with Caltrans anyway, but the idea that it will hurt any business that wants to work with Caltrans. What they're doing is they're changing the amount of dollars that you make as your growth in a year, and they're raising it so they can get an extra 20 percent of the people in there. The problem is that that completely devastates our chances of getting work." [#1]
- The Black American male owner of an MBE-certified professional services firm stated, "If I haven't won anything, it's been just a complete waste of time. I mean, I went through all this rigamarole to get certified, and I haven't benefited one iota from it. So, what was the purpose of getting certified?" [#7]
- The Black American female co-owner of a DBE- and DVBE-certified and uncertified MBE construction company stated, "I work with other customers who work in the public sector, but because they're not a minority-certified or a DBE-certified, they have even less

paperwork than I do. So, I find that even when you're certified, you have additional pieces of paper because of the certification." [#38]

- The non-Hispanic white male representative of a DBE-certified and uncertified WBE construction firm stated, "We've learned to not participate in some of those bid opportunities because of that. I think that the prime contractors understand - the estimators and the bid people understand, but when it comes down to the project managers who are out there and tell you that there's work or no work, they don't understand the DBE process. So, like I was telling you, we got a certain percentage of work contracted to us, and the foreman or the project manager would say, oh, we don't need you tomorrow. We'll call you when we need you. Well, then you find out that that foreman owns a water truck, too, and has his water truck on the thing. And then you start saying, hey, you can't do this. But when you call around and tell people, like call Caltrans, and they say, hey, this is not our job, this is not our project, we're just over there, or - I said, well, I'll call so and so, or - you know? But it just never kind of materialized it, any of it, and I was just kind of beating my head against the ground, which was not fun at all." [#43]
- The non-Hispanic white male owner of an SB-, DVBE- and Micro-BE-certified construction firm stated, "Well, you know, a lot of the firms that the primes are looking for are disadvantaged and women businesses, so we're - and we haven't seen anything beneficial from the disabled veteran, because only Caltrans seems to use that as a percentage, but everything else, everybody wants something that they can use for multiple boxes. That is, you know, women, minorities, and other disadvantaged groups. So, it's tough to get on the teams and get work." [#44]
- The Middle Eastern American male president of an WBE-certified professional services firm stated, "No. So far, it hasn't [benefited my firm]. But, like I said, I was discouraged completely so, I didn't even try after that - after I saw how much paperwork and things you have to do. I just pretty much let it go. I only got one project about two-three years ago from community colleges. They were doing some remodel. I got a project from them." [#46]
- The Hispanic American female representative of a DBE-, MBE-, and WBE-certified construction firm stated, "It's funny because we do have the certifications. But I don't think as of today we ever won a project because of that. They do have like a lot of requirements for the DB - how is it? What's the - disabled veteran business enterprise. They do have requirements for those. This project needs to have three percent or five percent or whatever. But for the other ones it's only like a goal. Like if you do it, ok. If you don't do it, that's fine too. They don't make it like they have to. And I think that's one of the reasons it doesn't - at least it's not been doing anything for us all these years." [#49]
- The Hispanic American male owner of a DBE-certified construction firm stated, "Other than being a DBE with the one company no because, like I said, there's no incentive for them to use us. So, while I get - while I field calls about doing business as a disadvantage enterprise, I don't get any contract from it because they don't have to do that." [#55]
- A comment from a majority-owned professional services firm stated, "Since the mid 1960's and implementation of affirmative action, being a white male-owned business has made it extremely difficult to compete in those markets. It has constituted reverse discrimination." [#AV321]

- The Subcontinent Asian American male representative of an uncertified MBE professional services firm stated, "They just want our certifications, the prime just wants our certifications. There is no checks and balances with Caltrans to see that we are being treated normally." [#PT3]

4. Experiences with the certification process. Businesses owners shared their experiences with Caltrans' and the State's certification processes [#5, #8, #9, 11, #12, #16, #17, #21, #23, #25, #45, #46, #49, #53, #59, #AV, #FG3, #PT1, #PT3, #PT5]. For example:

- The Black American male co-owner of a WBE-, MBE-, and DVBE-certified construction company stated, "Very easy. We did all that online." [#5]
- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "It's kind of difficult. Yeah. I'd say it's quite difficult to figure out what to do, to figure out what to provide, go through everything, get it all established and maintain it. Yeah. I'd say it's quite difficult. I think the OSDS is harder, but they all are quite difficult." [#8]
- The Asian Pacific American owner of a DBE-, MBE-, and SB-certified professional services firm stated, "Oh man, oh, that was year one, six months into the business. I started doing the paperwork for it, and one of the qualifications for being a DBE is being Asian. Since I was a refugee coming over to the United States, I didn't have any paperwork and they said, well, how do we know that you're Chinese? And then I'm like, well, you can come here, and I'll speak Chinese to you, because there's no way for me to prove all that. But I had to circumvent [that by] getting my grandma's death certificate, [proving] my dad's Chinese. I had to do a whole bunch of stuff just to prove to them that I'm Asian. And then they had, I guess the caseworker come here to the office and interview me personally, took pictures of the office and stuff like that. So, it was very extensive process, but I did understand why it's so extensive is because they don't want fraud I guess, or they had fraud in the past. But yeah, it was a really complicated process. No, I mean it's there for a reason and everybody has to go through the requirements. I wouldn't make it easier. I think the process is fine, but the thing is, how many people that have DBE certification really get work. That's the stat I want to know. I don't know that stat, so I really want to know that stat. Is it worth it going to get their certification? For me, I haven't seen it yet." [#9]
- The non-Hispanic white male representative of a Native American-owned MBE-, SB-, and Micro-BE certified professional services firm stated, "I do have a comment. I think that their certification, [Caltrans specifically], is the gold standard. I think they do a very thorough job, and they do a good job. And what I base that on is I know people who have gamed the system and Caltrans caught them, and I liked that. And when Caltrans came through an audit to us four years ago, when the business first transacted because ours is a bona fide Native American[-owned firm]. The person who purchased the company hadn't made enough of the payments money-wise to pass. And it's legitimate, but I liked the fact that they went through everything, the books and everything because it really gave me a sense that it's a very legitimate. And so, it's one of those hard things that I talked about earlier that I say that's good. And so, I think the Caltrans system based on how they treated us and how we went through it was excellent and very hard to game it, which makes me as a taxpayer very happy." [#11]

- The Hispanic American female owner of an MBE-, WBE-, and SB-certified professional services firm stated, "It was time consuming, but it's not difficult." [#12]
- The Black American male representative of a DBE-, WBE-, MBE-, SB-, and Micro-PW-certified small business development association stated, "They were actually getting pretty good at it until Covid hit, and now, it's just hard to get a hold of somebody. You make the phone calls - they were thinking, 'Well, we're not working in the office.' And they'll e-mail us or something like that. So, I really don't feel fair to complain now, because I know there's a big problem with the Covid." [#16]
- The Hispanic American female owner of a WBE-, MBE-, SCMSDC-, and DBE-certified goods and services firm stated, "You're asked for more information. You're asked more detail about you as an individual and your taxes and stuff. So, it's a long process the first time. But then, after, because everything is there you just have to update it." [#17]
- The Hispanic American male owner of a DBE-certified and uncertified MBE construction company stated, "I would say it wasn't bad. Like anything, it's a lot of paperwork, but that's understandable. You're going through a certification process. It actually didn't take as long as I had thought it would, or they had said it would take. So overall my experience with the certification process was good. And so, as a new business owner, when I had somebody mention to me about the DBE status, I didn't even know anything about it. And then as I looked into it and researched it, and went through the whole process, it was so excited. I thought, 'Hey, this is gonna be great for us. It's gonna give us the opportunity to get some work.'" [#21]
- The Subcontinent Asian American male owner of a Micro- and SB-certified and uncertified MBE construction firm stated, "I would say the small business as well as the micro small business certification that I got was easy-peasy. I mean, I didn't fully understand what was the question referring to? I mean, there was no description of - there was no help box or - forgive me if I was wrong, at the time when I worked on the application, I couldn't really find much related information. Like, usually if you go to the IRS forms, they have explanatory pages attached to it, like what are they actually referring to? Let's say as an example address: Are you talking about mailing address here? Physical address? Business address? What kind of address? And this is just a very simple example that I am giving. Sometimes when the questions were there, I didn't fully understand what they were asking. That's why I was lucky to contact PTAC, who actually helped me get through the application. But once I started looking into the application with their assistance it was a quick 10-minute or maybe 15-minute run. And I got it done really quick. And so, the process itself has been really simple, very easy. I wish they had put a little more help notes or maybe additional information there, what kind of information they're looking for, as I said. And that's for the small business certification." [#23]
- The non-Hispanic white male owner of a majority-owned SB-certified construction firm stated, "It's a pretty easy process. It's pretty straightforward because you're, I mean - you're, of course, showing them the financials." [#25]
- The non-Hispanic white male representative of an SB-certified professional services firm stated, "No, [it's not difficult to] maintain it. I know just figuring out the paperwork and

everything on the initial certification was a little bit more challenging. But, because it's a renewal, basically, of it, we've done it before, so it's second nature now." [#45]

- The Middle Eastern American male president of an WBE-certified professional services firm stated, "The way I remember it was if you were like, a corporation and you wanted to get the certification, there was a lot of paperwork, a lot of - very hard, very difficult. They ask for a lot of information. But if you were just like, a couple working out of your garage, it was very simple. That's what I remember. They wouldn't even need too much information. It was very complicated for us because we were a corporation back then as well, and then, they needed track record, all kinds of information we had to put together. And I was surprised. If I told them that we just started, then they would just kind of stop right away." [#46]
- The Hispanic American female representative of a DBE-, MBE-, and WBE-certified construction firm stated, "It was hard. It was a lot of paperwork." [#49]
- The Asian Pacific American male owner of an MBE-, DBE-, and SB-certified construction firm stated, "The SB is super quick, and I did that through the DGS portal. That was pretty quick. You know what is really a long process is the DBE. And I started that last year in March, on the Metro website, and then I just finished it, like I said, like two months ago. 'Cause it's just one of those things you just can't sit down in one shot to do it, y'know. And you start it, but it's a lot of requirements. You gotta get stuff notarized, and then you have to get bank statements, and work with your accountant to prepare all these tax information they want. So, it's a lot, and it's really involved." [#53]
- The Asian Pacific American female owner of a SB-, DBE-, and WBE-certified construction company stated, "We are in the renew for the last 25 years, so to us, it's not hard. A thing is my son was born in 1994. I go into labor [with him]. I have some issues so in the very last minutes, they have this operation, a C-section. I was applying for Caltrans minority business certification [at the time]. They have an African American man as a consultant doing the site visit to verify the minority ownership of the business. At that time, my manager in the office say, [the owner] is in hospital. She has a, deliver a baby. But I say, I would like to meet this man. And because I am the owner of [my company], right? [The name of the firm] sounds like a white man and I am an Asian woman. So, my manager asked me. Because in Asian culture, when you deliver baby, you don't shower. You try to keep your energy. Because the older generations believe when you shower, you take your energy away so you should rest, so not catch cold. So, this man, I remember his face. He comes to hospital, and I have to take a shower because I am going through the labor, then go to the operation under, they put me to sleep right? They put me to sleep, so when I wake up knowing about all this, I take a shower and ready to see him. And I did. And this is Caltrans. So, I'm not complaining. I just say, it is very serious from their certification I appreciate that, because I'm no white man on [my company], if I'm a Black man, Asian man, any kind of man, Mexican or Hispanic, or whatever, it would be easier. But I'm an Asian woman, and he insists to see me, he is doing the job. He's doing his job. So, I talk about this experience. I do appreciate the hard work for Caltrans to hold certification serious. And I do understand a lot of people cheat and whine and say they are the owner of the business, and they don't do anything they just look pretty at the office. So, I understand that I have to prove." [#59]

- A comment from a non-Hispanic white WBE professional services firm stated, “The only problem we have is our business is small. We have to file as a Disadvantaged Business with Caltrans. This is a very long process lots of paperwork and time consuming.” [#AV8538]
- The Hispanic American female CEO of a professional services business development organization stated, “Yesterday, I received a call from one of our members, who would like to become certified ... And excuse me, if I say the wrong terminology, because I’m not too sure about all the terminology ... or is in the process of becoming DBE certified, right? Is that how you say that, DBE certified? Anyway, so I guess he’s tried to work with Caltrans, but Caltrans is telling him, he needs to get a letter of attestation or something from his local Chamber of Commerce. I guess, he seems like there’s barrier upon barrier for him. There’s continual barriers, that had he had history, working with Caltrans, they wouldn’t be asking for this. He has the experience, in other ways, but he just doesn’t have that. So as a good analogy, he is getting credit. It’s like he needs a cosigner. I’m not going to be there when he does the work. I don’t know anything about engineering or putting up a freeway, but yet, he needs that from us, to be able to apply. I don’t understand how that process works, that those barriers are being put in front of him. So, I had to actually go to another agency to ask them to help me help him, so that he can apply. It’s unfortunate that you have to go through so many hoops, just for him to be equal to anybody else who’s applying for a job. It seems unfortunate. I feel bad for ... He’s one out of I’m sure many, that just give it up and just say, you know what? Why even try? Because they’re going to come up with another barrier.” [#FG3]
- The Hispanic American female representative of a professional services business development organization stated, “When you think about applying for a job, how many of us are like, I don’t know if I really have all that experience. I think I’ll wait it out this time. And that’s just really just for the application. But when you’re applying for something that’s this big, the amount of materials that’s required ... If someone had called me for what they needed [from the other representative of this focus group], I’d be the same way, like, what is that? What do you need? I mean, I written letters of rec for people, based on more. I’m like, the integrity of the person, honesty, the results of their work, but I can’t really say. I’m not with them on day-by-day, to see how they work through it. So, to answer your question, I would say, not very successfully have people applied.” [#FG3]
- The female owner of an uncertified DBE and WBE professional services firm stated, “We [have] mostly been working with private sectors as well as local cities, because every time we try to go through this certification process, it’s so daunting. The pile of information they want, it’s easier to get a house loan than getting certified, right? So, we start and then because we’re small business, all of us do everything else that a bigger company does and we’re a small firm of 10. So, we get then caught up in a project that we need to get finished. Then we have this pile of work stuff that we didn’t finish and then now is old. So, I have to start all over again. I think the barrier of getting certified is high and I’ve tried to work with people to do that. And there’s issue with me, even though my husband and I own the company, I’m not an engineer. My husband’s an engineer, even though I am intriguingly involved in the company, and I do the business side, marketing side, contracts and he does the projects. It just makes it hard for anyone to want to go in. We have to balance how much time want to get involved to get certified and go after those jobs versus getting something that is less, I mean, we do the work really well, but we don’t want to spend four days filling

out paperwork. So, I think for small companies like us, we really have to weigh the possibility of getting the job and actually working on some other projects during that time.” [#PT1]

- The male owner of an MBE- and EB-certified professional services firm stated, “Each one was separate, so it confuse me because first I register the state, this County...so I know State covers the whole of California. So, I think, okay. The condition, no, it should reduce the County. Now I reached the County and that's a vendor's number and the some like MBE. Yeah. Then I contact with Metro. Metro said no, because Metro said, if you registered at the Los Angeles City, maybe with a share, that's even a number. You should register certified by the Metro. So, I don't know the Metro plan to the County, to city, or to the state. So right now, I'm just confused, and I also try to contact with a neighbor County called Orange County. Orange County no state certification, I would say, okay. So, what should I understand? Because they said, hey, if you in the California state, they give you 5% advantage or something like that.” [#PT1]
- A respondent from a virtual public meeting stated, "One thing is the paperwork that it takes. For example, to get a DBE compared to the Department of General Services, how they show their data or even the small business certification, which is primarily going to a website and then putting in all the information. Then, they validate that information right then and there. It makes it a lot more easier to save the progress and work on it later, compared to a lot of the paperwork on the DBE. Which I think if it can be done online, I don't know if it will make it a little more easier, but definitely the DGS makes it a lot more easier...the way they do their certification. There are a list of documents I need to provide. But these are the very general names of the documents, it's not a very specific one. And sometimes I have to go online to try to find out what other people are providing. How did other DBE certified companies get their thing, like what documents did they have to provide? For example, the meeting minutes, or how much money was put forward to start the business. Are we talking about everything? Like some of the personal things that I own, that I brought in to starting the business, do I also put a value to those? Like, show that this is how much I started or is it just about the money that I spilled out of my pocket to start the business. So, some of those seem to be a little bit of a grey area. I wish there was like a way that information was available online or somewhere. Where I can look for, okay where does Caltrans civil-affairs department actually acquire for DBE certification, like a list of documents- like a very specific list to bullet point type of thing. I know there is a webpage. When I read it, it seemed very general? Just giving a guideline or an outline of how this program works. It doesn't seem to talk very specifically about how a business can get certified and what are the steps they need to go through.” [#PT1]
- A respondent from a virtual public meeting stated, "The Caltrans DBE application is very daunting and extensive. Other MBE certification programs are manageable. Can the DBE application process be simplified?" [#PT3]
- The Black American female owner of a DBE-certified and uncertified WBE and MBE construction firm stated, "I'm already registered in Cal eProcurement, and I tried to recertify again this past summer. So, the recertification for Department of General Services, I'm getting to my question. She made it mandatory that one of my board members produced their tax returns and he's not willing to do that. So, I'm kind of like at an impasse. So, that's

what my question is. As a minority woman-owned trucking company, I'm trying to get certified as a DBE with Caltrans and it seems like I'm running into this roadblock. He's only 2% and I'm 95% owner. I have a two-percenter, a two-percenter and a one-percenter for the other 5%, but I'm 95%. I'm the one that went to go get the truck and it's my credit that's on that truck. The Caltrans DBE application is very daunting; other MBE certification programs are manageable. Can the DBE application process be simplified?" [#PT5]

Fifteen businesses owners described their experiences with the certification process in negative terms [#2, #7, #18, #20, #23, #24, #55, #56, #61, #AV, #PT11, #PT12, #PT2, #PT5]. Their comments included:

- The non-Hispanic white male co-owner of a majority-owned construction company stated, "It's a barrier to getting certified because it's so, so brutal. [An acquaintance of mine,] I mean, he's got horror stories about years of effort, a legitimate minority person, a legitimate owner of a business, and how absolutely brutal it has been to get certified. And then, the other part of that is, you're certified to do one thing. They use these construction work codes that says, oh, I'm certified because now I can put pipe in the ground. Well guess what? All of a sudden, I want to do concrete. Oh, you don't have that code. You're not approved for that. Well, what do we care? What in the world do we care? If you want to go out and try to do more work as a DBE, go do more work. If I use you as a guy who's going to put in concrete, that's on me and you, it's not on the state. Why is the state all of a sudden saying you're qualified, or you're not qualified, or you listed a code that you're not certified for, and so now the job gets rejected? I mean, I just... It's gone so, so far in regulations and restrictions, for these poor DBE companies to go back and then get recertified for more codes so they can grow their business and diversify, when it shouldn't have to happen." [#2]
- The Black American male owner of an MBE-certified professional services firm stated, "I'm African American. I had to prove that I was African American. I had a guy from the state sit in front of my office, take a picture of me with my shirt logo on it, took a picture of me in front of my door that had my corporation's name on it and still denied my certification. It took me six to seven months to get certified as a minority-owned business through the state of California, because I had to prove that I was African American. And the only way that I was able to get the certification completed was, fortunately, my mother was still alive, and I had to get my mother's birth certificate and I had to get my birth certificate, showing that my mother was born in the United States and that I was her child before the certification process was approved. And the irony was it was a Hispanic lady that was servicing me, which she and I got a big kick out of it, because we were saying, here it is. At one point in time, you were penalized for being an African American. And today, I can't even get certified as one, having been born as one. So, it was quite the chuckle. Six or seven months. It was unbelievable. We went back and forth, back and forth, back and forth, back and forth to get the cert. And I had to keep proving retired military, my military ID... All that was not good enough. I had to get my mother's birth certificate, showing that she was born in the United States, and I had to provide my birth certificate, showing that I was her child before they approved my certification. Because they denied my request, and then they sent a representative from Sacramento to my office in San Diego, literally looking at me, taking pictures of me and still denied it until I ended up needing birth certificates, the most

unbelievable event in my life. The National Minority Supplier Development Organization was like, here's the application. Fill it out and pay your money, and you were certified. It took all of about a week." [#7]

- The non-Hispanic white female owner of a DBE-, SWBE-, and CBE-certified professional services firm stated, "That was painful. It's time-consuming. Again, if you're small business, the kind of information they're asking for and the kind of - what you need to do in order to get it together is difficult and hard and time-consuming. The other thing that is challenging in the whole process is, when you go in there and you ask for certification, you have to give them the numbers that you want to be certified in. There's NAICS codes and there's work codes. Caltrans are the work codes that's specific to Caltrans. If you are - for me, I didn't understand how the work codes worked I think that when it comes to them certifying, they don't have the manpower. They also don't have people in their ranks that understand the work. So, when they're trying to certify you, they're trying to certify you - I felt more like they were trying to decertify me than they were trying to certify, meaning they were trying to find ways of not certifying me more than they were trying to find ways of certifying me." [#18]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "I've worked with DBEs and the DBE with Caltrans for many years, and I believe the hardest thing to do is actually get signed up as a DBE. I've actually went in and tried to do it myself, just to see, and the paperwork was just almost impossible. Yes, the paperwork itself is very difficult. I mean, like I said, I logged in just to see what it was like, and I was frustrated by the time I got to the second page." [#20]
- The Subcontinent Asian American male owner of a Micro- and SB-certified and uncertified MBE construction firm stated, "The DBE, I have had conversations with PTAC as well as with a number of other small business owners that I know of. It's a very challenging application. They ask for a lot of information which they might ultimately have or may not. But I also know - or I think somebody said the regulations have been set by Congress, or maybe it's been written at a national level, so that's why the application is very tedious and time-consuming. And sometimes it can be difficult - again, going back to what kind of questions that they're asking. Like, what exactly are they looking for? And so on. And that has been one of the reasons it has been off-putting for me, because I just have to take the time, sit down, and maybe spend four or five hours trying to get through it. And I mean, I know I'm in a very simplistic situation here. I'm just a one-person owner fully controlling the company, fully making all the decisions, so I cannot imagine a situation simpler than this. Even with my situation, I feel like after I go through three or four pages of the application it's just draining me out. There's so much to get through. I think the application is 17 or 18 pages, if I remember correctly, and that's just one part of the application. There's two or three more attachments you have to provide - just ownership and controlling and so on." [#23]
- The Hispanic and Native American male owner of a DBE-, 8(a)-, SB-, and MBE-certified construction company stated, "I know two people that are women-owned businesses that got into business and - or one got into business, and one transformed the business from what it used to be to what it was. And I think they were both legitimate and I think they both understood what they were doing as businesswomen, and they couldn't get certified

as DBEs with Caltrans. And what people do typically is they withdraw their application, and they go to the City of Fresno, or they go to the LAMTC or they go to some of the other places that are porously simple and then they just get approved there. So, the fact that they were legitimate or illegitimate kind of went away because somebody else thought they were even though Caltrans had a lot of suspicions and wouldn't let them be approved. [My certification process with Caltrans] was challenging. And it was challenging to the point where we've got to be certified and had to appeal it all the way to Ethics WA in Washington, D.C. It was like volumes and volumes of paper and a lot of time that I didn't want to spend. And I got it overturned because Caltrans was full of it. And the attorney in D.C. affirmed that, and so they had to - they ordered Caltrans to immediately put me back into the system." [#24]

- The Hispanic American male owner of a DBE-certified construction firm stated, "Part of the process was - so I'm Hispanic-owned but there's no real - so I say I'm Hispanic. Birth certificates don't come with that as an option. So, I had to join a Latino - because I used to be in law enforcement, I joined a Latino Peace Officers Association, had to have them write a letter to DOT to confirm that I am, in fact, Hispanic. There's no real mechanism, so when people apply as a minority-owned business, there's no real way to - there's no convenient way to do that, right. If I say I'm Hispanic, I have to them prove that I'm Hispanic, but they don't necessarily take like DNA. So, it makes the process a little muddy because there's no - there's just no way that you know of to prove that you are what you say you are. I mean aside from me having a female name, if I said I was a female, a woman-owned business, there's no way to prove that because there's no interview process, so they don't see who they're talking to. In my case, you can see that I'm Hispanic, but there's no way to prove that. So, again, I have to join other agencies that cost me money so that I can prove that I am who I saw I am so that I can get certified as a DBE. Fortunately, I knew about the Latino Peace Officers Association, so I was able to join that. But, again, some of those places even require you to be a member for a year before they'll put out such a letter. So, it can take a little whole depending on the agency that you're using to verify your DBE status." [#55]
- The Black American female owner of a DBE-certified and uncertified WBE and MBE construction firm stated, "When I started this Caltrans thing, the other day, the other two, three days in the middle, I had to redo my application, I was saying. I was already active, but it seems like in order for me to get to the disaster recovery contract section, I had to put the company in that. And then once my DUNS number didn't [update]. It stops you, makes you call Dun and Bradstreet. They have to get all that straightened out. Then you have to wait 48 hours, but that's just system update. It was just, it took me three days to do one thing. I was like, "This is crazy." [#56]
- The Hispanic American female co-owner of a WBE-, MBE-, Micro-, and SB-certified professional services company stated, "Just because our company was established over 40 years prior to when I applied. It was maybe 30 something or 35 years. And so, they wanted all the documentation. I wasn't even here. I had to go through the previous owners, everything like the meeting minutes, stock certificate, it was such a pain. It took me six months to get everything together. It was just to collect the information, and then once we submitted, I think there was a little bit of a backlog. CUPC was a lot easier. I think it's because I already got certified through CPUC. I think they said, if you're certified by another agency, let us know. And I did and they're like, okay, you're good." [#61]

- A comment from a non-Hispanic white WBE construction company stated, "Right now it's so hard to get your certification. I don't know how to get them. When you're trying to apply as a woman owned business, they're so worried a man is really the one running the business and they assume you're just not telling them. I have given death certificates and done all I can do and it's still going on more than two years getting all this done. This is how I survive. It's just me and my daughter and this has been horrible." [#AV54]
- A comment from a non-Hispanic white WBE professional services firm stated, "Caltrans and the California certification group was my biggest impediment. Large prime contractors who were familiar with what I do requested I be certified by Caltrans. It took me a year and nearly \$100,000 and once I became certified Caltrans gave me an incorrect code and wouldn't change it. Right out of the gate I couldn't do anything." [#AV318]
- The Hispanic American male owner of a DBE-certified construction firm stated, "Everything it's by letters and, complicated. One of the things that happened to me, I've been slow submitting information because I didn't get it, but they give you two, three days, they take a month. It was, I don't know, misunderstanding me, maybe with them, then they send me these letters out. You're not anymore this, but if you want this other one and I have contracts with them that I'm doing, you have to provide them more, it's like they have no connection between the human rights and what's going on inside Caltrans. That's my frustration over here. It just takes a month. I'm okay with that, but when they give me only three days to submit a lot of information. This is a true story, in December. So, I was working every night on the job. I'm 65, I'm not that computer guy. I don't have a huge company or it's just a few guys. Basically, I have to resubmit everything still. So, I'm kind of giving up." [#PT11]
- The Hispanic American male co-owner of a DBE- and MBE-certified and uncertified WBE construction firm stated, "I've had problems with this DBE since it started, and I got with the help of the city of Fresno back in 2012. I've had it for a long, long time. Never been able to utilize it once. I get a letter or email about, I guess about a month ago from DBE or whoever establishes it now it's federal program, and they said that if we need you to fill out a questionnaire to see what you're doing, and if you don't fill it out, we're we going to lose your status. That's just to letter said. So, I tried filling it out and all I did is went dead. It would never go through. I had nobody to call to... Nobody has no idea how to interact with the system and find out somebody to look into this. I called the city of Fresno. They have no idea what to do with it. I'm probably going to lose my status if I didn't have it already, not from me, but from the way the system works. It shouldn't be that difficult." [#PT12]
- The female representative of a business development organization stated, "We assisted a client who wanted to do the DBE certification and Caltrans told them the application was perfect. Application was perfect. The only thing they had an issue was with the ethnicity of the small business owner. And that blew me away, and the reason it blew me away because he was born in Nigeria. So, in Nigeria, their birth certificates don't have ethnicity on them, so they don't have ethnicity. He had his naturalization, he was a U.S citizen now, he had all that, but that was a one thing because that's part of the requirement that he didn't meet. And then finally, they did the site visit, and they gave him the DBE certification. But I would like to know what else can we use if we've submitted everything. What's the other thing, if

you have to verify that you're African American, or Hispanic, or Asian, or Indian, what other document, other than all the things we submitted is acceptable?" [#PT2]

- The Hispanic and Native American male owner of a DBE-, 8(a)-, SB-, and MBE-certified construction company stated, "I've personally had to fight the battle to get NAICS codes. The contractor won't use you because you have the wrong works codes. Getting the correct codes isn't complicated. An 'a' license should let you get any of the work codes." [#PT5]

Recommendations for improving the certification process. Interviewees recommended a number of improvements to the certification process [#1, #6, #7, #8, #15, #17, #18, #20, #21, #23, #27, #32, #44, #46, #59, #60, #61, #AV, #FG1, #FG2, #FG5, #PT2, #PT5, #PT9, #WT1]. For example:

- The non-Hispanic white female owner of a WBE-, DBE-, UDBE-, and SB-certified professional services firm stated, "I mentor small businesses and I actually have them come into, the owners, come into my office, sit down on a computer and I help them with getting their certifications. So, I show them the how to avoid the pitfalls. But most agencies are, like I said, a huge... Everything's a huge process, and they don't tell you how to do it. They don't help you. There's agencies out there like SBDC, and I went to them once and they said, 'Well, you could teach us.' And so, what I do is just for free, I help small businesses gain their certifications, gain how to work with each agency, what the differences are in each agency and how to thrive." [#1]
- The non-Hispanic white male representative of a majority-owned construction firm stated, "I mean, other than them just having more dialogue with those businesses to make sure they're getting the full support that they need to be successful. I think if they can make it easier for small businesses DVBEs, or DBEs, or any minority companies to get into their certification be it more easily. I think that'd be a huge step they can make because it's not an easy process." [#6]
- The Black American male owner of an MBE-certified professional services firm stated, "After the fact, they didn't explain what I needed, yes. What would have helped tremendously is that if the representative for the state would have been clear on why or what you needed to prove what ethnicity. I later learned from a conversation I was having with another organization. It had nothing to do with state or federal. It was the National Minority Supplier Development Organization that I was telling the story to, and the president of that organization said, 'Well, possibly, the reason for this is that because you have dark skin doesn't mean that you're African American.' Having been one all my life, I found that very interesting, but once he explained it to me, I understood it. Just because you have brown skin doesn't mean your origin is Africa. That's an assumption that people make, just because you have brown skin. So I mean, I could have been from France. I could have been from Iceland. I mean, I could have been from anywhere. So that was something that wasn't explained clearly. So, I think an explanation in the process should be, 'You have to show viable identification, showing that you were born in the United States and that your mother...' or whatever the case may be to clarify that, because I was never told that from the state. No one ever explained that to me. I walked away dumbfounded that I went through seven months of trying to get certified, and I still never got an answer until talking to someone a few years later. And then, they say, well, this may be what they were doing. So, I

think clarification needs to be put on that certification process for the requirements to make it clear.” [#7]

- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "A large firm, such as a national firm or multinational firm can still register at a small local business here. And that totally disrupts us from being able to do any work, because they may set up an office here with one person and then they immediately have more credit than any of the local businesses that are here. Maybe if they had somebody who was assigned to assist us, an individual who's assigned to handhold and assistance us. A lot of the stuff is new for us, and these larger firms can maybe assign somebody directly to manage that but for us as small businesses, assign maybe two or three people to do that. And so, I think if there was somebody on the agency side to help with that maybe." [#8]
- The Black American female representative of a minority chamber of commerce stated, "I think it was 2019 for the Caltrans work group, for the African-American work group in particular, we were asked to do a survey to identify how many Black DBE contractors in the Central Valley were actually qualified to do work on the Caltrans contracts that were available in that year. And so, they provided us with a list of all of the DBE certified businesses and asked us to reach out to them and see who responded... they're in Caltrans' district six. And we identified 11 firms that were in our service area, and we made every effort to contact them really wanting to identify both qualified and capable entities. And in our calling and our research, two of the firms out of the 11 had been de-certified. One firm could not be found in the database by name or number. So even though they were listed as being certified, they could not be found when you went online to look for them and there's five firms that were qualified and capable to do work with Caltrans. We had a DBE coordinator in the city of Fresno that actually worked for the city but was responsible for processing the DBE certification applications and there was not a neat pass through or handoff with the Caltrans office. So, we know that Caltrans is actually a certifying body for DBE, but they did not have a permanent office or staff assigned to the Central Valley for that. And so Central Valley is a region that deserves resources just like everyone else, and we'd like to see an expansion of those services here. Additionally, in the process for DBE, like I shared, most of their paperwork is physical hard copies; if there's any way to possibly improve the process by reducing that physical burden and moving it to an electronic system, we think that would be a great investment and something that will be easier for us to do in helping our small businesses. Intentionally they're great, but when we're looking at the delivery of the program and contracts awarded based on that, we do be very careful when we break down the numbers. When we're looking at the WBE certification, we are seeing that more white women are using that certification and that they are getting contracts based on their designation as a woman. But when you look at the ownership of their companies, they're 51 percent owner and their husband is the 49 percent owner. They are using the designation for their benefit and for their gain, but not being totally honest about who really owns the company and whose expertise is actually being used to deliver on these contracts. So, we have to be careful when we look at WBE in particular on that fact. And then also looking at the minority business enterprise, we know that under MBE and under DBE, that the LGBTQ status is being used in a very similar way, that when you break down the LGBTQ by demographics, we're seeing more white men were using that designation to receive contracts they would receive otherwise if they did not have this

special designation. So, we have to be careful, but also very intentional about how we use these certifications, and that the numbers that come out proving the worthiness of the program. That we apply an equity lens, and we understand that women of color and people of color still are not receiving the contracts, even though people who are certified as WBEs and DBEs are receiving contracts. So being very clear about which part of the certification is being used, whether it's race or it's gender, or whether it's race or sexual identity orientation. The programs are important because they are intending to close those equity and access gaps, but in the delivery of the program we are not seeing those results. And in California, with the passage of prop 209, and restricting race-based anything, DBE is very limited in its application in closing in equity gaps on other public work contracts that don't use federal dollars to begin with. So, it's a key that unlocks a couple of doors but it doesn't unlock all of them. And if we're truly pursuing equity and justice, we need a universal key that opens every door, and right now none of the certifications are functioning in that way.” [#15]

- The Hispanic American female owner of a WBE-, MBE-, SCMSDC-, and DBE-certified goods and services firm stated, "So, everything that I've done is - like, about certification, nobody tells you about that. Nobody really knows about then when they start a business until they start finding out and going to functions and doing a little bit of networking, and it kind of slips out somewhere else and you kind of get that information and you look it up on your own online to see. So, that's - basically everything that I've done is by the networking and the professional organizations that I've been with and then the coaching there and the volunteerism that I've had within the cities that we provide services.” [#17]
- The non-Hispanic white female owner of a DBE-, SWBE-, and CBE-certified professional services firm stated, "I think that when it comes to them certifying, they don't have the manpower. They also don't have people in their ranks that understand the work. So, when they're trying to certify you, they're trying to certify you - I felt more like they were trying to decertify me than they were trying to certify, meaning they were trying to find ways of not certifying me more than they were trying to find ways of certifying me.” [#18]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "Caltrans, I mean, there's only roughly 400 DBE contractors that do hands-on construction work, that are qualified. And that pool hasn't grown probably the past four or five years that I know of. So, they definitely need to expand that pool. There need to be more qualified contractors in that pool.” [#20]
- The Hispanic American male owner of a DBE-certified and uncertified MBE construction company stated, "I almost feel like the DBE minority status maybe has too high of a ceiling for the amount of assets or income you can have. Because if it was lower, then not all of the jobs would go to the same one or two DBE minority companies. Because you'd have to start to question like, 'Okay, are they really a minority?' I mean, they get all the work in this area, so how much of a minority are they, y'know?" [#21]
- The Subcontinent Asian American male owner of a Micro- and SB-certified and uncertified MBE construction firm stated, "So, that [DBE] application has been a little bit scary to me. I wish they had something like a Caltrans SB certification, like simple, online, where you go, you save your stuff, and some things you can just upload, like tax forms and assets, and that's - yeah, I wish they made that application really simpler. I could not think of... What

I'm saying is maybe they can make an assessment at the beginning of the application, like 'Who does it apply to?' If it is just one person controlling the company - which I have heard a number of my fellow friends, typically it's one or two people, husband and wife, or it's just one person - then they can provide the subsequent pages modified specific to that situation. Instead of just everybody having one flat-out general application to fill out for every situation, maybe there are ten people managing a company as partners, that could be completely different than as a one-person, what I'm managing. In these computer and technology years that we live it can be easily done, I believe. Like, yeah... So, that's one thing. And the second thing I really wish, is if I have a question, if there is a chat window or something where I can ask the questions or e-mail somebody who can answer that specific to my case instead of just providing a general answer, and I believe this can also be done easily online rather than through an offline paper application, which is typically how DBE is done. I mean, I can do a PDF online, but still, I have to print it out and file it as a packet when it comes to submitting the application for DBE. Or at least that's my understanding." [#23]

- The Middle Eastern American female representative of a majority-owned professional services firm stated, "We haven't gone through it, but I have suggested a few companies to go through to become certified. And they're pretty straightforward honestly. It's a good process. It's very expeditious. Like LA Metro, MTC, they went through, and they got it done pretty quickly." [#27]
- The non-Hispanic white female owner of a DBE- and SB-certified and uncertified WBE professional services firm stated, "The small business I barely use. DBE is the one that I use the most. And I don't see a need to get any others. The small business application is very simple and so that's why I did it, but I haven't used it. I don't even know if I've used it on any projects. I have it because it was simple to apply for. Now the WBE it's more timely. Like I've looked at the application and there's a lot more they way. And to me when I don't have projects that people are asking for a WBE to be on it just doesn't seem like it's worth my time to even get that certificate. The DBE is definitely has been way worth the time to keep that going." [#32]
- The non-Hispanic white male owner of an SB-, DVBE- and Micro-BE-certified construction firm stated, "I've been in the industry in the area for 30 years, so I worked for firms and developed relationships over the years. So - but it's still not easy. As a prime, they have to - they have to perform, and performing, part of it is the diversity. If a small firm does not have those certifications, race or biological sex certifications, it's very, very tough. The state's website is really geared towards construction contractors, not professional services firms. So, I get a lot of people - I get a lot of people calling and asking if I do plumbing or concrete work and things like that. Not for professional services. So, I think that's an area that really needs attention by the state. I don't think the website is set up to distinguish that. I don't think the primes are - I don't think the website is easy enough to use for primes to distinguish between the two groups [professional services and construction]. Yeah, that would be great for me and other DVBEs, but it would be best if they were more economically based rather than race and gender based, I think." [#44]
- The Middle Eastern American male president of an WBE-certified professional services firm stated, "I wasn't born in this country. I was born in the Middle East. I was born in Iran, and I came to this country in 1975 - about 46 years ago - and then, in 1988, after I went to college,

I worked for some firms from 1979 to 1988 and then, I started my own company. So, I don't know where I would fit in within the categories that you mentioned. Usually, there is Asian or African American or American or white or Latino, but I don't fit into any of them." [#46]

- The Asian Pacific American female owner of a SB-, DBE-, and WBE-certified construction company stated, "I wish the processing can be easier and I wish the renewals dates doesn't need to make us renew every year. Our tax dollars doesn't need to hire employee of the Caltrans to do certification evaluation. If someone say who they are one time you don't need them to repeat because we don't have extra manpower to keep repeating [that] I'm an Asian woman. I'm an Asian woman every year and then these people have the job because their job is oh I just reverify who you are. It's not fair. Do you know what is CPUC? Public utility. They do every three years. And their re-certification is much simpler." [#59]
- The Black American female owner of an uncertified WBE and MBE professional services firm stated, "Why is Caltrans continually certifying firms that they have no interaction with? What is the real reason behind that? You don't have interaction with a beautician or nail salon and all. Why? I don't get it." [#60]
- The Hispanic American female co-owner of a WBE-, MBE-, Micro-, and SB-certified professional services company stated, "Maybe provide training to people how to get certified and where they can get certified." [#61]
- A comment from a majority-owned construction company stated, "I have tried to get the DBE certification but I've been told I can't get it because my skin color is white." [#AV167]
- A comment from a majority-owned professional services firm stated, "They should revamp the DBE/SBE program. There should be some limit as to how long a DBE could be a DBE." [#AV48]
- A comment from a majority-owned construction company stated, "We are not minority owned and that this has affected our efforts. Plus, the state may pay more to minority owned companies." [#AV814]
- A comment from a majority-owned professional services firm stated, "Frustrated by the number of different local, regional and state certifications and having to go through different processes with each one. We are a small business and have to spend too much time on these. Need something more standardized." [#AV8162]
- The female owner of a WBE-certified construction company stated, "The recertification process is bad and the process at BART is worse than Caltrans. It is hard to add [work] codes, hard to find which codes to add, etc. There needs to be better interconnectivity across certifying entities." [#FG1]
- The Native American male owner of an SB-certified and uncertified MBE construction company stated, "The CUCP database needs to be cleaned out so it's easier to find [firms]... To get Native American certification, you need to prove current membership not ethnicity. This should be changed - Cherokee tribe changes in recent times are hopeful. In order to participate in the Caltrans DBE program, a business attempting to certify as a Native American-owned business needs physical proof and a Tribal Card. This is not readily available for all individuals - broadening the available forms of evidence required to include online verification would simplify the process could help make the process more

equitable... [You should] ask DBEs where they have bid Caltrans work (by zip code) in the previous 2-4 years. Add a brief narrative profile for DBEs to include in the database that allows DBEs to describe the types of scopes they perform. Make this narrative searchable in the database. Set up a verification process so the DBEs listed in the database can confirm the NAICS Codes and Work Codes that they are listed under. Include more filters in the database for more sub-regional searches (i.e., similar to the Florida database). There are more than 5200 searchable entries in the DBE database, but a much smaller percentage seems to bid Caltrans projects - we need a way to determine who bid Caltrans projects over the past several years." [#FG1]

- The non-Hispanic white female representative of a construction business advocacy association stated, "Working for micro business, when 605 increased the small business cap to 36-million-dollars it really hurt small business. Because Caltrans can meet their goal very easily by going after 36-million-dollar firms. And let's be real, when you are a general contractor working on a 500-million-dollar job, you want to get the job done as expeditiously as you possibly can. And the ability of a 36-million-dollar small business firm to be able to do the work is a whole lot easier than one that's 1.2-million-dollars. So that's become a problem. If small business after 605 is defined as 36-million-dollars for public agencies, that is your legal definition in California now. I don't think people get the idea. And now we're talking about raising caps again for DBE. I'm sorry, when you raise a cap at 36-million-dollars, you cannot compete with a 5-million-dollar company. It can't be done. And for an agency like Caltrans, it's their job to hit their goal. But if their goal can be defined as 36-million-dollars, they're going to go there. They have to, it's business. And so we have to as a group of people who want to help small and micro businesses in the state of California, are caught with our hands absolutely tied behind our back, and for [us] to WCOE and say, Come on down and you can get work with Caltrans, if Caltrans for SB1 money is looking at 36-million-dollar firms, we aren't really being honest with our constituents, because they're not going to get work." [#FG2]
- The non-Hispanic white male president of a majority-owned construction firm stated, "Need DIR certification to be listed. Some DBE certified firms don't have the DIR number. Some DBE certified firms don't have the right contractor license (ex. electrical contractor trying to do other utility work). There's a problem with lack of specificity; 'electrician' isn't actually good enough." [#FG5]
- A respondent from a virtual public meeting stated, "The certification process. Try to simplify it to showing your tax transcripts and your tax forms and get certified as a small business." [#PT2]
- A respondent from a virtual public meeting stated, "The certification process should be simplified to 'show your tax transcripts, get certified as a small business.'" [#PT2]
- The female owner of a professional services firm stated, "Why are you certifying people in so many areas that you don't even utilize them within your contracting? It doesn't make sense. You have to make sense about what you do, and it just doesn't make sense." [#PT5]
- The male owner of a DBE-certified professional services firm stated, "I hope by you guys can help advocate for that type of position which is just a lot more opportunities for DBEs once they spend all the time to get their certifications and all that stuff. None of the

marketing and of the effort to go attending outreach events that that doesn't get realized until you get the task. And sometimes the task is not immediately after your award of the contract, so your workload may fluctuate between point A and point B.” [#PT9]

- The Hispanic American male owner of a DBE-certified and uncertified MBE construction company stated, "There are a few competitors in our niche industry that are often awarded many subcontracts and it leaves to question how they qualify for DBE status with the size of their company. “ [#WT1]

D. Experiences in the Private and Public Sectors

Business owners and managers discussed their experiences with the pursuit of public- and private-sector work. Section D presents their comments on the following topics:

1. Trends toward or away from private sector work;
2. Mixture of public and private sector work;
3. Experiences getting work in the public and private sectors;
4. Experiences doing work in the public and private sectors;
5. Differences between public and private sector work; and
6. Profitability.

1. Trends toward or away from private sector work. Business owners or managers described the trends they have seen toward and away from private sector work [#5, #8, #10, #11, #14, #20, #22, #53, #54, #61]. For example:

- The Black American male co-owner of a WBE-, MBE-, and DVBE-certified construction company stated, "We see a small fluctuation, but still for the most part, the majority of work that we do is still private." [#5]
- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "There's a trend towards private work I'd say. At least for us there's been a trend to private work because it's been harder for us as a small business to get public work. It's much easier for us to get private work because there's no procurement process and et cetera. So, I wouldn't say there's a trend, there's still a lot of public sector work, it's just that we are too small to win that work. Or it's been hard for us." [#8]
- The non-Hispanic white male owner of a SB- and ELBE-certified professional services firm stated, "I started getting into more private work because of the private market was booming back in the early 2000's until the recession. And so, at one point in time, 65 percent of my volume was private because I was working with people who built subdivisions and I would just come in and pave them for them. But when the subdivision market crashed then you had to go back to public work and be more aggressive to get the public work. But when the recession hit, then the big contractors would hammer down on all public works jobs because they had the big advantage. So, it was tough to get public work. So, from 2008 to 2015, it was just survival mode. That's all it was." [#10]

- The non-Hispanic white male representative of a Native American-owned MBE-, SB-, and Micro-BE certified professional services firm stated, "We're trending away from public work" [#11]
- The Subcontinent Asian American male owner of an uncertified MBE construction firm stated, "Sometimes it changes. When we have not much, for instance, commercial or public, then we go increase our residential or private." [#14]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "The private sector has been pretty constant, and the public sector, I think I've seen more jobs going out now than I've ever seen." [#20]
- The Asian Pacific American male owner of an MBE-, DBE-, and SB-certified construction firm stated, "We started off in residential, so no, I didn't start off in commercial. We started to really test the waters with commercial maybe five years ago, and slowly kind of got our feet wet, and got a little more experience. But then I realized, as the owner, the future was gonna be commercial. And then, now recently, about two years ago, we start to fold in public works, which is probably gonna be the direction that we're gonna be headed in in the long term." [#53]
- The Asian Pacific American male owner of a DBE-certified construction firm stated, "I have survived. That is all. That is why I am planning to move towards private sector, where there is less regulation, less bid wars. But we will be moving towards private sector. Public sector has too much paperwork. And the size of contracts in public sector are too large, not really geared towards small businesses." [#54]
- The Hispanic American female co-owner of a WBE-, MBE-, Micro-, and SB-certified professional services company stated, "I would say the public works. It looks like we're getting public works contracts, and then Caltrans is getting ready to get more work, SANDAG right here in San Diego. They are getting ready to issue. So, I think there's a lot of planning for the upcoming infrastructure bill that's supposed to be passed in D.C. That's a big kick to hopefully federal funded projects in transportation. There's been an uptick on land development since we work also in private development, because of Governor Newsom's 2019 Housing Act. He created a lot of law, legislation that would support development of homes, or more housing in state of California." [#61]

2. Mixture of public and private sector work. Business owners or managers described the division of work their firms perform across the public and private sectors and noted that this proportion often varies year to year.

Five business owners or managers explained that their firms only engaged in private sector work [#10, #12, #13, #55, #AV]. For example:

- The non-Hispanic white male owner of a SB- and ELBE-certified professional services firm stated, "Currently, a 100 percent of my work is private." [#10]
- The Hispanic American female owner of an MBE-, WBE-, and SB-certified professional services firm stated, "100 private sector." [#12]
- The Hispanic American male owner of an uncertified MBE construction firm stated, "100 percent of my work comes from the private sector." [#13]

- A comment from a majority-owned professional services firm stated, "Our firm only does private, no public and is not interested in doing public." [#AV336]

Four business owners or managers explained that their firms only engaged in public sector work. [#7, #10, #40, #44]. For example:

- The Black American male owner of an MBE-certified professional services firm stated, "My work is primarily in the government sector. We've tried to work with the airport authority. We've tried to work with SDG&E. Years ago, I think I sat in some Caltrans meetings, but have never been able to get any traction. So, the federal government has been our best solution. So that's where we're putting all our resources at." [#7]
- The non-Hispanic white male owner of a SB- and ELBE-certified professional services firm stated, "In my past business, 100 percent of it was public, because as a union contractor, I could not compete with the private market. Private labor costs approximately 25 percent of mine." [#10]
- The non-Hispanic white male co-owner of an SBA-certified micro- and WBE professional services firm stated, "As I sit here today, all the work is for public agencies." [#40]

For nineteen firms, the largest proportion of their work was in the private sector [#5, #8, #9, #16, #23, #26, #29, #31, #36, #37, #39, #41, #42, #45, #46, #51, #52, #59, #62]. For example:

- The Black American male co-owner of a WBE-, MBE-, and DVBE-certified construction company stated, "We mostly work in the private sector." [#5]
- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "We've gotten a lot more work from the private sector. And the private sector, prioritizes minority, small businesses way more than the public sector does." [#8]
- The Asian Pacific American owner of a DBE-, MBE-, and SB-certified professional services firm stated, "Probably 95% is private right now. I would say only 5 percent to 10 percent is public. A lot of times with the public stuff we are somebody else's sub. We're sub, so we're never a prime. It's just hard to win as a prime." [#9]
- The Black American male representative of a DBE-, WBE-, MBE-, SB-, and Micro-PW-certified small business development association stated, "Maybe 75 percent of mine come from the private sector." [#16]
- The Subcontinent Asian American male owner of a Micro- and SB-certified and uncertified MBE construction firm stated, "I've been focused on private contractors and general contractors, developers, and so on, individual owners. So, the solution that I provide is a really very small portion of the entire project." [#23]
- The Middle Eastern American male owner of a construction company stated, "I've been in the private sector. Interested in getting into the public sector as well. That's definitely one of the, something I would like to be part of. I haven't had the opportunity to go public bidding on public projects yet." [#26]
- The male co-owner of an uncertified WBE professional services firm stated, "Public is actually probably, you know, maybe 20 percent." [#31]

- The non-Hispanic white male owner of a majority-owned professional services firm stated, "Probably 20 percent is public work and 80 percent is private." [#36]
- The Black American male owner of an uncertified MBE construction firm stated, "I have done nothing in the public sector in Los Angeles." [#37]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "Our primary market are single-family custom homes. We also do some commercial jobs, a little bit of municipal work, and I guess you'd call it a little bit of institutional work with churches and schools. It's maybe five percent public, maybe ten, five to ten percent." [#39]
- The Black American male owner of an SB- and MBE-certified professional services firm stated, "About 80 percent of it is in the private sector. Because most of my work comes from small contractors who are working on a project that needs to be done. And most of it's only - it needs to be done within a month or six weeks. It doesn't take very long to do it, you know? It's a matter of reviewing the system that they're installing and making sure that the load is in compliance with the electrical system that they want to connect it to - and/or installing a new solar system on a commercial building and making sure that we can tie it into the existing electrical system or upgrading the electrical service so that it meets the code requirements." [#41]
- The non-Hispanic white male co-owner of an SB-, DBE-, and HUBZone certified construction firm stated, "Well, we kind of want to do public agencies only, but we keep having to return to the private sector to find work." [#42]
- The non-Hispanic white male representative of an SB-certified professional services firm stated, "We're probably about 40 to 50 percent on the residential side, or actually, sorry, probably around 60 percent on the residential side and then 20 percent on the renewable energy side, and then 20 percent for the commercial." [#45]
- The Middle Eastern American male president of an WBE-certified professional services firm stated, "It's about, I would say, 65 percent residential and about 35 percent commercial. I'm 100 percent private sector now. It's how I started in private industry. I don't even - until lately, that I started looking into it, I had no understanding of the public sector - how to apply, where to go to look for the jobs." [#46]
- The Hispanic American male owner of a DBE-, SB-, and DVBE-certified and uncertified MBE professional services firm stated, "Because of the challenges that I've had, I actually, essentially have given up on the program with the state and have instead focused on other private ventures." [#51]
- The Asian Pacific American female owner of a SB-, DBE-, and WBE-certified construction company stated, "5 percent public, 95 percent private." [#59]
- The non-Hispanic white male owner of a majority-owned construction company stated, "You know what, I would say probably 90 percent of it is private now. It might even be more than that. Well in the private sector there's no need to go out after those bids. I don't have to do the private work. The work themselves, the hours are already set." [#62]

For twenty-two firms, the largest proportion of their work was in the public sector [#3, #6, #11, #14, #18, #19, #21, #22, #24, #25, #27, #28, #30, #34, #35, #38, #43, #47, #48, #49, #53, #54]. For example:

- The non-Hispanic white male co-owner of an SB-certified professional services firm stated, "I would say 90 percent of our work is with the public agencies." [#3]
- The non-Hispanic white male representative of a majority-owned construction firm stated, "For us it's probably about 35 percent private and 65 percent public. It varies. For us it varies slightly. Maybe plus or minus 5 percent." [#6]
- The non-Hispanic white male representative of a Native American-owned MBE-, SB-, and Micro-BE certified professional services firm stated, "Probably 85 percent public, 15 percent private." [#11]
- The Subcontinent Asian American male owner of an uncertified MBE construction firm stated, "More than 50 percent of them are public. Private is we... Since we had a large crew, we don't do much private because we are so much busy with a lot of public [work]. So, we cut it down, that private, a little bit less. Like more than 50 in public, less than 50 with a private I'd say 70 percent public, 30 percent is private." [#14]
- The non-Hispanic white female owner of a DBE-, SWBE-, and CBE-certified professional services firm stated, "I would say 90 percent of our work is done with Caltrans right now. I mean, I only do public work. I don't do any private work." [#18]
- The Black American male owner of a DBE- and SB-certified and uncertified MBE professional services firm stated, "I would say probably 85-percent of our work is public." [#19]
- The Hispanic American male owner of a DBE-certified and uncertified MBE construction company stated, "A hundred percent of it is public." [#21]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "I'd say two-thirds public and one-third private." [#22]
- The Hispanic and Native American male owner of a DBE-, 8(a)-, SB-, and MBE-certified construction company stated, "Almost to an exclusive extent public." [#24]
- The non-Hispanic white male owner of a majority-owned SB-certified construction firm stated, "Mostly it's public works that we work for. The owners are public works projects." [#25]
- The Middle Eastern American female representative of a majority-owned professional services firm stated, "Maybe 65/35, 65 for public. In some areas we do more public than the others. But let's just say 65 public work, 35 percent private" [#27]
- The Hispanic American male owner of an uncertified MBE construction company stated, "I'm going to say it's 90 percent is going to be school projects." [#28]
- The non-Hispanic white male co-owner of a majority-owned professional services firm stated, "I would say it's 80 percent public." [#30]

- The non-Hispanic white male co-owner of an MBE-, SB-, and DBE-certified professional services firm stated, "I would say a good split would be 90 percent public, 10 percent private." [#34]
- The Black American female co-owner of a DBE- and DVBE-certified and uncertified MBE construction company stated, "75 percent is public and then the other is private." [#38]
- The non-Hispanic white male representative of a DBE-certified and uncertified WBE construction firm stated, "I'd say 95 percent public." [#43]
- The Hispanic and Indian American female co-owner of an SB-certified and uncertified WBE construction firm stated, "We do a good 95 percent of public work." [#47]
- The Hispanic American male representative of a construction union stated, "They're mostly the public sector. Probably 80 percent or more." [#48]
- The Hispanic American female representative of a DBE-, MBE-, and WBE-certified construction firm stated, "Mostly it's public work like schools, parks, and that kind of stuff. We can do - if we want to, we can do private, but we prefer to stay away from private at the moment. Well, at some point there wasn't much to be on the private sector. And when we started the business in 2008 the economy wasn't doing so well and we didn't do well for a few like two, three years." [#49]
- The Asian Pacific American male owner of an MBE-, DBE-, and SB-certified construction firm stated, "Moving forward, we are planning to be full time public works and commercial, and no residential. But we still do some residential now, but just for cash flow, but very, very little. It's hard, but I just know that we have to make that full transition, and have all feet in one arena, and kinda struggle through it until we break through, which is right now very promising." [#53]
- The Asian Pacific American male owner of a DBE-certified construction firm stated, "80% public, 20% private." [#54]

Seven firms reported a relatively equal division of work between the public and private sectors while acknowledging year-to-year variability due to changes in the marketplace and economy [#1, #8, #17, #32, #33, #50, #61]. For example:

- The non-Hispanic white female owner of a WBE-, DBE-, UDBE-, and SB-certified professional services firm stated, "Before the pandemic it's normally about 50/50." [#1]
- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "Right now it's pretty close to 50/50. But before it was mostly public, but right now it's mostly, 50/50." [#8]
- The Hispanic American female owner of a WBE-, MBE-, SCMSDC-, and DBE-certified goods and services firm stated, "I'd like to say that about 45 percent would be public, and the rest is private. It changes every so often. And I think this is the best thing about being diverse, having a diverse business, meaning that I go through so much - a period of - like, in 2008, because I had the government contracts, that helped me out in that shift when things were really hard with the recession. And now, because I have the public sector, now when the - I mean, I have the private sector, now when the public is hurting so much I'm able to shift

through that process and I'm doing well. So, for us, we try to diversify it as much as possible on both ends. We don't concentrate on just one area." [#17]

- The non-Hispanic white female owner of a DBE- and SB-certified and uncertified WBE professional services firm stated, "So like we're working for a Kaiser or a Walmart of a subdivision that's going in or a church that's going in, that's like half of them. And then half of them are probably like the city put it out to bid or for a proposal and then I'm a subconsultant doing the traffic signal design for a like federally funded roadway project." [#32]
- The Hispanic American male owner of an uncertified MBE construction firm stated, "I do probably like half and half, half work the public and half work private." [#50]
- The Hispanic American female co-owner of a WBE-, MBE-, Micro-, and SB-certified professional services company stated, "Every year is different. Last year, majority was private development. One year, we were 90 percent public. So, it really depends on the opportunity and year." [#61]

3. Experiences getting work in the public and private sectors. Business owners and managers commented on what it's like to seek work with public and private sector clients in California.

Fourteen business owners expressed that it is easier to get work in the private sector. Many noted the benefits of personal relationships, the difference in process, and the ease of finding work as reasons they see getting work in the private sector as easier [#1, #2, #5, #6, #11, #12, #14, #19, #20, #31, #36, #41, #46, #62]. For example:

- The non-Hispanic white female owner of a WBE-, DBE-, UDDBE-, and SB-certified professional services firm stated, "It's much easier in the private sector because they aren't looking for a large company that's going to, like a large environmental firm who's going to have higher rates. They're looking for, I mean, we do houses. We do all sorts of projects. And so, what happens is, it's for people who really want a one-on-one relationship where agencies could care less who you are." [#1]
- The non-Hispanic white male co-owner of a majority-owned construction company stated, "So there's some things that the private market are more forgiving-than in the public." [#2]
- The Black American male co-owner of a WBE-, MBE-, and DVBE-certified construction company stated, "The public sector is typically harder to get the work." [#5]
- The non-Hispanic white male representative of a majority-owned construction firm stated, "The difference is on the private work it's usually they can make a choice of who they think is the best value for the project versus just being the low bidder on a public auction. It's easier to attempt to get work in the private sector." [#6]
- The non-Hispanic white male representative of a Native American-owned MBE-, SB-, and Micro-BE certified professional services firm stated, "Vastly easier to get [work] in the private market." [#11]
- The Hispanic American female owner of an MBE-, WBE-, and SB-certified professional services firm stated, "It's less competitive in the private sector than it is in the government

sector. I think I had... I've developed my reputation over the last decade as an expert in my field. So, when a company or a brand is looking for assistance with their sustainability measures or sustainability programs, they've had several recommendations leading them to me. So, by the time, like I said, somebody reaches out to me. They're basically already convinced. When I have applied to public sector contracts or things like that, you know that you're in the running, it's more of a competition and you're preparing documents, you have to outshine the other team in order to be awarded that contract, when it's private sector, they're already coming to me, so there's no competition in that sense." [#12]

- The Subcontinent Asian American male owner of an uncertified MBE construction firm stated, "It's easy to get private. On the public, you have to go for instance, for a bidding and you have a meeting with them, then they have to explain the job. And then there's a lot of rules and regulation on the public. On a private sector, you don't need much of that. You just sign a contract with them and then they describe what they need to be done. And it's easy to get with a customer and understanding what they want and easy to finish the job." [#14]
- The Black American male owner of a DBE- and SB-certified and uncertified MBE professional services firm stated, "Private companies are much easier and sometimes you don't have to compete at all. They just call you up, say, 'Hey, we want you to design these roads in my subdivision.'" [#19]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "Well, private's probably a little easier, 'cause there's not as many rules. And public, public can be a little more difficult. I mean, Caltrans is a behemoth. There's a lot of paperwork. The paperwork has to be done right." [#20]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "It's definitely easier to get work in the private sector than public sector. Well, primarily because of our size. We're smaller. So, there's certain things we can't do in the public sector. Because we don't have extensive personnel. So that limits our range - what we can do. And that's primarily it. Even though we're sure that if we had the opportunity that some of the public-sector jobs, we probably could take on a lot more. If there was an easier way to get involved." [#36]
- The Black American male owner of an SB- and MBE-certified professional services firm stated, "The private sector is generally - isn't tied to the restrictions of the public sector with the low bids and a lot of the other things that are associated with it. So, when a small contractor electrician comes to me with a request, he's already got the job with his client, and he's just looking for a proposal to do the design work." [#41]
- The Middle Eastern American male president of an WBE-certified professional services firm stated, "[In the private sector] they just ask you - they give you the scope of work and you send them your proposal and that's it. Either they hire you or not. You won't know what goes on behind the scenes." [#46]
- The non-Hispanic white male owner of a majority-owned construction company stated, "I've always been better off in the private sector, only because private sector, it's easier to get paid. For me it's always been easier to get paid, and the private sector, I don't have all the red tape that you guys have to go through get from a government contract. don't have to bid on private work. They just call me and I go do it." [#62]

Twenty-six business owners elaborated on the challenges associated with pursuing public sector work [#2, #7, #9, #10, #12, #19, #21, #29, #37, #44, #46, #49, #54, #55, #59, #AV, #PT9]. Their comments included:

- The non-Hispanic white male co-owner of a majority-owned construction company stated, "Most of the changes are both equally affecting the public and the private sector. The public sector is a little more acute, in the sense that you can really get your hat handed to you if you don't know what you're doing in the public sector. If you don't submit a bid proposal correctly and it has all the information that's required, you can get your bid thrown out. Obviously, if you don't know what you're doing and don't know how to construct the work properly, your work might be rejected. If you don't turn the right forms in, you may not get paid for a long time." [#2]
- The Black American male owner of an MBE-certified professional services firm stated, "I would say dismal at best and the reason why I say that is that it seems that, unless you know somebody on the inside, you're not getting any work. Working in the various industries, we proposed on work in several different areas. If someone, say, at Caltrans or someone at SDG&E or someone in programming don't know somebody, then your company don't stand a chance of getting any work. They won't take your reputation or your past performance and give you a chance. At least, that's been my experience. So, we've had to build relationships first, and then market that particular person our opportunities as a fund agent. Try to get to know someone and seriously talk to them about what we're doing and give them information of past successes, showing them that we're capable to the point where they believe in us." [#7]
- The Asian Pacific American owner of a DBE-, MBE-, and SB-certified professional services firm stated, "We try to have a balanced house where we're trying to get government contract. We've been trying for five, five and a half years. That's why we're getting all these certification, small business, DBE, MBE, ELBE. We try to be on everybody's bench, but just because you go through all the certification doesn't mean you're guaranteed any kind of work. So that hasn't come through for us yet, but we're still trying." [#9]
- The non-Hispanic white male owner of a SB- and ELBE-certified professional services firm stated, "As far as public sectors, when money gets tight, like it has been because the revenue stops flowing and the taxes stopped coming in. The first things that people that own pavement do is they stop maintaining the pavement." [#10]
- The Hispanic American female owner of an MBE-, WBE-, and SB-certified professional services firm stated, "I think with the public sector or with the government sector, there's always multiple organizations or multiple firms bidding for the same contract. Whereas for government entities, I'm trying to sell myself No. I've been on teams that have bid on projects before, they weren't awarded, so yeah, all my work... I have had some opportunities, but all my actual work and all that I've learned has come from private sector." [#12]
- The Black American male owner of a DBE- and SB-certified and uncertified MBE professional services firm stated, "In any event [in the private sector], they just go to phone call, went to my website, heard about it, placed it down, and that was it. But in public works you have to go through - you've got to spend some money upfront, and you may or may not

get the project. You know, we basically only get 1 out of about 15 to 20 projects we propose on. Each project is going to cost us maybe \$10,000.00 to \$20,000.00 just to put the project together. Easily. The bigger it is the more money we have to spend to put it together.” [#19]

- The Hispanic American male owner of a DBE-certified and uncertified MBE construction company stated, "There's a lot of jobs out there bidding. But we go through spurts where some jobs are only available for DVBE, whereas other jobs are available for DBE. And so, you kinda have to ride those waves a little bit until you can find jobs that you're able to bid on. Which are pretty frequent, but again, I think what we run into is the complexities behind us sending bids out and then not really getting any interest on 'em." [#21]
- The non-Hispanic white female co-owner of a majority-owned construction company stated, "We don't do underground when it comes to, you know, hooking up sewers or that sort of thing. And we don't do freeway work. That's the other - you know, a big Caltrans thing is freeway work. We're not ready for that. We may have been ready for that, you know, starting two years ago when we were heading into the minority sector or change, you know, step forward into a movement of growing the business. But now that's been stalled, so we can't hire, you know, underground personnel that, you know - I mean, [the co-owner] certainly can read the plans, you know, we know it. But he's not comfortable enough to perform the work himself." [#29]
- The Black American male owner of an uncertified MBE construction firm stated, "I know it's hard on your end to sort of ensure that the guy who is applying to participate is actually able to do the work. I know government's tough. I could tell you, 'Listen, I can do the job, and I have the experience that qualifies me to be successful,' I could tell you that all day long, but you're not going to know until I actually show up and start doing the work that I can do right? On the same token on the agency side of things it's tough for you to be able to decide - it's tough for them because you're a third party - it's tough for them to kind of decide how to give a small guy a break - would he be able to do - I mean you look around and see the kind work [Caltrans] is doing, it's big stuff. It's heavy-duty stuff that is not for anybody to just show up with a hammer and a screwdriver and they can do the work. They have to have the competencies to also perform. So, it's kind of I guess the way that they go about it is that they just exclude those small guys and keep it for the bigger guys." [#37]
- The non-Hispanic white male owner of an SB-, DVBE- and Micro-BE-certified construction firm stated, "Several times, the engineers' union would sue Caltrans, and they would have to get rid of all the consultants. So, Caltrans has become very [gun shy], and that's extremely difficult for small and micro small businesses to staff and plan for. And Caltrans I believe has become unreasonable in their requirements for staff. Construction inspectors and resident engineers, they're requiring engineering degrees, they're requiring engineering training certificates, and in some instances, they're requiring professional engineering licenses. And sometimes very good project construction inspectors come up from the trade. They know how to read plans and things like that. And it's extremely difficult to get inspections positions at Caltrans. And they also don't allow consultants to be resident engineers. So, I've managed work for Caltrans and for BART and other agencies as a resident engineer. I'm professionally licensed, and I have some other certifications. But Caltrans does not allow that. So, I think they're restricting themselves quite a bit. But they're making staffing their projects very difficult." [#44]

- The Middle Eastern American male president of an WBE-certified professional services firm stated, "I talked to friends of mine that they tried, and they said it's - they showed me some of the requirements and it was a lot of paperwork, and they couldn't get the jobs. A lot of requirements that they just couldn't meet. And when they showed me this, I was discouraged. So, I didn't go after the job after that. If things change, I will be happy to, yes." [#46]
- The Hispanic American female representative of a DBE-, MBE-, and WBE-certified construction firm stated, "We do a lot of school work. Lately they've been doing this, they call it prime. You bid as a prime. And what it is, is they - instead of oh you bid to the GC and if you're the lower bidder they give you the job. Now what they're doing is they say ok. This is the steel portion of the project, and you also need to grab the decking subcontractor and you also need to grab - so they build a package. So now when we bid it, we need to be responsible for the decking contractor and we have to be responsible for whatever if there's something else. If there is fence you need to be responsible for the fence contractor. Now you have to get a bid form. Now you have to get bond which makes our project go bigger and more responsibility. They been changing a lot in the last year. I don't know if it's for good, but it doesn't look like it's for - at least it's not good for us." [#49]
- The Asian Pacific American male owner of a DBE-certified construction firm stated, "I have to submit 20 bids to win one. Waste of my resources and time; I cannot afford it. Big companies can sink the resources, prepare for the bid, and win one 100- 200 million dollar bid and that covers the cost of all of them. Harder for smaller business. I had to pay a big price and I have only 2-3 contracts. I have no time for... No life, for no family, no church. No girlfriend... no it's not worth it." [#54]
- The Hispanic American male owner of a DBE-certified construction firm stated, "The issue comes in while we provide industry-trained evaluators, a lot of the transit providers are not willing to hire us. They just leave that part of the contract open, and agencies really aren't calling them on it. It'll be part of the RFP that they have to do so many evaluations a month, but those aren't getting done, and nobody seems to care even though they're taking DOT and federal transit dollars to provide those services. All contracts seem to have it. The problem is that nobody wants to enforce it. Most agencies would have to go before their board, and what's missing seems to be the liquidated damages for employee evaluations. So, they do liquidated damages for on time performance, that kind of stuff, but they don't do liquidated damages to enforce the fact that they need to have ... so let's say you have 150 buses. So, they're supposed to do somewhere between 150 and 300 operator evaluations a month, but there's no liquidated damages if it doesn't get done. Agencies just don't ... providers don't do it. I started with four contracts. I'm down to three. I'm going to lose one this month. I'll be down two and I can't get my foot in the door to expand. I mean I could literally do this nationwide, but I can't get people to see that it's important that the general managers that are running these facilities know how their operators are opening their buses, how they're interacting with the public, because there's no incentive for them to have to do that. Instead of relying on the contractor who's providing the transit service, they should just put out an RFP for call center evaluation, IT evaluation, employee evaluation kind of things so it takes it out of the hands of the contractor." [#55]

- The Asian Pacific American female owner of a SB-, DBE-, and WBE-certified construction company stated, "We cannot do much public. It's all hard bid. And I don't have to employee to look at the big package and try to win the job, because then we don't have the control in the profit. So, if I spend 10,000 dollars, I should get 13,000. If the contract is 10,000 dollars, material and labor, then I should at least have 13,000, to the 3,000 should cover it. But it's not covering the future. When you make profit, it should have an amount over. When we prepare this, that 3,000 dollars already spending. What if we didn't get the job, right? So, those bidding processing is still a cost. So, like Metro and Caltrans and all this big contract, doesn't know small business don't have the overhead upfront to pay for company overhead. So, I have to have an estimator to find the job. But what if, when we've worked on 10 jobs, 10 quotes and we only get one, that means the nine jobs we spent has to fall into the one we got on that income to cover the 10 jobs that we did. But in private sector, I don't want to do that one job or the 10 jobs, because I have 50 percent winning instead of 10 percent. And then if I got a job, I don't want to have to pay more for time on prevailing wage, on which audit, the labor audit because all those are labors that was not in a direct material, direct labor." [#59]
- A comment from a majority-owned construction company stated, "Dealing with the public sector is challenging. There is a lot paperwork involved. Prevailing wages and contracts are an issue. I don't mind paying prevailing wages as long as it's in the contract." [#AV812]
- A comment from a non-Hispanic white WBE construction company stated, "The paperwork involved [is] so complex and crazy." [#AV8435]
- A comment from an MBE Black American-owned construction company stated, "It is a little hard to get federal or state or local jobs because many of the requirements are not set up for small businesses. For example the extensive paperwork and the rate of the insurance for many projects etc." [#AV8202]
- A comment from an MBE Hispanic American-owned construction company stated, "[Why we're not interested in future Caltrans work?] Well, that's a 2 fold answer. One, we are too busy working in the private sector and two, there are too many rules, regulations, and paperwork involved in the public sector." [#AV8233]
- A comment from a majority-owned professional services firm stated, "We're not expanding [the] company because of paperwork required in public projects." [#AV8271]
- A comment from a non-Hispanic white WBE construction company stated, "We are currently trying to get some government contracts but the government does not make it easy to get work through them." [#AV8484]
- A comment from a non-Hispanic white WBE construction company stated, "Caltrans contracting process is a nightmare. Proposal process is incredibly time consuming and expensive for small businesses. Limits [the] profitability of company. Retention hold back is a big detriment and leads us to limit the number of public contracts." [#AV8493]
- A comment from a majority-owned professional services firm stated, "Public works has been difficult lately. We've bid a few projects that we were low on, and they get put back out we have to rebid it to get the project." [#AV857]

- A comment from a WBE and MBE Asian Pacific American-owned professional services firm stated, "Getting through to the right channels has been difficult. The pandemic has also made it difficult." [#AV923]
- A comment from a WBE and MBE Hispanic American-owned construction company stated, "We don't know how to do it. We've been trying with cities and counties. We haven't been able to get work with anyone anywhere." [#AV950]
- The male owner of a DBE-certified professional services firm stated, "One of the big primes in the region and they're like, we would love to have you for this two-year project. It's an eight hundred thousand dollars. It's almost a million dollars over two years and it's yours because we have nobody to staff it. Provide your resume. I spend hours trying to coordinate all this stuff. I signed all the documents. I need and then I get the phone call, a very different phone call and they're like, sorry there's too much red tape and it's unfair to the existing contracts subs, unless I get a letter from each one stating that they're okay to add another one to the to the boat which is near impossible because why would you want more competition on your team? So, it's just unfair. It's really difficult to do work, especially when you're starting out and you don't have an opportunity to get on here." [#PT9]

Eight business owners and managers described public sector work as easier or saw more opportunities in this sector [#11, #40, #42, #47, #48, #49, #53, #AV]. For example:

- The non-Hispanic white male representative of a Native American-owned MBE-, SB-, and Micro-BE certified professional services firm stated, "The main difference is, public work is qualification-based selection and that's where we excel." [#11]
- The non-Hispanic white male co-owner of an SBA-certified micro- and WBE professional services firm stated, "I like working for the agencies because they tend to treat me like a pro as opposed to private, who tend to really like to beat you up. So, I usually won't work for private anymore, unless their problem is so bad that they're willing to pay upfront for it. You know, the interesting part is that in the last ten years, I've been more happy to work with agencies because they tend to be more respectful of the skillset." [#40]
- The non-Hispanic white male co-owner of an SB-, DBE-, and HUBZone certified construction firm stated, "One, the money is guaranteed. Usually even though there's more paperwork involved the actual work that you're doing is just right in our wheelhouse, cut and dry. When you go to the private sector they don't - most of the time you're dealing with somebody who doesn't know what they're doing anyhow. So you get people wanting things that aren't possible, even on a commercial level. It's a pain in a different way. And sometimes you've got to fight for your money. I mean I've - we've worked for - we've done projects for lawyers and for corporations where they just said, 'We're going to keep the retainage since we know you don't have the money to sue us.' And that just gets old." [#42]
- The Hispanic and Indian American female co-owner of an SB-certified and uncertified WBE construction firm stated, "In the public, it's, I'm going to say, easier because everything is made available on the Internet. We can search the search engine that we use to get the jobs through the Internet that way, and through the different city websites, because they offer bid opportunities." [#47]

- The Hispanic American male representative of a construction union stated, "Most people [in our union] work in the public projects. So, when they do that they have all the benefits. And sometimes when we had to work with the other companies there is not signatory, sometimes they don't have the benefits. When there's not signatory, they require like apprentices. They don't have the benefits. They have the benefits in money. But they don't have the benefits like enough hours to cover insurance or something for medical. It's better when they work on the public projects. Also they have more supervising than [in the private sector] and the rights and the classifications on the workers. So, I think they're [public jobs are] better. I know they're better." [#48]
- The Hispanic American female representative of a DBE-, MBE-, and WBE-certified construction firm stated, "The only thing that was out there to bid and to do was public work, schools and - because the government was paying for all that. And that's how we started. Right now, I think it's more secure when it comes to get like payment, to get paid and all that when you're working for a government than when you're working for a private. Even when you do it for the government involves a lot more paperwork." [#49]
- The Asian Pacific American male owner of an MBE-, DBE-, and SB-certified construction firm stated, "We're gonna do primarily public work, but I'm also gonna still do commercial work. And primarily I think the public works I'm gonna use to drive the volume, in terms of sales volume. And then the commercial work I'm gonna use for cash flow, because I think we can finish those jobs quicker, and we can get paid hopefully quicker. I know a lot of the public work jobs can be net 60, 90 days before we get paid. But I think beyond that, I think being involved in public works, and people complain about the paperwork that's involved, but I think that's a good way of structuring your business. Because what I'm beginning to realize is the public works paperwork, they're all the same. And they all have a really clear set of rules that I like. I like rules a lot. Just like plans are very important. And I think that's a big thing about public works, is the sales volume that's involved. And also, we feel like we're part of the growth, the overall growth of our communities, the overall growth of our cities. And I think to know that you're a part of that is important, too. And then secondly, it helps structure your business professionally and in the long run, and you can have more jobs, create more jobs when you have more volume, and you have more structure in your business." [#53]
- A comment from an MBE Portuguese American-owned construction company stated, "Our work is bid related and with public agencies. That [is] pretty much why we work with public agencies they are pretty straight forward." [#AV195]

Two business owners or managers noted that it is not easier to get work in one sector as compared to the other [#11, #17]. For example:

- The non-Hispanic white male representative of a Native American-owned MBE-, SB-, and Micro-BE certified professional services firm stated, "Not really for what we do, we can move in between both of them pretty well. It's challenging for other firms to get into the public agencies, but we seem to be able to." [#11]

- The Hispanic American female owner of a WBE-, MBE-, SCMSDC-, and DBE-certified goods and services firm stated, "I think the private sector holds you just accountable for everything you have in that scope, both ends. I don't think it's any easier in any area." [#17]

4. Experiences doing work in the public and private sectors. Business owners and managers commented on what it's like to do work with public and private sector clients in California.

Twelve business owners discussed their experiences doing work in the private sector [#1, #4, #5, #8, #11, #14, #28, #32, #37, #38, #40, #59]. Their comments included:

- The non-Hispanic white female owner of a WBE-, DBE-, UDBE-, and SB-certified professional services firm stated, "The main difference between private and public sectors, is with private sectors you get paid much faster and they pay you. Where in public, they basically say, 'What are you going to do? Sue me?' And that's their attitude and that's where the problem lies. Private is efficient and they know what they're doing and it's much easier. It's much easier and you don't have all the horrible paperwork that some of the agencies force you to do." [#1]
- The Hispanic American male owner of an uncertified MBE construction company stated, "It's very hard to make any money. There's too many small contractors...to be after each other." [#4]
- The Black American male co-owner of a WBE-, MBE-, and DVBE-certified construction company stated, "The only good thing about COVID, if you will, is that it made people spend more time in their houses. And so, they got to stare at stuff that they don't like about their house a lot, and it makes them want to get work done. But the other factor is, when you tell them how much it really costs to do this stuff, then there's another thing coming. In a strange way also, it affects what we do in residential or some of these television shows because they have people who look at these shows, and they think it happens overnight and they think it happens cheaply. And it just doesn't." [#5]
- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "In the private, I work with the private sector on what they want in the roadway, how they want the lanes, what they're willing to pay for, because they're going to be paying for stuff in the public right away. So, I work with them on what they're willing to do and how much they're willing to do. And then I come up with the designs with the private sector directly and once we worked with the iterations and come up with our best foot forward, we go to the public sector, we'll be like, this is what they're paying for. Right? And in the public sector it can either be like, cool, cool free project. Right? And they might mark up a couple of things, but they don't really dive into it too much because it's done by somebody else. Whereas when I go to the public sector, the conversations are really much about what we're trying to do, what kind of materials, how do you want to design it? And we will go through a lot more iterations with them before we submit finally. But in the private sector it's a lot more of a third party. Now in the public sector, they go through a lot of these changes and they're not willing to pay for all those changes, they're just like, oh no, but change is just part of the process. But in the private sector they'll be like, yeah, yeah, we changed it a few times. The city told us to change this. So, they're willing to pay for all of

those changes. So, working with the private sector is a lot better, in my opinion. Even when working in the public right away. Now, when working with the private sector on their private campuses and lots, super smooth it just happens within a few weeks when projects start to finish everything, because you're on their private lot and we don't have to go through a lot of the same processes. But what's in the public right away, it is smooth, but it's not as smooth as if it's in the private." [#8]

- The non-Hispanic white male representative of a Native American-owned MBE-, SB-, and Micro-BE certified professional services firm stated, "In the private sector, they just want the job done. They don't have standards; they just want performance completions." [#11]
- The Subcontinent Asian American male owner of an uncertified MBE construction firm stated, "We get the prime contractor when they have a residential in this area, because when they are advertising, the customer doesn't know where the contractor live. They look up their phone number or their email and they send them that we need this job to get done and they agree on the price or the settlement, and then that contract look at the job site is in Northern California, but they are in southern, and it says residential work. So, they cannot waste their time to come all the way, and so they just gave it to us or another contractor, subcontractor. It happened to the residential and commercial." [#14]
- The Hispanic American male owner of an uncertified MBE construction company stated, "Sometimes you go with a private project and the only problem on that one, I kind of feel you're more insecure because sometimes, yeah, I got you this job, and we have so much time we need to finish it, and then sometimes, you get burned up. Sometimes they try to pay you less, or they try to get you down or they try to - when you already finish the project, then, oh, you know what? By the way, we don't have the funds, and so kind of in that position, I kind of got burned out before. And yeah, you try to get an attorney or whatever payment, trying to collect and stuff, but it doesn't work that well. You're just wasting your time on that. You just keep working and get to the next one." [#28]
- The non-Hispanic white female owner of a DBE- and SB-certified and uncertified WBE professional services firm stated, "So like we're working for a Kaiser or a Walmart of a subdivision that's going in or a church that's going in. And because they're doing this, they're adding traffic and so they have to put like a traffic signal in or do something like that." [#32]
- The Black American male owner of an uncertified MBE construction firm stated, "When you're out there competing in the private sector as a small licensed contractor then private people don't really care if you're licensed or not; they hire whoever does the job for the price that they want to pay. So, my competition has been with guys who don't even have a license. There is no -which everybody's got to work and make a living but it's impossible for the small, licensed contractor trying to do his work and compete because there's a whole unregulated - and I know regulation is a bad word and I don't want to take food out of anybody's mouth, these guys are out there hustling, working, trying to make a living, and the consumers really don't care whether - sometimes they care, but on the private sector so consumers don't care if the guy building the deck is a licensed, insured and bonded contractor." [#37]

- The Black American female co-owner of a DBE- and DVBE-certified and uncertified MBE construction company stated, "I think that in the private sector, it's less bureaucracy with paperwork and politics, to be honest with you. It's 'do the work and I pay you for the work.'" [#38]
- The non-Hispanic white male co-owner of an SBA-certified micro- and WBE professional services firm stated, "The only qualifier that I really do have is I won't take private work that's speculative. If you were to arrive here and say, 'we have a job for you; we're going to do 6/1000ths or whatever and we're going to sell them,' I'd be really happy to give you a referral and send you on down the road. So, we don't do that kind of work. But if it's private and you were to say, 'Come in,' and say, 'I've got an office building and I'm going to be occupying it,' or 'I'm going to be enclosing my business,' I'm happy to work with you." [#40]
- The Asian Pacific American female owner of a SB-, DBE-, and WBE-certified construction company stated, "With private, you can ask questions anytime, but in public you have to submit your questionnaire. So, everything needs to be... Everyone that bid the job needs to receive the same information, right? The project manager or the buyer or the contracting officer, they cannot answer any question. Everything, you asked me a question? Oh, go ahead. Send me a question, so I can answer in public. Do you know that processing? When you go through a pre-bid and you have questions, you have to send a written submittal and then the public agency representative will answer to the mass email that everyone was there. So, what if I'm asking a stupid question, should I ask? But in private sector, you just ask anything, that person that answer can just tell you what's their opinion. They don't need to, in fact, document." [#59]

Ten business owners discussed their experiences doing work in the public sector [#11, #19, #26, #28, #43, #44, #50, #61, #62, #PT9]. Their comments included:

- The non-Hispanic white male representative of a Native American-owned MBE-, SB-, and Micro-BE certified professional services firm stated, "The public sector work is technically more complicated. For example, most of our work comes from engineers in the public sector or licensed surveyors in the public sector. So, they know what is required technically." [#11]
- The Black American male owner of a DBE- and SB-certified and uncertified MBE professional services firm stated, "The public sector you have to go through a lot of upfront work. You've got to submit sophisticated proposals, you've got to have interviews, and then you've got various reports and everything. It's a lot of upfront work. But the big deal is that you know you're going to get paid. You're pretty much assured that you'll get paid for your work." [#19]
- The Middle Eastern American male owner of a construction company stated, "It's the steadiness of the projects. You don't go in for months, but you can go in for six months and there is continuity of the project. There's the size - there's somehow continuity of cash coming in. But there's also a stability in the work itself. You can have a team and that team can live with you for many years versus when you do an elevator for a commercial private. You build the next the elevator, [in the] commercial sector it can be years from now. Versus

if it's Caltrans facility or water plants which we have done, the crew tends to be similar to longer duration project that they can be kept for a longer time." [#26]

- The Hispanic American male owner of an uncertified MBE construction company stated, "On the government or public jobs, you know, that's another different story. They have the funds, they have bonds and all this stuff, so that's a different - you perform, you get paid. And if they don't, so that means you make a mistake, that means you pay the price. But actually, you don't want to make a mistake. You want to do your job the best you can, represent a good quality work, and you keep going. And, actually, your project will speak up for you." [#28]
- The non-Hispanic white male representative of a DBE-certified and uncertified WBE construction firm stated, "I think the agencies or the prime contractors - and there's good ones and there's bad - understand it, but I think that when it kind of falls down the line to the project managers or the foreman or - they don't understand the process." [#43]
- The non-Hispanic white male owner of an SB-, DVBE- and Micro-BE-certified construction firm stated, "Small companies don't have a bunch of money that they can either pay people to stay home for two or three months while it's raining or send them to other projects. So recently, I was asked to - if I wanted to be on a team for Caltrans work. I looked at all these requirements, and I passed. There's really nothing - nothing for me that Caltrans [puts out to bid]. [Other public agencies besides Caltrans] seem more realistic. They find office work and QA work for inspectors and other staff while the work slows down during the winter months. And that's not my experience lately with Caltrans. Well, I worked with City of Mountainview. I've worked with City of San Mateo. And they have that administrative work and QA-ing the construction files available to inspection staff during the - during the winter months." [#44]
- The Hispanic American male owner of an uncertified MBE construction firm stated, "Well, the ones that I worked for, like the union workers, like the freeway and stuff, they are definitely nicer than the private ones. The work... like they're much more on you but like they're respectable. Every time I've been to one, they're cool. They're a lot more on you like 'Hurry up. Let's go, let's go. Let's go.' But it's a freeway. They want you to do the work really good. But I don't take it as bad work environment. You know what I mean? Oh, actually I did work for one they shortchanged me. It was on a street. They're doing a street in Orange County. They're doing like the piping under the street. I don't know if that's with you guys but that's the company that short, that kind of shortchanged us from with our hours." [#50]
- The Hispanic American female co-owner of a WBE-, MBE-, Micro-, and SB-certified professional services company stated, "The public work projects, they start off as task orders and it's under one master sub consultant agreement or one master agreement, master services agreement. So, you never really know how much it's going to be until all the task orders are done." [#61]
- The non-Hispanic white male owner of a majority-owned construction company stated, "I think they're overpriced, to be honest with you. The problem was it's a lot cheaper, it's a whole different world in the public sector. When you have to pay prevailing wage and payroll... it's just the numbers are way up there." [#62]

- The male owner of a DBE-certified professional services firm stated, "During the execution and during the performance of a contract there's too much red tape to be added to an existing contract. If you're a DBE or if you're any sub or if you're any entity. The response was we can't add you to the team because we need to find letter from our other 15 people on the [team] with the firm saying, [that] your services do not complete with ours. I'm a dime a dozen civil engineer, so like 10 of the firms especially the big ones, they're gonna be like, no I don't [want them]." [#PT9]

5. Differences between public and private sector work. Business owners and managers commented on key differences between public and private sector work.

Fifteen business owners and managers highlighted key differences between public and private sector work [#1, #5, #6, #8, #9, #13, #14, #26, #29, #30, #32, #36, #52, #54, #PT10]. Their comments included:

- The non-Hispanic white female owner of a WBE-, DBE-, UDDBE-, and SB-certified professional services firm stated, "The public sectors have employees that go by certain rules or they don't understand that the private sector has to adapt to what's going around them. With the large agencies, [they] just do the same thing, no matter if it's inefficient or it's wasting money or whatever, they just do what they do. And they're just like a big machine. So, the employees continue that instead of adapting that they just do what they do." [#1]
- The Black American male co-owner of a WBE-, MBE-, and DVBE-certified construction company stated, "Public sector, everything appears to be laid out, cookie cutter and you follow the pattern. You do what you're supposed to do. Everything's fine. In the private sector, everybody changes their mind. There's always a change order that the customer doesn't want to pay for. They work completely different. And then within the private sector, you're dealing with personalities. That can be tough." [#5]
- The non-Hispanic white male representative of a majority-owned construction firm stated, "The biggest difference is the private sector usually has less administrative and compliance procedures to have to administer versus the public has many more." [#6]
- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "I'd say the private sector does a lot more of having a pool of money than we do work on, kind of like an on-call. And then the public sector is very much like, we got this money from this grant for this project, and we have to burn this money before this time, right? And the only companies that can actually burn the money before that time are these larger firms. And for certain project [it] is grant funded or something funded, and they need to use that money before a certain quarter or something, then the larger firms that can have the expertise that can really crank and crank out that job quickly are the ones who get that type of work. Compared to us who are a bunch of small local firms who would have [a lot of] our collaboration there. It'd just be a different time, scale and more, and so in general, a lot of these larger jobs just go to these bigger companies. I'd say in the private sector the decisions are made quicker and we submit it through a permit to the city, and the city does their markups or whatever through that permit. Whereas with the city, the cities are really re-strategizing a lot for the city, so the conversations are quite different. Whereas when I

work with private, we're submitting and the city is giving the responses. When I'm working with the city, I'm really working with a whole agency on what they're trying to do, why to try and do it, how much of a change they're trying to make? But in terms of procurement, private sector is more like, we like you. We want you, here's what paper you need. And the public sector whereas they'd be like, we like you. We want you; we might have some proposals coming up in the next year, keep checking on it. Right? And we're checking up on it and so are a bunch of other firms." [#8]

- The Asian Pacific American owner of a DBE-, MBE-, and SB-certified professional services firm stated, "The work is the same, the pace is different, the price is different. So, on the private side for example, you bid for a project and usually it's really competitive, right? So, it's tight and the work is fast, that's the private side. On the government side, they already have a budget. A lot of times you just meet their, if you're within their budget, then you're good and the project is really slow and everything's slow. So, the pace of the project is slow." [#9]
- The Hispanic American male owner of an uncertified MBE construction firm stated, "Well, the private sector seems to favor, I believe, bigger companies, obviously because of the volume and because they can handle more loads, so on and so on, whereas the smaller company, like myself, can handle one or two loads at a time." [#13]
- The Subcontinent Asian American male owner of an uncertified MBE construction firm stated, "On public, [they] required a lot of safety, a lot of larger works and manpower and also need a lot of different equipment especially when you have a lot of equipment in the job site, you need safety. Safety is more important. On the private side, you don't need that much of that equipment to use on the private, because you go and enter in somebody's houses, which is no one's there. And you do all the electrical works, and you probably need a ladder or something easy to access to building. So, it's a big difference." [#14]
- The Middle Eastern American male owner of a construction company stated, "Paperwork. Yeah. With the public sector, including Caltrans, paperwork is very important to keep track of. While the amount of work might be the same or even less sometimes the paperwork is definitely more elaborate and has to be kept on track." [#26]
- The non-Hispanic white female co-owner of a majority-owned construction company stated, "When you service the public is a little bit different than servicing, say, a homeowner or a business who owns the parking lot. They're a little bit more tedious on corners and things and rock pockets and things that really matter, that could cause an issue, you know, a few years down the line. Whereas, on a state job, if you will, they're just, like, 'Get it done,' you know what I mean?" [#29]
- The non-Hispanic white male co-owner of a majority-owned professional services firm stated, "Generally the public side pays slower than the private side, in our experience. You send an invoice and wait 30 to 60 days to get paid. But most of our private clients, they're pretty much - y'know, we don't take 'em unless they pay promptly. So that's the biggest difference. And I understand what the agencies pay - y'know, I mean, you have to go to city councils for payments and all that stuff, so I understand that. And it's not a detrimental thing today, but that's the way it is." [#30]

- The non-Hispanic white female owner of a DBE- and SB-certified and uncertified WBE professional services firm stated, "Private developers usually want things much faster so there's that aspect. But then sometimes those jobs get put on hold for a long time too. So, it's a little bit - sometimes more unpredictable when the work is going to happen. I feel like when public agencies put it out for proposal the timeline - sometimes it can get stretched but it seems to be a little bit more consistent than with private developers. It's either we want it yesterday or oh, hold on, we've got to wait for more funding. And then you're sitting on it for a year. I do have some cities that are horrible at paying. And that's one thing with private development. It seems like I get paid a lot quicker with private developers than I do with certain cities. I'm not going to say who." [#32]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "Quite a bit of difference. Obviously, the bureaucracy's different. But even private work still has a lotta bureaucracy. But the public work has quite a bit more. They are different, and primarily it just has to do with the paperwork that's involved. And also, the pay scales that we have to keep track of for the different types of work. The public sector has more of a layer of complication than the private work. I'm not sure how to describe that because it depends on the job of course. Bigger companies have the staff and personnel to take care of all of those... I don't wanna call them idiosyncrasies but all of those details. In the private industry, there's some animosity toward working with public jobs like you're talking about. There's a fear of it, is what it is. Because they're afraid to take on whatever the bureaucratic responsibilities are." [#36]
- The Asian Pacific American male owner of an uncertified MBE construction firm stated, "Private sector work, I can go out and go look for work every day, and I can find work every day." [#52]
- The Asian Pacific American male owner of a DBE-certified construction firm stated, "In the public sector- you have to participate in a bid war, which is different from the private sector. In the private sector I spend money on advertising, not bidding, billboard advertising." [#54]
- The female owner of a WBE-, DBE-, and MBE-certified professional services firm stated, "There's no issues with mentoring in private work, where there are issues with mentoring in a government work. When mentoring occurs in government work, there's always that fine line that Caltrans or local agencies will say, 'Oh, they are now the prime contractors performing your work.' Well, I need assistance. That's what helps me be successful. So, the thin line here is allowing the contractor to provide some assistance and not immediately identify that assistance as an appearance of performing my work. So private work is great. They pay on time. I don't have to go through a lot of negotiations because they're not looking at my DBE status or my women business status. They're looking at my work versus in public work sector, all the contractors are looking for is how do I meet my goal? Do you have the proper certification so that I can meet that goal? Do you have the proper work type code or [NAICS] code to meet the work?" [#PT10]

6. Profitability. Business owners and managers shared their thoughts on and experiences with the profitability of public and private sector work.

Seven business owners perceived public sector work as more profitable [#5, #10, #12, #13, #14, #46, #48]. For example:

- The Black American male co-owner of a WBE-, MBE-, and DVBE-certified construction company stated, "Well in the public sector, commercial sector, your profit is usually spelled out, and then you stay on schedule, you pretty much can know how much you will make at the end of the job. In the private sector, residential, you kind of hope but so many things change from... Your profitability can change in the blink of an eye. If one of your workers or if a customer changes his or her mind about the color of paint in a room... so profitability is easier to predict than the public sector." [#5]
- The non-Hispanic white male owner of a SB- and ELBE-certified professional services firm stated, "As a union contractor, it's impossible to get private work. Your labor costs are too high." [#10]
- The Hispanic American female owner of an MBE-, WBE-, and SB-certified professional services firm stated, "I feel like there's more opportunity in the public sector, like in city and government, because usually those contracts are a little bit longer, whereas with private industry it's one-off events. So, it's a 5k or it's a commercial or something, it's not something that's ongoing." [#12]
- The Hispanic American male owner of an uncertified MBE construction firm stated, "Just generally, slightly more efficient loads and better pay, typically. I can't really say for certainty, but I do imagine that public sector generally pay more than the private." [#13]
- The Subcontinent Asian American male owner of an uncertified MBE construction firm stated, "Of course, because on private, our profit is less because most homeowner, they're not a big company, so there's a little bit difference between private and public. That was one thing that we had a little bit difficulty because they don't pay the minute you finished the work, and they have their time limits. Sometimes 30 days later. Sometime like 45 days later. They have to go to another procedure in order to pay. It's not like a private sector. The minute you finished, the guys write you a check. So that's working with the government or the public sector or any county, city. They have to follow their procedure. It takes some time." [#14]
- The Hispanic American male representative of a construction union stated, "Well, the employers that can go in a good project when they work for union. They're going to have better projects and there's benefit for the contractors and there's benefits for the members. Because I believe they are, they can make a little more profit when they're doing public projects than the private. And same for the members. The members like I said before they have the benefits. So that's, that helps in both directions, in general and members." [#48]

Thirteen business owners and managers perceived private sector work as more profitable [#1, #6, #8, #9, #11, #17, #22, #32, #38, #59, #61, #62, #PT3]. For example:

- The non-Hispanic white female owner of a WBE-, DBE-, UDBE-, and SB-certified professional services firm stated, "There is much higher profitability in a private job. They ask you to turn in invoices a certain way. They ask you to do a certain type of work and everything else, and you do it and they're happy. But with agencies, there's somebody who's

just getting paid to work there and don't have a stake in it. They don't care how much they ask you to do, because it doesn't affect their paycheck." [#1]

- The non-Hispanic white male representative of a majority-owned construction firm stated, "Private [is more profitable]. Just because there's less red tape. It's more about just being able to build the work and again not having to deal with the compliance and the back and forth of again all the administrative burdens that are put upon us and the owners that we have to comply with." [#6]
- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "It's a lot more profitable to work for private. The projects are better, the projects happen a lot more smoother, there's less back and forth so it's easier for me to scope the projects and they're willing to pay for all of the changes. Whereas in the public sector, they do not know what they want, they keep changing what they want, and they don't want to pay for what they got or what they're getting. Because they do not know what they want and so it's different." [#8]
- The Asian Pacific American owner of a DBE-, MBE-, and SB-certified professional services firm stated, "On the public side, the agency, the government agency has a cap on how much you can make. I believe, I want to say 5% is the maximum profit you can make. Whereas on the private side, in theory I think you could do more, work more, get paid more in terms of how many projects you can go through versus the government might be one project a year, whereas the private side you can probably do three projects a year. So yes, the profit margin's different." [#9]
- The non-Hispanic white male representative of a Native American-owned MBE-, SB-, and Micro-BE certified professional services firm stated, "There's more money in private work for a business, it's more profitable and there's less overhead associated with it. And in the private work, it's basically a low bid work. However, it's more profitable." [#11]
- The Hispanic American female owner of a WBE-, MBE-, SCMSDC-, and DBE-certified goods and services firm stated, "Probably the private sector is a little bit more profitable." [#17]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "Private's better. They pay quicker." [#22]
- The non-Hispanic white female owner of a DBE- and SB-certified and uncertified WBE professional services firm stated, "Private you can definitely usually make a little bit more." [#32]
- The Black American female co-owner of a DBE- and DVBE-certified and uncertified MBE construction company stated, "The profit is greater on the private sector just because you have a little bit more leeway with your pricing, and there's not a lot of fees. Because we're union, so that is one-third, honestly, of the money that we have to pay out as far as labor. Where, on the flip side, it's not on the private sector. It's still union work; it's just paid at a different rate, and that's the difference, as far as - so we have more of a profit margin. And, honestly, it's just easier to get paid, again, since it's less paperwork to deal with." [#38]
- The Asian Pacific American female owner of a SB-, DBE-, and WBE-certified construction company stated, "I think private sector make more money because you have no red tape,

there's time, it's all straight to labor material and how the coordinating is simplified. The public work, more paperwork, more detail." [#59]

- The Hispanic American female co-owner of a WBE-, MBE-, Micro-, and SB-certified professional services company stated, "Private development, we can make 20 to 30 percent profit, and public works, you're limited to anywhere between six to 10 percent of profit." [#61]
- The non-Hispanic white male owner of a majority-owned construction company stated, "I think we make more money on the private side without having to bid and compete with other contractors, if that makes sense. More profit, less work. It's less administrative work." [#62]
- The Subcontinent Asian American male representative of an uncertified MBE professional services firm stated, "The way Caltrans does business it's actually a predatory agency for small businesses. Because I've heard from others that they don't want to work with Caltrans because it is way too hard, and they lose money. With big businesses they have a lot of overhead, and they also can have a lot of projects that will absorb any loss they have from Caltrans. Where in small businesses we don't have that; we're very lean." [#PT3]

Four business owners did not think profitability differed between sectors [#36, #40, #45, #47]. For example:

- The non-Hispanic white male owner of a majority-owned professional services firm stated, "They're probably equal in profitability." [#36]
- The non-Hispanic white male co-owner of an SBA-certified micro- and WBE professional services firm stated, "No, it's all the same. I don't treat [either sector] differently than the other except that when I work for private, I generally am more proactive about making sure that my contract is - that we will get paid." [#40]

E. Doing Business as a Prime Contractor or Subcontractor

Part E summarizes business owners' and managers' comments related to the:

1. Mix of prime contract and subcontract work;
2. Prime contractors' decisions to subcontract work;
3. Prime contractors' preferences for working with certain subcontractors;
4. Subcontractors' experiences with and methods for obtaining work from prime contractors; and
5. Subcontractors' preferences to work with certain prime contractors.

1. Mix of prime contract and subcontract work. Business owners described the contract roles they typically pursue and their experience working as prime contractors and/or subcontractors.

Twenty-two firms reported that they primarily work as subcontractors but on occasion have served as prime contractors. Most of these firms serve mainly as subcontractors due to the

nature of their industry, the workload associated with working as a prime, the benefits of subcontracting, or their specialized expertise [#1, #9, #16, #18, #21, #23, #24, #28, #29, #32, #38, #43, #44, #47, #49, #50, #53, #55, #62, #AV, #PT12, #PT3]. For example:

- The non-Hispanic white female owner of a WBE-, DBE-, UDDBE-, and SB-certified professional services firm stated, "Rarely [do I prime], and I'll tell you why. It's too much paperwork. It is too much to deliver for the RFP. It's things that we don't... It's not worth the time to spend a week doing something that we may or may not be able to win the contract." [#1]
- The Asian Pacific American owner of a DBE-, MBE-, and SB-certified professional services firm stated, "We're a civil firm, so for example, let's say a park project, usually it's managed by a landscape architect. So, the landscape architect or the architect would be the lead, and then we would be their sub. So certain projects we could prime, certain projects we cannot be the prime. But majority of our public works right now is being a sub to somebody." [#9]
- The Black American male representative of a DBE-, WBE-, MBE-, SB-, and Micro-PW-certified small business development association stated, "I do subcontracting. Once I really have a better understanding of what prime contracting was all about, that's - I'm not sure if I'll ever get to that point. Maybe on a small contract. Most of what I do is subcontract work." [#16]
- The non-Hispanic white female owner of a DBE-, SWBE-, and CBE-certified professional services firm stated, "We're subcontractor to general contractors." [#18]
- The Subcontinent Asian American male owner of a Micro- and SB-certified and uncertified MBE construction firm stated, "My position as an engineer, as a subcontractor, or specifically more subconsultant who has a very small scope in the life of the project." [#23]
- The Hispanic and Native American male owner of a DBE-, 8(a)-, SB-, and MBE-certified construction company stated, "We had prime. But usually subcontracting because you don't have to get a bond. And you can do niches of work that you normally probably couldn't get because they don't - I mean, they don't bill the contract as a prime that would be a size that we could actually entertain as far as bonding capacity goes that fits our niche. So, it would have to be some other random things. Like, we don't do pipe and there would be pipe in it. And there would be other things that would put us at a disadvantage." [#24]
- The Hispanic American male owner of an uncertified MBE construction company stated, "I've been doing sub. As a prime, it takes some time, all the paperwork, especially, like, prevailing wages and all those meetings, and that's what I kind of got stuck just trying to do. So, I've been, I mean, we have our superintendents, and we have whoever represent the project, and someone else do the paperwork and we do the actual work I can probably do as a prime, the only thing, I never try to even think about it, and try to investigate whether we need a bond, whether we need to require, you know... But, I mean, I think that we can do it. If we have to, we can do it. So, I guess we have to get up for that position. If we go as a prime, I mean, probably we can get a better price. I mean, our price is price, but I think if we have involved as a prime contractor, it's going to be a difference on the contract, because they still have to make their own money, too, for insurance and in order to manage the project and all of that. So, it's going to be increased the amount of contract. Probably we can

either keep more money like that, or the owner of the project can save some more money.” [#28]

- The non-Hispanic white female co-owner of a majority-owned construction company stated, "Most of the time, we're subs. would say - it depends on the year, it really depends on the year and what we're doing and what - you know, again, the economic temperature." [#29]
- The non-Hispanic white female owner of a DBE- and SB-certified and uncertified WBE professional services firm stated, "I work for a lot of civil engineering firms. The civil engineering firms are private. I don't directly work with cities a whole lot anymore, but I do have a few projects or a few cities that I work directly with them. But usually, I'm a subconsultant to a civil engineer." [#32]
- The non-Hispanic white male owner of an SB-, DVBE- and Micro-BE-certified construction firm stated, "I'm generally subbing, and we're trying to grow a little bit more." [#44]
- The Hispanic and Indian American female co-owner of an SB-certified and uncertified WBE construction firm stated, "We're one hundred percent subcontractor." [#47]
- The Hispanic American female representative of a DBE-, MBE-, and WBE-certified construction firm stated, "We're doing like 95 percent as a sub and 10 percent as a prime." [#49]
- The Hispanic American male owner of an uncertified MBE construction firm stated, "So as of right now I'm doing all of my work through sub-haul contracting. So, I haven't had any jobs per se myself or bid on any jobs like that since I've been - I just barely started. I don't have the manpower like a lot of trucks, or I don't know a lot of people yet really." [#50]
- The Asian Pacific American male owner of an MBE-, DBE-, and SB-certified construction firm stated, "I'm a sub. Yep, right now, 100 percent of the time, concrete sub." [#53]
- The Hispanic American male owner of a DBE-certified construction firm stated, "I'm a subcontractor on their contracts." [#55]
- The non-Hispanic white male owner of a majority-owned construction company stated, "I would be a subcontractor most of the time. Because normally they have a time or a general that would do the whole job. Normally, mine's just water, sewer, storm drain. I'm a specialty which is just the way it works." [#62]
- A comment from an MBE Hispanic American-owned construction company stated, "A lot of prime contractors have a no compete clause so it's difficult to get prime work." [#AV]
- The male owner of an ACDBE- and DBE-certified goods and services company stated, "I mean, my DBE contracts are essentially ACDB contracts generally, the way you participate is with prime contractors and, they are they fit you in their box either is joint venture partners or sub-concessionaires." [#PT12]
- The Subcontinent Asian American male representative of an uncertified MBE professional services firm stated, "I always work as a sub. And my prime they don't care as long as they get the job. They take off and then they don't pay attention to us afterwards. So, we always get taken advantage of." [#PT3]

The majority of firms (25 out of 56) reported that they usually or always work as prime contractors or prime consultants [#2, #5, #6, #7, #8, #11, #12, #14, #19, #22, #25, #26, #27, #30, #31, #33, #35, #36, #37, #39, #42, #46, #51, #54, #59]. Many interviewees preferred working as a prime contractor or consultant because they have more control over the end product or have had bad experiences as subcontractors regarding pay or scopes of work. For those primes who work as both prime or contractors, the size or scope of the project determines their role. For example:

- The non-Hispanic white male co-owner of a majority-owned construction company stated, "We're almost always the prime." [#2]
- The Black American male co-owner of a WBE-, MBE-, and DVBE-certified construction company stated, "We're 80 prime, 20 sub." [#5]
- The non-Hispanic white male representative of a majority-owned construction firm stated, "We're probably a prime 60 percent of the time and a sub 40 percent of the time. If it's a job that we think we have a better chance of getting as a subcontractor, we will. It just depends if the job fits us as a prime with what we self-perform then we will bid at prime. Again, if it's too large for us to bid as a prime we'll bid as a sub as well." [#6]
- The Black American male owner of an MBE-certified professional services firm stated, "I rarely am a subcontractor and the majority prime." [#7]
- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "As a prime I'd say 70 percent of the time, and 30 percent as a sub. We're a very specific niche. I also don't like being the sub and so I'm trying to be more and more of a prime. I've been a sub a few too many times when I haven't just got any work out of it." [#8]
- The Hispanic American female owner of an MBE-, WBE-, and SB-certified professional services firm stated, "In my personal experience, I think that sub-contracting would be a better way for me to get into certain contracts that I want, as opposed to trying to be the prime for the thing. I think that getting hired as a subcontractor would be good for me." [#12]
- The Subcontinent Asian American male owner of an uncertified MBE construction firm stated, "Actually, personally, I would like to get contract from whatever companies directly. We don't subcontract to others because I don't want to, as a subcontract, do a lousy job and I get blamed for it. Whether it is a small job or a big job, I like our company do it themselves. We never subcontract our job to others and because of lack of the job security wise, and I don't want to lose my reputation. I say 20 percent of the time we were a subcontractor, 80 percent of the time we are prime contractor. Actually, we prefer that because that way we don't have to involve another company to report to them our work. It rather be directly with us, the customer who actually have a job or we'll have the contract." [#14]
- The Black American male owner of a DBE- and SB-certified and uncertified MBE professional services firm stated, "Yeah, we're normally primes. That's why we've found success." [#19]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "I'd say I used to always work as a prime, but lately with NSF, the carbon offsets, I'm a subcontractor." [#22]

- The non-Hispanic white male owner of a majority-owned SB-certified construction firm stated, "We do some sub work, but most of it's prime." [#25]
- The Middle Eastern American male owner of a construction company stated, "Most of the jobs I do is a prime contractor. Number one is when we deal directly with the clients, when it's word of mouth referrals then we are the first person that would be needed. So, we would come in first and then if there's any specialty in the work then we would be doing subcontracting. That's the only reason why." [#26]
- The Middle Eastern American female representative of a majority-owned professional services firm stated, "I would say 75 percent prime, 25 percent sub. We sometimes go sub as like billion-dollar companies when they want us. Because we're kind of a medium size company we can't really go on prime \$100 million project. So that's where we kind of - the size of the project and also the expertise that's needed. So, if the project is a \$200 million engineering we'd never prime that. We'd go under somebody who is a true engineering firm, and we can provide those expertise areas under that." [#27]
- The non-Hispanic white male co-owner of a majority-owned professional services firm stated, "We like to be the prime, because when we're the subcontractor in the big contracts, we're far down the feeding chain about getting paid and all that stuff. So, I'd say 70 percent of ours are - we're the prime, and the other things we'll sub to somebody else." [#30]
- The male co-owner of an uncertified WBE professional services firm stated, "I've done the public works, only a handful of jobs, I'd say, that we were prime. Anything private, we would be considered the prime on it every time." [#31]
- The non-Hispanic male owner of a majority-owned SB-certified construction firm stated, "I'm prime, usually, although I do work in the commercial industry. In the commercial industry, I do a lot of work for general contractors also." [#33]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "Usually. A few times we're not, it depends on the situation. Mainly because we do most of the kind of work that's necessary for civils. But a lot of our jobs are connected with architects because they work on the buildings themselves. So basically, they're separate contracts. There's not really a prime and a non-prime. They're equally - contracts are equally administered. Not together." [#36]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "Sometimes we're sub, mostly we're prime contracting directly with the owner." [#39]
- The Middle Eastern American male president of an WBE-certified professional services firm stated, "I am usually the lead because in private industry, nobody wants to take the responsibility for everything. So, I usually - usually, the property owner contracts with each individual company separately. So, they contract with me, they contract with an architect, and then, when things are ready, they will contract with a contractor." [#46]
- The Asian Pacific American female owner of a SB-, DBE-, and WBE-certified construction company stated, "Because our job are small, so generally it's prime. It's a small job and then we go in, finish the job. So, both in private and public, we are prime." [#59]

Nine firms that the study team interviewed reported that they work as both prime contractors and as subcontractors, depending on the nature of the project [#3, #10, #17, #31, #34, #40, #41, #45, #61]. For example:

- The non-Hispanic white male co-owner of an SB-certified professional services firm stated, "We tried to [diversify] in the last couple of years. I'd say it's 50/50." [#3]
- The non-Hispanic white male owner of a SB- and ELBE-certified professional services firm stated, "It's varies dependent upon how well the economy is going. If the economy going, booming and we're doing a lot of paving in subdivisions, we would be subcontractor 50 percent, 60 percent of the time." [#10]
- The Hispanic American female owner of a WBE-, MBE-, SCMSDC-, and DBE-certified goods and services firm stated, "Most of my public contracts have been as a sub. Most of my private have been as a prime." [#17]
- The non-Hispanic white male co-owner of an MBE-, SB-, and DBE-certified professional services firm stated, "Of the 90 percent that we're doing in the public arena, our prime roles are about half. It depends on the size of the project and the contract. We have contracts with local municipalities, and then that's - some of the small municipalities, we'll tend to prime, and then the larger municipalities, there's either a small business requirement or a minority business requirement that allows us to sub-consult for that work. And that's usually where we see our subconsultant roles is when there are those requirements." [#34]
- The non-Hispanic white male co-owner of an SBA-certified micro- and WBE professional services firm stated, "It goes both ways. The work that we would take on in our own would be work that we can reach around and touch our fingers on the other side of it. It is possible to have a project, and we've seen them, where it's so large that we can't reach all the way around it. Those, we would prefer to be a sub. If it's a smaller job, I don't have a problem being the lead." [#40]
- The Black American male owner of an SB- and MBE-certified professional services firm stated, "Because I am a small electrical engineering consulting firm, I have to be in responsible charge for design of everything that I put my stamp on, okay? So, from that standpoint, I'm the lead on every project that I do, 'cause I can't take it unless I'm gonna be able to review it and provide the certified drawings that the designers meet the code, okay? But whether or not I work directly with the client or whether or not I work - I'm subbing to the electrician or the contractor, it all depends on what the project is." [#41]
- The non-Hispanic white male representative of an SB-certified professional services firm stated, "When we end up working with architects on commercial buildings or senior housing buildings, along those lines, we tend to be a sub under the architect. But, on large greenfield land development projects, we tend to be the prime. it just depends on the type of project." [#45]
- The Hispanic American female co-owner of a WBE-, MBE-, Micro-, and SB-certified professional services company stated, "Private development we're almost always the prime, public works we're almost the sub. We don't really select it, it's what we get." [#61]

2. Prime contractors' decisions to subcontract work. The study team asked business owners if and how they decide to subcontract out work when they are the prime contractor. Business owners and managers also shared their experiences soliciting and working with certified subcontractors.

Thirteen firms that serve as prime contractors explained why they do or do not hire subcontractors [#8, #9, #10, #11, #17, #25, #26, #30, #36, #42, #45, #46, #59]. For example:

- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "We do typically work with outside of our expertise which is environmental engineering, community outreach, equity-based planning and traffic engineering, electrical engineering. I mentioned environmental, so that includes researching for any materials or native burial grounds and other stuff that's our on site. And so, I work with a lot of small sub-consults that do those different disciplines." [#8]
- The Asian Pacific American owner of a DBE-, MBE-, and SB-certified professional services firm stated, "Whatever we cannot do in house, then we will find a sub to perform the services that the client needs." [#9]
- The non-Hispanic white male owner of a SB- and ELBE-certified professional services firm stated, "Work we didn't do. If we had the concrete on it, we'd subcontracted out. We didn't do concrete. We did asphalt." [#10]
- The non-Hispanic white male representative of a Native American-owned MBE-, SB-, and Micro-BE certified professional services firm stated, "[We sub out] services that we don't provide internally." [#11]
- The Hispanic American female owner of a WBE-, MBE-, SCMSDC-, and DBE-certified goods and services firm stated, "I have done it in the past but it's not something that I do constantly. It's only based on what the contract is needing." [#17]
- The non-Hispanic white male owner of a majority-owned SB-certified construction firm stated, "Well, we, of course, like to work with subs we have experience with. Sometimes, if it's unusual work, but we'll put it out. Like, say, traffic control, for instance, we'll put it out to several different traffic control subs that we work with. That's an example, I mean, but it could be dike and guardrail on a project that we don't do or might be signage or striping on a road. We don't do that. So, we'll sub a lot of that stuff out." [#25]
- The Middle Eastern American male owner of a construction company stated, "If it's beyond our expertise in one trade there will be a subcontractor for that trade that is specialized in that particular activity but capable of taking any kind of projects within the amount of the project. Finding trades is not a problem because there's always specialists. We definitely sub a lot of work. The determination whether to sub it or not depending on the size of the project. If we have a big facility that has for example a lot of asphalt, then we would get our asphalt contractor. If the asphalt is just a patch, then we can get two individuals that we know that can take care of the job versus a whole contractor." [#26]
- The non-Hispanic white male co-owner of a majority-owned professional services firm stated, "Yeah, we sub out some work, like surveying. We're not surveyors, so we sub out

that. And some work, like if we get - our drafting is overloaded, there's a draftsman that we sub out to who is not an employee, but we sub out to her." [#30]

- The non-Hispanic white male owner of a majority-owned professional services firm stated, "If there's maybe a roadway project, we may have to sub out for inspection. It's mainly if we have a need for somebody to do something and we don't have the staff for it. Rather than bring somebody new into the company, we will just sub it out to somebody that we know can do the work. We haven't done it much lately, but we have done it over the years." [#36]
- The non-Hispanic white male co-owner of an SB-, DBE-, and HUBZone certified construction firm stated, "Well, depends on the size of the project. So, when a project's a little larger it's the value of somebody - let's say concrete pour. So, if we don't have enough guys to do a concrete pour because of the size of it, or people - or people we know to bring on, first of all it's going to be too difficult. Also, somebody who just does concrete every day, it would probably cost us less than to do it in house if we were able to, you know, just - you know, especially in public works you have a wage determination that [is] making wages you have to deal with. So sometimes it just is more cost effective to have subcontractors do the work, because you have somebody who runs electrical every single day or pours concrete every single day, and they're just going to get it done faster and cheaper than we ever could." [#42]
- The non-Hispanic white male representative of an SB-certified professional services firm stated, "Yes, we do sub work out. I've had landscape architecture as a sub. I've had retaining wall consultants as a sub. For smaller projects, we have pulled in structural and joint trench under us, as well." [#45]
- The Middle Eastern American male president of an WBE-certified professional services firm stated, "Sometimes I do when I'm overwhelmed. Also, there are times that the owners of projects insist to have a few things done under my supervision. So, like, for surveying construction, surveying, I usually accept the responsibility and then, I have a few subs that I use, and they do the land surveying, and they return the work to me." [#46]
- The Asian Pacific American female owner of a SB-, DBE-, and WBE-certified construction company stated, "Yes, but not officially. Not officially subcontract. I hire a temporary help. It's not like... So, it's not like I have to find somebody, that they are licensed, bonded, insured..." [#59]

Thirty-one firms that the study team interviewed discussed their work with certified subcontractors and explained why they hire certified subs [#2, #3, #5, #6, #8, #9, #10, #11, #12, #17, #19, #22, #25, #26, #27, #31, #33, #34, #35, #37, #42, #45, #46, #51, #53, #58, #61, #62, #AV, #FG1]. Their comments included:

- The non-Hispanic white male co-owner of a majority-owned construction company stated, "There's not enough qualified DBE companies out there to do the volume of work that Caltrans is putting out to meet their goal. So one of two things happen is we go with the firms that we know are already providing that service and are established and doing well, which usually means that they're overloaded, stretched, and can't make their commitments. And in some instances over committed to the point where they ended up going out of business, or we try to take a chance on somebody that is new and the only person or people

that end up taking the hit, if you will, if that doesn't work out is typically the general contractor... [I see] a lack of consistency in [which DBE firms say] they're available and who is actually available to do work. [I'm] interested in how many new firms have been certified since last time and added to capacity in relation to how much work is going to DBEs because [I don't] expect the number of DBEs is improving/growing. However, [I] expect the work going to DBEs is consistent or higher. Therefore, [I don't] understand why goals are going up [for DBE participation.]" [#2]

- The non-Hispanic white male co-owner of an SB-certified professional services firm stated, "Every job [we work with certified subcontractors]. You know the Caltrans website, there's several different publications that we go through that have a list for that category that we need. So that's how we do. Because it's a requirement most of my subs are certified because most of them they're certified in some form of small business, DBE, MBE. Yeah. I really don't deal that much with contractors that are not certified because of the requirements that we have in these contracts that we do. Most of them in fact, I would say all of them are certified." [#3]
- The non-Hispanic white male representative of a majority-owned construction firm stated, "Yes [we work with certified subcontractors]. All the time. We find them through the different approving agencies on their approval list of who's been certified and then we'll send out advertisements to them [when] we're bidding work. I mean, there's some that are certified that don't have the same experience or the same bandwidth capacity to be able to keep up on certain contracts. And a lot of that's only because it's really more if they're new or if they're small they don't have the resources versus whether they have the certs or not." [#6]
- The Black American male co-owner of a WBE-, MBE-, and DVBE-certified construction company stated, "My company, we don't specifically look for [certified subcontractors], but because of who we are and where we live and sometimes where we work, that's how we run into our minority and women owned businesses. I don't see... I see more of my Latino brother every day, because not only do we work together, but we live together. I know very few white contractors. So it's just kind of how things work out. How everything just kind of falls together." [#5]
- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "I think equity is a big part of how we pick our sub-consultants because that's how we sign on our bicycle and roadway facilities. And so I have a few companies that I work with, mostly minority, small business women-owned companies that I like to work with, that I'll bring on because they have the same perspective as when it comes to running their business or running projects as we do. When I work with the smaller firms, it's a lot more collaborative because we're learning and growing with each other. And they learn from us and we learn from them and we we're able to introduce each other with these connections because we are not competing because they do different expertise than I do when I work with a small company. So it's a very much a mutual agreement be like, okay, you do community outreach. Hey, you should totally meet this person, you should [tell me about] this person. Oh I do engineering, Oh, you should totally meet this person. And we grow that way. Whereas when you work with these larger firms who are minority women owned, et cetera, they're always looking at how they can strategize off of you, capitalize off of you or

keep you out of certain conversations because they have a different strategy, overarching regional strategy or something. And so working with them we either are cut [out] of the conversations until they only need us and they want us to hit the ground running immediately, or they're using us to try and learn as much as they can from us, so they can have their staff do the same work that we do and cut us out." [#8]

- The Asian Pacific American owner of a DBE-, MBE-, and SB-certified professional services firm stated, "I mean they're in our boat. It's the limitation of not having enough staff to turn around the work quickly. So for example, I'm a small firm, so if I'm looking at a small firm, let's say survey work again, and I'm looking at a big firm and they have five people that can do the job, whereas the other small firm only has one person but that person's not available so I have to wait another week. Then I would say, Okay, I'm going to pick the bigger firm. Because the due dates are the due dates, the deadline is the deadline, so I've got to get things done fast. So they have the same weaknesses we do because we don't have enough staff to do the work sometimes." [#9]
- The non-Hispanic white male owner of a SB- and ELBE-certified professional services firm stated, "On the public workshops where I had that requirement [to work with DBEs], we definitely would solicit to those folks. Certification only applies to paper goons. I'm really concerned about you being... Give the right price and you can get the work done. You got to be competent and you got to be priced right. I don't care about pieces of papers saying you have some certification." [#10]
- The non-Hispanic white male representative of a Native American-owned MBE-, SB-, and Micro-BE certified professional services firm stated, "[We work with certified subcontractors] whenever there's a requirement as a prime." [#11]
- The Hispanic American female owner of an MBE-, WBE-, and SB-certified professional services firm stated, "[I haven't worked with subcontractors] with that specific certification, but in general, yes. For example, refer my clients to... When I recommend water brands that they should be using on their shoots or on their production, I tend to favor those that are women or [have] specific designation, like Climate Neutral or One Percent for the Planet, B Corp, Made in the USA. So there's certain criteria that definitely have priority and hierarchy." [#12]
- The Hispanic American female owner of a WBE-, MBE-, SCMSDC-, and DBE-certified goods and services firm stated, "For everything that I've done as a sub, having subcontractors is on the private end. I [work with certified subcontractors] a little different than what other people do. Since I don't do it on the public sector, I don't do it on government contracts and stuff, I do kind of MBE to MBE - so, business to business. So, when they get their numbers they send it. And I already know the individuals, the portfolio that they have and what they can do because they've already shown it to me, and now it's just committing to their numbers. So, for me, that's how I do it. I'll give them the scope and they come up with the numbers and then we submit it and their actual numbers that they put on paper. So, it's not me going out there and getting four different DBEs to bid against each other I mean, there's - like I said, there's organizations that I've worked with, like SCMSDC, which is called the Supplier - Southern California Supplier - Southern California Minority Supplier Development Council, and they're the - that's the organization that actually certifies you as an MBE, minority business. And then, later then you also have WBENC - the Women

Business Enterprise. And there's a network there. By being active with them, participating in their functions, volunteering, supporting them, you kind of find out who does what. And so, you have your own little directory that you're able to have access to." [#17]

- The Black American male owner of a DBE- and SB-certified and uncertified MBE professional services firm stated, "[I work with certified subcontractors] as much as possible. And in some cases 100-percent." [#19]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "I'm not being required to [work with certified subcontractors], so I don't see any reason I'd do it." [#22]
- The non-Hispanic white male owner of a majority-owned SB-certified construction firm stated, "Generally, what's driving [working with certified subcontractors] is you've got to meet goals. If it's Caltrans work, it's almost every project. We're just required. A lot of them we have a relationship with, and we work with them pretty consistently. Then, a lot of times, it'll be when we get on a bidding list, bidding a project, we advertise for the sub. So, they'll respond to advertising. We've had occasion where we've had to be careful. If you don't know who they are - because a lot of times, you'll bid a job, say, up here in Northern California, and there's minority contractors out there that put out numbers for projects, quotes, estimates, and they don't do very much of the work, and they're not anywhere close to where you're at. They might be in Southern California. Kind of got to be careful with that. These projects have deadlines. So, you've got to have somebody who you can - you have confidence that'll be there when you need them, because these deadlines have penalties attached to them. If you're late getting a project done, it can be thousands of dollars a day that can add up. So, if you - we don't like to just willy-nilly pick somebody because they're the low-bidder. They need to have a good reputation, and that's not always the case. They're not always - just because they're approved on the list, that does not mean you can depend on them." [#25]
- The Middle Eastern American male owner of a construction company stated, "Absolutely [we work with certified subcontractors]. I think there's a lot of incentives in soliciting these groups. And that's it helps both. It helps us, it helps them. I think it also is appealing for the client to have these groups involved in these projects as well. You would think the only reason somebody would use it is because it's something we can benefit from. But truly it seems like these groups are - they put more effort. I don't know if it's something personal to the owners to feel that they're going to prove that they are as qualified and as capable as the majority versus minority. I don't know if that's what it is but if it's something else but it's all been positive. We've worked with companies owned by women specifically. And in construction this is very rare. So a lot of the times when you search of course the blue book but we rely more on the internet. We just search online and then these companies - and of course also the word of mouth of other contractors that you've worked with. If you know a company that does so and so that is part of so and so group or minority company. A lot of it is word of mouth. But if we can't find word of mouth we just like the internet, like to search online." [#26]
- The Middle Eastern American female representative of a majority-owned professional services firm stated, "And also one of the areas that we're looking at and to be honest we have, ourselves we have a DBE, SBE list where we want to partner with firms. We do have a

list and we go, ok. This is a category we want somebody to team up. So we're looking at partnering too. So that's an area that we - 'cause you can't hire everybody so you've got to partner. And having the right DBE partner with the right - what you calling? Expertise, is sometimes it's not easy. I mean we have established some relationships. But the market is very - you guys know it. The company has to be certified with different agencies anyways as an MBE, DBE or whatever. And then a lot of times in the past - I think it's changing now but in the past the only DBE was only that you would have three percent, five percent allocated. So you'd name somebody. But what we want to do, we want to have a relationship where the DBE performs meaningful work and they add their expertise to us, so we're kind of able to not just get the score for the DBE but also get on the technical side, improve our score. So I honestly I've seen this area is not as bad. I mean I'm coming from New York or other regions that I did. It's I think because of the market and how California has approached it over the past few years I think you see pretty strong, relatively pretty strong DBE firms here. So from whether it's transportation or whether it's technology, whether it's planning, whether it's a lot on the public consultation. We do team up with a lot of DBEs on that side. To be honest we always find somebody at least. Sometimes we have two or three and we have to choose. Some areas are stronger. As I said public consultation, engagement areas where they're women owned or things like that, it's a lot we have lists. We have built relationships. So most of the time we approach them. There are often RFPs out and you see DBE firms go through the list of companies that pick up the RFP and they send you email and they try to introduce and market themselves. But it's usually the other way around. We go find the ones that - because we have had relationships. We'll go and find them. The fields are limited. That's the only thing. Sometimes finding the right, whatever, DBE, is very limited where you have a lot more options outside of that." [#27]

- The male co-owner of an uncertified WBE professional services firm stated, "Anything we've been prime on hasn't been large enough that it's been something where they were trying to have a DBE associated with it." [#31]
- The non-Hispanic male owner of a majority-owned SB-certified construction firm stated, "Yes, I do [work with certified subcontractors]. One of the companies I use is a woman-owned business. Another one I use is minority business, and a couple other of 'em are also small businesses so, yes. They seem to be a little bit more professional. Any kind of company that has a certification of some type, you know, either with a small business through DBEs, yeah, they seem to be a little bit more savvy on what it's required to do - public works stuff. So, yes, I would say they're more competent." [#33]
- The non-Hispanic white male co-owner of an MBE-, SB-, and DBE-certified professional services firm stated, "We don't usually solicit bids or quotes [from subcontractors] because we're, you know, professional, so we solicit proposals, and usually it would, you know, we're kind of targeting a few people when we look out. But that is always a concern of ours is local or disadvantaged, and where we can utilize those services as subconsultants, we're very excited to do that, and I think we try and do that - I think we do that on most of our subcontracts. No difference between certified and not certified." [#34]
- The non-Hispanic white male representative of a majority-owned construction firm stated, "I mean, Caltrans has usually a commitment that we have to give our best, good-faith effort, whether it be - DVBE commitment would be usually around five percent. But if it's a DBE

commitment, it's usually around 15 percent on a job. And we have to do our best effort to find companies to meet that 15-percent goal of the project. Or at least show a good effort that we do. The hardest part is: this is a low-bid job. And when they require low bid, DBEs and DVBES aren't always the lowest sub-bid. So sometimes you use 'em, you don't get the job when it's low bid. And that makes it hard 'cause someone else decided not to. Every single job. California has a DBE and SBE, all that, list. And we send an e-mail out for every single job we have. There's a Caltrans list for DBE. A California list. We're required to. There're some that are good and some that are bad. That goes with any sub. Or prime, for that matter. The DBE has nothing to do with whether you're good or bad. It's just whoever the person is and how they run a company determines on whether that company runs well or not." [#35]

- The Black American male owner of an uncertified MBE construction firm stated, "I don't look at [subcontractor certification]. In the private sector it's not necessary; it's not something that comes up." [#37]
- The non-Hispanic white male co-owner of an SB-, DBE-, and HUBZone certified construction firm stated, "I mean we have to generally it's a - you know, it's a rule of the contract that we have to make a good faith effort to reach some sort of minority or women-owned business especially. I mean there's different websites for those small businesses set aside, things like that. The other thing is you're allowed to do an advertisement. So sometimes we'll do that. And then the other last [thing] is, you know, if we've already established a relationship with one and it works well, we'll just keep going back to them if we already have it. Well, you know, sometimes because it's a requirement. And then once you establish relationships with different contractors it's just easier to use those people. We still go and check and make sure that their numbers are going to be good against other subs. Every once in a while it's just easier to use the same people, especially a lot of times there's a requirement to use them. And a lot of those have the knowledge. They're in that industry or in that realm of public [works and] know how well just a subcontractor is at something they are certified for. So if they have a set-aside you know that they're already working in public works, would mean they already have a handle on things like certified payroll and they understand how the public works sector operates and what's expected of them. Whereas you don't always know that about any other subcontractor. You don't know if you're going to have to hold their hand through it or if they know what they're doing." [#42]
- The non-Hispanic white male representative of an SB-certified professional services firm stated, "A lot of the people that we work with do tend to be various ones of the [certification] acronyms you provided. I would say, one, they can perform the work, and, two, we have the relationship with them, so the trust level is high, and the knowledge that they can get the work done on time and in budget. Yeah, my experience is they work at the same level, and actually I've found that DBEs can be more prepared, more responsive." [#45]
- The Middle Eastern American male president of an WBE-certified professional services firm stated, "Well, the firm that I do work with, yeah, it's - actually, it's owned by a husband and wife couple and the wife is majority owner. That's the only one that I know of. It just happens. The relationship. Yeah. It's just the way it works out. Usually, a private industry, you go for - there is that lowest price so, if they happen to be minority, that's fine [when]

finding and using subs. In this case, they are a woman owned - you know, half of it is owned by a lady. But my primary purpose in private industry is just to make sure get the best service at the lowest possible price. You don't really look at who owns it or what. It's different from public." [#46]

- The Hispanic American male owner of a DBE-, SB-, and DVBE-certified and uncertified MBE professional services firm stated, "The opportunity is when these companies who are not DBE and they're trying to meet their percentages, that's when they reach out to me. Because my time is so limited, I only pick and choose very few where I would spend the time putting together the bids. The companies that I would be subbing are typically not a DBE." [#51]
- The Asian Pacific American male owner of an MBE-, DBE-, and SB-certified construction firm stated, "For me, I don't know if they're DBE, SBE. That's generally not important to me. What's important is that they're registered with the Department of Industrial Relations. That's what's important to me. 'Cause the prime would hire me. I'm the guy that's already DBE and SBE So then the guys that work under me, again it's just for me, and gets the demo stuff for me accomplished, so it doesn't really matter to me." [#53]
- A male representative of a majority-owned construction company stated, "So here's a classic example of, we had a DBE requirement, and we won. [The project was] roughly a 2-tell you it was 2 to \$3 million project. I was utilizing a DBE who had solicited me to do the asbestos abatement. He was going to pop the actual pipe and then I was going to load it into a truck. Now, what I did is, when he solicited me, I went on to the, because I always check the web on the state licensing board, but what I failed to check was that there was a red asterisk, that he had paid his fee for the current year. So he was a valid license, but apparently his fee had slipped. So Caltrans basically pulled, not basically, they pulled the contract from us because he did not have a valid contractor's license at the time, he had not paid his fee. Guys, if we're having a DBE program, I don't care of your politics. I really don't care about your gender or your ethnicity, but 1. you actually have to be qualified to do the work. And most of these SBES, DBES are just not qualified. They have maybe one or two trucks. They're small, they're starting up. We have to almost push the criteria down to something they can actually do that actually helps them, because 22% [to DBEs], you're then into mix-matching where if they have a truck, they can use the truck. You're into all sorts of nebulous rules. Go back to the very trite conversation of BS. Guys, do something that they can actually do. That's actually achievable. Allow the general contractors, we'll reach out for you guys. But there does come a point where you're licensed as a DBE, we have your reps, we have your certs. You're licensed through Metro. You're licensed through Bavin. You're licensed through all of these various certifiable agencies. You're basically putting the general into a position of babysitting where we have to go back and check. We're being told, 'Yes, I have everything.' And then we have to go back and verify multiple different sources. And please use that example at the [project]. That's a classic example where, guys, there's not much we can say. And when we do meet these requirements, especially, especially if you wanted to, where we have the ability to meet where they're not race-conscious requirements, they're small business requirements where, hey, we can have multiple folks in play, if there's a 13 and now you want to go to a 22%, if that is what is in fact you guys end up doing, allow us to meet that listing multiple people. And we can meet them with a pool of maybe these five firms. I can't promise you... I can't promise you what percent is I can give them work. But I'd like to be able to give them work to the percentage

that they could actually perform without them having to go and take their one truck and take their one... their small piece of equipment and augment that through another, which then becomes a scheduling problem for us." [#58]

- The Hispanic American female co-owner of a WBE-, MBE-, Micro-, and SB-certified professional services company stated, "Whenever we can [we work with certified subcontractors]. We establish them a lot in private development, when we're prime. When sub consulting on public work projects, we don't always have the opportunity but we do try to use women-owned businesses that are qualified. The most important thing is that [they] can perform the work. And so if there is a good match, which there has been, we use women-owned businesses. We like to solicit from companies that we have working relationships with, and the women-owned businesses I know they're from industry, from women's groups. So it's really good to do business with people that you have relationships with." [#61]
- The non-Hispanic white male owner of a majority-owned construction company stated, "I don't even know how to word that. But no, I don't [work with certified subcontractors]." [#62]
- A comment from a majority-owned construction company stated, "Trying to meet the goals for DVBE is a challenge because a lot have gone out of business. When I was bidding some SBE contracts it was with OC Transit. Some of the sub base that we would reach out to for DBE types are very weak. There's [not] a strong base, it made it difficult for us to acquire [the] percent that they needed for us to submit the bid." [#AV233]
- The non-Hispanic white male owner of a majority-owned construction company stated, "[I am engaged] daily in the process of reaching out to CUCP firms [or DBE]. The same DBE firms are being reached out to by many primes, so they don't have capacity [to take on additional work.] Other DBE firms don't respond [to outreach efforts by primes]." [#FG1]
- The female representative of a majority-owned construction company stated, "Too often [when a prime reaches out to] DBEs, they respond to calls with 'we don't do Caltrans work' or 'we don't work in that geographic area' - if the info was up to date [in the databases] at the start it'd be easier." [#FG1]

3. Prime contractors' preferences for working with certain subcontractors. Prime contractors described how they select and decide to hire subcontractors, and if they prefer to work with certain subcontractors on projects.

Prime contractors described how they select and decide to hire subcontractors [#3, #5, #6, #7, #8, #10, #16, #17, #22, #24, #27, #30, #34, #37, #39, #45, #61, #62, #FG1]. Many interviewees noted that the main factors for selecting subcontractors are if they have a prior relationship with the firm, the quality of their performance, and the subcontractor's price. For example:

- The non-Hispanic white male co-owner of an SB-certified professional services firm stated, "We have to advertise for subs and then we have our guys that we know that we've worked with for many years. So, we'll advertise and then we'll send out letters that we're bidding on this project and we'll request a sub-bid from them." [#3]

- The Black American male co-owner of a WBE-, MBE-, and DVBE-certified construction company stated, "Usually someone that I know or through a recommendation." [#5]
- The non-Hispanic white male representative of a majority-owned construction firm stated, "We select the lowest qualified bidder." [#6]
- The Black American male owner of an MBE-certified professional services firm stated, "Based on their experience and whatever the requirement is, and they're fulfilling a piece of the requirement. So, for example, I'll just make up something. Let's say we're going to build an ice cream truck, right? So a subcontractor might be good in tires and engines, but not necessarily know anything about ice-cream-making. And I may not know anything about tires and engines but know everything about ice-cream-making. So, hiring a subcontractor that can take care of the engine and tires, and I'll do the ice cream, and then we'll have that team now, the total solution. Maybe I've got ice cream on my brain right now. It's more determined by your level of experience in the work that needs to be performed, not so much your certifications." [#7]
- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "I typically select that they're either have local expertise in the area so they can help add to our firm if we're not establishing the area, or they have a very, very good practice that I think has a good equity base. I think equity is a big part of how we pick our sub-consultants because that's how we sign on our bicycle and roadway facilities. And so, I have a few companies that I work with, mostly minority, small business women-owned companies that I like to work with, that I'll bring on because they have the same perspective as when it comes to running their business or running projects as we do. And so, we don't have to work with some of the larger firms where we have to explain certain things about certain communities to. I have a list of folks and if those lists are not available or if I find that somebody local who's better, then I typically will, a small local firm. But I don't align with the larger firms, I try not to, it's been a waste of our effort. I will either find them through my network, as I've done work with NACTO and other agencies and I've made connections. Sometimes I might even ask the public sector client who their local companies are that they prefer or like to use, that's all been good. Yeah, but I think just through my networking and asking the client, that's how I find out about somebody small. And Google Maps is my also friend. I use Google Maps so to find, if there's a company that's in the same county that does this type of work, then I'll call them up and be like, hey, how big are you? Would you like to be on this job with us?" [#8]
- The non-Hispanic white male owner of a SB- and ELBE-certified professional services firm stated, "As far as subcontractors, sometimes you'll get a bid from somebody you don't know, and that's risky. So, I would sometimes not choose a lower bid from somebody I don't know, going with somebody that I do know, because when you get on the contract you have to perform. Sometimes you get stung by people that come in with their low price, but when it comes time to do the work, you can't perform timely. And that becomes very difficult. Performance and price." [#10]
- The Black American male representative of a DBE-, WBE-, MBE-, SB-, and Micro-PW-certified small business development association stated, "Most times, it's somebody I meet in - I do a lot of business mixers and webinars and things like that." [#16]

- The Hispanic American female owner of a WBE-, MBE-, SCMSDC-, and DBE-certified goods and services firm stated, "For us, we select them by their specialty. I don't have very many subcontractors working with us. For example, there was one that I went and bid on just recently and the subcontractor was in pesticide. So, it's on a different specialty than what we offer." [#17]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "I usually know them personally." [#22]
- The Hispanic and Native American male owner of a DBE-, 8(a)-, SB-, and MBE-certified construction company stated, "Mostly who's available in a geographic location, because you don't have - well, number one, it's going to be probably more expensive. And it turns out that the vast majority of the people that we use - by coincidence, I guess - I couldn't tell you that we seek out DBEs or small businesses, but that's who we typically use. But it really has to do more with the geographic constraints of how far we can reach out. And then, typically the ones who are further out cost more. But we don't do that much work that is outside of our realm that we typically sub out." [#24]
- The Middle Eastern American female representative of a majority-owned professional services firm stated, "It's, it is a combination of in that area that we are bidding have they had previous experience, how strong they were. Did they have the knowledge? And then at the bottom line is pricing at the end of it. What they give us and how different it is. But to be honest most importantly is their fit for that particular project." [#27]
- The non-Hispanic white male co-owner of a majority-owned professional services firm stated, "We mostly sub out to people that we know, and not much of a consideration for what they are, just how well they do. People that previously worked for us, and how things look, so - How well we've worked with them." [#30]
- The non-Hispanic white male co-owner of an MBE-, SB-, and DBE-certified professional services firm stated, "Usually based on past experience with the subcontractor or local experience, and the reason is typically our subcontractors are doing field investigation-type services for us, so we are hiring people who kind of know the lay of the land, so to speak, or we have a good working relationship with them." [#34]
- The Black American male owner of an uncertified MBE construction firm stated, "I rely on personal relationships, and I use those subs, the people I know that I've worked with in the past and I send them work." [#37]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "Most of the people that I talk to I've never met in my life I never see them. I don't know the color of their skin. I just know if I can understand the words that are coming over the line. When it comes to hiring subs for boundary surveys, it is purely a meritocracy-based decision based on who can do the work and not get me sued in the process." [#39]
- The non-Hispanic white male representative of an SB-certified professional services firm stated, "Well, the first one is can they do what is needed on the project, obviously, but then a lot of the times we have relationships, and so we tend to first reach out to those that we have relationships with that we've worked with in the past and we've been successful with." [#45]

- The female owner of a WBE-certified construction company stated, "There needs to be a better way for primes to find subs." [#FG1]

Primes discussed the effect working in the public or private sector has on their decision to hire subcontractors [#3, #6, #8, #10, #26, #27, #35, #37, #42, #45, #46, #62]. For example:

- The non-Hispanic white male co-owner of an SB-certified professional services firm stated, "Private sector, you can basically do what you want. That's the big difference. I mean, with the public sector it's set in stone within the specifications [to use certified subs]." [#3]
- The non-Hispanic white male representative of a majority-owned construction firm stated, "A small amount [of subs we only utilize in the public sector], but most of them we use on both sides regardless of the certification." [#6]
- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "Not really, no [there's no difference between sectors for the subs I use]. I mainly hire based on their expertise. With public, like I said, I might hire more local, but I think with my list of folks who kind of think the same way as we do, no, I kind of use them everywhere." [#8]
- The non-Hispanic white male owner of a SB- and ELBE-certified professional services firm stated, "If they're no better and competent, [I would use certified subs in private sector as well]." [#10]
- The Middle Eastern American male owner of a construction company stated, "Primarily it's finding out at the subcontractor is qualified to be a subcontract on a public job. If it's a union job, are they union? Are they employees that will be doing the work with the union, the apprentices and all this or not? The work itself, of course public works tend to be larger in size. But if it's not the size the work itself is very similar. It's more of who is qualified to work on a public job versus a private job." [#26]
- The Middle Eastern American female representative of a majority-owned professional services firm stated, "The private sector doesn't have that requirement [to use certified subs] really as like public sector. Because like you want to go after a job for [the public] you have to have over 30 percent DBE in your bid. You have to. It's not even a target. It's something that you have to hit. Versus with the private sector, you don't have to do that most of the time." [#27]
- The non-Hispanic white male representative of a majority-owned construction firm stated, "I would assume so [that we'd use subcontractors in both sectors], but I've never done private work. My guess is yes. 'Cause we've won a lotta projects being second bidder. A lotta private companies win a job that usually deal with private - they don't really put an effort in finding DBEs and they get kicked out of the low-bid job." [#35]
- The Black American male owner of an uncertified MBE construction firm stated, "I don't look at that [a subcontractor's certification]. In the private sector it's not necessary, it's not something that comes up." [#37]
- The non-Hispanic white male co-owner of an SB-, DBE-, and HUBZone certified construction firm stated, "I would say they rarely cross over to private sector work. The crossover for them is really difficult because their guys are - once they're in the public sectors their guys

are used to making a certain wage. And they don't really want to go in the private sector where that wage is not a requirement. It's not never happened, but it's rare, much more rare." [#42]

- The non-Hispanic white male representative of an SB-certified professional services firm stated, "No, when we need to pull in a sub under us, we tend to use the same DBEs and those that we have the relationships with." [#45]
- The Middle Eastern American male president of an WBE-certified professional services firm stated, "Usually, a private industry, you go for - there is that lowest price so, if they happen to be minority, that's fine. In this case, they are a woman owned - you know, half of it is owned by a lady. But my primary purpose in private industry is just to make sure get the best service at the lowest possible price. You don't really look at who owns it or what. It's different from public." [#46]
- The non-Hispanic white male owner of a majority-owned construction company stated, "The only thing where it would come into that is requirements, licensing, and et cetera, et cetera. If they're not licensed to do a public contract or insured. Insurance is another big issue. If they're not insured to do it. That's the only things that affect that." [#62]

Firms who work as prime contractors explained that they do not want to work with subcontractors who are unreliable and consistently under-perform. Preferred subs usually have a long-standing relationship with the prime and are responsive to the needs of the project [#2, #3, #5, #6, #7, #8, #9, #10, #11, #12, #20, #25, #26, #27, #33, #35, #39, #61, #62, #PT2]. For example:

- The non-Hispanic white male co-owner of a majority-owned construction company stated, "We have one electrical company. It was one of the few DBE companies who'd cost us money in the past, cost us time in the past, liquidated damages, had horrible, horrible relationship with. The owner, just unreasonable, wouldn't cooperate, sandbag us, we'd get under contract, he'd come back and want more money, or claim he didn't have stuff. And we would just keep using him because he was one of the few electrical DBEs that we could... Some of these jobs, you don't even have enough work that you can give to a DBE subcontractor in the first place, because there's only two or three elements, sometimes. So, if the only thing I can give out is, in addition to me self-performing, is electrical, I got to look at this and go, I have no DBE on this job. It comes down, sometimes, to one electrical DBE, and three or four that are non-DBE, and that's the only place to get coverage. And if that DBE guy comes in, and he's 30 or 40 percent more, now, what do I do? Because I still got to be low if I want to get the job." [#2]
- The non-Hispanic white male co-owner of an SB-certified professional services firm stated, "These people they've been bidding to us for a long time. The type of work that we do they're set contractors within the Sacramento and general Bay area that do this type of work. So, they're always sending us quotes and obviously we list them and you work with them, you get to know them and you form a relationship." [#3]
- The Black American male co-owner of a WBE-, MBE-, and DVBE-certified construction company stated, "Their skill level, their mental capacity, meaning they're... Meaning that

they're not... They don't do anything that's going to embarrass you and that their pricing is fair." [#5]

- The non-Hispanic white male representative of a majority-owned construction firm stated, "If they like to not work together, if they want to try to work against us or file frivolous claims against us, or don't perform and meet their schedules or submit us the correct paperwork timely. There's subs that we have really good history with that we really try to make sure they're going to bid our projects but at the same time we like to get new contractors in the mix and try to meet new people and build that pool. We want the largest pool possible. They're good at performing the work. They meet or beat their schedules. They're good at turning in all their paperwork timely. They again try to work together versus against us on a project. Those are what we define as quality subs." [#6]
- The Black American male owner of an MBE-certified professional services firm stated, "The level of trust that I have with other business owners [means I use a lot of subs repeatedly], but that doesn't exclude me from bringing on someone new. It's just that someone new has been a little more carefully [reviewed]. If you're new and you're honest, I'll certainly be more than willing to help you and work with you, but there's a lot of shady people out there, out here I guess, that have different motivations. We're a pretty straightforward company. I let everyone know that we do not compromise our integrity for anyone and if you're not a strong integral company with a good reputation, I don't want to waste time with you. If I have to think about your antics, then I don't want to do business with you." [#7]
- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "I think [an engineering firm] from the East coast, they're one of the largest firms in the East coast. They got into the Bay area as a woman owned firm, but I think they just were trying to pretend to have one person in one office, but now they can't do that anymore. And so now they're outside of that program. But I wouldn't want to work with them again, I'm not a huge fan of their principal here and she cut us out of multiple jobs. And I'm also not a fan of their equity-based practice, I think it traps cities, but let's say that's a conversation for another day. That we're both small, we're both local and we're not competing on the same stuff. I do have firms that are small local that we do compete on, and it's actually been very nice to keep them close. We actually collaborate on jobs together quite often, which is nice. So, I'd say even if we do compete in the same expertise, we're still able to collaborate quite well. I think with the small businesses, they all understand what we're all... Each other are dealing with and they want to make sure we all survive, and less of trying to run each other into the ground than there is with these larger firms that established small offices in the state." [#8]
- The Asian Pacific American owner of a DBE-, MBE-, and SB-certified professional services firm stated, "Unless they're so expensive that they don't give us a chance to win a project, then we wouldn't ask for their scope and fee. Because if they're consistently overpriced, then we would not go to them and say, okay, give me a scope and fee because we're bidding on this project." [#9]
- The non-Hispanic white male owner of a SB- and ELBE-certified professional services firm stated, "There were subs we wouldn't work with because they were incompetent. Couldn't get the job done. Or the job had to be done over. It creates you all kinds of grief and extra time on a job. It costs money. Meritocracy, the word I mentioned earlier. I would work with

them as long as they were competitive and competent. They didn't necessarily have to be the low number. If somebody would come in, I didn't know with a lower number, I would go with the girl I want to take to the dance." [#10]

- The non-Hispanic white male representative of a Native American-owned MBE-, SB-, and Micro-BE certified professional services firm stated, "We usually know them personally and usually we've worked with them in the past." [#11]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "The contractors that I've always met with or talked to, if you can do the work, they want you on that job, and they'll repeat. They'll use you over and over again, if you can do it." [#20]
- The non-Hispanic white male owner of a majority-owned SB-certified construction firm stated, "They'll be specialty subs, meaning they focus on one area of work, which might be traffic control or striping. They're throwing dike in there. The ones that we work with that we have good relationships with, they're very efficient. They're very service minded. They understand schedules and they've got to meet schedules, got to be there when you need them, because the work is set up in a way where you've got to do this first, that second, that third. They might be the 12th thing on the list, but when that time comes up and you're communicating with them, 'Hey, we're going to need you around the second week of June,' and they get you on their schedule, they've sometimes got to be flexible. It goes back and forth. Sometimes they'll say, 'Hey, man, we can get in there right now, but we can't get in there in two weeks from now,' so you squeeze them in. But yeah, it's about relationships and we have some good relationships and you've got to have a good - that relationship's got to go both ways. There's contractors out there that are not nice to work for and they're kind of bullies and kind of very demanding. If those subs aren't careful, they can get burned. There's contractors they don't like to work for. We understand that. So, we take good care of our subs, and, in return, the respect is they take good care of us. It's a two-way street." [#25]
- The Middle Eastern American male owner of a construction company stated, "Many times we were offered lower costs from subcontractor than the one we used. But we knew the one we used was more expensive but was going to deliver and was going - maybe there would be no profits using that subcontractor. But that contractor would make us look so good that we will gain this client for future projects. So, it's not just who can provide the lower cost. Mistakes happen in construction. Who can stand up to their mistake and take charge of it and be accountable for it? Certain traits exist that when you deal with certain people you know I'm picking this person regardless of the cost you're going to put on the table for me." [#26]
- The Middle Eastern American female representative of a majority-owned professional services firm stated, "[I don't work with subs that] don't have a great experience and they only think that they're going to be participating and they don't do the work and you have to do the work for them. But just the fact that they want to be named so that you get the credit for it. There's still some. I expect it's less and less these days to be honest." [#27]
- The non-Hispanic male owner of a majority-owned SB-certified construction firm stated, "I've had guys I've been working for since I kind of started my business and I've known 'em

prior to starting my business, and I've established a good relationship with these subcontractors that I use for certain jobs that require 'em. So, I've been using the same subcontractors I've had for the 13 years. I've known 'em. So, I've used them because of experience and their quality of work." [#33]

- The non-Hispanic white male representative of a majority-owned construction firm stated, "Always being on time. Good with their paperwork. Good with communication." [#35]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "It has been extraordinarily difficult to make good business out of boundary surveys in Orange County due to many factors, specifically with the tough map checking in the county. Now we tried various sub consultants to help us with these boundary surveys, and I may have hired something like seven or eight separate surveyors to do these boundary surveys as a sub to us. And at the end of the day, there's only been a very small handful, namely two to three surveyors that can actually do the work in a timely manner, can start the job, complete the job, submit the map, and get the map recorded in any sort of reasonable time." [#39]
- The Hispanic American female co-owner of a WBE-, MBE-, Micro-, and SB-certified professional services company stated, "If they don't perform the work they say they're going to do. Basically, it's performance? If the firm is responsible, it's easy to work with." [#61]
- The non-Hispanic white male owner of a majority-owned construction company stated, "Dependability. I know what they can do and know that they're going to do what they say they're going to do. It's really tough if you get a contractor that says they're going to do something, and they can't do it because it screws everybody's schedule." [#62]
- The female owner of a DBE- and WBE-certified professional services firm stated, "There's also a concern that primes keep reusing the same subs - how does a new entrant break that pattern? How can Caltrans help?" [#PT2]

4. Subcontractors' experiences with and methods for obtaining work from prime contractors. Interviewees who worked as subcontractors had varying methods of marketing to prime contractors and obtaining work from prime contractors. Some interviewees explained that there are primes they would not work with.

Eight subcontractors mentioned the helpful role Caltrans' programs play in finding work [#3, #21, #22, #32, #47, #53, #54, #FG1]. For example:

- The Hispanic American male owner of a DBE-certified and uncertified MBE construction company stated, "[We find primes] just through the Caltrans website, as far as knowing which primes are bidding on projects. Calling, emailing, visiting job sites, things like that." [#21]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "Well, through the Caltrans website, or whatever that California State Procurement I do, but nothing's - well actually - I will tell you this: when I looked a little further and I looked at the names I started doing more research. And it's there, it's very deeper, you've got to spend time learning: 'Oh, there's this website list of all these primes.' Started looking at them - so I

started looking up their websites and I called them up, I said - or I think I left a message or sent them an email: 'Hey, I can do biological work. You want to hire me?' And so, my interest and surprise many of them contacted me back, said, 'Yeah, we're bidding on this. Give us your -' they started then getting into very specifics: 'Give us your price lists or something.' 'Well price list, what is that?' And I said, 'Do you want like -' they actually sent me these links, and these very large files. It's like with designs and everything, and it's kind of hard to interpret. They started downloading and looking at them. They wanted me to estimate time and hourly cost to do things, I said, 'Well, I don't really know how long it would take.' They just kind of - and they were going to assemble it in a giant package and bid on it. So, I never really bid on any. But they were pretty responsive, and it looked like - they all asked me, 'Are you a DBE?' or whatever minority. I said, 'No, no, no,' but they still said that we'll take your bid. So, they seemed to be desperate to really quick get biologists. So, there is a way to work that network that I haven't quite figured it out yet. Yeah, through the California procurement website. They tried to update it and make it more accessible. It's working partly, yeah." [#22]

- The non-Hispanic white male co-owner of an SB-certified professional services firm stated, "We're on bid platforms. Also, we've pre-qualified with the cities and transportation and school districts, so they send us notifications via email." [#3]
- The non-Hispanic white female owner of a DBE- and SB-certified and uncertified WBE professional services firm stated, "So I am registered online with a ton of agencies. And I get a lot of emails like saying what they have out for proposals. And I have gotten some work that way." [#32]
- The Hispanic and Indian American female co-owner of an SB-certified and uncertified WBE construction firm stated, "When we go to look at the particular project, it asks you on there, 'Subcontractor?' and we click Yes. They can look you up and see what it is that you do, but word-of-mouth mostly. They start to know who you are and go, 'Okay, I'm going to call so-and-so and let's get a price.'" [#47]
- The Asian Pacific American male owner of a DBE-certified construction firm stated, "Caltrans emailed me invitations to bid." [#54]
- A respondent from a trade group focus group stated, "Opt-in DBEs get phone call, etc. that's more personal [and it] gives a name and number which is helpful for those who are persistent, but not the best [method]. Opt-in needs to be taught [to all firms]." [#FG1]

Nineteen subcontractors reported that they are often contacted directly by primes because of their specialization, their certification status, or because of they are known in the industry [#5, #6, #7, #9, #10, #14, #16, #17, #22, #24, #27, #28, #31, #34, #40, #49, #AV]. For example:

- The Black American male co-owner of a WBE-, MBE-, and DVBE-certified construction company stated, "Someone will call us, they know us, they know what we can do." [#5]
- The non-Hispanic white male representative of a majority-owned construction firm stated, "I mean because of our long history and our good reputation we typically will just submit a bid for the project, and we know a lot of the generals that are bringing the projects and we've worked with them before so that definitely helps our chances." [#6]

- The Black American male owner of an MBE-certified professional services firm stated, "We've been very blessed, because we have done such an outstanding job, that a lot of firms see us to be a part of their teams. So, we really haven't had to do any strong marketing. It's been word of mouth and reputation that's brought us all the success. In both situations, but again they'll reach out to me to be a sub, if I have something of interest to them that they need to complete the picture, but if not, they don't certainly reach out just because they think I'm a nice guy." [#7]
- The Asian Pacific American owner of a DBE-, MBE-, and SB-certified professional services firm stated, "As a sub, usually they pick us, we don't pick them. So, they would come to us, then they would say, 'oh, we have a project. Can you give us your scope and fee to work on this project', and we would submit it to the prime. The prime might be getting multiple scope and fee from different engineering firms, civil engineering firms. And then they would, maybe they'd shop around or whatever, but they would select based on combination of experience, pricing, and everything. And then if we get picked, then we work with them." [#9]
- The non-Hispanic white male owner of a SB- and ELBE-certified professional services firm stated, "We got the job done on time. We didn't give him the story that when he calls up saying, hey, we need you there next week. We'd say, no. We can't get there for six weeks. That doesn't work. If you're a subcontractor, and I've done quite a bit of work for bridge builders, you're on a schedule. And when it comes your turn, you've got to be there. Otherwise, their schedule goes to pot. So again, it's not about that piece of paper is about, are you competent? Do you show up on time? And so, the bridge builders like to work with us because as long as they gave us a good schedule, we would put them in the book and we'd be there. When you only have one team, you only have an A team, you don't have a B team and a C team, you've got to schedule that team. Make sure that one, you keep them busy and two, you're performing for the folks that you're contracting with. If there's a job out in the prime, or a prime contractor is looking for a paving contractor, when you've been in business for 30, 40 years, people know you're there. So, they would like you to bid the job. And if the job looked like it would fit and was something we could do, we wanted to do it, we'd give them a price. And if it didn't, we said, no, it doesn't fit. We're not interested." [#10]
- The Subcontinent Asian American male owner of an uncertified MBE construction firm stated, "Some contractor called us, and they says, 'listen, we have a job that we cannot finish it ourselves. We need to subcontract to you a portion of it or all of it because we have to.' The same time, they might have two different contracts. They might have three different contracts. So, they ask us if we want to take one of the contracts as a subcontract to do for them, because their manpower is not enough to do all the work at the same time. So, they call us, 'Oh, hey, we have a three different side jobs and can you guys come and help us out?' And we should and if we agree with everything, then we'd be a subcontract to them. We list our company to Craigslist and some of the other local advertising company, or they go to the city to see if we have no complaints against our company. And they look at our quality of the work and they talk to others, because some company knows each other and they also, they know which company are better than others, and that's how we get referred." [#14]

- The Black American male representative of a DBE-, WBE-, MBE-, SB-, and Micro-PW-certified small business development association stated, "Interesting, because - well, [a local college] - they were out looking for consultants to - they were out looking for clients. They were gonna provide small business assistance and so, I signed up as a client trying to get small business assistance, even though I wasn't really seeking it. I wanted to get my foot in the door. So, once I started explaining to 'em what my business was and what I was offering as a businessperson, they recognized that really, what I was doing - exactly what they need as a consultant. So, they asked me if I would be interested in consulting and, of course, that's what I wanted anyway. So, I said, 'Yes.' So, I turned around and - and I did the same thing with the SBDC here in my county. Just once I became aware of who they were and what they were doing, I contacted them and just explained to them that I had a small consulting firm and the service I'm offering is exactly what they did." [#16]
- The Hispanic American female owner of a WBE-, MBE-, SCMSDC-, and DBE-certified goods and services firm stated, "If I get an e-mail and they're asking me, 'Would you like to submit? We're looking for a DBE,' then I send my certification saying, 'I am. I'm interested.'" [#17]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "We're kind of joined at the hip because I'm one of the few that have certified. I got a certification to do this work, and I asked them, 'Why did you hire me?' and they said, 'You were the first one who answered the phone.'" [#22]
- The Hispanic and Native American male owner of a DBE-, 8(a)-, SB-, and MBE-certified construction company stated, "I know a lot of people because I've always been pretty active in the industry - and I mean, not just the DBE side but the non-DBE. When I was president of the associations that we belong to I got to know a lot of people that were the heads of big companies that are around the Bay Area. O.C. Jones to Ghilotti Brothers. There's a lot of construction in all the Bay cities, all the popular ones. And so, I - kind of through word of mouth they all know me." [#24]
- The Middle Eastern American female representative of a majority-owned professional services firm stated, "In general again most of the top firms here know what [our company] does. And as I said we're very, very strong in transit, rapid transit stuff, transit development studies. So, whenever there is a piece of work that they like somebody to do it they come to us. They usually come to us for that. Word of mouth, [and] relationships especially these are the ones that you build a contracting and prime subcontracting relationship. You have to establish it before the RFP is out. So, people generally know this agency is going to issue this. Let's talk to so and so. It's word of mouth and the fact that the primes, the prime knows us. That's really the main avenue" [#27]
- The Hispanic American male owner of an uncertified MBE construction company stated, "The way they say they find us, well, we already have history on these schools or districts, and when the new projects, they're coming up, they send us the invitation to bid, you know, the email, they email us notifications, you know? So, that's how we do that." [#28]
- The male co-owner of an uncertified WBE professional services firm stated, "Usually it's because the public project is like local, and a prime approached me thinking that having a

local firm, that they might be outside the area, but they think having somebody in town would be helpful in partnering with on the bid.” [#31]

- The non-Hispanic white male co-owner of an MBE-, SB-, and DBE-certified professional services firm stated, "We have a lot of, just, a lot of internal knowledge of a lot of the things going on down here in the San Diego region, and we have a lot of varied capabilities, so we're often brought in on a lot of different, large projects because we're looked at as a firm that can kind of handle multiple roles, especially in projects where the scopes may be varied or wide-ranging. So, we're kind of looked at as a firm that can handle a lot of different boxes, and that helps out a lot of primes." [#34]
- The non-Hispanic white male co-owner of an SBA-certified micro- and WBE professional services firm stated, "I've been at this a long time. There's a network out there that is aware of who we are. Generally, the phone will ring. people reach out you as a woman-owned business or microenterprise." [#40]
- The Hispanic American female representative of a DBE-, MBE-, and WBE-certified construction firm stated, "Mostly it's because we're being working for the same companies for a long time. We knew a few of these companies before we started the business. So, when we started the business, we just let them know that we were working now with a new company. They usually email us an invitation to bid. And now with the years we can tell ok. This is a bad contractor to work with so sometimes we stay away from those. But that's how we get the projects. They email us an invitation that includes the plans of the project and everything and we just go from there." [#49]
- A comment from a majority-owned professional services firm stated, "Companies have contacted me when they need my services." [#AV46]
- A comment from a majority-owned professional services firm stated, "It's hard if you're not a minority or woman owned business. If you don't qualify for DBE... the primes are looking for woman-owned, minority-owned, veteran-owned and you don't get the work." [#AV255]
- A comment from a majority-owned construction company stated, "We don't pursue any contracts. We've been pumping concrete for a long time. They call us." [#AV8036]

Sixteen interviewees said that they get much of their work through prior relationships with or past work performed for primes. They emphasized the important role building positive professional relationships plays in securing work [#5, #9, #11, #13, #15, #17, #21, #33, #40, #45, #46, #52, #61, #62, #AV, #FG1]. For example:

- The Black American male co-owner of a WBE-, MBE-, and DVBE-certified construction company stated, "You just meet them over the course of the years doing the work, or you might see a job that looks fascinating to you, and you'll stop and talk to the people, hand out your card." [#5]
- The Asian Pacific American owner of a DBE-, MBE-, and SB-certified professional services firm stated, "Basically you know somebody that works at the firm, like a friend or something. Then you would go to lunch, you would chat, email, text. Let's say a project comes up and the manager is okay with us submitting something, then that's how the connection is built. It's basically networking, but more on a personal level. We have

relationship with, for example where my past company I would have relationship with. I know people, but the main thing is, the question is why should they give us work versus feeding the system. So, if they can do it all and they have a civil engineering department, then technically why should they give me the work instead of feeding their own group. So that's another challenge in itself." [#9]

- The non-Hispanic white male representative of a Native American-owned MBE-, SB-, and Micro-BE certified professional services firm stated, "We have what we would call industry partners that we work with." [#11]
- The Hispanic American male owner of an uncertified MBE construction firm stated, "Yes, once we get established with a particular logistics brokers call them and see the availability of loads that we book as needed or as available." [#13]
- The Black American female representative of a minority chamber of commerce stated, "Firm C said that none of their current contracts is from DBE seeking primes. All of their current clients and contractors are folks who they developed a working relationship with, and if they do get work to work with Caltrans, it's not an official contract." [#15]
- The Hispanic American female owner of a WBE-, MBE-, SCMSDC-, and DBE-certified goods and services firm stated, "Yeah, I would say about 95 percent of our clientele is because of other people referring them. And then, keeping on with the people, the clients that we've had. We've had some clients that have been with us since 2003, 2006." [#17]
- The Hispanic American male owner of a DBE-certified and uncertified MBE construction company stated, "Sometimes we find that contractors, they kinda have a business relationship with the DBE companies that they use, and so even if we provide better rates, sometimes we don't have that business relationship that they have with somebody else. And I know it's not like before, when we used to be able to see the DBE commitment letters and like the DBE contractor bids like that the general selected. I know that that's not available anymore. Y'know, they made it for privacy reasons you can't see the bids that the contractor is using. But before, all the time we used to see. It was like, 'Wow, we had better prices.' 'Oh, wow, we had better prices.' 'Oh, wow, we have better prices.' But still, it didn't help us much." [#21]
- The non-Hispanic male owner of a majority-owned SB-certified construction firm stated, "I know a few general contractors that I've worked with over the years so, they solicit bids to me. They send me e-mails for upcoming projects that they have. Say they have a Starbucks - it's coming up in 30 days. They want their bids by 30 days. So, I'll get e-mails - 'Hey, we have a Starbucks bidding. We need this quote back in 30 days. For your trade, it says 'Paving, striping, or concrete'.' So, they specifically solicit to me because I'm on their list of subcontractors." [#33]
- The non-Hispanic white male co-owner of an SBA-certified micro- and WBE professional services firm stated, "They [our repeated primes] really like our work. I fully expect to hear from them not too far off in the future." [#40]
- The non-Hispanic white male representative of an SB-certified professional services firm stated, "Typically, it's based on the relationships we have it's a matter of building those relationships through conferences or industry functions." [#45]

- The Middle Eastern American male president of an WBE-certified professional services firm stated, "This time, I did [win a project based on prior relationships] because the project that I started with a small owner - the owner was a small-time developer. I started working with him because he knew me from before, and then, he sold the project to a national firm and then, the national firm kind of inherited me. So, they work with me. But that was the only time. They never called me back to do anything else for them." [#46]
- The non-Hispanic white male owner of a majority-owned construction company stated, "People just call me. I've never marketed by business ever. I've never advertised, I don't have business card. I just, word of mouth." [#62]
- A comment from a non-Hispanic white WBE professional services firm stated, "I haven't been aware of anything that needed to be proposed-most of my work is by referrals." [#AV]
- The Hispanic American female representative of an MBE- and DBE-certified construction company stated, "It is hard to get work unless you know someone or can get personally connected to someone. Our firm doesn't need help going to Caltrans websites [to help get work]. DBEs face fatigue trying to get work." [#FG1]

Fifteen business owners reported that they actively research upcoming projects and market to prime contractors. Those businesses reported that they research upcoming projects and sometimes identify prime contractors using online and other resources. Some firms then contact the prime contractor directly to discuss their services [#1, #3, #6, #8, #14, #17, #18, #21, #27, #32, #38, #50, #56, #61, #PT3]. For example:

- The non-Hispanic white female owner of a WBE-, DBE-, UDDBE-, and SB-certified professional services firm stated, "What I do is if I see a RFP for a client, no matter who it is, I will try and contact the... Well, I'll only contact the people that I like that I work with to see if they want us on their team. When an RFP is issued and it's on one of the websites like PlanetBids or BuildingConnect or one of those, they have the opportunity that once you're logged on there, you can see the prime contractor. So, if somebody who has looked at the idea of possibly bidding on a project. I contact the people I would like to work with, or that I've worked with before and say, 'Hey, I see you're bidding on this. If you decide to continue to bid on this, I'd love to be on your team.' And that's all that it takes, basically." [#1]
- The non-Hispanic white male co-owner of an SB-certified professional services firm stated, "Once the projects are advertised and we decide that we're going to bid it either as a general or a sub. So, let's say for this case, we selected that we're going to bid it as a sub, we'll look at the plan holders list. We'll call all the generals to see who's bidding it as a prime, and then we'll provide a sub quote to them. We don't say market. I mean, again, we're in a community of contractors that basically bid on the same projects or types of projects. We have our website and some of the developers and school-unified school districts, they know us, they see us. So, we do work for those people as well. But again, we're not...we don't go out market us. We've been in business for so long. They kind of know who we are." [#3]
- The non-Hispanic white male representative of a majority-owned construction firm stated, "Sometimes we do, but yeah. We do at times, but not very many. There are some new people we haven't worked with that we do market ourselves to through emails or through

meetings and luncheons that we do. We usually pull a plan holders list or a bid meeting sign-in sheet, and then we'll call them and see who's bidding it." [#6]

- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "If there's a job that's there and we know we don't have a lot of connections in the area, then we will call up some primes in the area and be like, 'Hey, can we be a sub for you guys? We have this expertise we'd love to provide.' Or if we have an area that's our area of expertise, our region of expertise and the client's there, and the job is too big for us to go after then primes may reach out to us and we'll go as a sub to them." [#8]
- The Subcontinent Asian American male owner of an uncertified MBE construction firm stated, "Of course, we contact each other. You know, sometimes they called me and says, 'Hey, we have a job. Would you guys want to do it?' Like, there's a contractor in Southern California in Los Angeles. They got a contract on Northern California, and they couldn't come all the way to bring their crew here. So, they call us and they said, 'Listen, we have a job. Would you guys want to be a subcontractor? Because our men cannot reach out that far. It's like six-hour drive.' That's how we says, 'Okay, we will do it since it's a local.' Because a lot of contractors, or a lot of company[ies], they don't realize, if they look at the contractor and they see where they're located. For instance, we are located in Northern California, we only take the Northern California. If they offer these Southern California, I might not be able to go there. Some company, they don't care. They just go and take a contract regardless of where the part of the California they are. And then once they get the contract, they subcontract it to the local contractor who live in that area." [#14]
- The Hispanic American female owner of a WBE-, MBE-, SCMSDC-, and DBE-certified goods and services firm stated, "You get the reach-out of e-mails of some of these primes looking for subs. And if it has the criteria that meets - that I can provide, that scope, then I do it. It's usually through e-mails. They do reach-outs, but I have never been successful with the reach-outs. It seems like those are just done just to say they did them. I don't think they're serious." [#17]
- The non-Hispanic white female owner of a DBE-, SWBE-, and CBE-certified professional services firm stated, "I have somebody that I've hired. He does our bidding. He and I are out building relationships. That's like our full-time job, because it is that important. I'm actually building relationships with companies and I'm also doing relationship-building and trying to, basically, steer our destiny through politics as well because a lot of these policies that get put into place, everything from the CSLB, anything that comes down the pipe will affect small businesses to a place where we've got to always know what's going on. So, I don't think that most general contractors are open to building relationships with their subcontractors. I would say half of all of our time is based on doing that. He does bidding, so at time of bid, he and I will go, before we ever even do a bid with general contractor, if we haven't worked with them in the past, and even if we have, we'll go to their office and meet with them. Talk to them about some of the particulars, about the uniqueness of each of the bids, what will be our - how we will be able to give them the best price, how we will be able to maybe mash up our partnership together so that we can have an advantage. We bid to everybody, but we know that there's some people we'll just do an exclusive with and just say, 'We'll just bid to you because we know we can make this work better.' But we'll go and we'll talk to their people that are doing their bidding and start there. We try to build

relationships and we've tried to steer it so that we have some control over it, but really it comes down to pricing. That's all they care about." [#18]

- The Hispanic American male owner of a DBE-certified and uncertified MBE construction company stated, "I know that a lot of the companies out there still don't really send us requests for bids. I mean, we do get requests daily, of course, but on a particular project where maybe there's 10 or 12 contractors submitting bids, who should be requesting for minority submittals from companies like myself, and maybe I would get 2 or 3 of them who would talk to us and ask us for a price. So, we generally would just email or fax, send something to them, like a general estimating department, whereas the other companies, when they send us that request, they'll tell us who the estimator is, and then we can start to kinda build that rapport with them. A lot of them, we've asked, 'Hey, how do we get on a list? When you guys are submitting a bid, how can you guys send that information to us?' And y'know, like say, 'All right, we'll add you,' 'Oh, we'll add you,' but we never get added." [#21]
- The Middle Eastern American female representative of a majority-owned professional services firm stated, "It's vice versa too. If something comes up and we haven't heard, we try to go knock on their doors. 'Hey, you guys are you guys planning on bidding on this?' But it's mostly them coming to us because they know we can provide those elements." [#27]
- The non-Hispanic white female owner of a DBE- and SB-certified and uncertified WBE professional services firm stated, "If it's a city that I like to work in I might like try to get on a team with somebody for that project. If I'm not busy with work, then I'll ask people 'can I be on your team. There's a DBE percentage. I'm interested in this job. If you guys are going to propose on it, I'd like to be on your team.' I have done that if I'm not - so if I'm too busy with work which has been kind of the case the last few years I don't typically look at many of those. But I still have them coming through my emails." [#32]
- The Black American female co-owner of a DBE- and DVBE-certified and uncertified MBE construction company stated, "It's just a bid process because most of the public works job have a bid-holder's list, those who are [interested] so those are who we send our rates to." [#38]
- The Hispanic American male owner of an uncertified MBE construction firm stated, "I talk to other drivers to see what brokers they go through and usually they don't like to tell you because you're just going to be crowding their spot. Like I tried to find out about the Caltrans thing, and nobody wanted to tell me nothing. They're like 'Oh you should look it up' or something and nobody really wanted to give me information. But I do try to talk to other drivers, and they've given me some brokers to go through. And I just call a broker and ask them if they are subcontracting. And they have me fill out a sub-haul agreement and they call me for the work." [#50]
- The Black American female owner of a DBE-certified and uncertified WBE and MBE construction firm stated, "I go to these pre-bid meetings and let these primes know that I'm here. Not one has sent me an email or called me back and said, 'Ms., we need your truck.' And I know they need trucks. It's not that I don't have something that they don't need me." [#56]

- The Hispanic American female co-owner of a WBE-, MBE-, Micro-, and SB-certified professional services company stated, "I'll call them, one-on-one calls. Social media up close, in terms of in my network there's primes that I've worked with...in my social network. We're in directories for different agencies, like AGC and BIA, so if any members of those agencies need our services, they can look us up." [#61]
- The male owner of an MBE- and DBE-certified services firm stated, "I've been providing quotes on many Caltrans projects. There's no feedback from the primes about quotes. It feels like a disconnect of the new sub trying to get break in." [#PT3]

Seven subcontractors shared other thoughts about finding projects [#22, #23, #47, #FG1, #PT11, #PT4]. For example:

- The non-Hispanic white male owner of a majority-owned professional services firm stated, "I would say with these businesses they always ask me - the primes - you can go on their website and there's 'Primes seeking subs' for doing work, like a prime contractor might do the whole thing for Caltrans and they need the biological surveys. They often ask you are you a - those certifications and I'm not. I think that probably - they would probably rather - I don't think add bonus points or certain types of - like you said, the government wants to see that they can certify that so many of these disadvantaged businesses are being employed on their projects and that's a good thing, not a bad thing. So that's probably kind of an anti-barrier - and unintended consequence of those is that I don't have one of those." [#22]
- The Subcontinent Asian American male owner of a Micro- and SB-certified and uncertified MBE construction firm stated, "There's been at least a couple of people exactly like you mentioned, like they are overloaded, and they needed to deliver the product to the client, so they approach me. And that's something also I do, not typically on an everyday basis because that's going to be a temporary thing. Eventually they are going to have the business and I will be left with nothing - meaning, I'm not building any relationship with the client or anything for repeated business. Usually the contractors approach me asking for what kind of solution can you provide for, let's say, a certain problem? So, I would run some preliminary calculations, give them a decent engineering solution, and they put together the cost that it would involve for the materials to build it, and they'd take it from there. Typically it would be a preliminary design and until now I have been offering it as complimentary to the people I have been working with. So, that's usually where it starts for me. Since it's just me I'm able to just speed it up in my overhead or anything, so it doesn't really bother me too much. If I had to employ somebody just to do only preliminary calculations, then it's something I would have to think about very seriously. But on the other hand, I would have to say most of the people I work with - in fact, all of them - are very grateful because they have been in business for a while. They do understand some of the initial weightlifting or anything that I do has been really appreciative of the time and the effort that I put. So, that is why I like to say I have about 80 percent repeated clients because of the way that I, yeah, that we work together." [#23]
- The Hispanic and Indian American female co-owner of an SB-certified and uncertified WBE construction firm stated, "We do get a lot of primes that reach out to you for a quote." [#47]

- The Hispanic American female representative of an MBE- and DBE-certified construction company stated, "She hears that primes are always looking for DBEs, but as a DBE doesn't see that. [When primes do reach out, the] outreach emails are too vague, NAICS codes are not helpful." [#FG1]
- The female representative of a WBE-certified construction company stated, "Fatigue is real. Too many primes reach out, often emails end up ignored/deleted without a response." [#FG1]
- The female representative of a DBE-certified professional services firm stated, "I'm a DBE, brand new, trying to be a sub for the prime. But all the prime prefers to use their existing sub or the subs that they'd been using prior to the new proposal that came out. How do Caltrans encouraged those primes to use different subs every time? Because it seems like they're sticking with one sub and they're using it over and over. So new people like me have no chance to become a team member. It's really, really hard for me." [#PT11]
- A respondent from a virtual public meeting stated, "One of the biggest challenges is getting that extra information from primes or on projects when you're bidding with a prime, and you get the... 'If you don't know the answers, then you shouldn't be here.'" [#PT4]

Subs discussed the effect working in the public or private sector has on their ability to work with prime contractors [#1, #32, #53, #61, #62]. For example:

- The non-Hispanic white female owner of a WBE-, DBE-, UDBE-, and SB-certified professional services firm stated, "On private jobs, I get about 85, 90 percent because of my experience. And on public jobs it's kind of like luck of the draw. It's whatever my team has. If they win, then I win." [#1]
- The non-Hispanic white female owner of a DBE- and SB-certified and uncertified WBE professional services firm stated, "So most of them, the ones I'm a sub to are all like civil engineers and they work in both [sectors]." [#32]
- The Asian Pacific American male owner of an MBE-, DBE-, and SB-certified construction firm stated, "Generally the primes I work with stick to their own lane. So, if I work for a commercial prime, they probably only do all commercial. Once in a while, I will meet, I have to say - Lately we've been bidding on a couple of primes who has their foot in both areas, just like we do." [#53]
- The Hispanic American female co-owner of a WBE-, MBE-, Micro-, and SB-certified professional services company stated, "When people know you as a certain company, they don't necessarily know that you do public private development work. And so, we're the primes, they don't do private development work, they only do public works." [#61]
- The non-Hispanic white male owner of a majority-owned construction company stated, "It kind of varies. Most of the time, there's a pretty distinct line between people that do public work and private work. The people that do public work stick with people that do public work." [#62]

Ten subcontractors discussed hiring second tier subcontractors [#1, #9, #16, #18, #24, #28, #32, #40, #53, #62]. For example:

- The non-Hispanic white female owner of a WBE-, DBE-, UDBE-, and SB-certified professional services firm stated, "I have [hired second tier subs] before. And what I found out that my insurance goes up remarkably because I'm the umbrella for another company. So, I do not do that anymore." [#1]
- The Asian Pacific American owner of a DBE-, MBE-, and SB-certified professional services firm stated, "We choose [second tier subs] the same way the prime choose us. We choose the sub meaning, for example, the prime tells us, hey, go find a surveyor. So, we said, okay, we have three people on the list that we always worked with before. We call those three people and we're like, we have this project. They send in their scope and fee, and then we have a list and then we submit it back to our client. And then the client might say, okay, I want to work with B. A, B, C, here's three choices. The client might say, I want B, and then that's how we pick the sub. If the client does not have a preference, then we pick based on our relationship, how well we work with A, B or C. Then we pick it that way; we do it based on working relationships. We don't look up whatever, back in the day, the yellow page, we don't look up the yellow page say, we're going to call these 20 people for a quote. We don't do that. Whoever we worked with in the past, we tend to use the same people, same firm." [#9]
- The non-Hispanic white female owner of a DBE-, SWBE-, and CBE-certified professional services firm stated, "We have suppliers, but we do any - nobody does our work but us." [#18]
- The Hispanic and Native American male owner of a DBE-, 8(a)-, SB-, and MBE-certified construction company stated, "It depends. Mostly we do it all. But there's the occasion - it depends on the time of year, the resources available or whatever. There could be things that are subbed out." [#24]
- The Hispanic American male owner of an uncertified MBE construction company stated, "I did in the past, I'm going to say in 2004 to 2007, somewhere around there." [#28]
- The non-Hispanic white female owner of a DBE- and SB-certified and uncertified WBE professional services firm stated, "In 11 years I did sub out one time and it was just last year. I hired a firm that I had worked with, and the city liked. So, the city and I kind of talked about who I would sub out to and then we went right after to that firm." [#32]
- The non-Hispanic white male co-owner of an SBA-certified micro- and WBE professional services firm stated, "To that point, I would say if you came to us and said, 'We want to work on this,' and then I would say, 'You need to hire a geotechnical engineer. You need to hire a surveyor.' We will work with them and use their product. We would not subcontract them and then act as their agent. We don't do that." [#40]
- The Asian Pacific American male owner of an MBE-, DBE-, and SB-certified construction firm stated, "Not in the commercial work. In the public works, yeah. I have to - I generally see myself subbing out to demo. Until we get big enough and can afford a bigger yard and more equipment. Then we'll probably self-perform the demo. But for now, that's the only other thing I would sub out, is demo." [#53]
- The non-Hispanic white male owner of a majority-owned construction company stated, "Very rarely. Occasionally, I will." [#62]

5. Subcontractors' preferences to work with certain prime contractors. Business owners whose firms typically work as subcontractors discussed whether they preferred working with certain prime contractors.

Eight firms that the study team interviewed discussed their work with certified primes [#1, #3, #8, #17, #27, #32, #38, #52]. Their comments included:

- The non-Hispanic white female owner of a WBE-, DBE-, UDDBE-, and SB-certified professional services firm stated, "The agencies want certain certifications from a bidder. And when they see that the entire bidding team has different certifications, it gives them a leg up." [#1]
- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "Well we haven't really met with primes that are MBE, DBE, SBE certified. Most of them don't meet that criteria because they're already prime and already large. If we do meet somebody who is a prime, like we've done jobs, it doesn't actually do anything to help us because we're already their prime. So there's no reason for them to hire more minority firms or anything else because they already meet that criteria. So yeah, I guess to answer your question is if we do meet a kind of firm like that, they'll be less likely to hire us because they don't even need to. And if there's a larger firm that isn't in that category, then they'd be looking at us, but mainly just to meet that quota, not necessarily to help us gain expertise or grow or, et cetera." [#8]
- The Hispanic American female owner of a WBE-, MBE-, SCMSDC-, and DBE-certified goods and services firm stated, "A lot of people that I work for are minority-owned, women-owned. I don't make that a criteria. But because I understand the need to help and support, to build our communities, and to build the economic - the viability of the - our economy, I don't hesitate to go with any organization based on if they're MBEs or WBEs. I - in addition, I go with - if they can provide the service, then they'll get the job." [#17]
- The Middle Eastern American female representative of a majority-owned professional services firm stated, "In fact there were a few of them we submitted last year where LA Metro had targeted SBE or whatever, DVBE targeted prime. I think it's like under 5 million or so. And yeah, we were subbed to a few of them. For especially for the DBE primes in this situation. They only come to us because like we had worked with them in the past, and they thought ok. Would you sub to us? This is in targeted for, set aside for a DBE prime. They would come to us usually." [#27]
- The non-Hispanic white female owner of a DBE- and SB-certified and uncertified WBE professional services firm stated, "I think sometimes that's 50 percent of the time that's why I'm on the team is because they're trying to fulfill that [goal]." [#32]
- The Black American female co-owner of a DBE- and DVBE-certified and uncertified MBE construction company stated, "Usually the primes that we work with are larger; they don't really have certification. There's just, you know, now there's one female-owned engineering company, but, I mean, other than that, nothing aside from that." [#38]
- The Asian Pacific American male owner of an uncertified MBE construction firm stated, "They're all owner/operators. Even my broker, she's a - or my dispatcher, she's self-employed, owns her own business, and she probably has got five to eight trucking

owner/operators that she dispatches for, and that's her business. My sub-hauler, he's an owner/operator. He's got three or four trucks in the hay business, and he hauls cattle, too, and that's - we're all... they're just like me, you know." [#52]

Twenty-six business owners and managers discussed the factors that encourage positive relationships between prime and subcontractors. Many indicated that they prefer to work with prime contractors who are good business partners and pay promptly [#1, #3, #7, #8, #9, #6, #10, #11, #14, #17, #18, #23, #24, #28, #32, #33, #38, #40, #43, #44, #47, #48, #52, #53, #61, #62]. Examples of their comments included:

- The non-Hispanic white female owner of a WBE-, DBE-, UDBE-, and SB-certified professional services firm stated, "There's a lot of people out there that don't have the integrity that we hold. So, I just won't work with them, but the people who I have had long-term relationships with, and I'm talking 15 years or more, they always come back. That they know what they're doing, because they have to know what their actually their tasks are and what they need from me. They need to have a good team, that's one. Another one they need to, once I submit the invoices, they need to pay. And they also need to, when I call, be able to talk to me. And I'm not saying I'm needy and that, I want them to talk to me now. It's not like, I usually just email them and say 'Hey, when you get a chance, give me a call. I have a question about this.' Or an estimator, oh my gosh. This happens all the time. There's estimators out there that they asked for us to have a bid. But then when you ask a question, because you didn't get all the documents that they were supposed to send, they never get back with you. And that happens a lot." [#1]
- The non-Hispanic white male representative of a majority-owned construction firm stated, "They help us be successful. They don't combat with or argue with us, or they don't work against us. They pay us timely and they're just good partners to work with. [Primes we won't work with again?] Well, just the opposite of what I just mentioned. They work against us. They don't acknowledge when we have extra work or change orders that we need to be paid. They don't pay us for... They don't pay us on time, and they just create issues on projects." [#6]
- The Black American male owner of an MBE-certified professional services firm stated, "[There are primes we won't work with]. The unethical business practices that they do, the unfair treatment, the disrespectful nature in general, all those bad things that one does that makes you not want to really deal with them, lie and deceit and unethical practices that have been documented." [#7]
- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "Sometimes we have primes that want to give us work and keep trying to find ways to give us, we have some primes that don't invite us to the meetings and try to strategize from the very beginning how to scope us out of the project. It varies company to company. I have a huge list of companies that I would not work with again. They'd maybe have a different way of thinking about equity than we do and so we just don't align with the same values system as they do. Or the prime is mainly using us because they want to gain our expertise, that's a big one. We had that situation with [a well known prime], where they hired us and then they used us to give their staff a training and do an initial part of a project, and then the scope is out. Man, we trained your staff, and we did this." [#8]

- The Asian Pacific American owner of a DBE-, MBE-, and SB-certified professional services firm stated, "I don't think we have that luxury to be picky. I think if somebody gives you a call, then you're going to have to submit a bid, unless it's a choice of being exclusive to one prime versus the other. I think if they're giving us the opportunity, we have to try to work with them. We're just too small to be able to play that game." [#9]
- The non-Hispanic white male owner of a SB- and ELBE-certified professional services firm stated, "There were [primes we avoid]. I told him one prime contractor who wanted to do the work. I said, I've taken the liberty to checking you out. I said, Yeah, all bad. He said, All bad? I said, All bad. You, obviously, are not doing things that are, either the people are happy with because nobody will say a good thing about you, nobody. So, I'm going to pass on, giving you a price. He goes, really? I said, Yeah, you're obviously way too sharp for me. You'll probably take me to the cleaners. So, I don't even want to touch it." [#10]
- The Subcontinent Asian American male owner of an uncertified MBE construction firm stated, "Any primes, if they are doing everything by book or they are doing the right things or they have the certificates, they have the license, they have the background clear, no complaining incident, we work with them, whether it's a private or it's a prime. We haven't run to that kind of company [that we wouldn't want to work with again] except one time that there was a company offer as... It was a prime from Southern California. We get the job done and they don't pay us." [#14]
- The Hispanic American female owner of a WBE-, MBE-, SCMSDC-, and DBE-certified goods and services firm stated, "I do have some primes that I have worked with for a good considerable amount of years, for over five years. But I'm always interested in being able to grow that, get other clients." [#17]
- The non-Hispanic white female owner of a DBE-, SWBE-, and CBE-certified professional services firm stated, "We have made that part of our business plan which we go out and talk to these general contractors. First of all, we don't bid to very many people anymore. We've been super selective of who we will be we know people who will not pay us or who are not going to treat us correctly and we just won't bid to them anymore. That has helped out a lot. You have to because, you also can tell the companies who don't tell you the truth. When they try to lie to you, then you know that you've got a problem. I'm going to knock on wood because I have - in the last two years or so, we've kind of eliminated that issue. We've built up really good relationships with their [accounts payable] people, we go out and visit them before we start a job so that everyone knows who's who in the zoo. I take my girls out there. We buy the lunch for the group there so that everyone knows that [my firm] wants to partner. We just try to make it so that when there's going to be a check cut, that we are like the first in line. We spend about \$12,000.00, \$15,000.00 a year at the end of the year to buy gifts for general contractors and the people that we work with on a regular basis on these projects." [#18]
- The Subcontinent Asian American male owner of a Micro- and SB-certified and uncertified MBE construction firm stated, "It goes back to one of the bid shopping that we talked about, and it happened a couple of times, and I just feel like this individual was maybe thinking of things differently - I mean, not in a typical manner. I've known other project managers in the same company who don't take this approach, so I don't believe it's a company-wide approach. Maybe the company gives them too much freedom and this individual is like this.

So, yeah, it's not the company... As far as this particular business goes, the first thing I would like to know is how far are they in the bidding process? Are they close to bidding in terms of timing - time-wise? And also, secondly, how confident they are that they will win this project? Because like we talked earlier, some of the work, when it comes to me - and typically the preliminary design has been done on a complimentary basis in the entire industry. It's not just me. I worked with a couple other engineering companies and even there I used to provide the preliminary solutions as a complimentary. But like you mentioned, it could be time-consuming. I would end up putting days of work, which is not getting paid for by the clients but paid for by my former bosses and all that. So, that has to make some meaning. Right? That has to make some sense. So, if they are not confident at all that they will win this project because they have never done the work before with this particular city or particular agency or specifically Caltrans before, and if they don't have the full knowledge of everything that they need to do, that's very less likely I might get the project. So, that's something I try to talk to the contractors when I first get any projects - so, how sure they are to get that? So, more on the confidence line. I would look for how sure they can get that project? And second of all, I think most qualities that any person would expect in this industry, being able to provide me with all the information that I need. For example, architectural plans, structural plans, and all that information so I can be more using the information that has been already established rather than guessing the work. The problem with guessing the work is sometimes it could be questioned later by the reviewing agency or by the QA/QC personnel, and a lot of it will fall on my plate and I have to be the one to prove why I made a guesstimate of those - and, which, typically engineers don't like that because I'm trying to guess somebody else's work, somebody who has already performed something. I'm trying to guess how they did it. And so, this all involves a lot of manpower and brainpower, so you are losing a lot of time which could be easily established. So, if there are project managers who are able to provide the information that I need, which is not just me, but any engineer would need in order to do their job, that's somebody who I would enjoy working with. But unfortunately, our industry is also one of the old industries, so all the information is not available readily all the time. Sometimes you have to make guesses. Sometimes you have to take that approach. And if it is a legitimate case, I would consider that, but on a typical basis I would expect them to provide that information. That's something, yeah, I look for. And thirdly, when it comes to payment and stuff, keeping it smooth. If there are situations, just giving me a heads-up on what's going on than just being sneaky or anything. So, those are typically the ones I try to look for in the first contact, in the first project. But on a rolling basis, as repeated clients, how much they enjoy working with me and all the subtleties of how I can improve and make it efficient and profitable for them as well. And on a more - I would say on a midsize level to large projects that I have worked with, I typically try to get feedback from the client - or my contact person, my project manager - how I did and if there are places to improve or anything.”

[#23]

- The Hispanic and Native American male owner of a DBE-, 8(a)-, SB-, and MBE-certified construction company stated, "We've actually - there's two or three that are on our list of we don't bid them anymore, and unfortunately they have gotten some work over the years. And we don't bid them because we know they, number one, will never use our number, and

number two, have believed in years in the past that they have given our number to other subcontractors so that we weren't low." [#24]

- The Hispanic American male owner of an uncertified MBE construction company stated, "Lately, these years, I've kind of just been doing this with this [same prime] because, well, they've been keeping me busy. They've been keeping me busy, so, and I would like to sub with someone else, but there's no time nor room." [#28]
- The non-Hispanic white female owner of a DBE- and SB-certified and uncertified WBE professional services firm stated, "I think just being familiar with the process and working with them and what it's like. And them being like good engineers as well. Like I have a few that I struggled with. Like they just didn't - they weren't as easy to work with as others." [#32]
- The non-Hispanic male owner of a majority-owned SB-certified construction firm stated, "Some of them are more - what's the word? They're more experienced. For me, it's like, okay, if I show up for the job, they say it's ready to go, I show up with equipment crew to pave a job. And I get there, and the job's not ready. And I have to do extra work to do our portion of the job - somebody else's work just to get our job done. That's the difference between some general contractors and some others that aren't so good." [#33]
- The Black American female co-owner of a DBE- and DVBE-certified and uncertified MBE construction company stated, "There are those that we have, you know, just prefer to work with, and some of them are new. It's not that we have a strong relationship. It's just sometimes easier to work with them, just clear and concise in what they need and what they want, and just direct, where we all agree, and do things accordingly. And then there are some who you can tell them the sky is blue and they'll tell you it's black and want you to agree to it, and it just becomes a hassle. But it was just - it's just a lot, a lot to deal with when you've sent out, you know, all these people in these jobs doing all these hours and to have somebody not work with you on resolving whatever issue it is." [#38]
- The non-Hispanic white male co-owner of an SBA-certified micro- and WBE professional services firm stated, "There are agencies out there that you don't run, you flee. It's just like anything else, agencies are run by individuals. Companies are run by individuals. What we have learned is that the organization may be good, bad, or indifferent, but it's the people that you're working with." [#40]
- The non-Hispanic white male representative of a DBE-certified and uncertified WBE construction firm stated, "Now there's other prime contractors that we work for who are absolutely fantastic. And we've grown to - grown up with them, and that's pretty much primarily who we work with now. But the other - you know, we've had some bad experiences also. We get a lot of calls from people wanting us to bid on these DBEs, but then they don't - they either have - they talk to you and put - and say that they - they talk to you, and they try to get a DBE, but when it comes down to it, there's some prime contractors that don't want to play that percentage game. And so, I think that they go around it a lot." [#43]
- The non-Hispanic white male owner of an SB-, DVBE- and Micro-BE-certified construction firm stated, "Those are more personality-based. I don't know that they're indicative of the company." [#44]

- The Hispanic and Indian American female co-owner of an SB-certified and uncertified WBE construction firm stated, "Yeah, we're open to work with anybody and everybody, absolutely, but there are those that treat you a bit more with respect. We do have a couple, but that doesn't limit us because across the board we work the same. We don't play favoritism. We don't have favoritism in any of that. Right, right. It's communication. It's educating. Being new, I don't know all of the ins and outs of things, especially from the certified payroll and DIR, and it's forever changing, so that education that comes from the prime only makes the subcontractor great, and I have two primes that teach me as I go. I just love that about them. That's why I would choose to go with them at any point in time. I love working with them, so when they choose us, it's one of those, 'Oh my gosh. How wonderful. We're in a new area. I don't know anything about what their certified payroll requirements are, but she'll help me.'" [#47]
- The Hispanic American male representative of a construction union stated, "The respect, people, the people going to work. What I want, what I'm looking for is they get the right wages, the good treatment, the safe places. That's why they - that's the way to keep a good relationship with everybody, respect and follow the government rules and the union agreements." [#48]
- The Asian Pacific American male owner of an uncertified MBE construction firm stated, "Well, it depends. If I'm hauling livestock, I'd rather deal with people that's in the same field, you know what I mean? That's in the ranching business. The best ones to work with is ranchers that used to have their own trucks, because the California laws and regulations of smog and emissions, they had to get rid of their trucks, and they no longer have them. So instead of buying new trucks, they quit hauling their own and hired everything out. Those guys know the ins and outs about trucking and what it takes to haul livestock, so they know what to expect. They know how to treat you, versus somebody that don't have a clue, you know? Because they need us as much as we need them, so they really treat you good. But I'm the type that if you're not going to treat me good, then I'm not even going to work for you, and it ain't worth my time at the end of the day." [#52]
- The Asian Pacific American male owner of an MBE-, DBE-, and SB-certified construction firm stated, "It'd really be communication, and a prime that has professional empathy, I guess is what I call it. That understands the subcontractor struggle. And what I mean by that, usually how important cash flow is, how important schedule is. So, a prime contractor that has professional empathy for me is very, very important. That they get that. And so, when we send them an invoice for a segment of work that's done, that they really, really be there for us to push that through and make sure that we get paid on time, and that they support us in that fashion. So, just be empathic to our struggles as a smaller guy." [#53]
- The Hispanic American female co-owner of a WBE-, MBE-, Micro-, and SB-certified professional services company stated, "If they keep asking us for a bid and they never give us work. If there's a prime who doesn't represent us as an extension of staff, and they're more like, they're not partners with us for a project. They're more like, the kind of use you as the scapegoat. You know what I mean? I don't like to work with people like that. So, we like working with team players. We consider ourselves as a sub consultant, as an extension of staff for prime consultants, representing their company in front of the agency. Our integrity is important. And we like to be treated as part of their staff. If a prime kind of

treats us like the scapegoat, or they don't give us all the information or they don't communicate with us as if we were an extension of their staff, that's kind of a turnoff for me because you're going to miss something. If there is miscommunication." [#61]

- The non-Hispanic white male owner of a majority-owned construction company stated, "If a prime's got his stuff together, I guess it's the best thing. Got his ducks in a row. That just makes it a whole lot easier for everybody." [#62]

F. Doing Business with Public Agencies

Interviewees discussed their experiences attempting to get work and working for public agencies. Section F presents their comments on the following topics:

1. General experiences working with public agencies in California;
2. Barriers and challenges to working with public agencies in California; and
3. Caltrans' bidding and contracting processes.

1. General experiences working with public agencies in California. Interviewees spoke about their experiences with public agencies in California.

Forty-three business owners had experience working with or attempting to get work with public agencies in California and in other places [#1, #10, #11, #14, #17, #18, #25, #27, #34, #35, #36, #38, #40, #41, #42, #44, #45, #46, #47, #49, #5, #51, #53, #54, #57, #6, #61, #62, #7, #8, #9, #AV, #FG4, #PT11, #PT12, #PT12]. Their comments included:

- The non-Hispanic white female owner of a WBE-, DBE-, UDBE-, and SB-certified professional services firm stated, "We don't just do agencies, agencies are very unique and hard to work with in some respects, but you have to know what they need. Los Angeles Metro actually does have a very good group that tries to help small businesses, but they even are lacking. And the reason is, is because there's so many small businesses that they would need full-time people to be able to do the job." [#1]
- The Black American male co-owner of a WBE-, MBE-, and DVBE-certified construction company stated, "It was hard. By the time you found out about some of the work opportunities [to work for the State of California], the opportunity was over. It didn't matter when it seem to be any more or less difficult. They all seem to be about the same in terms of paperwork and requirements. You just didn't know because you didn't know anybody who was on the inside. You didn't know if the process is really fair." [#5]
- The Black American male owner of an MBE-certified professional services firm stated, "I did get some work with San Diego Unified School District. I did get some electrical work with them, actually very nice." [#7]
- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "Attempting [to use the] RFP, RFQ process [to help] making relationships with folks to see if there's anything that they can give us as a sole source, if it's less than 20K. We just are keeping track of that process, talking to the clients often, just to see if there's anything coming up, reading and watching the master plans. One thing that we did do as a marketing strategy that we'll probably bring up again is we went through the master plans and we

identified a few intersections that the city are supposed to have been doing already. And we've approached the city with some initial solutions to that, right? And with that, is that it has helped us get at least the first meeting with these cities when we do a cold call, because getting a first meeting with the cities is difficult sometimes. And so what we've done is we've said, Hey, we've already thought about your city and you're supposed to be doing this in 2020, but it's already 2021. Can we have a meeting to talk to you about what was already planned? And by us doing a little bit of a homework for what the agency's supposed to be doing, that's helped us get a first meeting, but that's about it really for a particular city. They're mainly roadway paving design projects, so bike lane design, protected bike lane design, crosswalk design near schools, intersection design, concept planning, feasibility studies. We do curb ramp design, flashing beacon crosswalk design and many dozens types of works that we've been be going after." [#8]

- The Asian Pacific American owner of a DBE-, MBE-, and SB-certified professional services firm stated, "Mainly SANDAG. Ever since I started my own business, one thing is to be able to work with them again you would apply to be on the bench, on the SANDAG bench, so that in the event that somebody needs help on a particular item, they could pick you off the bench because you were kind of pre-qualified already. They pick you off the bench and put you on the project. For example, somebody that I used to work for had a project and they picked me off the bench as a QAQC for a project, so that kind of worked out. So that's a mechanism to be able to get the SANDAG work, because we don't currently have a contract with them versus all the other big firms, they do. it's because of my prior experience as a plan checker, I was able to use that and they needed somebody to be the QC, and that's how I matched. And then I was able to, they brought me on. We went in as a team, we interviewed for the job, and then we were picked one out of like the five teams, or something like that. And then we were picked and then yeah, and then I was able to work on the project. Now basically I can list that project as Civil Sense QAQC on this XYZ project for SANDAG. Now I can show that project in our resume. Usually, the agencies are pretty good at advertising, so everybody knows the projects coming out. So, usually it's pretty fair that way." [#9]
- The non-Hispanic white male owner of a SB- and ELBE-certified professional services firm stated, "I do some consulting for public agencies, but I don't particularly care to be consulting for public agencies. And the last public agency I was working for was on a contract that I prepared for Cal Expo. And it did not end well. City of Sacramento, County of Sacramento, Placer County, El Dorado County, Nevada County, San Joaquin County. Those come off the top of my head [as agencies I have worked for]." [#10]
- The non-Hispanic white male representative of a Native American-owned MBE-, SB-, and Micro-BE certified professional services firm stated, "United States Department of Justice, United States Forest Service, United States Parks Service, those are the federal ones I can think of. There's more, but they're just not coming to mind. Then at the state level, we've done work with Caltrans. We've done work with multiple counties, multiple cities and multiple local jurisdictions, special districts is what they call them. But it's true. We started putting this together and the staff is like, oh my gosh, this is so hard. I'm like, Awesome, right? Because that's perfect, and we do very well in hard-to-get paperwork. County of Los Angeles is one of the most [difficult]. They just have an RFQ out right now and we have not talked to any single other company that is submitting because of the barriers. And so, we

really like our chances. And the only reason that we are doing it because of the timeline is very tight is because we've done it before, we could not do this from scratch. And so, we've called two or three firms to try to get them to partner with us, to bring them in as subs. They said, No way. They're not looking at it as primes or subs. So, it works." [#11]

- The Subcontinent Asian American male owner of an uncertified MBE construction firm stated, "We work for the small police station for instance, and also we work for the county of Sacramento. And also we've worked for some other small government facility. It was a building that we need to renovate. They will renovate the building, so we have to put a new lighting system, LED which is they had a different lighting there, which was pretty old. They asked us to come on and change all the lights and all the switches on the hallway, in the offices, and also some of the parking light was not working. That's the type of job we did for them. Some of the panel box, some of the wiring was not updated. It was energy save job type of thing. bid it as a prime. It's easy to find because normally I go to their job site and see what they are offering. They've got what they call the government job site. I go to their job site and look at the list what they're offering, or what they're contracting. So I contact the person. I said, 'Listen, this is my company. That's what we do. Do you guys have any job want to offer? We're willing to work, and we're willing to bid on that.' So that's normally, I go after them to find. I go after some of these count[ies] and cit[ies] to find out if they're looking for somebody to do their work They have a different rules and regulations. So we have to follow that. Some of the stuff we just made a discussion with them discussing, and they agree on that. They say, 'We don't know,' up to now when you tell us. For instance, they have a transformer. This transformer was located somewhere it was very dangerous. We said they can move this from somewhere else because of safety, and they really liked that with our recommendation. To us, it's not much hard, not much easy. Just like a take in and give in type of thing. Okay? Sometimes we have to give in, sometimes we have to take in. Every company is different. Every public sector is different. Some public sector is easy to work with. Some public sector is hard to work with, but we have to adjust ourselves to either one." [#14]
- The Hispanic American female owner of a WBE-, MBE-, SCMSDC-, and DBE-certified goods and services firm stated, "Most of my work has been with, for example, Los Angeles County MTA. I've worked with the City of Irwindale. City of West Covina. I've worked with several school districts. Currently, Garden Grove. West Covina Unified. El Monte Unified. So, we've done school districts; we've done cities. The University of Cal Poly, we've done work for them. Los Angeles County Board of Education, we've done work for them as well. Right now we're doing the homeless - Los Angeles Homeless Initiative. So, we've done - we're doing work for them. So, county - there has been federal - our federal contracts are with LACMTA For most of the public ones, like for the MTA bids, those were with - as a sub. There was reach-out 'Are you interested in bidding on this?' From the prime or the agency. The school districts, the city, the agencies reached out because we were on a list, we were on a portal. Overall, I think the public agency - overall, the people are very fair and I haven't had problems with them at all. It's just the process of what's been put on paper and following guidelines. It's not the agencies that are having the problem." [#17]
- The non-Hispanic white female owner of a DBE-, SWBE-, and CBE-certified professional services firm stated, "We do work with - we often have done work with RCTC, which is like Riverside Transit Authority. We also do it with LAWA, which is L.A. World Airports. We also

have tried to and we're still exploring it - we're going to be bidding something, I think, in the next week with L.A. Metro. So, those are some of the - SANDAG, is also - which is San Diego - it's a San Diego agency. It's called SANDAG. We've bid to them, and we've done work with them as well." [#18]

- The non-Hispanic white male owner of a majority-owned SB-certified construction firm stated, "I would say sometimes on federal work. If you haven't done a particular type - a job comes out and it's got, say, an earth-filled dam on it, and you haven't done an earth-filled dam in the last five years, then you might not qualify, which is a shame because we've done lots of earth-filled dams. We had a job come up that that was on it, and we've done lots of them. We know how to do it just as well as the next person, but we hadn't done any in the last five years, and we didn't meet the pre-qualifications." [#25]
- The Middle Eastern American female representative of a majority-owned professional services firm stated, "They're all very similar. Some have, it's kind of a lot more stringent. Like LA Metro especially when it comes to DBE the forms that you fill out. And of course, they are what they are. So, we spend a lot of time filling out those forms and making sure that you've got all your 'I's dotted and 'T's crossed off." [#27]
- The non-Hispanic white male co-owner of an MBE-, SB-, and DBE-certified professional services firm stated, "I followed a project role with into the company. I had a relationship with the owner and pursued a project that I was really passionate about, and got into the follow-on project as a sub-consultant on a large firm's team for - as a small business with the City of San Diego. So, really, kind of the project and the project in specific was the Pure Water program for the City of San Diego [is what propelled me to become owner of the company]. We've worked for the Port Authority down here, we've worked for the City of Coronado, the City of La Mesa, the county, Helix Water District - City of Oceanside. I mean, we've worked with a lot of people here, and a lot of them don't have small business or minority business requirements" [#34]
- The non-Hispanic white male representative of a majority-owned construction firm stated, "San Francisco, Oakland, the counties. You name any city and county in Northern California; we try to work with them if we haven't already." [#35]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "We've done parks with the county of Marin. We're doing ADA improvements for the town of Ross and Tiburon. And then there're some people that are in the county that have private roads and they need improvements, and so we've worked with them, with the county, to help get the improvements done and finance it. Because there's a lotta private roads that're really in bad shape in this county." [#36]
- The Black American female co-owner of a DBE- and DVBE-certified and uncertified MBE construction company stated, "As far as the public sector, we deal with a lot of Caltrans, a lot of county projects. We've had a good amount of environmental customers who do soil testing and asphalt testing and sampling for L.A. County, so we work with them, and we also work with L.A. Metro on about four major rail projects right now that have been going on for the last few years." [#38]
- The non-Hispanic white male co-owner of an SBA-certified micro- and WBE professional services firm stated, "The landslide repairs are for a municipality. The lighthouse and

reinforced masonry structures are for state parks and Department of Interior. The docks are for the Morro Bay Harbor Department. So, all that work is all agency related. Last year, I will say, too, I did the structural engineering on two office buildings. So, yeah, it was somebody I had known for many, many, many years. He asked if I could do that. I said, 'Sure, no problem.' So, last year, I did two private commercial buildings, multi-story. Let's see. Yeah, the work in the Sierras I did on the hydroelectric facilities was for a public utility. San Diego was the California State University system. The viaduct at Death Valley, that was Department of Interior. Well, agencies are just like everyone else. There's good ones and there's bad ones. There are agencies that I have found that I prefer not to work with. Actually, there are agencies that, when I hear about them, I just turn around and run away. So, yeah, generally, in that case, what we have done is we get to a point and we just look at it and we just go, 'You know, that just didn't feel good.' I have to tell you, that's really quite the minority. But in general, the agencies that we have worked with have been really a pleasure to work with." [#40]

- The Black American male owner of an SB- and MBE-certified professional services firm stated, "I had a proposal awarded by the city of Riverside and before we were finished - actually, before we got started with it - it was terminated because they just couldn't get the funds to do all the work." [#41]
- The non-Hispanic white male co-owner of an SB-, DBE-, and HUBZone certified construction firm stated, "I mean most of them, the person you get to work with on-site is usually really great to deal with." [#42]
- The non-Hispanic white male owner of an SB-, DVBE- and Micro-BE-certified construction firm stated, "And they [other public agencies besides Caltrans] seem more realistic. They find office work and QA work for inspectors and other staff while the work slows down during the winter months. And that's not my experience lately with Caltrans. Well, I worked with City of Mountainview. I've worked with City of San Mateo. And they have that administrative work and QA-ing the construction files available to inspection staff during the - during the winter months." [#44]
- The non-Hispanic white male representative of an SB-certified professional services firm stated, "We do have a couple public work projects going through doing some roadway reconstruction and new construction of some major [projects] within the city of Antioch. We actually are currently redeveloping specs and standards for the city of Napa and a number of other agencies, but I wouldn't necessarily say that it was a majority of our work. we've worked with Contra Costa County, the city of Walnut Creek. We've done work for Antioch. We've done work in the city of Napa with Sonoma. Quite a bit of agencies. We've done both [prime work and subcontract work] for that. I think the bidding process is always very similar: provide a proposal, and then there is always an interview, then there is a waiting period, and then there is contract preparation. Well, I take that back. I think the city of Napa has had a really good on-call process. We did have to go through all of those various things, but it's a little bit different in the sense that they have lists of support for [on-call] engineering firms that they have on their list for five years, so you don't necessarily need to go and prepare a proposal every year for an agency. I think that's kind of a nice way to make it easier on small businesses." [#45]

- The Middle Eastern American male president of an WBE-certified professional services firm stated, "I only got one project about two-three years ago from community colleges - Los Angeles County Community College. They were doing some remodel. I got a project from them. on that particular one, they contacted me and offered me to provide them with a proposal and my proposal was accepted. That was the only one. Yeah. That was the only one that I was encouraged by their administration, and I submitted my proposal, and I won the contract. The pay was much better than with private and also, the whole system was very good. Everything was organized. They were very clear what they wanted so, it worked very well for us. And I'm pretty sure it has something to do with the administration in that college. They were very professional people." [#46]
- The Hispanic and Indian American female co-owner of an SB-certified and uncertified WBE construction firm stated, "We've worked in San Diego County. We've worked in Riverside County. We've worked in Los Angeles County, and so far that's it. Even though there are quite a few jobs in those counties, that's where we were awarded the job. Well, we actually have had a lot of work in the, like I said, San Diego County area, the Port of San Diego. We've had jobs there. We've had jobs in Alhambra, Los Angeles County, the City of Alhambra" [#47]
- The Hispanic American female representative of a DBE-, MBE-, and WBE-certified construction firm stated, "I know that when we do work for the city of San Diego, I like that they let us know when the contractor gets paid. And in reality, they almost like they force the contractor to pay you on time and that's good. Because sometimes contractors tend to try to keep your money for the longest that they can" [#49]
- The Hispanic American male owner of a DBE-, SB-, and DVBE-certified and uncertified MBE professional services firm stated, "I've worked for subdivision projects, industrial projects, rail, pretty much any heavy civil engineering, utilities like Southern California Edison, for water companies, for all types of engineering." [#51]
- The Asian Pacific American male owner of an MBE-, DBE-, and SB-certified construction firm stated, "we have done jobs for public works, in partnership with the California Department of Health Yeah, they're all positive. I mean, the one we just completed was for UCLA Medical Center, and it was installing a large concrete pad for the emergency generators. And we learned a lot of that job. We learned to work with union people, which we never have. And I learned that I needed to hire apprentices when, y'know - You learn a lot. We used a boom pump for the first time, so, yeah. And found out there's a lot of rules that we have to follow, which I like. I am working on one right now that the bid is due on Monday, so it's funny you asked that. it's fun. It's a lot of making sure you read through everything, and paperwork, but I just - starting to put together a good team. I've got a good estimator that I just brought on board to help this is my first bid that I'm bidding out as a prime on, for this job. But, y'know, I see everything with a positive lens, positive outlook. And for me it's just learning, struggling. It's just, that's the best part." [#53]
- The Asian Pacific American male owner of a DBE-certified construction firm stated, "3-4 projects with Caltrans. I work mostly with cities, [they are] easier [to work with], [and have] less regulation. Less paperwork. School districts have more prequalifying requirements than Caltrans." [#54]

- The non-Hispanic white male owner of a majority-owned professional services firm stated, "I have limited hope that something will come of this, I just feel California is just really procedural, kind of bureaucratic. I worked in Oregon before this, and it was a lot easier to find people to talk to. They would say, oh why don't you do this, or we could get this project together for you. There's none of that in California" [#57]
- The non-Hispanic white male owner of a majority-owned construction company stated, "The last one the plans were all in metrics. But I guess that would be the only thing I could think of. And that's something you have to overcome. Well, it just makes a lot more work for me because used to working in English measurements versus metric. Three meters is a yard, you know what I'm saying?" [#62]
- A representative from a majority-owned professional services firm stated, "[The] worst County is Santa Clara County Planning Department. It's the old left [hand] doesn't know what right hand is doing." [#AV46]
- A comment from a majority-owned professional services firm stated "Administration changes within the city and they bring in their own subs that they've worked with in the past. I do work with a number of cities but over time things change and sometimes you get pushed and sometimes you don't." [#AV208]
- A representative from a majority-owned professional services firm stated, "This is not a government that is friendly to business, it is aggressively anti - business. For example, I have been sending all kinds of communications to state agencies and I have received 0 replies." [#AV278]
- A comment from a majority-owned professional services firm stated, "The standard market struggle of all competitive business that are compounded by inconsistent enforcement of rules and laws by various jurisdictions." [#AV286]
- A representative from a Hispanic American-owned professional services firm stated, " In the past 5 years there have been difficulties in obtaining details needed for our work on various sites within the timeframe presented. The Department of Fish and Wildlife has gotten a lot harder to communicate with and get approvals from." [#AV8250]
- A comment from a majority-owned professional services firm stated, "One parcel required 29 department permissions to perform. The San Diego agencies were helpful for that complex project. The levels of bureaucracy are enormous and it can take years to get projects approved." [#AV8346]
- The Black American female representative of a minority business chamber of stated, "in our area, have a pretty good record, in terms of our local agencies providing work for our small businesses and our micro-enterprises, not so much with Caltrans.[#FG4d]
- A respondent from a minority chamber of commerce focus group stated, "But it does tend to work here, because our municipalities and our local government has made somewhat of a commitment, some more than others, but have made a commitment to our small businesses. And we stay on top of them and make sure that they are being compliant, in the ways in which they said they would be, in terms of providing procurement opportunities for our members. But we got to stay on them. It's not ingrained. It's not part of their culture. Whenever there is construction going on, I've got to go knock on the doors, over at City Hall,

and say, 'Hey, wait a minute. We've got some folks out here that need work. And how are you going to make that happen for our members?' Fortunately, they open the doors for us, to let us, but if we weren't there to advocate for them, it probably would not happen. It's a big elephant in the room, but there is a whole lot of systemic racism, still, very alive and very much well, at Caltrans. And I'm just going to put it out there and say it. and I, personally, know that I can't get rid of it. I don't know how we do that. I don't know how we change those systems, so that there's more equity available for these small businesses that we serve. I just don't know what else to do, at this point, but to keep saying it over and over again, that equity is necessary, and you can't even think about equality until there's equity, so we've got a long ways to go." [#FG4]

- A respondent from a virtual public meeting stated, "I think for instance, the City of Fresno does a pretty good job at getting people paid on time. But I think that's one of the reasons is because there's 10 people who are responsible for getting people paid, not a hundred." [#PT11]
- They have the availability to where you can talk to people who are in charge of making decisions and get somebody who can assist you on the phone and available to you. If you called Caltrans, if you call the engineer on the project, not inspector, but you call the senior on the project, he's not going to be interested in helping you more than likely." [#PT11]
- The male owner of an ACDBE- and DBE-certified goods and services company stated, "my DBE contracts are essentially ACDBE contracts, generally, the way you participate is with prime contractors and, they are they fit you in their box either is joint venture partners or sub-concessionaires and generally, the airports speak directly with them and, you, I guess, accept the terms and various things negotiated on your behalf when you're supposed to have a voice at the table. You're supposed to have ownership and control, but in all practicality the airports, even if they have an advocate office or they just essentially are being counters where they just say, this is what's reported, you sign here, and that's it. And examples where you're sharing a contract where you have stores, for example, or restaurants, for example, when you have a joint venture partnership, or you have a minority stake in that. So you're participating on quarterly calls, and they have essentially, all of the costs. The prime takes on the cost. They are very clear on the expenses. The expenses get shared evenly, and the reimbursable expenses from the venture you don't have the option to then be able to perform them to be reimbursed. So those expenses, unless you're going to have millions of dollars to have a forensic accounting you just have to accept them as these very nebulous expenses from headquarters or international headquarters, and essentially, it's a mathematical algorithm so that there's no net profit share or very close to no net profit share. So you really, you pay the expenses for the concession down to the penny, but for the revenue or profit the expenses are so great, or the licensing fees are so high, and the rent charged by the airport that it's mathematically not even possible when you're exceeding sales or exceeding projected numbers that you'll make much of a profit, if any, because it's just set that everything up the baseline is so high, that it's very hard to make anything over that." [#PT12]
- A female representative of a local agency stated, "One of the biggest challenges with Caltrans Project is the expectation that the city perform the same level of DBE outreach that a large agency would. For example, when Metro goes out to bid, they have an entire

procurement section and those projects can be in the millions and billions of dollars and therefore doing the same level of outreach for that type of project compared to a \$50,000 project, seems a little bit imbalanced. What I mean is that when Redondo Beach puts a contract together, say for \$50,000, and we're still required to do outreach to DBEs and RFPs as part of the small business. Part of the DBE plan, you're required to do the same base level of putting your NAICS codes together and doing email blasts and supposedly going to local chambers of commerce and other outreach strategies. And it just seems that again, to do that for a million-dollar project expectation and a \$50,000 seems imbalanced. So I think the base level, what's working well, is that the city is doing NAICS codes for the project or unbundling and we're sending email blasts to, let's say on a \$50,000 project, that I did learn a few weeks ago, and we sent over a thousand companies. I think for that site project that's reasonable. For Metro, and I go, and I announce the procurement to all of the small business and disadvantage business organizations, for example, there's the Asian American Architects that are on there, the Arab American, I think they're also engineers. And so DPAC has lots of TBE representation and so I've been piggy backing on that meeting to make the announcement. But if Caltrans had a clearing house that we could post all of our DBE contracts or our contracts that include DBE in a clearing house where that's how we meet our requirement to do outreach to small business and disadvantaged business, I think Caltrans could carry that as either a website portal that's free or an agency to meet this requirement. Where they are not having to subscribe to a procurement service, right? So, like you say, they could go to this Caltrans site and then at least get the title of the contract and then the link could go the city site or procurement site or however it's posted. But I do the actual outreach for the city, so when we weren't in pandemic, I would go to kind of a job fair and all of those types of outreaches, but now that things are all online, I think Caltrans system is the place to have it. just this FTA requirement for DBE plan and then using federal money, small agencies, like you say, their burden. But I wouldn't say that the resources aren't out there, I would say the agencies are strapped for people, resources." [#PT12]

Forty-five business owners described their experiences working with or attempting to get work with Caltrans specifically [#1, #6, #9, #10, #11, #18, #19, #22, #24, #25, #26, #28, #32, #33, #34, #35, #36, #39, #41, #43, #44, #47, #48, #54, #59, #60, #62, #AV, #FG2, #FG3, #PT1, #PT11, #PT3, #WT7]. For example:

- The non-Hispanic white female owner of a WBE-, DBE-, UDBE-, and SB-certified professional services firm stated, "On this Caltrans disparity meeting that we had a couple of weeks ago, one woman asked, 'How do I work for Caltrans?' And my answer was don't. Don't, it's not worth it. It is not worth it. Because I had probably nine Caltrans projects in the last 10 years, and I have never even broken even. And I'm not saying made a profit. I've never broken even because of the way Caltrans does business. And they don't care about... They just care about what it looks like on the outside. They don't care about what the reality is. And that's a severe problem. So, as I still have like four or five contracts that are open, and it's only because of the clients begged me to do that. And I said, 'Yeah, for you, I will, but I will not for anybody else.' And every time somebody calls me and says things like, 'Oh, we'd like to have you on our team at Caltrans.' And I will say, 'No, I don't work with Caltrans anymore because they're a predatory agency and you can't win. You cannot make'... Unless you are a midsize company, you can't win with Caltrans. Its small companies cannot make a

profit. And I'm even talking about, all others I can deal with, Caltrans is like, you have a price, you give them your price and then they negotiate with you afterwards and then you can't fulfill it. It's horrible. It's just horrendous. I've never seen such an agency that is anti-small business in my life." [#1]

- The non-Hispanic white male representative of a majority-owned construction firm stated, "It was fine. It was a good experience. Their bids are very competitive. So, it's definitely a hard market to get work in. Their specifications are very straightforward. They're fairly black and white. It's easy to interpret and they pay really very well. So, it makes it easier to administer a project under them." [#6]
- The Asian Pacific American owner of a DBE-, MBE-, and SB-certified professional services firm stated, "Usually the Caltrans, even the contracts are so big we wouldn't even try to put a... It's hard for a small business to put a team together, because there's a lot of stuff we can't do. So, we're limited, so therefore we don't even try. So, unless somebody asks me, 'Hey, you want to be on this team to go after, whatever the freeway project,' then I would say yes, but I would not attempt to bid for a Caltrans project, no." [#9]
- The non-Hispanic white male owner of a SB- and ELBE-certified professional services firm stated, "I'm not contracting with Caltrans anymore. And as a matter of fact, I'm not contracting with the state of California anymore, even as a consultant. After several meetings, I disinvited myself by telling them the truth. The problem is not the industry, the problem is Caltrans. And the reason it's Caltrans, because nobody wants to work for Caltrans. Because even though we're supposed to be a partner of Caltrans, we're treated as the enemy. And Caltrans liked to play, 'Gotcha, we caught you doing something wrong.' I am now in the position of an inspector and I inspect the projects that I put on the street, which is only two to four million a year. I'm a partner of the contractor to see to it that he builds a job properly. And I protect the owner to see to it that they get the value for the money that they spent. That's what partnership is all about. Caltrans is not that partner. It wasn't when I left the Caltrans industry. And actually it hasn't been since probably the early eighties. In the good old days since I'm real old and I can talk about the good old days of the sixties and the seventies. You walk up and you shook the resident engineer's hand, and you work as a team to build a project. That's all changed. It all changed when Caltrans decided that resident engineers have to have a certain piece of paper in order to be a resident engineer. And none of them back in those days had any of those pieces of paper, but they had OJT, on the job experience. So, you do that when you run into a problem, it was our problem. It was the contractor's problem. And it was the engineer's problem. And you work together to solve the problem. It's the least possible cost. That all changed, very unfortunate. And what's the problem with the industry capacity expansion was the fact that, well, I don't care how much you can expand it. Industry's capacity, what differences it make, they don't want to work for you. And as long as the real estate market was booming, like it was in the late nineties all the way into 2007, there's plenty of work out there. Working for people that appreciate your help and services, rather than work for somebody who's looking to get you every chance they get. Caltrans replaced their experience with people with pieces of paper. They had that piece of paper that came out of college, never built anything in their life. And all of a sudden were elevated to resident engineers. And they don't know what to do, so they read the book like it's a Bible instead of a guideline. And the book is not a Bible. The book is a guideline. Low responsive, responsible bid. The Mantra. Caltrans doesn't always

follow those rules. I have a case in point where they didn't follow the rules and it cost me a bunch of dollars, 15,000 hours in attorney expenses because they award it to the wrong bidder. They won't have protested it, I protested it, through attorney to go all of the contractor had already started the job. It was in multiple locations. When they realized they were wrong, they stopped the contract. Now, did they award it to the actual low responsive, responsible, bidder, me? No, they didn't. Why not? It was within budget. They took it off the street. And two months later they put the work back on the street again, when everybody knew everybody else's numbers. I didn't change my numbers and didn't get the job. I think if you really want to cut to the chase, I don't believe that it was preference. I think it was incompetence." [#10]

- The non-Hispanic white male representative of a Native American-owned MBE-, SB-, and Micro-BE certified professional services firm stated, "My work with Caltrans has been challenging, they prefer bigger firms." [#11]
- The non-Hispanic white female owner of a DBE-, SWBE-, and CBE-certified professional services firm stated, "I think the bidding overall is okay. It's pretty good. One thing that I know that is a barrier that Caltrans seems to be doing more and more, and it might be because of COVID, is - recently - is they have been advertising bids and, a few days before a bid is supposed to be bid, they will postpone it for a few weeks. That's a real problem. Because as soon as - within a - a couple of days before the bid, even as soon as a week before the bid, I start giving some numbers, some preliminary numbers to my people. Well, as soon as they stop that bid and then it goes elsewhere, now everybody's got my numbers. So, being competitive is very difficult. Caltrans is difficult to work with, to be honest with you. Again, it comes down to who they have in the field managing their projects. If they have these mega projects, sometimes they'll put out a resident engineer isn't even familiar with it or he's not - it's a problem, and they know about that. They know about it. They've gotten better. They're trying to streamline that whole process. But depending on who you get out in the thing, you might have a problem out there." [#18]
- The Black American male owner of a DBE- and SB-certified and uncertified MBE professional services firm stated, "I would say that working with Caltrans, once we get the job, has been excellent. a big thing in the past, where you get these auditors that come in and they just rub you right down. You know, we've lost \$30,000.00 on an audit. They come in and if they like you or they see something, they say, 'Okay, hold it. I've got to go out to the car and bring my suitcase in.' You know, and you know they're going to be there for a week or three or four days, and they'll come up with that. With the exception of the auditors, which hasn't been too bad, I would say that our working with Caltrans has been excellent, with some exception for the auditing part of it." [#19]
- The Hispanic and Native American male owner of a DBE-, 8(a)-, SB-, and MBE-certified construction company stated, "Caltrans is - they're about as indifferent to DBE status or small business status as any agency on the planet. They are - and I, again, in many of these quarterly liaison committee meetings have broached these topics, and everybody in the room who's a department head of some kind hears them, and everybody in the room writes it down or looks at me like I'm crazy, and they go 'Huh.' And then we move on to the next subject. So, they really don't care about distinguishing between little guys and big guys. They don't have - they're not set up for it. And they're not very good at it. In fact, they're -

it's almost punitive sometimes. But I think it's their design. I think it's their model that just has - there's no distinction or exception or anything less that's required because you're a DBE." [#24]

- The non-Hispanic white male owner of a majority-owned SB-certified construction firm stated, "You know, I think that Caltrans is - we kind of stay in our particular wheelhouse with them. So, we've done lots of Caltrans projects. We understand how paperwork flows from certified payrolls to how the contracts work to quality control. I mean we've got a lot of experience with Caltrans. So, generally speaking, we have good success working with Caltrans." [#25]
- The Middle Eastern American male owner of a construction company stated, "Frankly they seem to be not as organized as other government entities that I've worked with in the past. And this is not particular to a project manager specifically or a construction manager but rather a system of how their construction managers followed, the protocols that they followed. They were a little bit inconsistent from one project to the other. Where the city of LA for example, every project is a mirror, carbon copy, just a different face and name on it in terms of procedures." [#26]
- The Hispanic American male owner of an uncertified MBE construction company stated, "For Caltrans, we did some - we did before, like, covered pipes and sometimes shoulders. Most of the drainage, that's what we did, a few of those things, you know, like road crossing and repair, drainage covers, and that's how we got into some of those jobs. I don't see any problem at that part. I did enjoy working for those projects, and I don't think I have any complaints." [#28]
- The non-Hispanic white female owner of a DBE- and SB-certified and uncertified WBE professional services firm stated, "Like some of my projects require some coordination with Caltrans or I'm a subconsultant on a project that is for Caltrans. The projects directly working with them are more like city driven projects. But the improvements are happening on say a state route within the Caltrans right of way. And so, we have to get like an encroachment permit and coordinate with Caltrans on the improvements because it's in their right of way. But the city is pushing the project and paying for it. Working with Caltrans can be a little harder sometimes. I like it because they know what they want. And so sometimes it depends on the agency but like I do like that there is a standard and that they - I feel like they review the plans good, and they know what they want and I can usually give them what they want without a problem. Where some agencies that I worked for are cities that are smaller that they just seem like sometimes they don't know what they want or they're not reviewing the plans. And so, it's harder to know if they're going to get the final product that they want because I feel like they're not telling me what they want. Where with Caltrans that's never an issue." [#32]
- The non-Hispanic male owner of a majority-owned SB-certified construction firm stated, "It's pretty good working for these guys. They're all pretty easy going. They're field guys and I kind of relate with a lot of field guys. I just - honestly, I hate paperwork, but I do have to do it. They're like, one of my favorite clients so, I really wouldn't have any - I like to work for Caltrans. I really love these jobs." [#33]

- The non-Hispanic white male co-owner of an MBE-, SB-, and DBE-certified professional services firm stated, "We have worked for Caltrans. For Caltrans, we did a value engineering where we were actually the contractor's consultant. My biggest thing is it's really hard to want to work on a project with the county or with Caltrans when we have to work with the Safe Harbor rates. And when I say that, it doesn't mean that we're - it's not economic, well, it's not as economically viable for us as working for some of our other clients here who are accepting our rates, our market rates, which are usually 35 percent below average market rates. And when we're at Safe Harbor, we're usually about 50 to 75 percent below market rates. And so, you're comparing that kind of drop in \$30 to \$40 an hour of our regular revenue, and, you know, it's not our fault we run a lean organization, you know? And I feel like that is the biggest head, or biggest wedge in wanting us to do bigtime Caltrans design work, having a 25 percent role in a major infrastructure project down here is because we just won't make the same kind of money. And, you know, I don't - maybe that's a selfish pitch, but, you know, the market demands what the market demands. The Caltrans cost plus structure is geared toward large firms making a lot of money on them, and just stealing money out of our - stealing money out of small businesses' pockets, and that's why they're not getting small business to participate the way they want to participate." [#34]
- The non-Hispanic white male representative of a majority-owned construction firm stated, "Probably 80 percent of our work is with Caltrans. They're probably one of the best agencies to work with in California. They have a great specification, standard plan. They've been around for a long time, so they have a certain way to do things. And if you work for them for that long, you kinda know how to do that. Familiarity is probably the biggest reason that it's easy to work with them. They don't stray too far from that either. So, you know - like, for us, we know what we're getting into if we bid a Caltrans job. They don't train as well anymore, the younger generation. They kinda just throw 'em to the fire. And the training they do give 'em isn't more on the engineering base. It's more on the management base instead of the engineering base, and they seem to have lost their engineering skills as an agency, as far as the field people are. I'm sure their design and everything is still probably very capable of that kinda work. But as far as their field guys, they seem to lack the engineering skills or the skills to be able to make decisions out in the field. It makes it a lot harder. It just makes contracts take longer; it costs money. If those guys were capable in the field, they would be able to make decisions quickly instead of going to some [office] in Sacramento. That takes weeks to get an answer." [#35]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "Caltrans - that is an area where we'd like to participate more. But it just doesn't seem to be very easy to do." [#36]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "Caltrans has been very friendly to us, specifically the Right of Way Departments. It happens occasionally that us private surveyors need records from the Right of Way Department and the team over there has been top notch." [#39]
- The Black American male owner of an SB- and MBE-certified professional services firm stated, "About four or five years ago, there was an opportunity to get some - really, a grant available, and I went through - I was considered for his grant and I had the advisor, and we

went through the entire process up to the financing portion and the grant got canceled. And so, it never went any further.” [#41]

- The non-Hispanic white male representative of a DBE-certified and uncertified WBE construction firm stated, "It was a weird one, because it was - it was a - Caltrans was the agency, but it was SANDAG was the owners. So, they hired Caltrans to do that project for them or something, and every time we kept just getting the runaround. So, SANDAG wasn't honoring it, but - and Caltrans understood, but then again, it was - you know, mostly Caltrans, and they're pretty awesome about it. Well, I think the only thing is - I've talked to a lot of PMs, project managers, even the engineers, and all those REs, and they're super happy, and they really encourage us when we're there. Thanks for being here. You know, so proud to have a DBE on site and all. And that's really good to be acknowledged like that. I think the only thing that I think would really, really help us is that if we had some kind of person to go to that was - that understood the DBE and maybe could correlate that with the prime contractor or any of its superintendents or foremen. I think if we did a little better job at that, it would be super awesome. But other than that, Caltrans is super encouraging, and like I said, it's really neat when they recognize you. Yeah, they - Caltrans led us to some people that helped us through a lot of that stuff.” [#43]
- The non-Hispanic white male owner of an SB-, DVBE- and Micro-BE-certified construction firm stated, "Several times, the engineers' union would sue Caltrans, and they would have to get rid of all the consultants. So, Caltrans has become very [gun shy], and that's extremely difficult for small and micro small businesses to staff and plan for. And Caltrans I believe has become unreasonable in their requirements for staff. Construction inspectors and resident engineers, they're requiring engineering degrees, they're requiring engineering training certificates, and in some instances, they're requiring professional engineering licenses. And sometimes very good project construction inspectors come up from the trade. They know how to read plans and things like that. And it's extremely difficult to get inspections positions at Caltrans.” [#44]
- The Hispanic and Indian American female co-owner of an SB-certified and uncertified WBE construction firm stated, "That was one of our longest, a year-and-a-half job, Right, because I don't really get involved with the different agencies, only the follow-up for notice of completion when the job is actually completed. That's really the only time I get involved with the agency. I'm always working through the prime contractor. That was fun. It was so much fun. I actually learned so much about how Caltrans works, from getting pricing for our equipment, how they bill, just the different documents, and just their process and procedure. I liked it because it was a challenge, and I like challenges, but the wonderful part is that the staff that we worked with was so willing to teach and help correct where necessary, providing the tools to keep it going. Yeah, it's a wonderful relationship. The resident engineers, well, I only know one there - there are other resident engineers that were on there - but the one that we dealt with was just hands-on, and he was just awesome. Yeah, and awesome, too, because the resident engineer on that particular job was the one who, because it was an emergency job, picks the prime and picks the subcontractor. I just applaud him for giving us, small business, the chance.” [#47]
- The Hispanic American male representative of a construction union stated, "Every project is different and when the contractor works with other contractors or other agencies like

Caltrans they have to go and talk about how the project is going to be. And they have to be agreeing on things that are already set up for the general. Let's say like Caltrans sometimes they say oh you can close these roads for safety. You have to wait till 9:00. You're not going to close it early. So, these, we've got to go with anything for what, for the general and for whoever is going to do the work for the general." [#48]

- The Asian Pacific American male owner of a DBE-certified construction firm stated, "On one hand Caltrans prepares small businesses for bigger projects but on the other hand Caltrans is designed for the participation of big businesses, not small businesses. E.G. Airplane companies, the aerospace industry is designed for big businesses. The stop light industry also. Maybe I am in the wrong field, in an industry designed for big businesses. Caltrans is designed for big companies, for people who know the ins and outs, not designed for people who are new, for new businesses. For new companies, it's not open for new companies to enter. New companies are discriminated against, it's an old boy network." [#54]
- The Asian Pacific American female owner of a SB-, DBE-, and WBE-certified construction company stated, "[We do] fire alarm, security system, camera. most are small, few thousand dollars. And I think the reason we got the job is because it's an on-call contract. They put so much effort to listen, to improve. I know a lot of small business is whining, complaining, nagging, but it's a big giant, if you choose slowly to improve and then get the big company enroll, invite them to be more open, or supported. So, every prime contractor, they have other private jobs. If they can give small business the private opportunity, private project opportunity... A dollar is a dollar. I don't need to do Caltrans job. I can do this ABC contractors job, make the 10 dollars. So, all this processing, the small business qualification, pre-qualification company information, that can go to Caltrans, and can also go to Caltrans' prime contractor or database. So this prime contractor is looking for a good subcontractor and they can use Caltrans' database. And then train us, that if I do this job with ABC Company a few times already, and if this ABC Company's doing Caltrans' big project, I already know how to work with these people. And then I will not fail them. I want to make sure they win, they make profit, because I still have the position to perform as a small contractor in this company, in their private sector projects. Caltrans go for lowest bidder. So, people know to play the game, they come in lower and I don't know if they do any change order after." [#59]
- The Black American female owner of an uncertified WBE and MBE professional services firm stated, "I stopped going to their meetings because the other part of what I was hearing was from the actual employees, African-American employees who have been working there 25 years, 30 years and never was promoted. They went after for those promotions. However, if they cause any [riff] or anything there was those that knew how to set them back, hold them back or even fire them, that makes their lives- So unless you held a position that require more than you watching the door or cleaning the toilets or cooking the food or doing some purchasing, you were really non-existent because you were so low on the totem pole. So, for it to be a state entity, there needs to be some changes from the top on down." [#60]
- The non-Hispanic white male owner of a majority-owned construction company stated, "I've definitely had more problems with Caltrans inspectors than any other type of agencies. Yeah, as far as it held the work back, but most of the time that I've ever dealt with Caltrans,

a lot of these were inspectors. All they've ever done is go to school and they're told what to do. They have no idea of reality. I think there should be a little...before they ever become an inspector, they should be on the job training, in field training, something. Because almost in every case, they were wrong." [#62]

- A comment from a majority-owned construction company stated, "We're not interested in Caltrans work [because] all the red tape. Prevailing wages. Dealing with inspectors." [#AV219]
- A comment from a majority-owned construction company stated, "We're not interested in Caltrans work [because] process is complicated and they are inefficient in scheduling." [#AV240]
- A comment from a majority-owned professional services firm stated, "Having to go through the audit process, it's pretty expensive to go through the audit." [#AV231]
- A comment from a non-Hispanic white WBE professional services firm stated, "I have been in business a long time. They [Caltrans] have made it difficult with too many regulations. Last year I spent \$2 million on a project that took 8yrs to get approved." [#AV306]
- A comment from a majority-owned professional services firm stated, "Too much paperwork, hassle and time to get paid." [#AV325]
- A comment from a majority-owned professional services firm stated, "We're not interested in future Caltrans work [because] Caltrans audit process is too stringent." [#AV8155]
- A comment from a non-Hispanic white WBE professional services firm stated, "Caltrans makes it too difficult to work with them; contract negotiations are enough to drive small business out." [#AV8322]
- A comment from a non-Hispanic white WBE professional services firm stated, "The cost of the audit process providing all of our financial information to the prime because then they can fill you staff and know exactly how much to pay them. Not having access to Caltrans to respond to contract and negotiation questions." [#AV8376]
- A comment from a WBE and MBE Hispanic American-owned construction company stated, "I've had a terrible time working with our local DBE office [at] BART [with] the Office of Civil Rights. They are difficult to communicate with and update records with." [#AV8419]
- A comment from a majority-owned construction company stated, "With Caltrans it's difficult to get someone to speak to, I work with counties and cities and it's much easier, since everything is done by district with Caltrans it is difficult to reach someone or know whom to reach." [#AV8430]
- A comment from a majority-owned professional services firm stated, "Disadvantaged to win contracts because we're not a DBE. Caltrans promises support for small business but fails to deliver because their contract structure favors major corporations for professional services." [#AV8575]
- The non-Hispanic white female representative of a construction business advocacy association stated, "Most of my experience is with Caltrans, and like I said, my employees that are all starting their own little businesses and trying to get out there, are overwhelmed with how difficult it is, between having the correct insurance, and depending if they're

bidding as a prime or as the subcontractor, all the paperwork that's involved, all the union stuff that's involved. It's complicated, it's super complicated, and it takes a long time of being in the business to know all the ins and outs of the business.” [#FG2]

- The Black American male president of a professional services business development organization stated, "I would say, then something they do good, well, although, I guess they do fair amount of outreach, a fair amount of outreach... what does Caltrans do well? I guess the website is available to everyone and the outreach.” [#FG3]
- The female owner of a WBE-, DBE-, UDDBE-, and SB-certified professional services firm stated, "I won't work with Caltrans anymore. It's not worth it. It's too much paperwork, you don't get any money out of it, and it's not worth it.” [#PT1]
- A respondent from a virtual public meeting stated, "I have five Caltrans contracts. I've always had Caltrans contracts; I have never even broken even on Caltrans projects. Any project.” [#PT1]
- A respondent from a virtual public meeting stated, "Caltrans is not adding all scopes of structural construction to their bid item list, for example concrete pumping... every Caltrans structural project has a large amount of concrete on it. A concrete pump has to be used on all projects. Caltrans has street sweeping on their bid item list but not concrete pumping.” [#PT11]
- The Subcontinent Asian American male representative of an uncertified MBE professional services firm stated, "As of right today, I will never work with Caltrans again and I'm hoping the contracts I have right now will peter out and I won't have to do any work. Because I have lost money on every single contract, I have ever had with them. I have never even broken even.” [#PT3]
- The male owner of a goods and services firm stated, "When I try to talk to Caltrans about my issues, the employees are rude and often give inaccurate information.” [#WT7]

Forty business owners described their experiences learning about or getting work with Caltrans specifically [#3, #5, #6, #7, #14, #15, #16, #19, #21, #22, #27, #32, #33, #35, #40, #42, #43, #51, #57, #58, #59, #61, #62, #AV, #PT1, #PT11, #PT2, #PT4, #PT5]. For example:

- The non-Hispanic white male co-owner of an SB-certified professional services firm stated, "I'd say same. They [Caltrans] advertise the same” [#3]
- The Black American male co-owner of a WBE-, MBE-, and DVBE-certified construction company stated, "Once you find out the website, the email lists that you have to be on, then it wasn't hard.” [#5]
- The non-Hispanic white male representative of a majority-owned construction firm stated, "they just do a good job of advertising the work and their website's very robust and it's easy to follow.” [#6]
- The Black American male owner of an MBE-certified professional services firm stated, "Well, we were going to some of the, I guess, industry days or doing business for Caltrans and things of that nature, and we seen opportunities that we bid on and just nothing come of it. We were not awarded it.” [#7]

- The Subcontinent Asian American male owner of an uncertified MBE construction firm stated, "To be honest with you, it never crossed my mind that Caltrans has that contract for electrical until when they contact me. Honestly, I never noticed. I thought they have their own company big enough to do all the work themselves. I was not aware of that at all, because even we worked with a lot of agencies, but I never thought that Caltrans has their outside... You know, they're giving some of the jobs to the outside contractor. I thought you have to be an employee of Caltrans in order to do the job" [#14]
- The Black American female representative of a minority chamber of commerce stated, "Caltrans, I think, has done a really good job with their outreach efforts in the last couple of years. They leaned heavily on us as a partner to organize outreach opportunities and do a great job at posting their upcoming works, excuse me, upcoming projects online and in publicly accessible places. But on the flip side of that, we have not seen a lot of those contracts be awarded to DBEs or companies owned by people of color. So I want to say that there have been some positives, but my initial reaction is it's mostly negative. They spent quite a bit on outreach in the last couple of years and really working to get their adverts in more spaces, awareness of the DBE program and which contracts are eligible to have the DBE consideration, knowing that you have to have one single dollar of federal dollars in order for DBE to be applied. has done outreach really well, their rebranding and the remodel of the website is also something that we've seen really well. The landing pages for DBE and how to find information, the changes they've done in the last two years have been great for us. As a service provider, it makes it a little bit easier for us to help folks find that information. So I think public facing, they've done a really good job, but intensive hands-on working with the DBEs, there's still a lot of work to be done." [#15]
- The Black American male representative of a DBE-, WBE-, MBE-, SB-, and Micro-PW-certified small business development association stated, "Caltrans has something called a DBE Supportive Services Program, and when I first heard about it, that's the subcontracting I did with Fresno State. They received their contract to supervise supportive services to DBEs. They were in it for about six months to a year. They lost the contract. I reached out to Caltrans and asked them if I could do it locally, 'cause I'm in - Caltrans is two counties away from me. And they were - again, they were hesitant to begin because of the size of my firm, and it was kind of a major contract so, I was - I'm still considering maybe going out and teaming up with a company somewhere to see if I can get that contract. What it does is the contract was for exactly what I do. But I am aware of the fact that it's gonna require a whole administrative section that I don't have." [#16]
- The Black American male owner of a DBE- and SB-certified and uncertified MBE professional services firm stated, "But number one, I would look at what's coming up in Caltrans. You know, the forward - I forgot what they call it, but upcoming projects, I'd look at that list." [#19]
- The Hispanic American male owner of a DBE-certified and uncertified MBE construction company stated, "Yeah, that's one thing that Caltrans does really well, just with the calendar that they have online and all of the different projects that are always available for you to kind of read on and for you to prepare your bids and stuff like that. From that perspective, I think they do a great job. So, but, yeah, unfortunately, that's not the issue." [#21]

- The non-Hispanic white male owner of a majority-owned professional services firm stated, "working with Caltrans and the State of California, it's really awful I would call it. I don't have a better word to use right now. It's just a morass of jumping through hoops that are not intuitively obvious why we're doing this. I went to some meetings, a presentation, nearby Redding, of how to do business in this state because the state - and it was at the Caltrans office, for example. That's where I noticed they really were reaching out. I thought, well I should work with Caltrans. They have a lot of money. But still it's really a number of barriers that prevent just easy - I'll just do the work - that it makes - I get a few calls from them, but usually they're very specific, again, and things like 'do you want to paint, you know, restrooms on a wayside rest.' And, 'No, I don't want to do that.' I get a lot of ads, but also a lot of Caltrans or other businesses they're more - they aren't really looking for an expert for someone to tell them how to do their job better, like really what my skills are. They want someone that can do the physical work like paint the restrooms on the rest stop, or provide sheets of paper to them, or tape, you know, things like that." [#22]
- The Middle Eastern American female representative of a majority-owned professional services firm stated, "Caltrans is the hardest. We're still trying to figure it out how to find out from Caltrans information and build a bit of a relationship there. For some reason for us trying to see what opportunities are coming up from Caltrans is a problem. I don't know where to find it" [#27]
- The non-Hispanic white female owner of a DBE- and SB-certified and uncertified WBE professional services firm stated, "The Caltrans process is quite lengthy and getting on those projects. And sometimes it doesn't pay off 'cause they have like the RFP process. The documents they require are very specific and you have to go through a lot of time preparing it all. And then sometimes I don't even get work on it. It just depends on the actual contract that comes down with the DBE percentages. And is it in what I do and can I help the firm on the project or not. But when we do these proposals and we have to do them every three years I think or five years. They expire. You become like someone that Caltrans can have bid on a project. So you're like on their short list. So you give them all your qualifications and you try and get on this short list so that when they have a project they ask you to propose on it and then you actually do the fee structure for it. And so yeah. Sometimes we don't even get to probably do the RFP on it. And then sometimes I don't even get asked to be on the team maybe too." [#32]
- The non-Hispanic male owner of a majority-owned SB-certified construction firm stated, "I did a lot more Caltrans work in the past. And I was working out of district seven and I think it has to do with people retiring. I knew some people that had been there for quite a few years and they were in positions like supervisors or superintendents. And then, you know, after a few years - five or six years - they retired and then, new people promoted into those positions. And that's kind of how I feel like I lost a lot of the Caltrans work. And then, I didn't hear anything for probably maybe four years or five years. I maybe got one or two jobs, you know? And I used to do a lot more quantity for Caltrans and it just kind of died off. But, just recently, I'm starting to do some more work for Caltrans out of District Eight. Somebody referred me to District Eight. They go, 'Hey, why don't you try this guy out in District Seven? He's done work out there. Try him out here.' So, I got a call just probably - when was that? Just a few months ago. Towards the beginning of the year, I started getting Caltrans calls from District Eight for asphalt repair work" [#33]

- The non-Hispanic white male representative of a majority-owned construction firm stated, "They're pretty good with that. You pretty much - everything's online. So the whole bid process is pretty easy." [#35]
- The non-Hispanic white male co-owner of an SBA-certified micro- and WBE professional services firm stated, "I have elicited work from Caltrans but, no, we have never. It was really burdensome. It was a lot of work and we put a lot of time and effort to preparing the proposal. I hear this is a pretty common thread here. When you put us up against the PR and the graphic artists and the whole team, we just simply can't compete on that. So, there needs to be some way. A good example is - this was a while back, probably - oh gosh, probably 20 years ago. We thought we had a really good shot at doing some work for one of the railroads.. It was a re-stabilization of one of their trussells. There was an abutment that was having some issues. So, it was a perfect job for us. So, we went to the interview. We were all set. We got past the initial part. We were going in for the verbal interview. We're waiting to go in. The engineering firm that won the contract, what they did is they brought with them one of the railroad engineers from the railroad office to assist them in explaining what they were going to do. There is absolutely no way we would have been able to do that, to bring in one of the engineers from the railroad company to help explain what it was that they were going to do." [#40]
- The non-Hispanic white male co-owner of an SB-, DBE-, and HUBZone certified construction firm stated, "I guess that would be my thing, is I don't know how to see them. I'd love to work with them." [#42]
- The non-Hispanic white male representative of a DBE-certified and uncertified WBE construction firm stated, "Yeah. And then the other thing that helps is we have a notification that comes to us like email that there's projects coming up in your sector 11, and there's bids available, and that kind of stuff, kind of keeps us on track to say, hey, we should go out to bid on another project. We're getting a little slow. This one's coming to an end. But those emails really help. Bid Sync It's just - it helps that they send them out, and then you can kind of see what's going on. You know? And you can get prepared, oh, they're going to put something out to bid, it's due on this date. So that's kind of a big deal to us" [#43]
- The Hispanic American male owner of a DBE-, SB-, and DVBE-certified and uncertified MBE professional services firm stated, "I bid on several Caltrans projects and it never went anywhere, that's where I'm hoping that I can share some information to perhaps make it work for myself and for Caltrans and for the State and, hopefully, make it happen. the system is broken right now for contracting through Caltrans. Ideally, if, later, somebody from Caltrans really is reviewing your study and can find a way to - and also change - the whole process would need to be change, and it starts with Caltrans not being allowed to go outside of the DGS route. So, it really is between the agencies and how Caltrans operates in terms of their energy purchase. They would need to find a way to work directly bypassing, essentially, DGS or having DGS participate at a different level and a different program. it has been very frustrating to bid on numerous Caltrans projects and either not get the award or see that the others that got the award had underbid me and never were able to complete the project. That has been very frustrating. It took me weeks and weeks and weeks traveling and lots of investment on my part. It was sure frustrating to see that the agency did not achieve their goals and we could have helped achieve their goals. It's very

frustrating to not find a way to make it happen. So, hopefully this study would allow folks at Caltrans to - higher ups - to make decisions that would hopefully make it work, at least from an energy standpoint." [#51]

- The non-Hispanic white male owner of a majority-owned professional services firm stated, "Now there's another way you can bid with Caltrans, they have 250,000 dollar - no 2,500 dollar purchases they don't have to put out for bid. And I did go to an interesting meeting that was put on by Wayne Gross at Redding Caltrans and he said you have to do all these registrations. I did all the registrations and believe me those [processes] are really obscure and not really intuitive. But he helped me through it, and you have to list all these key words. It doesn't make a lot of sense, but apparently that is how people will search for you. He just really had to explain these really complicated things. Website itself isn't really well organized for someone who is not in the know of those things-how to set that up. Nevertheless, I set that up and that last thing I'm supposed to do is contact this other agent and see if they would approve a...I can't remember what it was, it was so complicated and obscure. I talked to a lady and she said, well you could send it in, and send it in as a...copy what this other company had done and I never heard back. And that was six months ago and it kind of fell apart. So, I don't know where I'm at. I get notices from the state on bids. I am seeing those, and it's based on the thing Wayne Gross helped set up, kind of like a search criteria. It's too complicated to contract with Caltrans for small businesses, that's probably the easiest way to say it. Can I make it more simple? Or is there a way I can get on some kind of list so they can just call me up, how can I get in on this 2,500-dollar purchase agreement thing? I could just cover for them. You know I could write documents, I could edit them, I could analyze data, but I don't have a foot in the door." [#57]
- A male representative of a majority-owned construction company stated, "this was a contract that you, that Caltrans had solicited us on an emergency response basis. The apparent low bidder, if you'd write down this bid form. And there was no DBE requirements, there was nothing of this nature, but the apparent low bidder issued a state contractor's license 44712, which at the time of bid was not valid and not registered. Four days later, it was registered with the State Licensing Board, California." [#58]
- The Asian Pacific American female owner of a SB-, DBE-, and WBE-certified construction company stated, "So they do have this bidding from different districts. They will announce their project opportunity. But I am located in Los Angeles County, so I'm interested in Los Angeles County, Riverside, San Bernardino, even Orange. Our specialty is building, building security, fire alarm, camera, security system. So, for some reason, I don't know how to get to know the buyer. Their job is not buying. They are like facility maintenance people and they need this done, they need that done. But I don't know how to find them or get to them. It's hard to get to people, they know of us. Because these people, they don't buy every day. They just need a one-off and they needed to do certain things. But I don't know how to get that. It's like their name, it's a secret. I do respect that because they don't want to be bothered or people will go to them, Do you have this job for me? Do you have that job for me? So I do respect that. But we are more in a react. People call me, say, Can you give me a quote? And then I'll work on the price for them. But I'd really want to know more. Like, who is buying what and how they buy." [#59]

- The Hispanic American female co-owner of a WBE-, MBE-, Micro-, and SB-certified professional services company stated, "For instance, currently, the opportunity for small businesses to be a team with Caltrans is through the design contracts that are awarded once every three years. And there's no opportunity for subs to be added to the contract after the award. So it's one time, you get that one shot, that small window of opportunity to get on a team, and then once that prime wins the contract, you hope you're on that team and then you probably get work. But that's the only opportunity you have. So that makes it difficult for subs to be interested in working with Caltrans because there's only that one opportunity, you know what I'm saying? So, the prime puts the team together and it's one contract, and the prime usually select the people that they know. So if you've never worked with that prime before, you're not going to get on the team. And that's the only opportunity until the next time that contract opens up for bid, which is in three years, usually." [#61]
- The non-Hispanic white male owner of a majority-owned construction company stated, "I've never chased Caltrans work. Just when the job comes up, and an opportunity comes up, I'll bid it. I wouldn't bid, but I subbed guess if that works. If that makes sense." [#62]
- A representative of a Native American-owned construction firm stated, "A lot of the Caltrans bids they basically go in at cost and we don't play game." [#AV67]
- A comment from a majority-owned construction firm stated, "I have been able to obtain work; but have not been able to get through to Caltrans on how to obtain work with them." [#AV244]
- A representative of a Native American-owned professional services firm stated, "[It's] hard to break into getting Caltrans Work." [#AV15]
- A comment from a majority-owned professional services firm stated, "[We haven't learned about work, maybe its] just not having been requested to provide a proposal, not being on a list for agencies to reach out to us." [#AV22]
- A representative of a majority-owned professional services firm stated, "[I'm] not aware of any contracts in those [other] regions [in the state]. [It's probably due to a] lack of knowledge and not our [area of] expertise." [#AV331]
- A comment from a woman-owned professional services firm stated, "Yes; there seems to be unfair advantage given to incumbent cultural resource firms that hold Caltrans on call contracts in some districts. Thus it makes it hard to expand into those regions." [#AV8129]
- A representative of a woman-owned professional services firm stated, "Caltrans is a specific system unto itself. In order to get work you have to know the system and put in a lot of time and energy into doing the work." [#AV836]
- A representative of a Black American-owned professional services firm stated, "I didn't know the right resources to go to [in order] to get in contact with Caltrans for information." [#AV905]
- A comment from a majority-owned professional services firm stated, "[We are] not interested Caltrans work: Too much paper work. There are too many hoops to jump through and process of proposals for these people.:" [#AV952]

- A comment from a woman-owned professional services firm stated, “Unless you're a minority or vary large company it's impossible to get any work with Caltrans” [#AV8399]
- A representative of a Native American-owned professional services firm stated, “Caltrans and other large public companies are hard to get work from.” [#AV8489]
- A comment from a Hispanic American-owned construction firm stated, “[We have been] outreaching [to] find work there, [we]want to get into Caltrans, [but] don't know how to reach out and gain work from Caltrans.:" [#AV8509]
- The male owner of an MBE- and EB-certified professional services firm stated, "I think the most challenging is for the buyers, the purchasers, communication, because you don't know the schedule and how to get the communication each side" [#PT1]
- The Hispanic American male owner of a DBE-certified construction firm, "Caltrans has a lot of emergency work and only for small business, correct? And in procurement the same way, how Caltrans or specifically talking with them, they decide to invite you because I used to get in by it now, I don't get invitations anymore" [#PT11]
- The CEO of a WBE- and MBE-certified goods and services firm stated, "when I network with other business owners, hey why don't you try with other counties or the state. At least I'd get some feedback, who do you talk to or the opportunity hasn't arrived. But with Caltrans most of the time it's pretty silent, it's like okay maybe even sometimes you are calling the wrong people, I don't hear from that." [#PT2]
- The male owner of an MBE- and SB-certified goods and services firm stated, "There is a disconnect between the individuals we meet at Caltrans procurement events and actually connecting with the actual buyers of products. I have attended several in my region and in Sacramento and have been unable to reach the actual end users or the appropriate individuals." [#PT4]
- The male owner of an uncertified SB firm stated, "Caltrans work has been notoriously unavailable, inaccessible to folks who are not in the know the thing with Caltrans has always been that it is such an institution that it's practically impossible to get folks who are inside the institution, even tell you what is going on in their specific districts. You can't get that information from Caltrans employees let alone consultants or anything else. So it's tough." [#PT5]

Nineteen business owners described their experiences getting paid by Caltrans specifically [#1, #6, #10, #11, #15, #18, #24, #32, #33, #35, #38, #43, #47, #AV, #PT11, #PT3, #PT5]. For example:

- The non-Hispanic white female owner of a WBE-, DBE-, UDDBE-, and SB-certified professional services firm stated, "I know people who've worked for Caltrans and they can't make a profit. What they do is... It's not that they cheat or lie, but what they do is manipulate the budget so that they can at least break even. Let's just say we normally bill at 100 dollars an hour for certain services. That we do that for every single agency except Caltrans, because what they do is you have to... You spend so much time trying to get the contract by giving them all the financials on a project that I'd normally on every other agency make a 100 dollars an hour, I make 68 dollars an hour. It is not worth taking the time to fill out the

paperwork nor is it worth it, because once you're on a project, Caltrans, all of a sudden changes the scope of work, say, 'Oh, well, we'd like you to do this too.' But they don't pay for it. I had a 12,000 dollar small contract that, not only did I lose money, but I lost 6,000 dollars because of them. So no. And actually, everybody who calls me and asked if I could work on a Caltrans project, and when I say no and why. Every one of them said, 'We've heard that from other small businesses.' So I'm not alone." [#1]

- The non-Hispanic white male representative of a majority-owned construction firm stated, "It's been a good experience. They pay very well. Their compliance documentation is not as stringent as some other agencies that we work with. So it's been a good experience." [#6]
- The non-Hispanic white male owner of a SB- and ELBE-certified professional services firm stated, "when you talk about Caltrans, when you talk about the pay for emergency work like that, I did exactly one job and would never again do another for Caltrans. That specific event opened January of '97 when the pineapple express came through and dumped 12 inches of rain on eight feet of snow and took out Highway 50 And I was one of the three contractors that was brought up there to put it back together. And we worked around the clock for about four or five weeks, pretty much around the clock. And the first paycheck I got was ... in July. Caltrans' policies for payment just about took me out of business. Because I had all those expenses and I got no dollars, no money. And then when we worked 17, to 18, 19 hours a day, because of the way Caltrans' reimbursement book is the minute you go past eight hours, you get 50 percent of the rate for the piece of equipment. So by putting in the extra effort to hurry up and get the road built, I got penalized. And nothing was paid for, we're fixing this equipment when we came down off that mountain that winter, which took about two months in the shop that spring in order to get the equipment cleaned up and refurbished and rebuilt to the necessity for being able to do the summers work. Zero. That's all supposed to be in the equipment rebate. Yet the equipment rebate was cut in half. Oh, but hurry up, we got to keep working, we can't quit, we got to work. Oh, but then your payment will be in six months and it'll be cut in half. My employees came out all right. My employees got the same pay and got the overtime, and everything else, the owner got the shaft. Read, skip around. So I did one job for Caltrans on that basis. I was called for many others, and I said, No, thanks. I've missed good ones." [#10]
- The non-Hispanic white male representative of a Native American-owned MBE-, SB-, and Micro-BE certified professional services firm stated, "We didn't have an issue with payment. We didn't have any issues." [#11]
- The Black American female representative of a minority chamber of commerce stated, "I will also add that working with Caltrans, one of the biggest barriers and challenges is the payment period, and that our small business have to wait over 60 days to be paid for work that's been completed. Most of our small firms do not have cash on hand to be able to wait for their payments to be processed and received, and most of the time on contracts that have a 90 day turnaround time, we're seeing them actually waiting closer to 120 days. We've also seen that as subcontractors, that the primes responsible for paying are paying even further behind that payment schedule and it is unsustainable." [#15]
- The non-Hispanic white female owner of a DBE-, SWBE-, and CBE-certified professional services firm stated, "when we're working with Caltrans, they don't have the resources to oversee it either. You can really tell that happens because the field people that they have,

their Resident Engineers and their quality control people, they're not good. They are difficult to work with. That goes to the point of that trickle-down effect of they're not effective, they're not good to work with. When I say that, I mean there's a lot of times when they'll miss quantities. I've placed [by] 1,000 feet. That's just an example. When it comes down to the monthly, they're going to capture the quantities. They've missed 200 feet of it. So, I get short paid. Then you get short paid. So, that doesn't seem like a lot of money. You're short paid \$30,000.00. Okay, you'll just roll it into the next time. They should be giving you supplementals. I've never seen a supplemental, by the way, in 30 years. It's something they're supposed to do but it has to go through the general contractor. The general contractor doesn't want to have to deal with that. Especially if that Caltrans employee missed five or six other subcontractors. They've all got to deal with that, and they're not going to. So, you're out \$30,000. Then the next month, they might short pay you 15,000. Now I'm out \$45,000.00. This kind of thing that I'm telling you has happened over and over and over again throughout the years. I've changed my processes in my office. I've made it so that I - we try to make it so that we don't ever have that. But it makes it difficult because you're at the mercy of Caltrans to make sure that happens. We were a subcontractor with the biggest contract that we'd ever gotten. It was about \$10 million total. It was over a two-year span up in the border of Oregon and California, on the 5 Freeway. The general contractor that subbed us out was a contractor that was - at the time, we didn't realize it but they were a contractor that was a sub-business from a large conglomerate. They came into California never having done California work. Long story short, they stiffed us about \$2 million. At the time, I could not find anybody at Caltrans to help me get payment. I sold everything. I almost lost my house. I literally called dozens of people at Caltrans and every single person there said they couldn't help me. It was out of their hands. So, I finally got myself involved so that I could know the players, understand what was going on. I did that through an association called the Southern California Contractors Association. They gave me the opportunity to sit on these committees. The very first committee meeting I went to in Sacramento, they passed around a partnering booklet, and they were talking about how great their partnering banquet was, and that, 'Here's an overview of it.' I opened it up, and the contractor who stiffed me for the \$2 million had won a partnering award with Caltrans. They won that award, even though I was one of ten people that put a stop notice on that project because they did not only not pay me, they didn't pay a lot of people. That's what I'm talking about, that Caltrans - they partner with their general contractors but they leave the small subcontractors out in the lurch. I would have gone out of business had I been a normal - if I would have just started in my business and I would have just thrown in the towel. I mean, we literally sold the building we were in. I sold my cars. I sold anything that I could get cash for. It took me about four years to get out of that financial devastation mess. I settled for about \$900,000 with the company when all was said and done. We finally did a settlement out of court, even though we were almost in court. It cost me almost \$200,000 just to threaten them. We finally did that. That wasn't even enough to pay my taxes on that. Yes, we can see it. That's the one advantage of Caltrans that I have to say is they're very transparent compared to any other agency. Right now, if I was to work for Metro or some other company, some other places, we don't see when the general contractor gets paid which is a total [problem]- that's a real problem. Caltrans does. So, they will - once you submit your quantities to the general contractor, you can see when they submitted it to Caltrans and then you can see when they're going to get paid by Caltrans. So, we know when

either they get a check or they got a deposit made. So, if I know that it came on, say, March 1st, I know that ten days after that, they should turn around and get me a check. That's like clockwork here. We always are checking." [#18]

- The Hispanic and Native American male owner of a DBE-, 8(a)-, SB-, and MBE-certified construction company stated, "I mean, we went - we just now got an issue resolved on a job. It was worth about \$75,000 to us. Took a year to get it on the map. We've been in other jobs just recently where we've had issues that were straightforward, should have been easily done as far as determined and concluded, and it took eight, nine months to get paid. And we're talking about \$30,000 to \$60,000, which is - for a big company it's not the end of the world. For a small guy it's the difference between payroll and not making payroll. It was trying to get Caltrans to agree that they should pay it and process it. I mean, we had one, it was basically - it was for extra traffic control because our bid item that we had ran way over. Right? It was supposed to be 100 yards; it turned out to be 120 yards. Well, that took two more days. And so, two more days is obviously not the traffic control that we had. So, we submitted to get paid for that. And at first he resisted and then he decided that, yeah, it made sense. And then - that was about four months into the year. And then about two months after that the prime would - everybody agreed now, and the prime then didn't want to process it quite yet because they had other issues not related to us to deal with Caltrans. And then they finally got everybody on the same page eight months later, and then Caltrans said, 'Geez, you know, we agreed we would pay and all that, but we just ran out of funding in that account, so we're going to have to - it'll be a month or two before you get that resolved.' And we're over here going 'We don't care about any of that.' But I mean, that's just the tip of the iceberg on how onerous the treatments inside Caltrans are. And it's just that their model doesn't have any exceptions for 'Hey, this guy's a DBE. This has to be on a faster track. This can't be on a change order that you guys just sit on for three months until you feel like it, or you beat him down on his price or whatever.' And they've just never had a remedy for that. They've been that way for as long as I've ever known and almost nothing has changed in the positive. Where they kind of get confused is their guys in - at headquarters. And I know lots of them have good intentions and they try to rearrange things and to be a more efficient manner for, for instance, paying extra work bills and paying for change orders or paying for things that they go 'Yeah, this should be a lot easier now. The RE has just got to go do that. They didn't have to go through these other three steps.' And they go 'Outstanding. We just fixed that problem.' And then what happens is the RE doesn't know, or he still doesn't do that one step, because you can't get him onboard to agree that the step is valid, because he doesn't agree that you should get paid. And so, you've got to fight the fight. So, getting back to uneven playing field, we don't have the resources to go fight that guy when he wants to be dug in. I'm the same guy that's on the job and I do - we used to go to weekly meetings with those guys and they'd bring it up and they'd go 'Yeah, we'll look into that.' And then nothing happens. And nothing happens. And nothing happens. Well, if you're the prime contractor and you're a large guy, your guy is in there every day beating on him. We can't go every day. It's just not possible. So, they've got lots of things internally that they could actually - without, I think, too much cost to implement. But they've got to have somebody that's paying attention to it and enforcing it. The problem with Caltrans and many public agencies - not just them - there's no penalty for saying no. There's no penalties for saying, 'No, you're not going to get paid, and you have to file a claim' Because filing a claim,

everybody knows, takes way more work than just trying to get it worked out. And so, when we've got to go file a claim we're more likely to surrender or take a huge discount in what we should be paid or what we think we're owed because we can't last long enough to go toe-to-toe with these guys. If you're De Silva Gates you can go toe-to-toe as long as you want because you've got two attorneys and four area managers and three project managers and two project engineers, and they can all go attack the Caltrans guy. And if it takes two years, then you just charge more interest and you just charge more money. But they're going to get paid. We have to make a decision. We're either going to go out of business, not make our payments till whenever, or we have to take less because we don't have the resources.”
[#24]

- The non-Hispanic white female owner of a DBE- and SB-certified and uncertified WBE professional services firm stated, "Caltrans – those jobs as far as getting paid goes it's usually a lengthy process and they're so particular about the invoices having every 'I' dotted, every 'T' crossed. It has to be so specific. Like all the contract documents have to be so specific or they will not pay you. And so that's always like a timely process because if you leave one thing out they are - it's a little over the top when it comes to that and takes time to get paid but we eventually get paid. I don't get paid usually until the primes get paid. So it takes that much longer which I have to be really patient” [#32]
- The non-Hispanic male owner of a majority-owned SB-certified construction firm stated, "Caltrans pays us very quickly. I would say within 30 to 45 days. From the date of invoice” [#33]
- The non-Hispanic white male representative of a majority-owned construction firm stated, "Every 20th. Better. By far. Other public agencies are lacking that aspect sometimes. The only thing - for emergency work, the ELB jobs, sometimes it's such a fast job that they can't get their contract through quick enough to pay. A lotta times we'll be completely finished with a job before they even pay us anything on those kinda jobs. They can have a good contingency fund where they can start paying right away. It doesn't really hurt us. Like larger companies with smaller companies - or say subcontractors that we're working with - 'cause we don't usually pay subs until we get paid by Caltrans. They don't really have the money to hire overhead and money to hold that - yeah, to weather that and wait for that payment to come.” [#35]
- The Black American female co-owner of a DBE- and DVBE-certified and uncertified MBE construction company stated, "Caltrans, I have a case right now where I was not paid by a prime. I can look on the Caltrans website and see that they were paid every month. They got paid for the work that I did but they did not pay me. Again, tried to work that out with the prime contractor; it went absolutely nowhere. And I did put a stop notice in with Caltrans. The only response I get from Caltrans is we received your notice. Basically, you have to work it out with the prime contractor, and we give them X amount of days, but then they release the money. Like, what is the benefit of that? Like, where - I've done the work, and somebody's refusing to resolve it with me, and they're basically just walking the clock out; you're going to pay them. There are just not checks and balances or accountability from Caltrans to make sure that the subcontractors got paid. There's not any anything, and that's really unfortunate, because they get credit for using us as a disabled veteran business, so a lot of the jobs with Caltrans are disabled veteran. So, they're getting credit at the

government level saying, oh, look, we use a disabled veteran, we're putting money back in their pockets, but it's not coming. So, you know, how dare you take credit but you're not - it's not really happening. And it's unfortunate across the board. And Caltrans is saying well, we didn't know, but also, Metro has a great system, so I'm confused on how the State of California can't have a system. There should be - I mean, even when I - I deal with the federal government, and they pay within 15 days, period. You know, so, something - something's broken there, and I'm not sure what it is, but I feel like it needs to be fixed. I cannot be the only one dealing with this, and it is just an absolute nightmare. And then you have, you know, the prime. They'll put - they'll let - you know, Caltrans know, oh, you know, we're using this sub for \$50,000. They get their credit to say they use a disabled veteran, so they get whatever percentage points they need, but they never check to see if that was paid to us" [#38]

- The non-Hispanic white male representative of a DBE-certified and uncertified WBE construction firm stated, "And a couple of times we had a hard time getting payment or something. I'll go to an RE, and hey, we're having trouble. We're not getting paid in 30, 60 days, 90 days. But when I approached them with my concerns, they definitely addressed it, and we definitely got to the top of the ladder, saying, hey, these people need to get paid, you know?" [#43]
- The Hispanic and Indian American female co-owner of an SB-certified and uncertified WBE construction firm stated, "Yeah, and then they also have a Caltrans Form - oh gosh, what's the name? For example, if we have some equipment and it's older equipment, or it's been manufactured for the application of the work and it's not in their database for Caltrans rates, it becomes miscellaneous. Another thing, too, is when you use the miscellaneous, it has to be on a Caltrans form, and forgive me because I don't know the name of the form. I can see it, but I can't think of the name. It's called Caltrans Force something. You fill out this form and then you submit it, and then what they do is they assign a part number to it, get it in their database, because it has to have a trail for the billing to catch on. That was a real big hiccup for us in the very beginning, is that we didn't know that, and the primes didn't know that. I know that now, and believe it or not, which is awesome, is that I actually educate the primes saying, 'No, no, you've got to get this going before because, if not, you'll get a billing hiccup.'" [#47]
- A comment from a majority-owned professional services company stated, "I do not want the payment scheduling [Caltrans uses]. It is not acceptable to me." [#AV20]
- A comment from a majority-owned construction company said, "[I'm not] interested in future Caltrans work: Relating to prevailing to wages. And amounts of paperwork related." [#AV891]
- A representative from a majority-owned construction firm stated, "[I'm] not interested in future Caltrans work: They don't pay their bills." [#AV8514]
- A respondent from a virtual public meeting stated, "When Caltrans has change orders, sometimes these change orders will end up getting into disputes and they'll go through, so for instance, in our line of work, we do traffic control. There's never a dispute on whether or not traffic control was performed. The work is always done or it's not right. So a contractor, just to give an example, a contractor will say, 'Hey. This dig out depth on this demolition

work or whatever this is, is deeper than you guys said it would be. This is going to be a change order work.' And they'll include the traffic control as part of that request for change because it's materially different. Well, they don't, what they would say is, 'We're not paying for traffic control at all, because the work we did that day is not change over, it's all extra work.' Okay, well, nobody's disputing whether or not traffic control was done. But Caltrans may have a dispute with whether or not that other work was actually change order work. So what ends up happening is we get dragged into these very long, drawn out arguments about whether or not some other piece of work that's not actually our work was change order work. And we end up eight months down the line without a payment. If there was a way that we could not be involved in that. And I realize it's probably more of a contracts issue." [#PT11]

- A respondent from a virtual public meeting stated, "I own a cultural resource company, and even though I have multiple Caltrans on-call contracts, because of the Safe Harbor restrictions I can't bid the standard rate for our services that I can on other transportation agencies. On ALL of the contracts I have been on in the last 10 years, I have lost money (not even breaking even) on every one of the 12 contracts. I have told all primes (even Granite that I like to work with) that I will never work with Caltrans again. Every prime that calls me to bid with them tells me that they hear this complaint ALL the time from small businesses. When are you going to fix this problem?" [#PT3]
- The Hispanic and Native American male owner of a DBE-, 8(a)-, SB-, and MBE-certified construction company stated, "I would never recommend for a new firm to go to Caltrans due to payment and personnel. They view the contractor as an adversarial (there is a conspiracy by the contractor to get paid)." [#PT5]

Nine business owners described their experiences getting paid by public agencies in the California [#1, #7, #8, #9, #17, #38, #50, #62, #PT12]. For example:

- The non-Hispanic white female owner of a WBE-, DBE-, UDBE-, and SB-certified professional services firm stated, "Let's say I worked in November, here it is December. I will turn in my invoice to my prime, say the third of the month or whenever the last week when I get my stuff from my employees. I turn in my invoice, say the third to the fifth of the month. Well, the prime usually isn't prepared because they have other subs. And so they put off turning it into, like Caltrans, and so because of that, it's automatically over a month before Caltrans even gets it. And then by the time Caltrans gets it... I mean, I have work that I still have not been paid for and that was last year and there's nothing I can do about it and I won't be paid for it. So I just have to write it off. And Caltrans isn't the [only one]. It's all agencies. I mean, I have some from the city of Los Angeles, I haven't been paid since last February. And so it's just an issue with lead agencies and the inefficiency of the staff. And I know that it's not, I mean, some of it's their fault, but there's no checks and balances to ensure that everything is done as per contract. And I'll give you another example without saying the name of the agency. But I haven't been paid for a project we finished six months ago. And my client gave me, well, they owe me 50,000 dollars, they gave me a 6,000 dollar check and I sent it back to them. Because the agency has a program that they all they do is check to make sure you have been paid, they don't check to see if it's a full payment. They don't check to see if you're up to date. So I turned it back and all hell broke loose to the

point that I've now got the auditor for the agency that's going, 'Oh my gosh, what's going on here?' It's like...And I even wrote in... Because you have to, every month you have to say did you get paid? This is that blah, blah, blah. And then they have it. And you can state to the auditor or to everybody who's reading it, what are your comments. So I sent to the auditor for the last four months. I said things like, 'I'm not being paid, you need to get me paid. And as an auditor, you should pretty much, you should be doing your job.' So what I did say... And I found out who she is and I've talked to her now on the phone because I scared the crap out of her. But I said to her, 'It's obvious you're not even reading my comments.' And when I did talk to her on the phone, she goes, 'Yeah, I saw that.' But that's a problem. I've actually changed one large agency of how they... It took me seven years, five to seven years. But what happened is, I wasn't getting paid by a large agency that I complained and complained and complained. And I went to all their so-called groups that are supposed to take care of this issue. And what ended up happening is finally, it took a long time, but they made a one page piece of paper, the agency did, that if you are a prime and you aren't paying your subs, you will lose your contract. And so what it does is, it makes big primes, it makes them accountable for their actions. But that took me a long time and it was really bad for me because people considered me a complainer. But what I had to tell them was, 'If you didn't get paid by your boss for a year, wouldn't you complain?' And then they go, 'Oh yeah.' And so they got it, but it's still I'm out there as, 'She's making waves again.' But I see it that it's, we are the ones that don't have a voice. And so, we shouldn't be taken advantage of by the ones that make the laws. That's basically because when you're a prime, an agency knows how to pay their prime. They don't understand that there's a lot of lag time between when they pay their prime and then when the prime pays their subs. The problem is that there's the prompt payment act of 1999, which has been updated, and most large agencies don't adhere to that. And Caltrans is the worst offender. I take that back. High Speed Rail is the worst offender. They still have slow pay that it's in their audits, and this is 10 years. I think the last time I worked for them was 2009. So yeah, so that's 11 years ago and they're still not adhering to the law. So yeah, it's a different thing, they need to understand what subs or small businesses go through and nobody cares." [#1]

- The Black American male owner of an MBE-certified professional services firm stated, "Outstanding. I wouldn't say never, but very rarely do we ever go beyond 20 days in payments, 20, 25 days. Some of our contracts are paid as fast as four days. So the payment is very, very fast [for federal contracts]" [#7]
- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "But even then, I have two clients right now that haven't paid me in eight months and they're public sector clients, and I don't know what to do about it. I've talked to everybody. They're saying they're figuring it out internally. Net 60 days doesn't matter to some public sector clients, and so I haven't been paid since June for some jobs. And so it was just... Even if we have all that stuff, yeah, it's a barrier, even then, it's still not followed through. It just various client to client. So some clients, I think city of Fremont is very, very good about paying on time and some cities like Sydney or Emeryville or Oakland hasn't paid in months. And calling folks and folks are being unresponsive, or you call the numbers and you know they're not picking up the phone so you're just like, This is a public sector client, I like working with this client, I want more work for this client, but what do I do right now? And so a bigger firm can send their lawyers, but for us, we don't want to do that, right? We

do everything on our end properly, and just on the public sectors end, when I talked to them it's like saying, oh, the city manager has approved this so we have to get this extra form or something internally that they have to do it, or their budgets got moved around so they got to move money from a different job to come back to figure out how to pay us. So it's a lot of different excuses, but it's mainly on the city side. It kind of goes to what I mentioned earlier, different cities have different ability. Cities with large more money and better taxes have more staff to do work, and some cities that don't have that, have less staff.... We, as a private consultancy that resulted that we work with certain cities. It varies quite a bit. Some cities will just pay directly, like city of Fremont will pay directly. Some cities have internal issues they have to deal with. Some cities want to nitpick every hour and then they won't pay until they finish nitpicking every hour. It's good for them to do that when you work with the larger firms, but when they hire small, local firms, they're just stealing from us. The other big issue that we found in San Jose is they're so used to working with big firms. They don't know. The big firms have kind of made it so easy for them, for a while. The small firms, they expect us to be able to redo the work over and over again and not ask for more money. The big firms they can be like, Yeah, we'll do that. Because they're trying to get the big interchange project from San Jose so they'll take the hit, a lot of small jobs, but for us, we can't operate that way. And so we found that they have a different expectation of what we'll be able to take on and own because of how the big firms have been treating them." [#8]

- The Asian Pacific American owner of a DBE-, MBE-, and SB-certified professional services firm stated, "No, usually they have audit system now where if the agency pays the prime, the prime is obligated to pay the sub in a certain amount of days, and then so somebody is tracking that. So yes, we do get paid on a timely matter." [#9]
- The Hispanic American female owner of a WBE-, MBE-, SCMSDC-, and DBE-certified goods and services firm stated, "I think sometimes the primes slow it down." [#17]
- The Black American female co-owner of a DBE- and DVBE-certified and uncertified MBE construction company stated, "there's just mounds of paperwork to get paid, and it really needs to be streamlined, because there's a lot of pieces of paper asking for the same thing. Or, and a lot of it, in my opinion, can be electronic. So, that would be, to me, the big difference. It just takes more to get paid, and, honestly," [#38]
- The Hispanic American male owner of an uncertified MBE construction firm stated, "Oh actually I did work for one they short changed me. It was on a street. They're doing a street in Orange County. They're doing like the piping under the street. I don't know if that's with you guys but that's the company that short, that kind of short changed us from with our hours." [#50]
- The non-Hispanic white male owner of a majority-owned construction company stated, "When I was doing government work or contract work through a government, probably the biggest complaint I had on that is the paperwork was just a nightmare and sometimes it takes them forever to process it. I would think there should be better ways to ... Whenever you did the work, you should get paid. It shouldn't take a whole 20 days. I think if you're doing a contract everything should be laid out on how it should be done and right up front. There shouldn't be delays if you fill those forms out right. you bill monthly, you should get paid monthly, not 20 days later." [#62]

- The male representative of an uncertified DBE and MBE firm stated, "when we send the invoice to our prime, the prime maybe will take half month or one month to consolidate all the invoices from other firms all together. I'm fine with that. And after that, then I suppose they [have a] project approval process. But in our case, the current project with Caltrans, I just found out we have four months or three months of payments we never received. And then we find out all these invoices after the six months. Two months is always okay, three months is okay but not six months. As an individual or an owner-operator on the trucking side, how or who do we speak with in order to find out the information on the project? Because more often than not in the trucking industry itself everybody is pretty much left in the dark. So when the contract States that Caltrans has an X amount of days to pay the prime, and then the prime pays the broker, and then the broker pays the trucker, by the time that that happens, as [another participant] stated before, I don't know what line of work he's in, but it may take months before we see a payment. And so under those circumstances, how do we secure our funds? Or how do we follow up to make sure that the either prime or the broker, whoever was hired, is not just holding onto the funds after they've, according to Caltrans they've already been released?" [#PT12]

2. Barriers and challenges to working with public agencies in California. Interviewees spoke about the challenges they face when working with public agencies in California.

Thirty-six business owners highlighted the length and large size of projects, allowable profit margins, communication with decision makers, and lead time before projects are announced as challenges, especially for small, disadvantaged firms [#1, #2, #5, #8, #11, #18, #22, #25, #30, #36, #37, #38, #41, #42, #45, #51, #52, #57, #58, #59, #61, #AV, #PT2, #PT8, #PT9, #PT10, #WT3]. For example:

- The non-Hispanic white female owner of a WBE-, DBE-, UDDBE-, and SB-certified professional services firm stated, "And they're a smaller one such as a city, a small independent city within a County. And they don't realize that they're the ones that are also just hiring their friends. And they don't realize that they should have a specific bidding process out there and that they are excluding [other firms]. And I don't think they're doing it intentionally. I think they just don't understand what they're doing about excluding people from the bidding process. So, I think that's the major thing. Is that they don't reach out, they just expect people to come to them but the people don't know. We don't have time as small businesses to go on every single city website to see what the RFPs are. We don't have time for that. A larger business would have a independent individual, that would be their job, to search out work. But in smaller companies, that's not viable. That just isn't something that... I mean, I would love the opportunity just to have somebody sit there and go through every web page of every agency out there, but it's not that way. It just doesn't work that way. Now, because we have the PlanetBids that the cities now are submitting RFPs. So they'll say 'We need...' Like for my stuff, they'll need somebody for cultural resources and then I'll get an email. That's much better, but up to just a few years ago, that didn't exist. So they are in the process of getting better. It's just the agencies are so backwards, they don't even understand that the laws have changed. And that's an issue because they don't know what they want. They don't understand the laws that they're trying to uphold." [#1]

- The non-Hispanic white male co-owner of a majority-owned construction company stated, "you're not seeing people come into Caltrans. Number one, because they are so hard to... I mean, look at all the companies that are non DBEs that go out of business working for Caltrans. When the contractors are sitting here on bid day, going, I'm [bidding] with the same DBE contractors year after year, nobody's coming into the industry when I call and do my good faith effort, and go through all the lists, there is so much information about how many companies tell you, 'please stop calling me. I don't want to do Caltrans work. I don't want to be solicited by you. I'm getting calls and faxes and everything, stop bothering me. I'm not going to do it.'" [#2]
- The Black American male co-owner of a WBE-, MBE-, and DVBE-certified construction company stated, "We get emails from the State of California all the time and we get emails from some of the city agencies, what have you. And we follow the procedure that they say, but it never happens. It just never happens. I'm going to say, we probably send in, on a monthly basis, two or three bids a month. And these bids are expensive because you have to do takeoffs, you have to figure out everything to the penny. And so at some point you're getting older, your kids are getting older and you go, Well, maybe I'll stop fighting that fight and move on to something else." [#5]
- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "Maybe a lot of the cities that I work with are very understaffed and they vary. So for instance, if I work with a city like Emeryville, they have a lot of money, but they're understaffed. But they have a lot of products, so they keep hiring consultants. You work with a city like San Jose. They have a lot of money, but I don't hire as many consultants, but they try to do everything in-house. And then you have a city like East Palo Alto that has no money and has those staff. And so they don't do anything. And so [it] varies quite a bit within the County itself. And so there's a lot of inconsistency in who has the capacity to even apply for grants. A city like San Jose applies [for] all the grants. A city like East Palo Alto hires consultants to apply for the grants. And a city like East Palo Alto never ever applies [for] the grants, and it's a minority low-income community, but their staff is so low that they do not have the capacity to even think about any kind of those grant programs, and so nothing ever happens in [that] town. And so it very inconsistency from city to city based on class and tax code, and that affects the projects as well, and that affects the equity and how these projects get implemented. So I think a Caltrans could be more to help some of these cities out, but instead of the County, maybe. But for us on a lot of local projects, there's an inconsistency in the quality and deliverable of the process and projects." [#8]
- The non-Hispanic white male representative of a Native American-owned MBE-, SB-, and Micro-BE certified professional services firm stated, "It varies. it's easier with some and it's very difficult with others. Just as a side note to let you know, we prefer the more difficult ones. Yeah, because there's less competition. And so, when I see very high hurdles and very hard things to cross because we've trained ourselves, we prefer that because we know that we're going to be very competitive in that market because we know a lot of people can't do it. It's kind of backwards to what you're hoping for, right?" [#11]
- The non-Hispanic white female owner of a DBE-, SWBE-, and CBE-certified professional services firm stated, "What we know right now, that probably because most of the country, because of COVID, is really struggling, California continues to build their infrastructure. It's

lowering but we know that we're going to still have work probably. We know that there's going to be competition coming from other states to do work here. Those people have no idea how hard it is to work for Caltrans or any of these entities. Metro's the same way. The paperwork alone will bury you." [#18]

- The non-Hispanic white male owner of a majority-owned professional services firm stated, "I found that half the contracting officers were sort of - what's the word I would use? They were sort of skeptical of contactors, that you're going to try to cheat them, so they would always be looking for, 'How are you going to cheat me now?' and they'd try to squeeze every drop of juice of the lemon, I think. And the contracting officer would pick the load big, then the contracting officer's representative would be the guy stuck with the low bid. So he was kind of grumpy a lot of times, would try to figure out, 'Well, you should do it this way,' and try to order you around. And you'd have to read the contracts and, 'You can't order me to do that.' It was a lot of cat and mouse game that could come up, not always, I'd say half the contracts were like that. So it wasn't very pleasant." [#22]
- The non-Hispanic white male owner of a majority-owned SB-certified construction firm stated, "I think it's dependent because if I pick - I'll just use Caltrans, for instance. I've had project engineers that were difficult to work for, but predominantly, I've got a good relationship and know a lot of the project engineers that are in our area and worked for them before and have a great relationship, and it's not a problem. But once in a while - I'm just using Caltrans, for example. So, I won't apply this to any agency, any public works job. Once in a while, you can get somebody that's difficult, and it makes the job not run as smoothly. But it's a little frustrating sometimes, I will say, because I have no preferences, myself. But I know, if I had any kind of preference, any kind, it would be a lot easier. If I was, whatever, Black, Native American It sometimes feels like if you don't have some kind of preference, you're at the back of the line. Does that make sense? Yeah, almost like I want to tell my wife, 'Hey, I think you need to come down here and take over this thing. I'll just get a job working for you because it will be a lot easier for you to get work than me.' Does that make sense?" [#25]
- The non-Hispanic white male co-owner of a majority-owned professional services firm stated, "More firms who just gather up cities and do promotions for them, and send out all the RFPs. RFPs, or requests for proposals, are not coming from the cities anymore; they're coming from a company that does the contact with a city or an agency or whatever, to send out RFPs. So it's more difficult to respond to the RFPs, because you don't know how many levels [are between you and the agency] - you're not dealing directly with the cities most of the time; you're dealing with another entity or whatever who's somehow getting paid for doing this, I don't know how." [#30]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "I don't know if you're familiar with Highway 37. But I've been going to those coordinating committee meetings for a long time. And that's a road that hasn't been expanded since 1926. And there's gonna be a lotta work there. But I don't have any idea how we could ever participate in that. It's in four different counties. So there's not one impetus to get it done. But now there's a coordinating committee meeting group and they are gonna do something to it but it's not the ultimate solution. it's just one of those public jobs that we - have tried to

go to the meetings and stuff like that but I just don't see any opportunity for our company to be involved at all in the work itself." [#36]

- The Black American male owner of an uncertified MBE construction firm stated, "Los Angeles has a big thing called Bargains - it was a website where you could see all of the projects that they were doing. So when I went - first of all the bid rooms were filled with competitors, which is good for the owner because you're going to get a good price, but just to get through that process, unless you are an established, functioning firm you're never going to get to work with those entities. And maybe it's that way by design because they're doing public works and they need to have a certain level of service provider into the door, so unless - are you saying that they are attempting to assist small startup firms? I think startup firms shouldn't really participate because it's not for startup firms, it's for firms that are already established. I would say in order to participate you would need to have at least an office staff of three and the finances to cover that and one superintendent and the finances to cover that at minimum. Because if you're going to sort of sub work out and that kind of stuff then you could do it that way. But you would need to at least have the ability to have an office staff of three members plus one savvy field guy in addition to that, at the minimum." [#37]
- The Black American female co-owner of a DBE- and DVBE-certified and uncertified MBE construction company stated, "There's just mounds of paperwork to get paid, and it really needs to be streamlined, because there's a lot of pieces of paper asking for the same thing. Or, and a lot of it, in my opinion, can be electronic. So, that would be, to me, the big difference." [#38]
- The Black American male owner of an SB- and MBE-certified professional services firm stated, "Caltrans and a lot of the other organizations that work with minority and micro businesses don't understand. It's a lot different than being a contractor that's actually installing equipment and working with you to install - to make sure that your equipment is installed properly." [#41]
- The non-Hispanic white male co-owner of an SB-, DBE-, and HUBZone certified construction firm stated, "The hardship usually comes from the - any hardship that we have generally comes from the higher-ups on the government side who never go to the job site, never even see it, but they just have like, 'This is this and this is that and this is this.' So sometimes it's hard when you send in an RFI or something to make and they're the ones who are going to make the decision on it. Even though there's somebody on site to kind of be their eyes, it's hard to translate to them what you're dealing with out there." [#42]
- The non-Hispanic white male representative of an SB-certified professional services firm stated, "I would say that the biggest barrier, which we tend to overcome quickly once we get hired by someone, a public agency or someone, to show them that we're more than capable of getting the work done within a certain timeframe, the power of how important our employees are and how everyone can create a sense of customer experience and making sure that they know that they are one of our top priorities." [#45]
- The Hispanic American male owner of a DBE-, SB-, and DVBE-certified and uncertified MBE professional services firm stated, "I have focused on the program by the State of California whereby my firm was qualified, as I mentioned, to bid, build, own, operate a solar facility

within the state land and with the energy provided directly to the entity, in this case Caltrans. So, as an example, I bid on several. I mean I would say at least maybe 15 projects throughout the state going from San Diego all the way up to north of San Francisco. Multiple Caltrans offices. The majority of them, if not all of them, never went to reality. The reason for that, in my opinion, is that the program the State was doing - and to understand how it works is Caltrans basically hires.. let's say to make it easier to understand, hires DGS, Department of General Services, to manage their program for solar. So, DGS is an agency that has created a program that would allow the solar installation to take place at facilities such as Caltrans. This has worked, this program has worked for some agencies. Like I mentioned, Cal Fire was one that I was able to secure a contract. There has been a multitude of other agencies like the prison. CTCR was another one that has been very successful in using this program. The problem with Caltrans has been that the projects - the energy needs that Caltrans has have been very small compared to a prison, let's say. Compared to a prison, the energy needs that a Caltrans field office or a main office would have is relatively small. Then the other issue is that, of course, some offices of Caltrans are in the very [urban areas] like Downtown San Bernardino, Downtown San Diego. So, land is more costly. Right? So, there isn't the big fields available that the prisons would have. So, bottom line is that the smaller projects and more expensive type projects, in order to make them pencil out, they would need to be very cost effective. So, the main problem that I saw with the state program that Caltrans was relying on was that this program was funded by these projects. So, in other words, for me to build a project for Caltrans, I also have to pay for DGS services to review the bids, to basically inspect, to be part of the whole process. So, I have to pay for this program that the State is running in order to bid for a Caltrans project. The issues, of course, is when you have a big prison project, that's not a problem. But when you have small projects for Caltrans, then the fees that I have to pay for the State plus paying for [right-of] way jobs, plus being - all the other rules we have to follow, the amounts that I would have to pay for the project would not pencil out as compared to the current utility costs that Caltrans has. But if you eliminate - in my opinion, if you eliminate the fees that I would pay for the State to manage the project and bid it like any other time that Caltrans would need to have something built, Caltrans would pay for it directly without having to go through this procedure, I think that would be more cost effective, and it would pencil out, and we would get something done. So, right now, all the projects that I bid or that I visited and bid for Caltrans, to my knowledge, none of them were built, from San Diego all the way up north to San Francisco, including three right here in my backyard, in San Bernardino and Rialto. So, it's been very frustrating, number one, for the amount of time that I spent traveling throughout the entire state preparing these bids, and then it has been very frustrating because there could be a much easier solution. I'll share with you the solution that I'm thinking here, which is for me to be able to build my project in, let's say, San Bernardino County, and then just sell the energy directly to Caltrans and not build the project in a downtown area. That would be option number one. In my opinion, that would be the most efficient. That's what the school are doing or considering, and other facilities are considering. Then, the second, perhaps alternative that would make my small business be able to get them done would be to not have to pay for a program for the State to run to get the facilities to built for Caltrans use. In other words, have the State incur the cost that they would normally incur to oversee construction and oversee the design and whatever else they need to oversee as part of the agency that wants to have the facility built and not

for me to have to pay for the State to be able to do their part. That's what I'm trying to say I think the hardest part has been the bigger business underbidding and then not delivering. That has been, I think, the most frustrating item that I've seen. There was a bid for a Caltrans facility, a traffic management facility, here, right next door in my backyard in Rancho Cucamonga and Fontaneria, right next to where I am at. What happened in there is that a company bid the project and underbid the project, and never built the entire project. They only built the cheaper, easier part. Then they waited many, many, many years for the price to come down, price of material, price of things to come down. Then they finished building the project several years later. So, that's an example of the games that bigger companies play that I don't play." [#51]

- The Asian Pacific American male owner of an uncertified MBE construction firm stated, "I know with stuff like Caltrans, it probably pays a little bit better, but for us owner-operators, we - some people don't know - like for me, I know where I can [do work], but you've got to bid it,... but if I sit here and wait for Caltrans to get me a job and then nothing comes through, I'm sitting for nothing, when I could be out actually doing work for the private sector making money, instead of sitting and waiting for an owner/operator, our trucks, we figure on it's got to make X amount of dollars a day to make our ends meet, and then every day that we're down, you're not [collecting] revenue. So at the end of the month, then you might be short on the bills" [#52]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "It feels like they want contracts [to go to large firms], just push it through and don't make it complicated and get these big firms. I think it's a lot of wasted money too. I imagine those big firms are very expensive. In fact, I know they are. Because when I worked at Caltrans here's what they did, here is why they wrote the contracts so complicated...when I was in the Bay area, they did big construction contracts. They were so big, like building the Bay Bridge after it collapsed from the earthquake. That was about a multi-million-dollar project and there was about a handful of firms, maybe five or six, that had the capacity to bid on it. And what would happen? And they knew this, and Caltrans knew this. And the engineers told me, privately or whatever, it wasn't a secret. But they said that they would generally bid low. There was a low bidding game, they would bid low and give it to the lowest bidder. And then once they started doing the project they would-it was these big projects, invariably there would be a modification due to something." [#57]
- A male representative of a majority-owned construction company stated, "What I see with Caltrans and all of this is you have, and this is my point, you have too many forms and quite frankly, too much bullshit." [#58]
- The Asian Pacific American female owner of a SB-, DBE-, and WBE-certified construction company stated, "Possible. If I can hire of another estimator, the search for the job and try to find a job that we can more control or profit. Public work is great, but it just costs too much to save the profit. You see the profit, but at the end, especially us in construction, there is a one year warranty. So if anything go wrong- the labor has to return to fix and to adjust. you don't have friends, when you work with a public job, it's called by paper, because people are afraid to be your friend. If I'm working with a public job, I stay very polite to perform the job because there's no relationship. I win the job because my low bid." [#59]

- The Hispanic American female co-owner of a WBE-, MBE-, Micro-, and SB-certified professional services company stated, "Agencies that use Planet Bids where they email you based on your NAICS codes is easier for us when we're contacted, there are some agencies where you have to actually go to their website and manually look or download the list. And it doesn't necessarily come in door that information unless we take the time to go and look for it. So it once again goes to manpower and small businesses not necessarily having that overhead manpower. We also use a service called IMS, that lists all the advertisements, but sometimes that's too late because they advertise, like one month before the proposal is due. And if it's a larger project, we may not know about it- until it's too late. There are [also] some agencies that require a lot of forms for the subs." [#61]
- A comment from a majority-owned professional service firm stated, "Obtaining work with public agencies is really difficult, if not impossible, because they do get bids from lots of companies but they seem to select the same ones because they are the ones that have experience." [#AV16]
- A representative of a majority-owned professional services company said that, "The paperwork [for public contracts] is cumbersome." [#AV61]
- A majority-owned construction contractor stated, "The only resistance than we've found is through operations engineers, [and] local 12 in Southern California." [#AV85]
- A comment from a majority-owned professional services firm stated that, "[We are passed] over for work because not minority, veteran or women owned company." [#AV86]
- An MBE Hispanic American-owned construction company said, "Sometimes the DBE processing prohibits us from certain projects." [#AV87]
- A representative of a majority-owned professional service firm stated, "We are a small business, I get inquiries but it is not worth it for me to go through the billing process and wait for the payments in working with the government. You almost need a secretary just to take care of the paperwork." [#AV89]
- A comment from a majority-owned professional services firm stated that, "The amount of paperwork is cumbersome." [#AV98]
- A representative of a majority-owned construction firm said, "My biggest obstacle is the length of time it takes the city to approve plans." [#AV105]
- A representative of a majority-owned professional service firm stated, "Contractual paperwork is too onerous." [#AV121]
- A comment from a majority-owned construction firm stated, "I wish it would be easier to do public work without having to do so much paperwork." [#AV275]
- A respondent from a virtual public meeting stated, "I know there's a lot of small businesses out there that really don't want to speak out because they have a feeling that they don't want to be put in a position being blackballed. In addition, you're stating that it is going to be anonymous, but if there's legal...any legal then, their name could be put in the hat. As small businesses, what we're doing here in the trenches is really struggling right now with COVID and we're trying to keep employment...keep our employees to have jobs. So it's been a big struggle." [#PT2]

- A respondent from a virtual public meeting stated, "It costs money to bid. It costs money to actually prepare a bid. So I'm going to spend money to bid for something that I can't get." [#PT8]
- The male owner of a DBE-certified professional services firm stated, "I'll get an email from the state or the agency going come attend this event to see how you can contract with us and trust me... I'm the one raising my hand going asking you same questions and I get the same bureaucratic like oh, you know, we're looking hard into this blah blah blah, it just dissuades me." [#PT9]
- A respondent from a virtual public meeting stated, "Working with Caltrans and local agencies, the greatest challenges I've seen with local agencies is that they all seem to operate differently and separately. If I work with one local agency and there's a DBE goal, I wouldn't expect that another local agency would follow the same rules, the same requirements, the same analysis, the same review of compliance, of assistance. It doesn't happen that way. They're all different. And so that is very challenging. And then I go to Caltrans. And if I, again, work as a sub consultant there, then there's another set of rules, same law, same DBE rule, that doesn't change but the interpretation and application between Caltrans and the local agencies are all over the board. So it becomes challenging. I don't know if I'm preparing the right package or I'm responding to the bid documents correctly or doing contract administration correctly because everyone treats it so differently." [#PT10]
- The female owner of a WBE-, DBE-, and SB-certified professional services firm stated, "We will probably stop doing any government contracts altogether this year, because the high cost of responding to RFPs, low chance of being selected, high cost of long contract negotiations and delays in starting and completing projects due to government agency delays makes them a net money losing proposition with huge potential liability exposure." [#WT3]

3. Caltrans' bidding and contracting processes. Interviewees shared a number of comments about Caltrans' contracting and bidding processes.

Twenty-four business owners shared recommendations as to how Caltrans or other public agencies could improve their contract notification or bid process [#2, #6, #8, #10, #11, #14, #15, #18, #2, #20, #22, #25, #38, #40, #43, #47, #54, #6, #61, #62, #8, #FG1, #PT11, #PT12, #PT2, #PT5]. For example:

- The non-Hispanic white male co-owner of a majority-owned construction company stated, "I have come out with this suggestion to anywhere, you tell Caltrans, put a line item bid as an allowance and your bid for the general contractors for DBE utilization. So we got a 10 dollar project and we're bidding it and let's say the goal is 10 percent. So that means I got to have a dollar's worth of DBE utilization. Okay. Well, I have a line item in there for 10 percent allowance for, 1 dollar of that contract to go to DBE. So now if it's done as an allowance, that's basically a reimbursement. That means that, whatever's expended and can be documented and turned in, as basically like when you do force account work, where you're just getting paid time materials, you get reimbursed. So there's no risk and you get him an introduction into... There's no risk for the general contractor or the DBE. So when

you do that, then you now take away the risk, they don't have to have a formal bid proposal turned in because basically they just need to give us what their time and material crew, rages and that type of thing or not. And we figure out how to utilize them in the best way that can go with the job so that we can develop I mean and support it. So that was my concept of how to eliminate risk, how to help them learn Caltrans work, get familiar with it without losing their shirt on their first job and doing it in a way where maybe there's even an incentives. After 1 dollar views, if you get to a dollar and 50 cents, then you get some benefit as a general there too. So now you're trying to enhance what they do on the job. That's all I could come up with." [#2]

- The non-Hispanic white male representative of a majority-owned construction firm stated, "Just to continue to look at the compliance that's required and then from just again, assisting small businesses to get their paperwork turned in on time, do training for the small businesses or provide resources that will help them." [#6]
- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "I think better points for small local businesses, making sure the RE's read through, through an equity lens to help or prioritize small, local, minority, women owned, trans owned businesses, I think veteran owned businesses. I think encouraging teams of companies to apply opposed to DBE requirements maybe, DBE requirements, I thought it was cool and all in the beginning, but then as we've gone after a few jobs, it's not very cool. It's just us sucking up to a big firm and they using us for a percentage saying that we're a minority owned business and then we don't get anything out of that. And so I think if there's some way to encourage small businesses like us to collaborate with other small businesses to grow, I think is a better way, strategy than telling us to buddy up with a larger firm so they can expand and we grow because they can expand and grow a lot bigger than we can and they can also run us into the ground, which they do, and so the companies that have stolen from us, like Kimley-Horn and not giving us work out of that, and so it's been frustrating. I think just more emails if you have a list of folks like us to email. Because on the side to that, I get emails from agencies that don't get a lot of procurement. So if like for instance, city of Monterey and city of Paradise, don't have a lot of consultants in their county and don't get a lot of procurement. When they put out a job, they get one or two companies. So I get emails from those agencies semi-often be like, Hey, please, we need more people to propose [on] our jobs. And so that's always helpful to know about. Trying to consolidate everything into one system is always good because we have to check so many different systems and agencies and folks to find out about opportunities Having a good proposal is always good because a lot of times these proposals are copy-pasted. They're copy-pasted because they'll have like some as even the wrong project name or something on there. And so us as a private company, we're having to do a lot of guesswork to figure out what they mean when some of larger firms they may know or be able to guess that easier than us. In terms of payment, no, I don't know what else you can do. The only way, things that we're supposed to be doing is we're supposed to go bring in lawyers or somebody to go make sure that they pay. But to be honest, me as a small firm, I'm nervous to do that because I'm still trying to make friends, right? So if I was a bigger firm, I could be like, Yeah, our lawyers are coming up to you. They're going to breathe down your neck. And the city would listen. But the small firm, that's not really how I want to show myself. I had a phone call with a client two weeks ago and he was complaining about a contractor, about how the

contractor is nitpicking every hour in every task. And I was like, 'you haven't paid us since last year June.' And he was like, 'I'm being super-nice to you, man.'" [#8]

- The non-Hispanic white male owner of a SB- and ELBE-certified professional services firm stated, "Caltrans needs to mentor their employees. Mentoring has been lost. You don't take somebody who's been two years or three years or five years out of college and throw them on a multi-million dollar slide repair on highway 50. Because even though they had two years or three years or five years, they're no where, as near capacity to be able to do things like that. They need mentoring. The old people need to mentor the younger people. It takes 15 to 20 years in the field, before you start to understand about all the particular problems that you run into and how you go about solving them. And you solve them basically by working with the contractor from day one, you work with the contractor. The contractor is not working for you. And he's not your whipping boy." [#10]
- The non-Hispanic white male representative of a Native American-owned MBE-, SB-, and Micro-BE certified professional services firm stated, "Just comply with the Public Contract Code or the Prompt Payment Code. I mean, if they just followed the law, it would be awesome." [#11]
- The Subcontinent Asian American male owner of an uncertified MBE construction firm stated, "That was one thing that we had a little bit difficultly because they don't pay the minute you finished the work, and they have their time limits. Sometimes 30 days later. Sometime like 45 days later. They have to go to another procedure in order to pay. It's not like a private sector. The minute you finished, the guys write you a check. So that's working with the government or the public sector or any county, city. They have to follow their procedure. It takes some time. Well, recommendation is not going to work because they do their procedures. That's their procedures. That's their followers. They don't change it because that's how a government system works, I believe. Like I say, we used to work for a US military overseas. It takes 90 days to pay. What recommendations should I tell? Well, maybe the next-day paycheck. That's their procedure, so their procedures does not change" [#14]
- The Black American female representative of a minority chamber of commerce stated, "we've seen that on bids that we've been able to help them review prior to submission, we've seen higher rates of positive response, meaning that they were deemed responsive and that either they were awarded or they weren't awarded and given a justification for why they weren't awarded. And that's something that we've seen as a huge change in the last couple of years. Most of the time when they don't award, they don't give you a reason as to why they did not award the bid to you. And we've seen more and more responses with a justification as to, Your price was too high or we saw an increased benefit in going with this service provider, or you don't use the right kind of cleaning products. They're giving more justifications and opportunities for the businesses to improve on the next go around. And that came out of our advocacy as well. We said, You can't keep telling people no and not telling them why. It doesn't help anyone grow and it especially does not help you meet your requirements for contracting. Our city, under their DBE program, has a 5 percent, I mean it's 5 percent now, a 5 percent disadvantaged business or minority business enterprise goal for all of their contracts. And for the last six years they have done less than 1 percent of business with minority contractors. And so wanting to change that tide, they've leaned on

us to continue to provide those services and to help prepare contractors and present them as viable candidates for the contracts.” [#15]

- The non-Hispanic white female owner of a DBE-, SWBE-, and CBE-certified professional services firm stated, "The prime, again, they're almost like the middle man. They're supposed to look out for you as a small business, especially - that's one of the advantages to being a DBE that I know that if I don't get paid or I get short paid or I start to be mistreated, I will go to Caltrans. Now it's not always worked that way because the general contractor will just say, 'Well, this is ____ because of quality,' or something. It still gives me a leg up on everybody else to say, 'Hey, you can't treat a DBE that way.' Right? It kind of gives me a little bit more security. But it doesn't always. I've asked for this, and I think it would be important. I think that they need to have some sort of liaison in their civil rights office that is out there looking for problems. If a DBE calls and says, 'I have been short paid. I can't get paid. This general contractor won't do this.' That they have somebody that's going to be that person that you can contact and they'll help you out. They don't have anybody right now. It wouldn't be that hard. It shouldn't be, especially with the districts. Caltrans is divided up into 12 districts. Each of these districts could have a partnering liaison, a subcontracting liaison that is part of making sure that every subcontractors on a contract is notified about a partnering meeting or what it means for the general contractor to partner with Caltrans, and what that would mean to the subcontractor. It should mean something to the subcontractor. It should mean something to Caltrans because they're constantly asking for people to be the owner of choice. 'We want you to bid to us. We want more DBEs.' DBEs are scared to come and bid to Caltrans if they don't think anybody's in their corner to help them if something doesn't get paid.” [#18]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "It's kinda scary doing work with Caltrans. Maybe some more training at how Caltrans works, how Caltrans bids, how Caltrans pays.” [#20]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "if they could provide an easier way access to helping I'm sure there's a lot I could help them with. But there's not easy and obvious avenues by how we would make these business arrangements. They're there - they're going to say that they are, but they require you to spend a third of your time becoming expert and their computer systems are really bad, I think, for searching. There's too many clicking of unknown little clicks in there. I remember when I worked at the EPA someone said it to me - they - all the rules and regulations the government has to stop cheating, or make it so-called 'fair' - the intentions are well thought out - we don't want to waste our money, we want to make - let's just put regulations in place. And they get to the place but they give no common sense to the purchasing people that really want the work done. They don't let them make any discretionary decisions. Like now - I mean if you went out and I told you, 'Go buy -' you're out working for me, and '—go buy a car,' and if I trust you I said, 'Yeah, you'll know what to do. You know what you need; go buy one.' And you'd probably like that. You'd shop around and buy a car. But if I was a big government I'd say, 'No, you've got to have - it has to have a brake pedal movement of less than six inches. And the tire treads have to be over 5/67th of an inch. And plus the colors can't be these dark colors that aren't visible on the highway. And you have to make sure that the horn has a decibel -' you know what I'm saying? So if you would allow, say - and they're starting to move towards this, but have small purchases for somebody like me,

and I think they can do this under \$2,500 now in the state, they can make a purchase. But they don't even do one a year, I think. It has to be only one - at least at the Forest Service can do that. But they would say, 'Well, this guy is actually pretty good at reviewing this thing we're reading and editing it, and making sure that these -' I would do that, you know, for \$2,500. I'd love to do something like that. And they'd say, 'We know you're an expert and we're not going to give you all these rules to make sure you do the job right because we don't trust you. We do trust you, and that we know you're going to give us a good product. You've done it before.' So Caltrans - the other one is just - it seems to me Caltrans would want to hire me on an as-call basis to - because I know how to write their biological documents now, and they trained me to do all that stuff. And then I quit and went back into consulting, so then we lost all that training. It seemed ____ I could do that for them. But there isn't a mechanism for them just to call me up, say, 'Hey, why don't you come in and work for three days on this environmental document with us? We're on a deadline.' They don't contract those out. What they really want is these IDIQ-type things that you need. It's geared for the bigger contractors because I guess it's a lot less work for them, probably. They just get this whole company that's been preapproved. And they just ask maybe the three of us, say, 'Hey -' or maybe they'll just have one of them and I'll say, 'Hey, go ahead and give us a big for doing everything. You know the routine, these 16 things that have to be checked on our project and handle it all,' and they pay them." [#22]

- The non-Hispanic white male owner of a majority-owned SB-certified construction firm stated, "I've often wondered why there [were not] more design build [projects] because it's big in other parts of the construction world. It's huge. I've often wondered why Caltrans - maybe they do more of it on these really big projects, but why there's not a little more design build set projects? Where you're partnering with the owner. So, say Caltrans has got a project. They need to get it out and maybe they need to get it out faster, and they can have a little more flexibility putting a project out because they have a partnership going with the contractor, meaning they don't have to design every little thing about it because there's processes in place where they will negotiate parts of the job when they get to it. The contractor will help design and build it through. It would expedite and get projects out and minimize some of the risk." [#25]
- The Black American female co-owner of a DBE- and DVBE-certified and uncertified MBE construction company stated, "Caltrans should hold primes to be more accountable and stay closer to subs" [#38]
- The non-Hispanic white male co-owner of an SBA-certified micro- and WBE professional services firm stated, "I don't know that I have any constructive suggestions other than to say that it seems that there's not a lot of room in there for the microenterprise. I'm not clear about how they go about their process of selection. But I know that when I have worked in other agencies - at another agency, I had done work on - did some bridge condition assessments on a group of five bridges. They were in a collection. So, when the time came to do the engineering construction documents, it was the same thing. We just couldn't stand up in front of the selection committee with the other firm that won it. The firm they assigned it to was a regional company that had offices in seven western states. So, we'd had a track record. We understood the project. We had done conditional assessment reporting on it. They knew who we were. They understood our capabilities and our qualifications. It was one of those jobs that we really wanted it. I wish I could tell you I knew more about the

selection process so that I could home in on it, but no. I don't think there are a lot of constructive suggestions other than to say, for those of us that are out there that are the really teeny-weenies, it's tough trying to get your foot in the door with Caltrans." [#40]

- The non-Hispanic white male representative of a DBE-certified and uncertified WBE construction firm stated, "if they just designed a person that you - a point of contact if you're having DBE problems or something with your company, that you could go to them and say, hey, I'm not getting paid, or hey, I need this, or hey, they're wanting me to do that, it's unsafe, or - you know, something." [#43]
- The Hispanic and Indian American female co-owner of an SB-certified and uncertified WBE construction firm stated, "I actually do. The only thing that I would, if I had to streamline something a little simpler, would be the CEM forms. Once you understand them, they're wonderful. I'm going to be wordy, so forgive me. When you fill out the forms with the information they require for the day-to-day work, you cannot just e-mail it. You have to print it, or you have to have a program because that part of it is a little tougher for user-friendly, for myself, because I have to print it, like five pages, scan them all, and then send them. It would be real awesome on the CEM forms if they just allowed you to do that on your computer." [#47]
- The Asian Pacific American male owner of a DBE-certified construction firm stated, "Caltrans would save a lots of money if they had labor-only contracts. Street projects, cannot buy asphalt and concrete, and hard to store, so that could be bid out but smaller projects could be labor only." [#54]
- The Hispanic American female co-owner of a WBE-, MBE-, Micro-, and SB-certified professional services company stated, "For instance, currently, the opportunity for small businesses to be a team with Caltrans is through the design contracts that are awarded once every three years. And there's no opportunity for subs to be added to the contract after the award. So it's one time, you get that one shot, that small window of opportunity to get on a team, and then once that prime wins the contract, you hope you're on that team and then you probably get work. But that's the only opportunity you have. So that makes it difficult for subs to be interested in working with Caltrans because there's only that one opportunity, you know what I'm saying? So, the prime puts the team together and it's one contract, and the prime usually select the people that they know. So if you've never worked with that prime before, you're not going to get on the team. And that's the only opportunity until the next time that contract opens up for bid, which is in three years, usually. So providing more opportunities for small businesses to do work for Caltrans would be like smaller contracts, smaller scope contracts. They're doing several things, actually, the Small Business Council has, DPAC is doing different... They have different pilot programs to try to encourage small businesses to get to work with Caltrans, like they did a smaller scope so it's more specific, like I think in District 11 they had a landscape architect contract, small amount, I think is \$150,000. But the problem with that was there weren't enough people submitting a contract, and I talked to some small businesses, and they've never submitted to Caltrans before. So they were a little gun-shy to prime it because they've never submitted to the city, I mean to Caltrans, and some other agency said, Well, it's so much work to submit to Caltrans, and then go through the negotiation process for 150,000 dollars. So small, we're not going to do it. We've got other projects we can go after. So yeah, I honestly

think using a program like SANDAG where the prime wins the contract and then they can add subs on the pre-qualification list as task orders come up, is kind of the way to go. Because then the prime can select different subs. They don't have to stick with one sub for the duration of the contract.” [#61]

- The non-Hispanic white male owner of a majority-owned construction company stated, "Once the contract is initiated, everything should be set up like this, so that basically, you just input an amount, it goes through the process, the paperwork shouldn't be that hard. The checks and the double checks, [and then processing by the] accountants.” [#62]
- A respondent from a trade group focus group stated, "Too many forms, impossible to find them [online]. It is hard to ask for help [from Caltrans]. If Caltrans develops good universal forms, they can request local agencies use their tools. Idea: Can Caltrans provide the administrative requirements for local agencies, so the paperwork is consistent? (i.e., BART, Cities, and Counties, etc. have unique bid day forms and requirements)” [#FG1]
- The male representative of a DBE-certified construction firm stated, "If you called Caltrans, if you call the engineer on the project, not inspector, but you call the senior on the project, he's not going to be interested in helping you more than likely. And if you go above his head or above her head, which is always an option, if you know the right people, he's not going to be happy with you either. So it's like, how do we get the attention to people, friendly so that we can get what we need out of them to get paid without upsetting people or bothering people? We suggested through the Caltrans DBE Committee groups, we've suggested an ombudsman or something of that sort from Caltrans, just so that we would have a way to say, 'Hey, we're having trouble here. Can you drag people under this conversation who can help us get paid?'" [#PT11]
- The male representative of an uncertified MBE firm stated, "after a contract has been awarded, if you're a subcontractor in the trucking portion of it, the contractor performing the work usually hires a broker in order to bring in whatever amount of semi-trucks they may need for the job. As an individual or an owner-operator on the trucking side, how or who do we speak with in order to find out the information on the project? Because more often than not in the trucking industry itself everybody is pretty much left in the dark.” [#PT12]
- The Black American male owner of a professional services firm stated, "I've been working with different government agencies on diversity programs, and the first thing that the diversity group looked at is, 'Do you have someone on your team like us?' And I found that out as I worked on some project is that there's a trust factor. And so you have to be diverse in your program. And that was something I found that when I had to reach out to all the ethnic chambers. So that's why I asked the question. That is one thing that with Caltrans, if they don't have a diversity small business council or task force, those diverse communities will not interact with them. They're still focusing on how we do business 30 years ago. And I think that's where Caltrans have to look at their training program for their project managers, project engineers, [and make sure they know that diversity] is your job. But in the defense of inspectors, engineers, and managers, they have too many jobs projects on their plate. They can't look back. Is there a project that they can say, 'We have a Hispanic, we have after America, we have an Asian on this project'. Let's do some partnering. Let's really see if we can develop a program. So I think that's what the mission is that they really

need to go back with the development program in-house with the prime and subs. Okay. What is best practices in the construction, anything in it, and it leaves opportunities with the federal government. I've attended all those classes that the FTA DLT has. But the question is have the people [from Caltrans] come, [have] Caltrans staff attended those classes? And if you survey the people, the engineers and the inspectors, when I went to the bootcamp and their job is we only give you the facts about the project." [#PT12]

- The Hispanic American female owner of a WBE-, MBE-, SCMSDC-, and DBE-certified goods and services firm stated, "I'm tasked with doing it now, this agency oversight, is that I think the large agencies like Metro have a great big team to oversee the contracts, but a small agency like the City of Redondo Beach, they've had to hire me. But, it would be helpful if maybe Caltrans had some outreach to the small agencies who are receiving the funding. I know they have the local assistance, but local assistance covers a lot of different aspects of a project, but maybe we have a little bit more of a, let's see, a refresher on what does a small agency need to do for oversight of DBEs. For example, what are the correct forms that, that prime contractor should be filling out? Kickoff meetings with the prime and the sub in this before the project starts is an excellent way to start helping both organizations navigate the appropriate way. You'll probably have a much more successful process of the bid and in the end, of the service that's being conducted, if there's a kickoff meeting with both of them in the room together. So, there's no questions, everything is asked right there and there before they start the job. I think those work very well. Not everybody does it, but they should." [#PT2]
- The Hispanic and Native American male owner of a DBE-, 8(a)-, SB-, and MBE-certified construction company stated, "Nobody knows how terribly it works at the bottom end. The REs are very challenging to work with. Somehow there has to be a way to implement, to not hold a small business to the same standards as a large firm for paperwork. The unions are very onerous around this. Kiewit can push a button and get the information. The expectation is that you have the same paperwork resources in the same timeline." [#PT5]

G. Marketplace Conditions

Part G summarizes business owners and managers' perceptions of California's marketplace. It focuses on the following three topics:

1. Current marketplace conditions;
2. Relief programs for businesses affected by COVID-19;
3. Past marketplace conditions; and
4. Keys to business success.

1. Current marketplace conditions. Interviewees offered a variety of thoughts about current marketplace conditions across the public and private sectors in light of the COVID-19 pandemic.

Thirty-nine interviewees described the effects of COVID-19 on the marketplace and their firms as negative, describing a decline in sales, slower payment, difficulty obtaining supplies, and

general anxiety about future ventures [#1, #4, #8, #10, #12, #14, #19, #23, #25, #26, #29, #36, #37, #41, #42, #44, #46, #50, #52, #55, #56, #59, #61, #AV, #AV2, #AV3, #PT12]. For example:

- The non-Hispanic white female owner of a WBE-, DBE-, UDBE-, and SB-certified professional services firm stated, "On the construction side, because they consider construction essential service, our construction projects are still going on. On the side of the environmental compliance documents, it's iffy because it depends on the agency if they consider they want to wait to see if their funding comes through from the federal government or state government or whatever." [#1]
- The Hispanic American male owner of an uncertified MBE construction company stated, "We're affected a lot. On the forcible shut down, three times and then now because of the government incentive to workers, I can't find no workers to help me to do the jobs I got. So, I'm still in the back corner." [#4]
- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "We were supposed to expand and have a lot of projects and a lot of those projects slowed down or did not actually happen. We ended up not expanding into an office, like we would have wanted to. And we've had to kind of buckle down and, re-strategize a lot of the projects that we had worked on were either scoped out or change the direction quite a bit. So, it's delayed a lot of our projects and slowed down the work quite a bit." [#8]
- The non-Hispanic white male owner of a SB- and ELBE-certified professional services firm stated, "It cut about 30 percent my total business, which is all one market, which was apartment complexes. The owners were not paying their rent and so they quit making capital improvements. And like everybody else who owns pavement when they get tight on money, the first thing they cut is pavement maintenance. That it includes Caltrans and cities and counties and private owners of pavement." [#10]
- The Hispanic American female owner of an MBE-, WBE-, and SB-certified professional services firm stated, "Completely. I haven't worked for a year essentially. Because we are all based around special events and conferences, festivals. So, since everything went online, there was really no place for me to implement these types of programs." [#12]
- The Subcontinent Asian American male owner of an uncertified MBE construction firm stated, "Since the COVID start, as you know, it's hurt the entire California or I can say the entire United States. We lost a couple of jobs due to COVID-19. People don't want us to enter their property because of the COVID-19 problem. We were not getting as much as jobs before COVID-19 and we're not receiving phone calls, or everybody was scared. Nobody wants you. They says, 'You know what? We can live with the condition we are, but we don't want to get sick.' Our employee was also was afraid to go to the crowded area to do their job. That's why it's really affect us big time. The COVID-19 hit us really hard. Basically, we try our best to keep our head above the water. We had some local work that was going and tried to, even some of that employee we let go, but we still would call him sometime. You know what? We have a few jobs here and there, and keep him busy and keep ourselves, like I said, our head up off the water. So, we were doing okay, but not as much as we did before the COVID 19" [#14]
- The Black American male owner of a DBE- and SB-certified and uncertified MBE professional services firm stated, "My offices are empty. You know? I sent everybody home.

We basically are not doing any work right now. Our clients have said they've closed down, et cetera, et cetera. COVID-19 has pretty much shut our business down. We're down, and the lockdowns, and the concern for my people. I'll do anything for my people, for our staff. And I will not expose them to any dangers of COVID-19, which can range anywhere from being sick or mentally impaired or whatever to death. And so that was my decision, that it's just not worth it to me. So, we basically have pretty much been shut down. I'm just getting ready to go back out here and find some more work, which may be difficult right now." [#19]

- The Subcontinent Asian American male owner of a Micro- and SB-certified and uncertified MBE construction firm stated, "All the work has been put on hold due to COVID. So, that has dramatically changed my opinion." [#23]
- The non-Hispanic white male owner of a majority-owned SB-certified construction firm stated, "I can't say this with definite authority, but I think I can say this and I'm fairly confident that I'm correct when I say the words affected us isn't so much can we go to work and do that job, because yes, we can go to work and do that. But I think in the engineering design, get projects out, I think that got slowed down and it's affected us. Because I think there would be more work out right now, except for that end of it, which we're dependent on, getting projects out, getting them shovel ready. They weren't getting them out like they should've been, could've been if COVID wasn't here. In other words, those are office jobs, right? We had some work that was multi-season. So, we've had it from the year before. But it definitely affected us because that slowdown of shovel-ready jobs coming out, of course, means less volume out there for all us contractors to bid, which else down to more contractors bidding fewer jobs, and the competitiveness goes up. Which means the margins go down. It gets tight. It's so interesting. What we like to see, in an ideal world, three or four bidders on a job. When you're seeing 12, 15 bidders on a job, that's tough. Got to sharpen your - taking more risk. You've got to sharpen your pencil more to keep your guys busy and your equipment rolling." [#25]
- The Middle Eastern American male owner of a construction company stated, "COVID pretty much did not officially shut us down but practically workwise we had probably one or two projects in 2020 the entire year. It was very small projects. Pretty much the entire year was, was no work for that year. It does not count. it's a very unique historical - when I say historical, I mean it literally. It's a historical event that the world has not seen many of in the past. And it affected people in a very, very different way that it affected us in a way that - we've never for the past 12 years never didn't work a single day. We've had a year of being almost shut down and everybody is going home. We don't have the office backup team anymore." [#26]
- The non-Hispanic white female co-owner of a majority-owned construction company stated, "It's been very difficult, the shutdown. California has, oof, you know, we're alongside with restaurants; it's hard to see just companies - you know, we're on the construction side, but knowing that restaurants that have been there for years and years, lose them because they can't service, and that's what they do. Construction, we're the same way, you know, it's like a double hit, though, it's not just being shut down and not being able to do jobs, but it's also carpools, which we've been losing, you know, our fleet of trucks, one piece at a time. Every year, we're losing a truck, and if we're not able to replace that truck because of the

high value of what, you know, that loan would be, then, we're kind of left holding, you know - not sure how to move forward." [#29]

- The non-Hispanic white male owner of a majority-owned professional services firm stated, "With the pandemic, the industry is pretty stagnant. We usually are working with developers, and developers have really pretty much stopped doing development right now. We've had a little bit of change in personnel. We've had to reduce our employment. I mean, we had to reduce our staff a bit. Working fewer hours." [#36]
- The Black American male owner of an uncertified MBE construction firm stated, "So for the pandemic last year I did one project between October and December. That was during the pandemic. That was a \$60,000 contract. It affected my work directly, economically, physically, and emotionally I won the bid and watched the lumber prices go up almost by 80 percent. It was like, 'My God.' Because the shelter, the shelter at home orders, that means that all of the lumber yards and sawmills and all of that, their production was way down. That drove all those prices up and we build with wood here in California. And sometimes the concrete production got shut down last year, and that was also a bit nerve-racking. The thing about it was I had just gone from working for another construction company and started doing my own thing again and then the pandemic hit right after I won the bid." [#37]
- The Black American male owner of an SB- and MBE-certified professional services firm stated, "Most of my work involves going to the sites and visiting with people and making - and a lot of meetings associated with potential work, but that's been stifled by the pandemic." [#41]
- The non-Hispanic white male co-owner of an SB-, DBE-, and HUBZone certified construction firm stated, "Yeah, it shut down - it really slowed payment on things, and it shut down the ability to operate. And a lot of people stepped back and, you know, were kind of holding onto their money to see if this was going to be another 2008 thing, you know?" [#42]
- The non-Hispanic white male owner of an SB-, DVBE- and Micro-BE-certified construction firm stated, "They all seem to be pandemic-related, especially work with BART. A lot of the work has been going in-house instead of to contractors and to consultants, because they only have 15 percent ridership. So really, every - all of the - all of the detrimental stuff has been due to COVID." [#44]
- The Middle Eastern American male president of an WBE-certified professional services firm stated, "We were larger. Back then, we had like, around 10 people working. But when the COVID hit, some people just left the area. They were not from Southern California so, they left, and our workload went down, too. So, we're hoping that we can build up again. Well, mostly what impacts us is one is the demand for housing. And since the pandemic, the demand went down considerably 'cause a lot of people lost their jobs. So, they wouldn't buy homes. And then, also, apartment buildings were not being built. Lately, things have changing because the interest rates were kept low, and people are coming back. So, we're hoping that this summer, things are gonna be different." [#46]
- The Hispanic American male owner of an uncertified MBE construction firm stated, "The pandemic slowed everything down. It slowed the market down big time. Once I got my truck that's when the whole pandemic started right when I pretty much when I got into

getting my LLC and stuff. So yeah, the pandemic really slowed work down, made it real slow." [#50]

- The Asian Pacific American male owner of an uncertified MBE construction firm stated, "Like with COVID, a lot of stuff, they said they don't have product ready, because nobody wanted to work, and they can't find workers, and that slows everybody down. And then the fuel price is going up, and it is making business tough. Everything goes up, and nobody wants to pay what it's worth." [#52]
- The Hispanic American male owner of a DBE-certified construction firm stated, "I was shut down for several months because transit was one of the last things to be hit, but it was hit. It's also the last thing to come back because people are so leery of being on a public bus during a pandemic. Plus, when people aren't working, people aren't using public transit to get back and forth to work." [#55]
- The Black American female owner of a DBE-certified and uncertified WBE and MBE construction firm stated, "I'm ready to go to work. I haven't worked since last year. I mean, I did two days this year in April. And I want to be on a project that I'm going to be there for a while where I don't, I'm not worried about... Money is not an issue." [#56]
- The Asian Pacific American female owner of a SB-, DBE-, and WBE-certified construction company stated, "Many company closed their business. And many people lost their job, so we lose quite a few customer. And I'm okay for that because we are not alone. They are not alone. The whole world is in this special challenge. So, that's why we have part-time employees now, because the COVID-19 had make us, if you work, I'm away. If I work, you are away." [#59]
- The Hispanic American female co-owner of a WBE-, MBE-, Micro-, and SB-certified professional services company stated, "I would say we were on track until COVID hit. And then we lost about 50 percent of our revenue. As I mentioned, networking has been very difficult. A lot of colleagues have young kids and so their attention has been prioritized to homeschooling. Restaurants have been closed so professional organization meetings have been canceled, so it's very difficult to meet with people in person. We did go to remote from work, we're a remote telework policy, and for our employees have had the option to work from home, if you're able to work independently. And that initially, it was really for performance. In May, we billed 25 percent of what we typically bill in the month of May, when we went to remote working from home. Part of it was getting the program set up and kind of getting used to it. We rolled out the following month, in June, rates and what everyone has to meet, because if we don't build, we can't invoice, if we don't invoice, we can't make money to run the company. So, it was really difficult." [#61]
- A comment from an uncertified MBE Native American-owned construction company stated, "COVID made it slow, and hit a brick wall." [#AV8138]
- A comment from a majority-owned construction company stated, "I think that everything changed with COVID we haven't been getting as many contracts and owners don't want to let go of the jobs, they want to know how much it's going to cost them." [#AV816]

- A comment from a majority-owned professional services firm stated, “Work is starting to taper off. Jobs have been delayed, pushed or cancelled due to COVID, new administration and cycle of construction industry.” [#AV8183]
- A comment from a majority-owned construction company stated, “Since COVID and since new administrations, lots of bids but nothing is going. Things are slow, volume is down maybe 50%. Economy is in a volatile situation, maybe people are scared.” [#AV8292]
- A comment from an uncertified MBE Hispanic American-owned construction company stated, “Sales have been a lot slower due to COVID.” [#AV8299]
- A comment from an uncertified WBE professional services firm stated, “COVID has been a barrier--many of our contracts are on hold due to COVID and many of our clients are experiencing budget cuts.” [#AV8319]
- A comment from an uncertified MBE Subcontinent Asian American-owned construction firm stated, “When the COVID-19 came everything slowed down. There was less cash flow, so it became a struggle.” [#AV834]
- A comment from an uncertified MBE Subcontinent Asian American-owned construction firm stated, “There have been difficulties because of the COVID-19 pandemic. A lot of construction sites couldn't work. Access to jobs was very low.” [#AV8529]
- A comment from a majority-owned construction company stated, “Economy slow, COVID, bidding against other contractors that I wouldn't normally bid against. These big companies are bidding on contracts they wouldn't usually bid because of the slow economy.” [#AV855]
- A comment from a majority-owned professional services firm stated, “Pandemic impacted traffic volume which reduced the number of projects in play and value of industry.” [#AV901]
- The Hispanic American male co-owner of a DBE- and MBE-certified and uncertified WBE construction firm stated, “About a year and a half ago, I had to shut down my business because of the COVID, because of everything that was going on, like everybody else. So, I shut, laid off people, shut down a program, and then I stayed in it as far as the owner-builder. I had to get rid of all my equipment on and on and on.” [#PT12]

Twelve interviewees noted that COVID-19 has had little to no effect on their business [#6, #9, #13, #18, #20, #21, #22, #27, #30, #43, #47, #54]. For example:

- The non-Hispanic white male representative of a majority-owned construction firm stated, “I mean, it's definitely affected us with some of our people having to work remotely and obviously we've had some cases of COVID within the company but it hasn't affected us too significantly, but we've definitely had some effect from it. We put measures in place very early on and we've been very successful in the operating amongst those measures. Again I think that's why. That's what attributes to that we weren't severely affected. It was only a minor effect that it had.” [#6]
- The Asian Pacific American owner of a DBE-, MBE-, and SB-certified professional services firm stated, “At the beginning, yes, I would say last let's say March, April, May when people didn't know what was going on. But because we're in the housing business, there's a

shortage of homes out there, so the developer's been keeping us busy just to keep up with the demands. So no, we have not been affected as much." [#9]

- The Hispanic American male owner of an uncertified MBE construction firm stated, "It's very, very low, because at the beginning of the pandemic, there was quite the surge of bottled water and toiletries and stuff, so we didn't get affected very much. Well, for trucking, COVID-19 has been a very unique situation in trucking, that the market took an uptrend for quite some months. It's a general rule that post-New Year's all the way up until April, May, there's a downtrend, because companies are not restocking for any major holidays or anything. So late April or to May, there's more uptrend like there is now, because companies want to get their stuff out for summer. Summer comes, they want to get their stuff out for fall. So it's maybe a month or so behind, if that makes sense." [#13]
- The non-Hispanic white female owner of a DBE-, SWBE-, and CBE-certified professional services firm stated, "We have not. The lucky part of it was, again, I was on a lot of calls with Caltrans. I was on a weekly call, actually, with... their person in charge of construction. I was able to be part of hearing what was going on, how they were doing it. There was no shutdown with them. We were considered essential. We just had to make sure that our guys were practicing the best safe practices we could make sure that they did. In our nature of what we do, we don't work super close to each other outside on the freeway. So, we were able to - I'm going to knock on wood. We don't have any cases of COVID and we haven't felt that at all. We've all been really diligent, even in our personal lives. So, I think that has been - we haven't suffered from that yet and we kept working the whole time." [#18]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "It hasn't at all. It hasn't at all. Yeah, we're considered essential. I mean, we're building the roads and the schools and whatever else. No, it hasn't impacted us at all." [#20]
- The Hispanic American male owner of a DBE-certified and uncertified MBE construction company stated, "Luckily, I don't think that COVID has been the factor that's affected our business. Some of the employees don't feel comfortable working with others, or don't wanna be on a project where there's too many people, where they could be in close contact with somebody who's COVID positive. So there's that complexity with that. We just haven't been able to pick up any projects right now. And so that's been the difficult piece." [#21]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "Interestingly there they [the prime contractor] decided to do that in-house. So I lost that contract. But another one picked me up, and they still want me to do it, despite COVID. So that one's still going. And the NSF work, I can do that, that's the carbon verification. A lot of that I can do on my computer from my home. So that's - thank goodness for that." [#22]
- The Middle Eastern American female representative of a majority-owned professional services firm stated, "We were actually pretty quick given our type of work we do. Everybody switched to work from home quickly, less than a couple of days. We all - and some of us were already working from home at least partially. But it hasn't really impacted us. In fact, we are doing the same efficiencies, the same. But it's trying to keep the morale up. It's just a little bit hard. It's just otherwise from work perspective it's going ok. Everybody is doing - and we feel like we're going to continue working from home even after

pandemic, most of us. So the office, the need for office is like maybe go there once a week or something like that.” [#27]

- The non-Hispanic white male co-owner of a majority-owned professional services firm stated, "Y'know, the work has slowed down a little bit, but that's okay. The COVID thing slowed things down, as we couldn't work for many small cities. And most of them don't have anybody in the office anymore, so you have to deal with 'em, y'know, on Zoom or whatever, and that makes it a little more difficult when you lose that personal perspective on it." [#30]
- The non-Hispanic white male representative of a DBE-certified and uncertified WBE construction firm stated, "It was, and it wasn't necessarily - you hear about some businesses being shut down and what not. Some challenges that we had were people that got exposed that were quarantined for two weeks, and then people got - you know? They were a little more stringent about making sure you had your [PPE], the personal protection stuff. So I don't think that we missed too much work, which was a blessing to us. But some of the challenges were employees that would be exposed, and they'd be off for two weeks, and then you're frantic about trying to find somebody to cover the spot." [#43]
- The Hispanic and Indian American female co-owner of an SB-certified and uncertified WBE construction firm stated, "No. We were part of the essential group, so it did not affect us in any way, shape, or form." [#47]
- The Asian Pacific American male owner of a DBE-certified construction firm stated, "Did not affect the work. The kind of work I do was not affected by COVID-19." [#54]

Eleven interviewees noted that COVID-19 benefited their business through new ventures, increased work, or the ability to learn new skills [#6, #7, #16, #28, #32, #34, #38, #39, #45, #49, #62]. For example:

- The non-Hispanic white male representative of a majority-owned construction firm stated, "I expected the private market to slow down a little bit with COVID but because I think interest rates were maintained at such a low rate, I think that market stayed pretty vibrant and then with the residential markets still doing well also. And on the public side, there still seems to be good funding from all of the major owners here in our local market... We do a lot of work at airports, and they were significantly affected by COVID due to air travel slowing down, but they've still been doing quite a bit of work at some of the airports that we do work at locally." [#6]
- The Black American male owner of an MBE-certified professional services firm stated, "We've had the best year in our life in 2020." [#7]
- The Black American male representative of a DBE-, WBE-, MBE-, SB-, and Micro-PW-certified small business development association stated, "Well, my situation - my business situation has been a little bit different than most of the businesses that's going through this pandemic because my activity has actually increased because of so many people being out of work for one reason or another and they're starting to turn to starting a business as an alternative to the job that they couldn't keep." [#16]

- The Hispanic American male owner of an uncertified MBE construction company stated, "We hear a lot of bad things about COVID around. We never experienced anything, and we've been busy. But, to be honest, I haven't even seen the slow down. Everybody I've seen has been busy, busy." [#28]
- The non-Hispanic white female owner of a DBE- and SB-certified and uncertified WBE professional services firm stated, "If anything, I got busier." [#32]
- The non-Hispanic white male co-owner of an MBE-, SB-, and DBE-certified professional services firm stated, "Our revenue grew. It was more of a human resources issue, or just, you know, people's lives got upended in different ways, and some people, you know, we hired new people and we actually expected to grow, but some people just could not stay on working, and it's just - that kind of things happen when one of these, you know, when something this happens. I think the market conditions have been really good for our, well, for the business in general. I think, you know, as I mentioned, our revenue actually grew and we just had a hard time keeping up with that with kind of the human resources issues that presented itself with the pandemic." [#34]
- The Black American female co-owner of a DBE- and DVBE-certified and uncertified MBE construction company stated, "I mean, construction didn't stop, and we had - we still, we stayed busy the whole time, so we didn't have any - too much impact as far as work. Our employees in our office and staff definitely impacted, but as far as us closing as a business, no." [#38]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "It was mostly, I guess I could say it was a destabilizing effect in the short run when nobody knew what was coming in the next week. We were able to scramble to keep most of our office staff working from home. We maintained a very thin staff of just only a few of the most critical heads in the office were there throughout in order to keep our field surveyors working out on the job sites. Amongst our clients, there was kind of a bit of a pause in executing the contracts when nobody knew what was gonna come in the next week. But construction continued, and services were needed, and we did pretty well through the pandemic." [#39]
- The non-Hispanic white male representative of an SB-certified professional services firm stated, "During the pandemic things kind of stabled off, and there hasn't been changes last year based on workload, but that's far better than a lot of the other economy out there during the pandemic, so I would say we're lucky in that sense" [#45]
- The Hispanic American female representative of a DBE-, MBE-, and WBE-certified construction firm stated, "Last year, because we do a lot of school work and because the kids were not going to school we were pretty busy last year. We did have problems finding people to work because that's when they were getting the extra money, the extra unemployment money and some of them didn't want to work. They wanted to work and they asked if we can pay cash. And it's like no, we can't. So it was really hard finding - we were really busy and it was really hard finding people to work. But we made it. This year is at the moment for us personally is really slow. We were really swamped last year doing all this work that they wanted like right away that we - our project managers didn't have too

much time to bid stuff. And we're - right now is when we're having that reaction. We didn't bid enough. Now it's a problem because there is not much work." [#49]

- The non-Hispanic white male owner of a majority-owned construction company stated, "If anything, it got easier. Probably busier. Because everyone is stuck at home, and so on the residential, we probably see a lot more repairs." [#62]

Twelve interviewees shared that COVID-19 negatively affected their firm, but things have started to improve [#2, #5, #17, #29, #31, #33, #40, #48, #50, #AV]. For example:

- The non-Hispanic white male co-owner of a majority-owned construction company stated, "A lot of uncertainty about how to move forward. We were blessed that we were deemed an essential business. So we were able to return to work with certain protocols. So that required education and training and establishing procedures for a safe return to work. So the crews... And so that was a bit of a process, but we adapted quickly. The projects that we were contracted for at the time were suspended. Some of them came back quicker than others. Some of them didn't come back really for a long time, especially the private contracts that we had in the South Bay took months to return to work. But for the most part and ended up resulting in about a 15 percent decrease in volume." [#2]
- The Black American male co-owner of a WBE-, MBE-, and DVBE-certified construction company stated, "Most of our stuff is residential. When COVID hit, nobody wanted anybody who they didn't know in their house. They didn't want anybody around them. And even though COVID is far from gone, things look like they are getting better. You still get that hesitancy from people. I left a client about an hour ago and she was rushing out... A potential client. She was rushing out of there because she was on her way to get her shot. So, it's still a factor. COVID, it has people just not knowing if they're going to live." [#5]
- The Hispanic American female owner of a WBE-, MBE-, SCMSDC-, and DBE-certified goods and services firm stated, "So, it has been a struggle. We've done contracts with Metro. We still have them with the buses, which were reduced 50 percent on 2 of our contracts. Our other - our graffiti abatement and trash vegetation were reduced completely - another 50 percent. So, for us it was a very scary time. We had our - one of our - I remember, I can recall our first meeting that - when we were going through the process, and that was in March when everything was happening and things were being shut down. In one board meeting, one of our meetings, we had over 15 calls during the duration of some of the organizations that we were providing services for to tell us that they were going to cease services at that moment because of all the - everything that was going on. So, immediately we had to take a plan of action, what we were going to do, and our goal was if our clients were reducing such - like the buses, the graffiti abatement on the Metro rails, that means we needed to do something else. And our goal was to basically make sure we were taking care of existing clients, so we became masters at COVID disinfecting. And it wasn't because we got on and we started doing it; it's because we were already doing. We had already had that. Disinfecting was already in our blood. We were trained, ISSA-certified, and so it was an opportunity for us to take advantage of it, but it actually helped out our clients that were in great need. So, some of them were in the entertainment industry. A lot of them are in the transportation. Others were in the bottling manufacturing So, it was a big struggle. It really was. But what we did was from day one, because we were in it we were already putting our

protocols and Covid disinfecting protocols together, which helped out a lot of our clients, because what we were doing was giving that to them and saying, 'Here, use this.' Our goal was to make sure people were safe out there. We have clients that are clinics, and so that alone was an issue because you're right in the danger zone, ground zero. But we were able to get through it. And we continue to get through it. Some of my bigger contracts, like with the Metro - with Metro, the bus cleaning, we had two organizations that we were cleaning their fleet at the time, and we had two other contracts that were doing graffiti abatement. All those got slashed. Those were some of my bigger contracts. And that - just, like, reduction completely. So, it wasn't like - we weren't generating those funds from there anymore. So, what we needed to do was figure out, one, how we were going to be able to help other organizations within our community of clients, and what we could do better or what we could support. And so, fortunately we had the disinfecting already in stock that we were able to immediately just go ahead and do it, which was a blessing in disguise because that helped us offset the large amount of contracts that - or revenue that was coming in that we were not going to get. Just on that heartbeat - I think it was sometime in mid-March I had asked my accountant, 'If I do not get payment here, how long can I take my company?' And the longest I was able to - she would - she told me it was going to be at length of until May. The ending of May is where we would be able to hold onto anything. And right after that, that's when I found out that my contracts from all my Metro accounts were being reduced. So, just along that, that was something that was just like 'Okay, where are we going to take this company now? We need to continue. People still need jobs. People still need to work.' And it was a point that I needed to make the decision, 'Okay, do we go ahead and battle Covid completely and start fighting it because we know probably better told than most organizations because we've been in the industry so long?' And I think just by my employees coming back and saying, 'We'll be here to help you clean; just get us the work -' and so, by that alone it just gave me the drive to say we've got to continue on." [#17]

- The non-Hispanic white female co-owner of a majority-owned construction company stated, "I'm trying to schedule, right now, for - you know, I get a whole week, so that way, we could pay payroll for a whole week. And, you know, then they might be unemployment for the next week, and that's how we've been starting off the last two years. I've not seen this. In 31 years, it's not been the stress of - it's been the stress of securing the job, getting my guys back to work again. Even with the PP loan incentives, it's great, but if you don't have the work, you're not gonna be paying payroll, you know what I mean? So, it's a blessing and, yes, it's there, so I know I have it there right now for - like I said, last week we worked and it was, like, 'Yee.'" [#29]
- The male co-owner of an uncertified WBE professional services firm stated, "Tough, yeah, getting everybody working from home at the beginning, and then, you know, making the office safe for people coming back slowly after a while, a lot of expense with it. And, yeah, that definitely slowed things down for a little bit. Things seem to be picking back up, which is good," [#31]
- The non-Hispanic male owner of a majority-owned SB-certified construction firm stated, "I would say we got really slow there for quite a few months during the pandemic. And it got - it wasn't so bad right at the beginning, and then, it kind of dropped off. I would say we had maybe a six-seven-month period where I was really, really slow." [#33]

- The non-Hispanic white male co-owner of an SBA-certified micro- and WBE professional services firm stated, "They're steadier, yes. I'm blessed right now. I have work on the table. I think that things are starting to - what do you call it? I'm not concerned. Let's say I'm not concerned about whether we're going to be able to get some more work. But it was pretty tough at the beginning." [#40]
- The Hispanic American male representative of a construction union stated, "I'd say yes, it affected. The most people that keep working, the most people. But then affect when somebody has with COVID they have to stop the whole group and go to everybody. And stop and then go back to work. And as you know the construction is like it stopped a little bit to... Let's say when somebody has infection they have to test the whole crew and make sure everybody is fine and then go back to work." [#48]
- The Hispanic American male owner of an uncertified MBE construction firm stated, "What's keeping me in it is work is picking up. When I first, first started it was not at all - like I would work like one day out of the week. Work is picking up. And I'm seeing the numbers for the future that I' going to start getting paid consistently. It's just getting over this hump, getting over the 90-day period to start getting paid. And then they say after about a year, I talk to other guys, that after about a year you'll start seeing some pretty decent money especially if you work for Caltrans." [#50]
- A comment a majority-owned professional services firm stated, "Because of COVID there has been less work but now things are starting to pick up." [#AV175]
- A comment a majority-owned professional services firm stated, "COVID has caused a lot of projects to be cancelled, we are just starting to ramp up now." [#AV184]
- A comment from a Subcontinent Asian American owned MBE-certified construction firm stated, "Last year COVID-19 hurt my business it became very slow. By September things started picking up business became better." [#AV847]
- A comment from a Black American owned MBE certified professional services firm stated, "COVID was rough for some people, but now there is plenty of work." [#AV948]
- A comment from a Hispanic American owned MBE-certified construction firm stated, "COVID-19 hit hard. Had 7 workers then 2. Doing good now." [#AV8275]
- A comment from a majority-owned professional services firm stated, "COVID had put a damper on out business last year but it's picking up now." [#AV8328]
- A comment from a majority-owned construction firm stated, "COVID has slowed the construction jobs. Once the vaccinations came into play business picked up." [#AV8405]
- A comment from a Hispanic American owned MBE-certified professional services firm stated, "COVID-19 has hurt our business we are slow at coming back." [#AV8471]

Twenty-four interviewees discussed the other effects COVID-19 has had on their business [#2, #3, #4, #8, #11, #12, #13, #17, #18, #23, #24, #25, #26, #29, #32, #35, #37, #44, #45, #46, #53, #AV, #WT7]. For example:

- The non-Hispanic white male co-owner of a majority-owned construction company stated, "We had to adapt to working from home. We pretty much had everybody in the Admin

Support Management group, working from home for quite a bit of time. And it's required other steps as well, as you can imagine. Adopting to how to monitor who comes and goes through the offices, how we transmit paperwork. The shifts, obviously, to electronic resources, we'd already been there for some of the field operations, but eliminating field tags, which is a major part of our industry when deliveries of materials get shipped and moving those to electronic record keeping. It was another hurdle that we quickly got over." [#2]

- The non-Hispanic white male co-owner of an SB-certified professional services firm stated, "For one most of our contracts are with public agencies and obviously everybody's working from home with the public agencies. So as far as us bidding on work, we definitely had to adjust to the times via Zoom with bidding work and projects that bid on a certain day, but you have to deliver them two days prior to the bid date. Coming up with COVID plans to proceed with our ongoing projects was a challenge and that took a little time to implement because we've had so many different procedures that we had to go by. It was constantly changing. So, we have adapted, and everything seems to be going smoothly now." [#3]
- The Hispanic American male owner of an uncertified MBE construction company stated, "We have a weekly meeting, and we make sure all our employees don't go to big parties, big places and make sure they don't, but I make sure they try everything's possible. Then also all my trucks, they have maps inside or they have a hand sanitizer, they have a big roll sterilized rags for them to clean himself. Every time they want the drinking waters all by bottle. We pretty much do everything is possible and everything we can, related to that." [#4]
- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "We have all been working from home, one thing. We have focused a lot more on our relationships that we can maintain rather than going after new business, because everybody is so distracted during COVID-19 to focus on new business. We've been working with our existing clients quite a bit and trying to build out business within those existing clients. We've focused our work, it's kind of changed from bike lane streets to more outdoor dining streets. We worked on a few outdoor dining and street repurposing projects where they take the street and make it into a walking, biking trail. We worked on a street where during COVID-19, we took away a lane and it into a walking biking path and did community outreach in the area to get feedback from folks as to if they liked it before we made it permanent. We've had to change our type of projects we work on, how we want to expand and the strategies as these projects move forward." [#8]
- The non-Hispanic white male representative of a Native American-owned MBE-, SB-, and Micro-BE certified professional services firm stated, "The personnel issues have escalated, meaning people have various concerns and we've had people that have had... It just more personnel issues." [#11]
- The Hispanic American male owner of an uncertified MBE construction firm stated, "Not at all, other than keeping ourselves safe, inside and outside the truck. We don't really have a whole lot of contact with people. And now, many, many, many companies now have precautionary measures in place that pretty much protect us." [#13]

- The Hispanic American female owner of a WBE-, MBE-, SCMSDC-, and DBE-certified goods and services firm stated, "I think the biggest thing for us, is making sure our employees were safe from day one. And that was a big trouble because, one, who knew - who thought that they were going to need additional PPE when they would go in to clean? Correct? And so, what we started doing is going out in the market and trying to find it, and it was very difficult because it wasn't there. It was scarce. If you didn't have it out in the streets you were actually having to make it - have someone make it for you. And those were masks and things like that. And we did that because it was a priority for us to make sure people were safe. You were not able to - I mean, we were having paper rations as well. So, as you saw that when anybody - just a regular citizen went to the store to get toilet paper there was none on stock. So, for us, here we are, a large organization, we're responsible to make sure they get paper - right? - but now we are on a hold on how much we can order. And at that point some of our larger clients were scared about the situation, that there was going to be a runout, so they were requesting instead of us holding their paper that they wanted it all to be delivered at once. So, now you're talking about organizations that probably have over 500-plus employees, now they want all their paper in a month - a monthly paper amount allotted to them in a day or two days. But yet your vendors are rationing it off by how much you've ordered in the past. So, it was like because of our relationship with our vendors and because we just didn't go with one vendor in the paper distribution, we were able to meet that need. Don't ask me how we did it, but we did it. And another area, because of the situation with - let's go with masks, right? Here I was running the business and going through the operations and making sure we were making all our employees safe out there. I started deciding 'Okay, what are we going to do? We can't find anything in the market that's going to help them, and we need to move on.' I couldn't depend on a Home Depot, I couldn't depend on some of the vendors I was already using, I went ahead and went with another step, which was going to minority business owners, other minority businesses, small businesses, and I was asking them if they had connections that could help me expedite processes or orders, even out of the country, of masks and things of that nature, if they could support me. And by just the gracious thing like this the connection that got - put us in place with I was able to get that expedited, so immediately we had cases of items coming in for our employees. I mean, we had masks. We had gowns. We had face shields. We had everything. But that wouldn't have been something that I could have got on the market at that initial time. It was me connecting with other small businesses that had the relationships out of the country that actually got the stuff to us immediately. Yeah, that was something that - it's just the networking connections that you do have. And one of the things that I find from Covid that I really have seen is minority businesses, small businesses work together. And we've been working together in the trenches to make sure we're keeping our doors open. So, when someone calls me up that's another small business saying, 'I'm struggling; what do you recommend?' I'm not going to hesitate to keep my phone open for them and give the time that they need in order to get a solution for them."
[#17]
- The non-Hispanic white female owner of a DBE-, SWBE-, and CBE-certified professional services firm stated, "We actually took all the measures to make sure that we were mobile, I mean that we were able to - the people in the office could work from home, immediately. I got my IT guy on that within a week or two of all of this kind of going down in March. By

April, the middle of April, we were already to go, electronically if possible. Then we did everything we could. We even purchased new trucks so that our guys would not have to ride together. So, nobody was riding in the same truck. So, the impact for us, there was a cost impact, for sure. So, I think one of our big - I think, with COVID that still keeps happening, is the change of requirements for small businesses. It seems like the onus is on a small business to provide as much help and the financial impact seems to be on us. OSHA keeps changing the rules. EDD keeps changing. If somebody - there's a lot of impactful things that just keep kind of the trickledown effect of, 'If someone comes down with COVID, you have to pay them for a certain amount of time, no questions asked. You can't ask them to do this.' It's kind of the same thing that was going on before, but it seems like there's always a new rule. For small businesses, by changing - you had to change your handbook. You had to change your IIPP. You had to have a special COVID requirement within that whole standard. It's been a challenge to make sure that we know what we're supposed to be doing." [#18]

- The Subcontinent Asian American male owner of a Micro- and SB-certified and uncertified MBE construction firm stated, "I think for the most of the projects I got paid on time. Only after the start of Covid there has been a little bit delays but nothing dramatic. Just a few days, maybe a couple of weeks here and there. And it's all fully understandable because I know we are all in this together. So, I don't blame any of them at all. Everybody is struggling right now." [#23]
- The Hispanic and Native American male owner of a DBE-, 8(a)-, SB-, and MBE-certified construction company stated, "Well, it's kind of like a lot of things in the industry that people are not aware of necessarily because it's not out there in front. But we as a tiny business have to comply with the same exact rules as all of the larger companies, right? So, we can't go work if we don't have the proper PPE for our people. The large contractors who have departments of people to go get stuff and have lots of access to other stuff that we don't, they obviously have an advantage in being able to get to things and comply better. And the penalties are the same whether you're a little company or a huge company. If we don't follow the rules and the social distancing - and some of the operations are hard to do that way - we just - and we don't have a team to send to the job to go and make sure we're in compliance all the time. And then, OSHA started - most recently OSHA started kind of being the enforcement arm for the state, because they previously didn't have any way to enforce Covid rules. So, they brought them under the umbrella of the OSHA side, and then they have OSHA inspectors now weaponized basically to go out to job sites and they can start issuing citations. And as a DBE company you don't have the same resources to deal with it. You don't have the same capacity to absorb the fines and the penalties and all of those things that come with being in violation like the large contractor would. And I'm talking about a large contractor - when I say that I'm talking about somebody that does \$300 million, \$400 million, \$500 million, \$600 million a year. And we do \$10 million. So, it's just not even close. But that's not just true in Covid; that's true in lots of things." [#24]
- The non-Hispanic white male owner of a majority-owned SB-certified construction firm stated, "COVID shorted a lot of the manufacturers last year. So, there's a little bit of a backlog that we're still feeling that's not filled. In other words, some of these bidder contractors will turn machines over that are still good machines, low hours, late model. A

lot of them didn't turn them loose and replace them because the new ones weren't right there when they needed them." [#25]

- The Middle Eastern American male owner of a construction company stated, "During the pandemic these couple of projects I've worked on they were shortage of material, a lot of wait time to get certain products." [#26]
- The non-Hispanic white female co-owner of a majority-owned construction company stated, "Last year we didn't get started I think until the end of May, but we already had contracts on the books. So, I had to push 'em out and wait for us to be able to open, and then implement - it took a bit of time to implement all of the employee and the Covid, so we had to - and, you know, back then it was hard. We had to get a temperature thermometer, which I believe it took me six weeks to get one of those. And gloves. As you know, you know, the masks were very hard to find. I did have N95s that we had, that we keep for fire season... Fortunately, the clients have been very understanding, they understand that. When I make that phone call, I'm not wanting to make it, you know. And then some of them had to wait for the following year." [#29]
- The non-Hispanic white female owner of a DBE- and SB-certified and uncertified WBE professional services firm stated, "This pandemic has been horrible in a lot of aspects but such a blessing to allow so many people the flexibility to work at home and be there for their kids." [#32]
- The non-Hispanic white male representative of a majority-owned construction firm stated, "It did. But it goes away. If you low bid jobs work, the money was already there. And solid tax money is about cut in half this next year. The next couple of years will probably be when all this industry will be affected." [#35]
- The Black American male owner of an uncertified MBE construction firm stated, "The biggest one that I bid on and I won - then the pandemic hit and [materials] prices went through the roof - and the owner couldn't absorb the price increases so he sold the project." [#37]
- The non-Hispanic white male owner of an SB-, DVBE- and Micro-BE-certified construction firm stated, "Nothing's face to face anymore. It's all Zoom. So, when the agencies have pre-proposal meetings, it's all on Zoom. There's no ability to meet with primes and try to get some opportunities for - opportunities for teaming. It's made it extremely, extremely difficult. We have - we had two existing contracts, and then we had two contracts, two proposals that we were on, and both of those were winning teams, but again, the social distancing, trying to speak to the client and see what sorts of opportunities for positions are coming up is just very difficult. We still haven't seen the opportunities to be - even with the - even with the industry associations that we have, Construction Managers Association of America, or Society of American Military Engineers, they are still doing all their events virtually." [#44]
- The non-Hispanic white male representative of an SB-certified professional services firm stated, "It has challenged us in different ways of working. Obviously, being all together in an office promotes more collaboration than working remotely on a regular basis, and we're all looking to be back working all together in the office when it's safe and allowed." [#45]

- The Asian Pacific American male owner of an MBE-, DBE-, and SB-certified construction firm stated, "End of second quarter, third quarter was slow. But I took advantage of that to really organize things, in terms of understanding more about the bidding commercial jobs last year, and bidding public workshops, and integrating new software. And taking, y'know, the three months allowed us to learn, master that software and understand it more so. It was good." [#53]
- A comment from an uncertified MBE Black American-owned professional services firm stated, "Covid 19 is increasing cost of materials." [#AV111]
- A comment from an uncertified MBE Hispanic American-owned construction firm stated, "We have staffing issues related to Covid." [#AV8158]
- The male owner of a goods and services firm stated, "With COVID, Caltrans has shifted to entirely online bidding to follow social distancing regulations. Well, I live in one of the counties with the most restrictive regulations in place for COVID and we could definitely do an in-person auction while still following the regulations." [#WT7]

2. Relief programs for businesses affected by COVID-19. Interviewees shared their experiences applying for and receiving programs to reduce the impact of COVID-19 on their businesses. Most firms noted that they received some form of financial support through federal or state programs. Other firms described the type of support that would be most beneficial to their type of business during this time.

Thirty-three interviewees mentioned their experiences applying for and/or obtaining COVID relief programs [#1, #2, #3, #5, #8, #12, #13, #16, #17, #18, #19, #21, #23, #29, #31, #33, #34, #36, #37, #38, #39, #41, #43, #45, #46, #49, #55, #59, #61, #AV2, #FG3, #PT10, #PT12]. For example:

- The non-Hispanic white female owner of a WBE-, DBE-, UDDBE-, and SB-certified professional services firm stated, "I took out the PPP to get some extra funds for payroll. And then I also took that EIDL loan out in case, just to make sure that if we aren't having money coming in right away, that I can still pay the employees and a lot of our work is cyclical anyway. So, it's not like it's a big change and sometimes we'll have so much work that it's very hard to complete on time. And then other times we're a little slower, so what we do is we get the other things done that have been put aside done. They were extremely easy. One of them scared me to death because in March I found out about the EIDL, I did that first and I did it online and that scared me half to death because once I submitted it, I realized that what if I just submitted it to the dark web and all my information came out, because their protocols were inefficient because they didn't allow you to take a copy of your application or it didn't look... It looked like it was kind of done as not real. And it was only because I talked to a friend of mine who is a director for a museum, and I told her what I went through. She said, 'I went through the same thing.' But she did it two weeks earlier than I did. And so, we both got our money, our loan about two, three months later, but then that was the only thing that made me realize that I didn't mess up. And the PPP was fine, but that was still in the infancy of it, and we didn't get as much as we should have, but it was okay because both of those things helped us survive for the unknown, at least at the moment. And I do appreciate both of them." [#1]

- The non-Hispanic white male co-owner of a majority-owned construction company stated, "We were fortunate because we did apply and receive a PPP loan, which enabled us to keep everybody working as design. We did not have to fire anybody. I think the application process was not too tough. I think that the uncertainty of what the guidelines were, what the rules were, what the process was. The uncertainty of, and still uncertainty of once you applied, how to actually get the loan approved. Receive the money. What to do with the money to protect and make sure that you're doing it in conformance with the requirements of the loan. How it's going to be treated on the financial statements and for your taxes, is still totally unknown." [#2]
- The Black American male co-owner of a WBE-, MBE-, and DVBE-certified construction company stated, "We applied for one through LISC, I believe. And we did get that. It was 15,000 dollars, which on the surface may sound like a lot of money, but that's no money, not when you're trying to run a business. We certainly don't need millions, but 15,000 dollars barely covers operating costs in a month. We're on the wait list for another one and we'll see what happens. It was all easy because all you do is have your paperwork and they didn't even really look deep into your paperwork. They were very sincerely... LISC, I forgot what that stands for, but they were very sincere about helping you. They're like, 'Look, hey, we're going to get you the money.' And they got it to us. We needed it, but it went as fast as they gave it to us." [#5]
- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "Only the only the national ones. So, the PPP loan, we received the loan, the payment protection program. But other than that, not much we know about." [#8]
- The Hispanic American female owner of an MBE-, WBE-, and SB-certified professional services firm stated, "I'm still paying interest rates and I still have to pay it back, so I'm not actually making money. It just seemed like the debt is amounting." [#12]
- The Hispanic American male owner of an uncertified MBE construction firm stated, "Well, I was looking to get the Payment Protection Program, because based on repairs and a couple of those items I mentioned, we did take a hit. But I have been unable to secure a PPP loan, [we applied but did not receive it]. Well, the first time I applied, it was through my bank, JP Morgan Chase. And they had a questionnaire. This was on the first round of the PPP loan. But unfortunately, I think I was excluded or precluded from applying, based on my criminal record." [#13]
- The Black American male representative of a DBE-, WBE-, MBE-, SB-, and Micro-PW-certified small business development association stated, "I got a Payroll Protection small grant. It was not much. But again, it's just two of us. We ain't getting paid much, so... I applied for that, and we got one through - Facebook had a Women's Business Grant out and we got that." [#16]
- The Hispanic American female owner of a WBE-, MBE-, SCMSDC-, and DBE-certified goods and services firm stated, "I was able to take advantage of the federal PPP loan. Initially, when it came out, I was not able to take advantage of it. And one of the reasons why, the bank that I had used, that I had been with for over 30 years had decided that they were only going to offer the PPP loan to nonprofit organizations or for small businesses under 50 employees. And after that it was like 'Okay, then I guess I don't qualify.' And it was a little

frustrating considering that I had been with this organization for 30 years, and through the whole time when everybody was applying for the PPP loan my bank was holding off saying, 'Okay, just put everything in the portal. Get everything ready. When we go ahead and say it's time then we'll go ahead and use it.' Then at that moment, after I had been working on it for a couple of weeks or more, then they said, 'We're sorry. We're not going to go ahead and honor this. You'll probably have to look for another organization to support you in this situation.' And for us it was a struggle because you're a bank that doesn't have - that you've had a relationship for over 30 years and now you're in a situation, you're coming in like a new business that does not have a relationship with another bank. And we had to hurry up and build something up real quick. And thank God for this organization, this bank that really helped us and supported us. A smaller bank that just said, 'You know, we're going to take you on.' And so, they were the ones that supported us instead of the bank that I had been with for 30 years. I had to go to a small community bank that really supported us completely and walked us through the process. So, I was just very blessed with that. But it's the whole process. And then, after that, less than a week later you find out the reason why they didn't have funds was because they were giving all the funds to larger companies. Larger corporations. They decided to go for the big fish instead of working where they needed to work, where the federal government was saying to help small businesses. I think the PPP loan actually helped me out at the right time because some of my guys, some of the - our federal contracts - right? - and so, they're making a pretty considerable amount of funds, and now they were reduced - their hourly wages were reduced because they were cut in hours. So, for us, we didn't want them to suffer either, so we were able to continue with payroll without the hiccup for them. So, they were able to feed their families. So, for us it was a very - it was a struggle. Another area, credits that were given to us for payroll, it was a blessing for us." [#17]

- The non-Hispanic white female owner of a DBE-, SWBE-, and CBE-certified professional services firm stated, "We did apply for the PPP, the first round of it, and were accepted for that. We did borrow money from that at the urging of our CPA as well as our attorney and everybody else saying, 'You should.' We didn't know what was going to happen. We've already got it actually ready to go to payback or waiting to hear from the government with what they're going to do." [#18]
- The Black American male owner of a DBE- and SB-certified and uncertified MBE professional services firm stated, "I got a little - I got something maybe only half of what I asked for. But we did get some PPP, which was helpful. But what we need is work. You know, we need to get into the mix of things to really make much. PPP doesn't really carry us, that stands." [#19]
- The Hispanic American male owner of a DBE-certified and uncertified MBE construction company stated, "We did the Paycheck Protection Plan. we were able to purchase PPE and supplies to take care of our equipment and trucks, and make sure that the employees were safe." [#21]
- The non-Hispanic white female co-owner of a majority-owned construction company stated, "Ah, thank god, yes, thank god for the PPP loan, oh, my goodness, yes. It's not as - you know, yes, that's been good to us. We just qualified for the second one, or actually, last month, and we actually just started back work again, last week, but we're on and off." [#29]

- The non-Hispanic male owner of a majority-owned SB-certified construction firm stated, "We did file for a PPP. I think we got the first PP loans during the first time it came out. We got - I think it was three months of some salary and stuff like that. It wasn't a whole lot of money, but it definitely helped." [#33]
- The Black American male owner of an uncertified MBE construction firm stated, "Yes, I got the PPP loan and I got the emergency EDL, emergency disaster relief. I got that as well. I paid half of it back already and I'm making the payments on that on a regular basis." [#37]
- The Black American female co-owner of a DBE- and DVBE-certified and uncertified MBE construction company stated, "Definitely, I mean, you know, with some of our customers being affected, payments weren't coming in, so it was difficult in that perspective. So, we were busy working, but as far as the other side and getting payment, that was definitely impacted. So, yes, we did take advantage of some of the programs, you know, the PPP loan was great. I think there was, like, a grant out. So, those were definitely helpful during those times when we weren't - we were getting a lot of delayed payments, so it was a great help." [#38]
- The Black American male owner of an SB- and MBE-certified professional services firm stated, "I did and even that was - it's unfortunate, because I mentioned, I've got two employees - myself and one other - but up until the pandemic, I hadn't been paying myself. And so, I really didn't qualify for the forgiveness of the loans. So, I decided to start paying myself and now, I'm almost broke because I've been paying myself. Or at least my business is almost broke because I've been paying myself." [#41]
- The Middle Eastern American male president of an WBE-certified professional services firm stated, "I got a PPP loan, but it was very small. It was small amount. And then, I applied for SBA loan so, I got an SBA loan which, in a few months, I have to start paying interest on that one. That one is not forgivable." [#46]
- The Hispanic American male owner of a DBE-certified construction firm stated, "I took out an ELID loan, a small business loan. It's helped so far but, again, you still have to pay that back. And if I don't get more contracts, when that bill comes due, it's going to be tough to pay." [#55]
- The Asian Pacific American female owner of a SB-, DBE-, and WBE-certified construction company stated, "The PPP loan? It helped. It's not a lot, but it helped. We didn't get a lot of money, like many people. I don't know how they do it, but it's okay. We followed the regulation. We follow the form. We got something. It wasn't how we make it, but it's helped." [#59]
- The Hispanic American female co-owner of a WBE-, MBE-, Micro-, and SB-certified professional services company stated, "We were very fortunate to get the PPP loan that supplemented the lack of projects and billing, but we're out of that money now. I think this month is the last month for our second PPP. So, that was imperative that we continue to bill more every month in order to keep the doors open." [#61]
- A comment from an uncertified Black American-owned construction company stated, "I think the LBE especially Black contractor should be given an opportunity to participate in PPP successfully giving them a loan." [#AV8454]

- The Hispanic American female CEO of a professional services business development organization stated, "I feel that a lot of the money that has come to our community, whether it's through the county or the city, the city, I see, has been distributing the funds to the businesses or to the community in a very transparent way. I see there being more challenges on the county side, maybe because it's a bigger area. I just don't see that. And then I have talked to businesses or community-based organizations or individuals, who whether it's a rental assistance program, whatever program it may be, it's either too difficult to get the money or the money that they're providing is 1,000 dollars for a business with 10 employees. Although they're grateful, 1,000 dollars doesn't go too far. I don't know how to make our leaders accountable and how can that happen? It has to come from the top down. I think probably a lot of you might have applied for this funding through the state of California. And I talked to a lot of businesses in San Joaquin County. I wasn't seeing anyone getting the money. So I asked them for a break on well, who's getting the money if they keep telling us all this money's going to the community? How many people in San Joaquin received the money? It's just looking for accountability. I guess, I can go on, and on, and on. And there was only one barbershop that got money in San Joaquin County. That's it? All these millions and millions of dollars, somebody got 5,000 bucks, so how do we make all this money that's coming into our community, what do we need to do to make it accountable, show where the money's going? I think that would help." [#FG3]
- The female owner of a WBE-, DBE-, and MBE-certified professional services firm stated, "I can quickly say that was so cumbersome. So confusing. Every time I submitted an application, it was rejected because it wasn't complete, there was no outside assistance that could help me interpret what was actually being asked." [#PT10]
- The Hispanic American male co-owner of a DBE- and MBE-certified and uncertified WBE construction firm stated, "I see all this money that the state of California is going to have force and everything else. I have to have filled out every piece of paper you can think of with the state and no responses from anybody about any kind of help, except they just bragged about themselves all the time. It's just terrible. It's absolutely horrible what's going on with me." [#PT12]

Thirteen interviewees did not apply for or were not aware of COVID relief programs [#4, #6, #9, #10, #14, #22, #26, #30, #40, #42, #52, #62, #FG3]. For example:

- The Hispanic American male owner of an uncertified MBE construction company stated, "I never got none. I don't know where or how. One of my big mistakes, I stayed too busy working all the time because I never had the handouts from the government and I don't trust the government handouts either. Because all my life, if they don't come to me, I never got it. That's why I'm very discouraged to do anything like that. I am interested in applying, but I don't even know where to apply or what to do, because I'm not that smart. That's why I do concrete for a living." [#4]
- The non-Hispanic white male owner of a SB- and ELBE-certified professional services firm stated, "I don't qualify for stimulus checks and so I don't seek funds." [#10]
- The Subcontinent Asian American male owner of an uncertified MBE construction firm stated, "To be honest with you, no, I did not. Because of that PPP, I believe was the fund they

were releasing. We did save some money from our company. We had a saving box that we worked every year. We put up a month of money aside just for the big like COVID-19 days. So, we are having enough money to survive during the COVID-19, without asking for assistance from the government. A lot of the other people who really need the assistance, they're the ones, they need that, and they will get it. But us, we were okay. We did not need the assistance from government, and we were doing okay." [#14]

- The non-Hispanic white male owner of a majority-owned professional services firm stated, "Well, I don't want a loan. I wouldn't mind getting the work, but I don't want to go into debt. I kind of look at it as the government's offering loans - unless they don't make you pay them back, which would be illegal; I wouldn't want to do that." [#22]
- The Middle Eastern American male owner of a construction company stated, "I was not able to take advantage of that program, the PPP. Being a single, just myself as the only employee of the company was not able to take advantage of any payroll benefits." [#26]
- The non-Hispanic white male co-owner of a majority-owned professional services firm stated, "No, we didn't utilize any of those. Y'know, we didn't have any PPP or anything like that." [#30]
- The non-Hispanic white male co-owner of an SBA-certified micro- and WBE professional services firm stated, "We started to. The interesting part was because we are so small, just my wife and I, there was an issue with whether or not we would be a good risk because if we got sick, we wouldn't be able to [pay it] back. To repay the loan. So, we abandoned the effort." [#40]
- The non-Hispanic white male co-owner of an SB-, DBE-, and HUBZone certified construction firm stated, "We didn't have the paperwork that they wanted to be able to show, 'Hey.' You know what I mean? Like they relied heavily on unemployment, you know, state unemployment documentation, but when you're the owner and you're the guy working then that's most of it, you don't have nothing to show. Especially if you didn't have work, your work slowed up." [#42]
- The Asian Pacific American male owner of an uncertified MBE construction firm stated, "You know what? I've never even signed up for it." [#52]
- The non-Hispanic white male owner of a majority-owned construction company stated, "No, I didn't fill out [or] apply for it because I didn't need it, I was busy." [#62]
- The Hispanic American female representative of a professional services business development organization stated, "We put together a grassroots team of promotoras (promoters) who actually were going out, visiting businesses in person. And so, what we found is that more people, it wasn't that they didn't want to apply or didn't want to take the time. Sometimes, they just didn't know about it, because we assume that everyone can see things through internet and email." [#FG3]

Twelve interviewees shared suggestions on the most beneficial types of assistance their firms could receive to reduce the effect of COVID-19 [#4, #11, #12, #13, #14, #19, #43, #44, #47, #55, #61, #FG4]. For example:

- The Hispanic American male owner of an uncertified MBE construction company stated, "I need money and employees." [#4]
- The non-Hispanic white male representative of a Native American-owned MBE-, SB-, and Micro-BE certified professional services firm stated, "Our experience with the PPP loan seems to be okay. It was pretty helpful." [#11]
- The Hispanic American female owner of an MBE-, WBE-, and SB-certified professional services firm stated, "I did apply and receive an EIDL. Fairly easy process, I just feel limited in what those funds can be applied towards." [#12]
- The Hispanic American male owner of an uncertified MBE construction firm stated, "Maybe fuel incentives. There seems to be a very big expenditure, fuel costs, and repairs. Maybe some kind of subsidy or some kind of tax incentive, I don't know, reward cards or something like that." [#13]
- The Subcontinent Asian American male owner of an uncertified MBE construction firm stated, "Basically, if the government or any government facility or a county, city, if they try to give a small business opportunity for any type of job, because right now, a lot of small business is hurting from base of COVID-19. Big companies are at least, they're getting some assistance from government, but some of the small companies, they're really suffering or they're really having difficulty because their family themselves or their coworkers. Actually, if these government companies or including Caltrans or any other companies, if they give to small minority or small businesses some job to do, at least, they start working instead of they're going out of the business. That's my recommendation." [#14]
- The Black American male owner of a DBE- and SB-certified and uncertified MBE professional services firm stated, "I got a little - I got something maybe only half of what I asked for. But we did get some PPP, which was helpful. But what we need is work. You know, we need to get into the mix of things to really make much. PPP doesn't really carry us, that stands." [#19]
- The non-Hispanic white male owner of an SB-, DVBE- and Micro-BE-certified construction firm stated, "It was - it was extremely helpful. One hundred percent. We would be really scrambling for a business loan right now if it wasn't for that." [#44]
- The Hispanic and Indian American female co-owner of an SB-certified and uncertified WBE construction firm stated, "We were fortunate to be able to benefit from that PPP program and that absolutely helped us to survive, as well." [#47]
- The Hispanic American male owner of a DBE-certified construction firm stated, "I think there needs to be some information put out there. Public transit is as safe as riding in your own car. They're sanitized every night. The buses are cleaned every night. The bus agencies and operators are taking COVID precautions. We've got operators wearing masks, wearing gloves. They're limiting the number of people that are getting on a bus. So instead of running one bus down a line, they might run two just for safety's sake, those kind of things. But that's not being reported so people don't know that, you know, they still think that you jump on one bus and that's the only bus you have." [#55]
- The Hispanic American female co-owner of a WBE-, MBE-, Micro-, and SB-certified professional services company stated, "When I say job, product opportunities. If there's a

way for agencies to alleviate some of the paperwork in award of contract for small businesses, a lot of small businesses we do our marketing proposals and document and respond to clients, and so we're working on getting work and not working on before, it really is difficult for small businesses. We don't have the full marketing department or overhead budget like the large firms. So I think during COVID, it would be great if there was an easier way to get work." [#61]

- The Black American male representative of a minority business chamber of commerce stated, "The COVID just totally not only caught government off-guard, but it also caught the small or minority ... And I'm going to speak to minority, and I'm going to speak specifically to Black businesses ... off-guard, without the background of how you all or how Caltrans could be supportive. And I think Caltrans, itself, could have been more supportive and reaching out and perhaps relaxing some of the major insurance requirements and/or for being the insurance provider or guarantor of it, during this COVID. I don't see where Caltrans and/or the government, period, made enough provisions to assist Black businesses that were already struggling and suffering. The PPP was fine, but it really wasn't enough money, to help folk get through a crisis, I would also like to say that this would have been an ideal time, since we were in an emergency situation, to expand the opportunities for Black-owned businesses, through the emergency acts that were put in place. And here was an opportunity that the rules get waived for large corporations. The rules get waived for government. The rules get waived for local jurisdictions, as well. And so this is a time when some waivers could have taken place and So this is and has been an opportunity, where Caltrans, specifically, since we're speaking about them, has not been flexible enough, to reach out into the Black business community and say, Listen, we have some of the barriers are moved out of the way for the moment. Here's a chance for you to come in and do some business with us or other governmental agencies. So it's not over. It's not going to be over for a while. And so we already know that there is an under-utilization of Black-owned businesses, male owned and female owned businesses, in the state of California. So I know you're doing this study, rather than going back to implement their operational procedures, but maybe you can tell your contracted officer that this is the time that they need to be reaching into the Black business community and providing opportunities, because they've waived the standards that they normally have, during an emergency situation." [#FG4]

3. Past marketplace conditions. Interviewees offered thoughts on the pre-pandemic marketplace across the public and private sectors, and what it takes to be a competitive business. They also commented on changes in the California marketplace that they have observed over time.

Six interviewees described the pre-pandemic marketplace as increasingly competitive [#10, #13, #27, #AV]. For example:

- The non-Hispanic white male owner of a SB- and ELBE-certified professional services firm stated, "If the economy going, booming and we're doing a lot of paving in subdivisions, we would be subcontractor 50 percent, 60 percent of the time. And when the economy would take a nosedive and we're not building subdivisions anymore... It took a nosedive every 10 years. It's just like a cycle. It was the first three years of the decade. It was 51 through 54, 61 through 64, 71 through 74 or 81 through 84, 91 through 94. And then it all changed in 2000

and I thought, Oh my goodness. It didn't crash. That means that when it does crash, it's going to be a doozy. I was right. It crashed in 2008 and it was a doozy. So then all of a sudden I went to a hundred percent public work. There wasn't any private work that we could get as a union contractor." [#10]

- The Hispanic American male owner of an uncertified MBE construction firm stated, "It fluctuates, because of the necessity of receivers, meaning big companies. Because it fluctuates, there's some instability with owner operators, such as myself. So, I might get load A that may take X amount one month and take one and a half times a month later." [#13]
- The Middle Eastern American female representative of a majority-owned professional services firm stated, "I mean it's more competition. Competition is very strong in this market really. I guess our competition is coming into market because California is a very strong market. And they're coming here, and they have established in the areas that we were strong. So, I think that's a danger for us and that's why we're trying to see how we can address that." [#27]
- A comment from an uncertified WBE construction firm stated, "The market's more competitive which is a good thing." [#AV14]
- A comment from an uncertified WBE and MBE Hispanic American-owned construction firm stated, "Obtaining work has been difficult lately with the economy. Subcontractors are bidding at very low margins. We are a big company, and it takes a 10% margin for us to cover our costs, and jobs are being successfully awarded to companies that take a 7% margin." [#AV874]

Eleven interviewees observed that marketplace conditions were generally improving, especially for small and disadvantaged businesses [#2, #6, #9, #12, #14, #23, #29, #35, #43, #59, #61]. For example:

- The non-Hispanic white male co-owner of a majority-owned construction company stated, "The economy was very robust for several years. So I would say that was a positive change from a downturn, for us anyways, three, four years ago. So that allowed new entrance into the marketplace. It allowed for higher margins, and essentially a confidence level that's so important in our industry for stabilization and investing and moving forward. You can go with technology and talk about how quickly and rapidly technology has played a role in construction. In the last two or three years, how much we've had to adapt to technology just to compete." [#2]
- The non-Hispanic white male representative of a majority-owned construction firm stated, "I think the market has been pretty strong for the last few years." [#6]
- The Asian Pacific American owner of a DBE-, MBE-, and SB-certified professional services firm stated, "We've been going pretty strong the last five years, and we've been, every year is better than the year before. But we don't know what the future is going to hold because all the talks about the bubble, material prices are going up. So I think the housing market will be slowing down, meaning the developer won't be building as many homes because it cuts into the profits. So I think in the future, six months, nine months from now, to me I think it's going to slow down a little bit." [#9]

- The Hispanic American female owner of an MBE-, WBE-, and SB-certified professional services firm stated, "As a matter of fact, prior to coronavirus, business was doing the best had since its beginning. So it was getting really high profile clients, my just reputation was spreading with just really, really good and bigger brands. So it's unfortunate that it all came to a sudden halt." [#12]
- The Subcontinent Asian American male owner of an uncertified MBE construction firm stated, "Before the coronavirus, our company was actually with... There was so much job. We cannot handle it. We have to hire more people from minority to color wise to race wise. We hire anybody and the job was... We can't even handle it. It was so many jobs by people's referrals to us or by advertising where people know us." [#14]
- The Subcontinent Asian American male owner of a Micro- and SB-certified and uncertified MBE construction firm stated, "[I] would say that 2019 was a decent market. Even though it is a startup company I felt really confident that this would be a booming market when I saw all the different contracts and all the needs in the market." [#23]
- The non-Hispanic white female co-owner of a majority-owned construction company stated, "With this last year, we went from having what I would say really good last three years of steady business, and with construction, we feel the temperature of what's going on economically. So, when the market starts to turn, downturn, if you will, construction almost - it's like a forecast, so we know that we're gonna be hit. And depending on how the downturn is [impacts] how hard construction gets hit. In our particular area, it's, you know, expertise in asphalt, and what our projects are is driveways and private roads, parking lots, and that tends to be backburner, understandably why it would be considered backburner. Because if people need to hold on to their funds if they're shaky about what is going on with the economy, they're not gonna spend money that they don't have to." [#29]
- The non-Hispanic white male representative of a majority-owned construction firm stated, "The market was going up until that [pandemic] hit." [#35]
- The non-Hispanic white male representative of a DBE-certified and uncertified WBE construction firm stated, "There's some big contracts coming up, big work coming up, and so we're pretty excited about that. And the thing I think that challenges as a small business, one of the things that really challenges us is the CARB complaint, since we have trucks, the smog regulations. And so we had two that are non-compliant as of January, so now we're having to purchase trucks that are super expensive and get them up and going and make them water trucks and what not to keep our business going." [#43]
- The Asian Pacific American female owner of a SB-, DBE-, and WBE-certified construction company stated, "Some of my competitors, they have more business, especially the one that worked at home. So, I know some competitors say they grow more jobs because most of the people are home. So, they want to have more camera security, especially the Asian community is a pocket, that people think that Asian have more money, so become burglarized or robbery. So, a lot of alarm company do grow." [#59]
- The Hispanic American female co-owner of a WBE-, MBE-, Micro-, and SB-certified professional services company stated, "I would say that the prior to COVID it seemed to me that private had gone up and public work was a little bit slower for us, and then things started picking up actually during COVID for public." [#61]

Two interviewees observed that pre-pandemic marketplace conditions were in decline [#17, #AV]. For example:

- The Hispanic American female owner of a WBE-, MBE-, SCMSDC-, and DBE-certified goods and services firm stated, "I mean, all the rules and regulations that I've seen here - there's a lot of rules and regulations that the state of California has, and one of the things that really scares me personally as a small business owner, and you hear - and you've probably heard it already - the exodus of many large corporations and companies who are leaving California. And that's scary alone. And I think the state of California needs to do something to keep our corporations, our companies, our businesses here in California. And if we don't do something now, we are going to see that many doors are going to close. I mean, I know some major players in the last year to two years have already left. And that's scary because we're getting jobs from some of these corporate elite companies, and where do we go next? So, I think we have to figure out what we can do in order to help support but not fill the hopper with all these regulations that it's unbearable to actually do business in California." [#17]
- A comment from a majority-owned professional services firm stated, "Technology is changing the way our services are used. We have to keep up with what people are looking for. Technology has drastically reduced manhours, so we have to find more work" [#AV26]

4. Keys to business success. Business owners and managers also discussed what it takes to be competitive in the California marketplace, in their respective industries, and in general [#1, #2, #4, #5, #6, #7, #9, #10, #11, #12, #13, #14, #21, #23, #24, #26, #28, #29, #30, #32, #34, #35, #38, #39, #40, #42, #45, #47, #52, #53, #59, #61, #62, #AV, #FG4]. For example:

- The non-Hispanic white female owner of a WBE-, DBE-, UDBE-, and SB-certified professional services firm stated, "The more diverse you are, the more chance you have of being able to take if we have a downturn in the economy like now, we are able to survive. What we do is we show the clients how we're different than the others. So like for instance, I'm a very specific niche. We see where there's a deficiency and we give our clients ways to fix them. I hate that phrase, but the idea is you have to be able to roll with the punches and most people can't. So, that's what we do that they don't, nobody else. Plus by being a specific niche, there's a lot of environmental companies that have a [people who do what I do] on their staff, but that's not what they do. They are there to make money. They're there to roll out the documents, but they're not there to see the nuances. And so that's a huge difference. Because first of all, we're cheaper and we're on time, under budget, and we can get the job done because that's all we do. But they do the whole process and they're part of a huge multi-billion dollar company. And so they don't have the appropriate people for the specialization." [#1]
- The non-Hispanic white male co-owner of a majority-owned construction company stated, "I think to be successful; you have to be ready to put in an inordinate amount of effort and work and time into your business. You can't think that opening the doors and hiring people and even you knowing how to build in the field is going to give you success. Because it is a full-time and then some job to stay on top of. And, that's a big challenge as well. You can't hire people and think that that's going to solve it for you and be a stand by sides owner."

Right? You have to have your eyes on the game at all times, and you have to really know where the money's coming from, and where it's going, and how you're performing. Understanding financials is so important, and so lost for a lot of people. Knowing how to build is only one part of getting to the finish line, because if you don't get paid and you don't have cashflow, then you're lost." [#2]

- The Hispanic American male owner of an uncertified MBE construction company stated, "First off, [the firm] needs a lot of money. That's worse thing and they need competent people to do the jobs. Workers [are] very hard to find these days too." [#4]
- The Black American male co-owner of a WBE-, MBE-, and DVBE-certified construction company stated, "It takes, first of all, skilled workers, it takes a firm commitment to quality. Now it takes marketing because you have to have an internet presence. Yelp is very powerful and it takes money. You have to have a website. You have to have somebody always putting your name out there. It's funny. You go on TikTok now and you see contractors showing their work and how good it looks in 15 seconds. And I guess that's all the attention span that some people have." [#5]
- The non-Hispanic white male representative of a majority-owned construction firm stated, "You have to have a lot of diversity in your company. You have to be able to perform multiple operations. You have to be a low-cost producer and operating at a very efficient rate within your company but that's [because] we're in one of those competitive markets in the country. And that's how we've succeeded well by putting those measures in place." [#6]
- The Black American male owner of an MBE-certified professional services firm stated, "My level of understanding of business, my level of understanding of the industry and hiring the right people." [#7]
- The Asian Pacific American owner of a DBE-, MBE-, and SB-certified professional services firm stated, "We are competitive because we are on call for 24 hours a day. We don't do the basic eight to five, we are pretty much anybody can call us around the clock. That's how we stand out from other people, other firms. We don't really have that much overhead, whereas the bigger [firms] are carrying more expenses, if you will. So, we could offer more competitive rates, per hourly rates, so that's how we compete with other big boys." [#9]
- The non-Hispanic white male owner of a SB- and ELBE-certified professional services firm stated, "When I put a job on the street, and I do that 40, 50 times a year, I've got it spelled out so well, the [bidders] don't have to go out and look at the job to see the conditions. I've got it all laid out for them. That's why I've got this, this bunch of bidders that want to bid my work because they know I'm straight up honest. I've told them exactly what they got to do. They know exactly what they have to expect. They know I'm going to protect them. They know I'm going to protect the owner and they've got to perform and you have to be a low bid. And so, because you see, and the benefit of being a contractor for 45 years, I know what contractors need. I'm not just an engineering firm [that] plugged a bunch of stuff together that doesn't make sense. So, I have an advantage." [#10]
- The non-Hispanic white male representative of a Native American-owned MBE-, SB-, and Micro-BE certified professional services firm stated, "It takes licensure. It takes people who are on a professional track. We have various stages of licensure. In order to be successful in our industry, you need not just a licensee, you need several licensees to perform the work.

Well, it requires a minimum of six years to qualify to sit for the test, but it's really like 10 because not all of your experience will qualify. So, you need to find folks that are willing to commit to 10 years and you have to provide a lot of training and support and mentoring.” [#11]

- The Hispanic American female owner of an MBE-, WBE-, and SB-certified professional services firm stated, "I think a good well-rounded team [is key to success], for instance, I mentioned that I do everything for the company. And so I think that someone, for instance, who specialize in social media or PR would help bring more awareness about the work that I do, but because that's not really my area of expertise, I feel that I'm doing a lot, but I'm not doing the best with the things that I'm not familiar with.” [#12]
- The Hispanic American male owner of an uncertified MBE construction firm stated, "Well, for trucking, specifically, we go through the FMCSA score, [that is the] Federal Motor Carriers Safety Administration. And they typically give every company a score. So if a person has a lot of claims for insurance or accidents, their score typically goes down. And if you're free of claims and free of accidents, then your score stays pretty high. Mine has been pretty high. the brokers will look at that, and they may not take you on, because of a low FMCSA [score.]” [#13]
- The Subcontinent Asian American male owner of an uncertified MBE construction firm stated, "We did the best service for every customer, we treat every customer the same, with the dignity, with honesty, and also make sure that [the] job is a hundred percent the customer satisfied. That's how we grew up slowly from two person, all the way to 20 employees one time we have. So, every job we done, we call the customer to make sure they're satisfied. If something was not right, we go back and taking care of it. That's how we actually built our company from two person to 20 person. And because our job quality are satisfactory with [customers], and also our safety, and we [don't] have a single, even a zero complaint about our license in the state or the city.” [#14]
- The Hispanic American male owner of a DBE-certified and uncertified MBE construction company stated, "Well, pricing [is key]. I guess having a good rapport with the companies and people that are out in the industry is good, whereas having prices that are competitive, and having good staff to kind of back you and do a good job out there in the field.” [#21]
- The Subcontinent Asian American male owner of a Micro- and SB-certified and uncertified MBE construction firm stated, "Since there are so many different, I mean, civil engineers in California it does also take some relationships, and primarily because the contractors want the employee who they feel trusted more then who they know. And then, as you know, trust takes a little bit of time to build based on the previous work that I have done with them as well as overall the life of the company. But the quality of the work really matters as civil engineering, primarily, is focused on safety and construction issues and saving for the client et cetera.” [#23]
- The Hispanic and Native American male owner of a DBE-, 8(a)-, SB-, and MBE-certified construction company stated, "Even though I know them and I've had plenty of personal conversations with them, at the end of the day what gets you the job is the price. That's what it boils down to. They could be - they could like me, and I think they do, and they could

know that we're capable, and I think they do, but if we cost more than the other guy then chances are really good we're not going to get the job. So, it's price." [#24]

- The Middle Eastern American male owner of a construction company stated, "Aside from the price [the key is] to be competitive efficiency in work. To be able to do the project. You can have the same amount of workers doing the same tasks but do it a lot faster than others just because they have enough planning. So definitely planning affects cost, affects being competitive. That's one of the main things. We can go through quality. We can go through customer satisfaction, or client satisfaction in general, building relationships when we were doing schools with the LASD for example, [having a] relationship from time before starting company. It helped a lot to have a good relationship because even though it was a bidding process. But one of the [names] had been put on the map. The bidding process when personal choice comes in we were definitely top of the list with that." [#26]
- The Hispanic American male owner of an uncertified MBE construction company stated, "The main thing you have to be really, especially, like, for me, we do concrete work, and if those concrete works, you know, they have to be really done right, because actually we're dealing with a lot of those ADA compliance, you know, the slopes and all the stuff. And so, you really have to have the correct person to run the project, or if you don't do it, you just think, oh, yeah, I can do this project and I can do cheap, and just rush it up and cut corners, you won't make it, because at the end of the day or the end of the project, middle of the project you're going to be turning down some of those things you did, part of the project you did, the scope of work you did, and some of that, you have to redo it. So, that's when you're going to be able to be alive. So, that's the thing, as the owner of the company, I learned all that the hard way, and a lot of people, yeah, I can do this and I can do that. And, yes, sometimes they can tell you, yeah, I do that, and yeah is right, but actually, in the actual work, when it comes to detail, that's when you fail. And that's going to be a problem, because then your clients who you're working for, they don't want to call you back. Then you're going to be struggling for, like, paying suppliers, and so that's the key, you know? If you do your job once and right, you're going to succeed. And if you're trying to think I can go and make a lot of money because I got a big contract and all this stuff, well, you have to keep in mind, it's like you have a piece of cake. All that cake is going to be slices for everyone, and you might get two pieces of cake or you might get maybe a quarter, or maybe nothing. But that's the key you have to keep in mind. You have to [have] all those factors in order to succeed. And what they say, live and learn. That's how you learn. And I think if anyone [subcontracted] as a minor for a small business, so they have to keep all those factors, and I think you'll be able to succeed to be a bigger business, you know?" [#28]
- The non-Hispanic white male co-owner of a majority-owned professional services firm stated, "Well, quality of the work is most important, and being friendly to the people you work with. Quality of your work and that. Doing a good job as they come along from other small cities or whatever." [#30]
- The non-Hispanic white female owner of a DBE- and SB-certified and uncertified WBE professional services firm stated, "I think that I do good work and I'm very detailed. And I do research on things and coordinate with the client. And I really look at like the safety aspect of everything I do and the liability aspect. And I think that I'm not just looking at it for myself but for the client, for the city, the overall like this is the best, trying to get the best

product for the price that they want to spend, I guess. For a good price I guess. I feel like that's why I get so many return clients is because I don't - it's not all engineering to me in my life. There's a lot more to life than work. And so when I get to know my clients I bring that personal side in to it. And so when we're talking, if we talk on the phone it's not all usually just engineering. Sometimes I try to find out a little bit more about them. How was your weekend? Just a little bit more personable. And then you find out oh they have kids or they have two boys. I have two boys. And then you talk a little bit. And then I try to get back to work. But like I feel like having those personal relationships is really important." [#32]

- The non-Hispanic white male co-owner of an MBE-, SB-, and DBE-certified professional services firm stated, "I guess it comes down to a little bit of a sales pitch, but, you know, a lot of the people that we brought in in the senior level and, you know, has helped build the company, came from these really large companies. So, we're used to doing these big jobs. And we're usually asked to do this, like, one role or a couple roles on a project, and it's, you know, what's funny is we usually have more experience than the project manager for the large firm that's actually doing the overall project, and we could probably do the project better. So, we really excel at, like, oh, here's your, you know, here's role C of the project, and we're able to communicate how it relates to role A, B, and F." [#34]
- The non-Hispanic white male representative of a majority-owned construction firm stated, "Probably good management. Also [you] need a lotta good workers that stay with your company, basically, keep the people with the company and growing with the company." [#35]
- The Black American female co-owner of a DBE- and DVBE-certified and uncertified MBE construction company stated, "We still serve people personally. We still answer the phone. We don't have a voice, an auto voice. We still, you know, reach out to customers, we still visit their offices and, you know, just take popcorn and what not. I mean, I think we just give them more of a personalized service. We are definitely more flexible, you know, in the field and with - with pricing. If somebody's over budget and they need something, we're more than willing to work with them if we have a good relationship with them, because, honestly, we look at, you know, if I give, you know, an inch here, more than likely, this person will appreciate it and I'll make money down the line doing other jobs for them, and, you know, and I've had customers do that. You know, I've had customers say, you know, can you - I'm running short on this, you know, we have another job coming up, you know, I'll get you on that, and they've been kind enough to do that. So, again, having those relationships with us and us with them has been beneficial to allow us flexibility where other people may not. You know, the larger firms are more of a corporate structure where, you know, the price is the price, take it or leave it. And so, we don't have to operate like that. It's been a great rapport builder with the contractors." [#38]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "We built a niche of balanced a high level of customer service and work product control, quality control of our work products. There's kind of a middle balance that no one else has been able to match quite the same. Geez, that's a tough one to answer. It seems once a company gets their stuff together, once a company kind of figures out how to do the work, they grow too fast, and they turn big, and they either become a big company or they die, or it's the opposite way. There's a lot of companies, a lot of competitors, that we just

generically refer to them as the B-level competitors where they're in our market but they don't have the customer service or the quality control, and they just struggle to make ends meet on these small projects because frankly, they're messing them up more than they're getting them right. So we kind of settled into a niche of a high level of customer service, a high level of quality control and quality assurance and we've resisted the urge to grow bigger than we are and we've kind of settled into the niche." [#39]

- The non-Hispanic white male co-owner of an SBA-certified micro- and WBE professional services firm stated, "From my own perspective, you need to be flexible. As well, you can't be too proud. You have to be willing to do the research. I spend an awful lot of time feeling like an elderly college student. So, you have to be willing to do the research. I have one I'm working on right now that, if you could see my table, there are three textbooks over there that are all tagged and Post-It'd and making sure that I stay current. Flexible, research, and don't be too proud." [#40]
- The non-Hispanic white male co-owner of an SB-, DBE-, and HUBZone certified construction firm stated, "I guess [the key] would be our widespread vast knowledge of different trades and that we can - if there's a set of plans we can build it. We can build anything. I have no doubt of that." [#42]
- The non-Hispanic white male representative of an SB-certified professional services firm stated, "Our project management. The people, and the relationships that we've done and the fact that we put the customer first. The customer experience is everything for us, and we want to make sure that our customers are aware, informed, and are part of the project moving forward, which is not necessarily something that is done per my interviews with clients." [#45]
- The Hispanic and Indian American female co-owner of an SB-certified and uncertified WBE construction firm stated, "Our honesty. That's just it. We're straight up and we're honest, and we don't play the game the industry has to offer. I know that sounds a little harsh, but I'm learning about those and I don't like them too much. But, no, we're just very honest, and our word is our word, so if we're going to do a job, we do the job." [#47]
- The Asian Pacific American male owner of an uncertified MBE construction firm stated, "What I do is I treat everything as if I'm hauling it for myself, so my own personal [standard]. I just treat everything as if it was mine, and the way I want it to be hauled. I don't - just because it's not mine, I don't care. I just put 110 percent in everything I do." [#52]
- The Asian Pacific American male owner of an MBE-, DBE-, and SB-certified construction firm stated, "Communication. My level of communication with my prime contractors, and the level of professionalism that we give. I mean, there's a ton of concrete guys out there, but it's those little things that will set you apart, that a lot of the guys who are so focused on the trade don't - I have a sales background, and just calling back people at the end of the day, and communicating with them about every little detail or change that's happened on the job site. Those are the things they appreciate. It's never the big thing. It's all the little things that really surprise somebody. Especially just calling somebody, getting a call back. I understand how frustrating it is for some people when they need an answer, and they're

sitting there waiting hours on end for you to call them back to help them out. So, I get it.” [#53]

- The Asian Pacific American female owner of a SB-, DBE-, and WBE-certified construction company stated, "Quality of performance is [more] important than quantity." [#59]
- The Hispanic American female co-owner of a WBE-, MBE-, Micro-, and SB-certified professional services company stated, "I think it's the price of services. All the customers, whether it's in private or public, are very cost conscious, so you have to be competitively priced. And I think it's also important that we retain our employees because we've got people that have been here for four years or more, and during COVID I had two of them stolen from me." [#61]
- The non-Hispanic white male owner of a majority-owned construction company stated, "Hard work, willing to do hard work." [#62]
- A comment from a majority-owned professional services company stated, "You have to focus on one area to build your company and that is what we have been doing." [#AV304]
- The Black American female representative of a minority business chamber of commerce stated, "I think a lot of it has to do with the infrastructure that they have in place or not. I think that the businesses that have some semblance of infrastructure ... And I can only speak for my members, who are typically micro-enterprises. They have probably one to five employees, and if they've got a good foundation, with their business, they tend to do better than those that did not. I think the thing that really, we learned during COVID was that those businesses that were able to pivot their business into something that they could put online or use the internet for did much better than those stationary, brick-and-mortar businesses, that relied on a brick-and-mortar, to continue their business. We saw a lot of people go under. We've lost probably 41 percent of our small businesses up here in the Sacramento region, last year, but at the same time, we increased our membership by bringing in 78 new members last year. So I think it's the support that's available for the businesses, and I think it has to also do with their infrastructure." [#FG4]

H. Potential barriers to business success

Business owners and managers discussed a variety of barriers to business development. Section H presents their comments and highlights the most frequently mentioned barriers and challenges first:

1. Obtaining financing;
2. Bonding;
3. Insurance requirements and obtaining insurance;
4. Factors public agencies consider to award contracts;
5. Personnel and labor;
6. Working with unions and being a union or non-union employer;
7. Obtaining inventory, equipment, or other materials and supplies;
8. Prequalification requirements;

9. Experience and expertise;
10. Licenses and permits;
11. Learning about work or marketing;
12. Unnecessarily restrictive contract specifications;
13. Bid processes and criteria;
14. Bid shopping or bid manipulation;
15. Treatment by primes or customers;
16. Approval of the work by the prime contractor or customer;
17. Delayed payment, lack of payment, or other payment issues;
18. Size of contracts;
19. Bookkeeping, estimating, and other technical skills; and
20. Other comments about marketplace barriers and discrimination.

1. Obtaining financing. Sixty-three interviewees discussed their perspectives on securing financing. Some firms reported that obtaining financing had been a challenge but did not offer specifics. Many firms described how securing capital had been a challenge for their businesses [#1, #2, #4, #5, #7, #8, #11, #12, #13, #15, #16, #17, #18, #21, #23, #24, #25, #28, #29, #35, #37, #38, #40, #42, #44, #47, #49, #50, #51, #52, #53, #54, #55, #56, #59, #62, #AV, #FG2, #FG3, #FG4, #PT5, #WT5]. For example:

- The non-Hispanic white female owner of a WBE-, DBE-, UDBE-, and SB-certified professional services firm stated, "It's almost impossible for a small company. It is. And the reason is because they don't consider that you can pay it back. So a beginning company or a small company has 1,000 barriers against them. It shouldn't be our responsibility to fund their project while they're getting their act together. So, no, we shouldn't have to do that. You need our services because we are disadvantaged businesses or we have the certifications you require, but then they don't protect the small businesses from themselves." [#1]
- The non-Hispanic white male co-owner of a majority-owned construction company stated, "Those things are huge. Lines of credit and understanding how all that comes into play, and how valuable it is. And your cashflow, and all that. So it's pretty darn comprehensive. I personally experienced it. Yes, we've experienced it in the company. It's not so much obtaining it as extending it for cashflow needs. So as we grow, we need to increase the financing. So, it is definitely a barrier. You have to have extremely good credit. You have to know a lot of the requirements of assigning a line of credit or getting financing and you have to know a lot of the requirements that they have for financial metrics, so that you can stay in compliance with those financial agreements when it comes to your financial statements and being able to make sure that you're still in conformance with those requirements." [#2]
- The Hispanic American male owner of an uncertified MBE construction company stated, "Part true yes. I have a pretty good-sized project, I'm hoping I got. I'm pretty much done now and then I tried to get a working loan on a bank for 100,000 dollars. I don't even think I

got, it was like 15 or 20 or something like that. And then I have to manage it and then borrow money from friends to keep my business afloat.” [#4]

- The Black American male co-owner of a WBE-, MBE-, and DVBE-certified construction company stated, "With residential, we try to put the onus on the homeowner. Here's a job, it's 100,000 dollars, now how do we pay for it? I always put it in plural form, we, to let them know that I'm here with them. That usually works out fine because, ultimately, the homeowner knows they have to pay. But in terms of government contracts? Man, that's tough because some of these contracts require you to spend large sums of money, just to bid. There's got to be a way around that. You have to have a bond to bid on some of these contracts.” [#5]
- The Black American male owner of an MBE-certified professional services firm stated, "I think erroneous information is put out in the Small Business Administration, for example, small business loans. They advertise banks that are small-business-friendly. Well, if you are a new startup and you go to a bank for a small business loan, you're going to be denied, because they're going to say, 'you have no business experience.' Well, if you're a small business, you're going to say, 'the whole point of me coming to you for a loan is so I can get experience, because I have to have funding to hire people and to execute my plan, but if I don't have the funding, how can I start my plan?' So you're in this moment, the chicken and the egg kind of a situation. So you have to come up with creative means or someone personally to finance you until you can start generating revenue. So the advertisement, I think, is wrong. If you're not going to give small business loans out, don't advertise it or if you're going to advertise it, list the qualifications that you require in order to obtain the loan.” [#7]
- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "I would say [financing is] a barrier. Well, as a small business, it's a barrier because we can't plan for that.” [#8]
- The non-Hispanic white male representative of a Native American-owned MBE-, SB-, and Micro-BE certified professional services firm stated, "We don't have that barrier, but the only reason we don't have that barrier is we've been in business for 18 years. But a firm that has started since the Great Recession since 2008, that's a huge barrier for them.” [#11]
- The Hispanic American male owner of an uncertified MBE construction firm stated, "Yes, when I initially started the company, because I didn't have any experience in trucking, I needed my business partner to get added on, on my LLC. And again, with so low experience, my APR was pretty high. The high APR, in turn, obviously skyrockets your truck payment, which is also a huge chunk of our expenditures.” [#13]
- The Black American female representative of a minority chamber of commerce stated, "Access to capital. A lot of our businesses don't have the money to properly start their business nor to sustain or to scale their business. And so having access to capital and different systems for accessing the credit worthiness and capital readiness of our small businesses is also very important. So I think that touches on another thing, is regulatory flexibility and having the political will to institute policies that will help small business. That's one of the things that's really important that we saw about the 2008 crisis. And the return was that we didn't have a lot of business friendly policies. So most of those small

businesses never be opened and we've seen the same with COVID-19. We've lost over 40 percent of our small businesses are owned by Black people throughout the United States and we've seen that in California as well. And we don't know if those businesses will ever come back. And so that's a lost opportunity for community wealth, more importantly, for generational wealth for Black families. Then we know there's a gap that can't be closed, so I don't want to go down the rabbit hole, but I think those are some of the things that would be important in recovering from a crisis. We have another small business, she is in the personal services industry and has a body care product line. And depending upon the bankers and who we're talking to, and assessing her credit worthiness, they think that there is a saturation in the market of these types of products and why should they give her any money? When if a white woman or a white man came in and had the same idea and the same packaging, they wouldn't even think twice about lending. Despite the fact that the market is saturated, they would give her the chance. So one of the biggest lacks and one of the biggest barriers is just grace, and not having that same grace available to Black businesses. Everyone else is allowed to have a chance, we are not." [#15]

- The Black American male representative of a DBE-, WBE-, MBE-, SB-, and Micro-PW-certified small business development association stated, "[Financing] is, to me, the biggest barrier or the most prevalent barrier - the one I see the most. I am still working on how to overcome." [#16]
- The Hispanic American female owner of a WBE-, MBE-, SCMSDC-, and DBE-certified goods and services firm stated, "Small businesses, it's been a barrier to be able to acquire financing. And a lot of it is quick financing as well, meaning that the process is dragged completely in order for you to be able to obtain a loan of some sort. That's been a struggle for many small businesses, the speed of being able to obtain something like that." [#17]
- The non-Hispanic white female owner of a DBE-, SWBE-, and CBE-certified professional services firm stated, "I think you need an infrastructure that can support everything that Caltrans asks for them to do, meaning you need to have enough people to be able to fill out all the forms right, to be able to respond in a timely manner, to be able to pay your employees. I think it really comes down to enough money. That's it. You need some money." [#18]
- The Hispanic American male owner of a DBE-certified and uncertified MBE construction company stated, "For myself, it's just depending as far as having enough cash flow to keep the payroll going." [#21]
- The Subcontinent Asian American male owner of a Micro- and SB-certified and uncertified MBE construction firm stated, "As a civil engineering business there's not much of a production, or I'm not making products here, so the capital is not much. However, there is a decent amount of capital also required to set up the computers and the technology, especially the software, because civil engineering software licensing could be - could end up being expensive depending on what software I use. That's one of the big overheads in this business." [#23]
- The Hispanic and Native American male owner of a DBE-, 8(a)-, SB-, and MBE-certified construction company stated, "Absolutely. It does but I don't know that it's a - for lack of a better term, I think it's a small business thing and it's a real-life thing that's related to

people's journeys through life. And I mean because everything revolves around credit score, right? Credit score and resources. That's it. If - even the underwritten SBA things are rarely a real opportunity to take advantage of a program, for lack of a better word, because it - still, the underwriting process is pretty much the same as bonding. It's the same way." [#24]

- The non-Hispanic white male owner of a majority-owned SB-certified construction firm stated, "I think I can speak for most contractors. Sometimes we're pretty healthy and sometimes not so much, depending on how - the construction market is pretty cyclical, up and down. It's been - we've had times when we have lost money on projects and it takes you a while to recover. I'm going to say I don't think so. I haven't experienced too many problems, but I think it's about your personal credit as well. You know what I'm saying? It's like if I had poor credit, I probably wouldn't be getting a lot of help." [#25]
- The Hispanic American male owner of an uncertified MBE construction company stated, "Another thing, you know, is get the financing, your accounts set up for you, insurance suppliers. And I think that's the really hard part, you know. But as you start going and it's getting established, I think everything's kind of like a puzzle, you know? Everything will be coming together." [#28]
- The non-Hispanic white female co-owner of a majority-owned construction company stated, "When we were in the position to where, you know, your credit gets established and you're able to get a construction loan, and we would only get one construction loan at a time, because we knew that, at any time, you know, there could be a downturn. At the beginning, yes." [#29]
- The non-Hispanic white male representative of a majority-owned construction firm stated, "Everything's a barrier when you're talking money. Money's a barrier for everyone trying to start a business: whether you can have the money to buy the equipment or not. Just depends on how successful you are." [#35]
- The Black American male owner of an uncertified MBE construction firm stated, "So the industry is construction, and construction has a lot of liability and overhead. So then if a small startup construction company is trying to get in on a local, state, city, or federal contract it's virtually impossible because just to be able to participate the small entity has to be independently wealthy to sustain themselves until they win the first bid and that just makes it impossible. I feel like if there was a way to sort of make it possible for small minority businesses and so on to get to the bidding stage without having to go through so many hurdles then I would be able to participate. The PPP and the [inaudible] during the pandemic was - that worked sweet, except that it just came as kind of a lifeline because the country was shut down. But if I had had access to that when I had started under the same kind of sort of, 'Here, here's a lifeline, go do your thing,' if I had that when I had started out I mean so that I got - I got \$32,000, and then I got \$18,000 from the PPP, and I got \$42,000 in a loan at 3.75 percent. Now if I had gotten that when I started [my company] that would have been a dream. That would have been soup. That means I could have paid the worker's comp and hired a staff and then I would have been able to build my own pipeline going that way. But you know, I didn't have enough liquidity when I started the business to chomp down those overhead items that you sort of incur that cost and then you go out into the world and try to land contracts and make it work. I didn't have the wherewithal financially to take that risk of employing people and taking all the cost of overhead it would take to set

up something and then go chase down a contract. So I was just going forward as a startup, trying to get contracts and build." [#37]

- The Black American female co-owner of a DBE- and DVBE-certified and uncertified MBE construction company stated, "The hardest thing about finances is, like, when you're starting off. No one wants to give you a chance, but I think more so for people of color, they just - no one buys into it. So, you kind of have to prove yourself a little bit more than others, and, you know, there will be 100 people to say, oh, that's not true, but if you haven't walked the walk, you can't really tell me how it goes, or you can't tell me what we feel and what we deal with. But, again, that's not everybody. The biggest barrier is, like, getting financing, you know, when you grow? When you grow and trying to get financing, because growth, for us, we really didn't expect it. I mean, you receive a contact and then all of the sudden, it's just one comes after the other, and they're both, like, tremendous. They want the labor, and so you have to be prepared with payroll and payroll taxes, and, meanwhile, you don't have a line of credit, you don't have any financing, and you're truly dependent on your receivables, which are paid slow." [#38]
- The non-Hispanic white male co-owner of an SBA-certified micro- and WBE professional services firm stated, "Only to say that when we recently went out to look for some - my wife and I just recently went out for some financing or refinancing. They said, 'Well, we can't loan to you because you're self-employed.' Well, what different does that make? I could be working for XYZ and get laid off. We're more likely to be successful at paying this loan back because we're self-motivated. We have cashflow. We're doing just fine. Nothing wrong. They go, 'Nope, we just don't have any place in here for you.' So, yeah, we have issues getting financing. So, the solution, we are really fickle with our finances." [#40]
- The non-Hispanic white male co-owner of an SB-, DBE-, and HUBZone certified construction firm stated, "I think the biggest issue with every small business is cash flow." [#42]
- The non-Hispanic white male owner of an SB-, DVBE- and Micro-BE-certified construction firm stated, "That is the number one thing no one told me about when I was starting my company. We went through a period - the longest period we went without being paid was seven months. And it really almost put us under. We started to run out of places to borrow money from. So that is, in my mind, and I have other colleagues that are thinking about starting their own companies, I tell them, that's the number one thing, that they have to have funding and plenty of credit. And banks don't like to loan money to small businesses. So - that have just started, anyway." [#44]
- The Hispanic and Indian American female co-owner of an SB-certified and uncertified WBE construction firm stated, "You know, they will reach out, and you can reach out to them for funding but, again, when you're a new business, they say they're going to help you but they don't. They don't help you until you have money in the bank, and then they want to lend you money. Everybody I talked to who started just said, 'Hang in there. After about three years, they'll start looking for you,' and that has been absolutely true. There is no funding available for a small business in the beginning." [#47]
- The Hispanic American female representative of a DBE-, MBE-, and WBE-certified construction firm stated, "Getting financing is not that hard anymore. But I can tell you that the first years were almost impossible. To obtain loans, to obtain bonds we had to get like

private loans with higher interest rates like 12 percent because we couldn't get anything from the banks or the FBA. It was really hard for us the first five years." [#49]

- The Hispanic American male owner of an uncertified MBE construction firm stated, "Like today I have to, I had to park my truck for a week and I have to take a long haul trip with another company. I'm going to Tennessee tomorrow to just pay for my truck payment, just to pay for my insurance. Yeah. The long wait of the construction, the pay, the 90 days. I have to work two jobs. I have to work a lot of hours, a lot of hours just to - my second job I worked - I work in the daytime with my dump truck and then I work at night at another company just to pay for my fuel and just to pay for - I have not seen any profit at all with my trucking company, not one dollar, nothing." [#50]
- The Hispanic American male owner of a DBE-, SB-, and DVBE-certified and uncertified MBE professional services firm stated, "Obtaining a bank loan to build my project back in 2012, let's say, would have been fantastic. But because the banks didn't have a way to assess the proper risk of the projects, that was impossible to get. So, that has been an issue from that perspective." [#51]
- The Asian Pacific American male owner of an uncertified MBE construction firm stated, "The hardest thing about being an owner/operator is pretty much robbing Peter to pay Paul. Like a company driver, something breaks down, they put you in another truck, your revenue, personal revenue, keeps coming in, because you're still working. But when an owner/operator, your truck breaks down, you're not only losing the money you could be generating from doing that load, but I figure, and this is just me, but I figure my truck's got to gross \$1,000 a day to keep [me] afloat. If my truck's down for two weeks, you know, that's when you're an owner/operator and you try to get financing, especially if you're starting all by yourself, you've got nobody that can cosign for you. You're just on your own. And maybe you don't have the best credit. It makes it real tough to _____. So you've already got a bigger overhead from the get-go." [#52]
- The Asian Pacific American male owner of an MBE-, DBE-, and SB-certified construction firm stated, "Sometimes cash flow. I think those are the things that hindered my capacity to grow quicker, faster. I think loans are, y'know, we have a credit line; I'm thinking about getting us a second mortgage for cash flow in my public works jobs. But I think we can find the money if we need it." [#53]
- The Asian Pacific American male owner of a DBE-certified construction firm stated, "As a small business I am worried about financing, labor, materials." [#54]
- The Hispanic American male owner of a DBE-certified construction firm stated, "There's not a lot of information out there to kind of form a business and get into whatever endeavor you want. I mean, it's basically left to the banks and how well - how good your credit is. There's not really a lot of information out there for people to grasp onto for funding sources for businesses." [#55]
- The Black American female owner of a DBE-certified and uncertified WBE and MBE construction firm stated, "I'm trying to get my dump truck. I have a 20-ton dump truck to work. So what I, and I just acquired it last December. Right? And then I worked in October of last year. I only worked 11 days, but I'm grateful for that. It rained in January. It rained in February. In March, COVID. Then in April, the finance company then called the whole truck

loan due. And I haven't surrendered my truck yet. Because I know what, not my fault that all of this, and I'm going to hold out. Because I was on the phone with a nonprofit in Wells Fargo bank. They talking about how they got a plan, but already women on businesses because that's what I am." [#56]

- The Asian Pacific American female owner of a SB-, DBE-, and WBE-certified construction company stated, "Because people who have the money can last longer. They can hold on to the payables. But people who don't have a lot of savings for, then it will be scary thing to move forward." [#59]
- The non-Hispanic white male owner of a majority-owned construction company stated, "Financial barriers is probably the biggest ones that I can think of. You buy your materials, and the cost, and stuff, and then see a lot of people that just because they did a big project doesn't mean you're set, you've got to pay your bills." [#62]
- A comment from a WBE and MBE Subcontinent Asian American-owned construction company stated, "It is very difficult to start business in California, [the] funding part is very difficult for a business. I don't have access to capital so I have factoring service and it will charge me 2% on my invoices to clients." [#AV58]
- A comment from an MBE Black American and Hispanic American-owned construction company stated, "Little difficult getting funding." [#AV75]
- A comment from a WBE construction company stated, "We've had trouble with budget constraints." [#AV130]
- A comment from a WBE construction company stated, "In our area, not that hard to start a business. Need to have substantial nest egg to do it in order to cover startup costs." [#AV143]
- A comment from an MBE Black American-owned professional services company stated, "Lack of financing by construction lenders." [#AV111]
- A comment from a majority-owned professional services company stated, "Banks are starting to pull their funding for some projects." [#AV325]
- A comment from a majority-owned construction company stated, "Difficult on bonding, for large projects, lot of people will bid low and incorrectly to get the job financial/lack of funds/cash." [#AV8125]
- A comment from a WBE professional services company stated, "Funding sources are a challenge. In particular lines of credit. Can only grow as fast as my credit line." [#AV8198]
- A comment from a majority-owned construction company stated, "Funding to buy equipment." [#AV8205]
- A comment from a WBE and MBE Hispanic American-owned construction company stated, "Hard to get bank load, cash flow, need to have the cash reserves." [#AV8253]
- A comment from an MBE Hispanic American-owned construction company stated, "We had an [issue] trying to expand and were looking to look for loans and we were not qualified for anything." [#AV827]

- A comment from a majority-owned professional services company stated, "Problems with overhead expenses, [admin] expenses." [#AV8403]
- A comment from a WBE professional services company stated, "Barriers in 2008 when economy collapsed and we acquired a lot of debt hamstrung us so we couldn't bring in employees and can't being a prime for Caltrans on-call because of debt so have to sub. Need to demonstrate ability to handle prime contracts." [#AV8422]
- A comment from a majority-owned construction company stated, "Its difficult because we are such a small company, we are considered a micro company, we don't have a lot of funding available but its hard to go after big contracts, bonding is hard because we are such a small company." [#AV8450]
- A comment from an MBE Hispanic American-owned construction company stated, "Starting a business for scratch is always really challenging. Difficult to get bigger projects because of up-front costs. Difficult to get funding or financing from financial institutions to do that kind of work." [#AV8495]
- A comment from an MBE Hispanic American-owned construction company stated, "Really hard thing to do to start a business in this industry. They want to see history assets but if you are just starting you don't have that." [#AV8510]
- A comment from an MBE Hispanic American-owned construction company stated, "Trouble expanding because budget is small. Can't bid on bigger projects." [#AV8550]
- A comment from an MBE Black American-owned construction company stated, "It takes money to grow a business and difficult to receive a grant or loan. The bank never extends my credit for a loan to generate a revenue to operate." [#AV8554]
- A comment from a majority-owned professional services company stated, "Lack of financing support and marketing." [#AV902]
- A comment from an MBE Black American-owned professional services company stated, "Covid 19 affected the momentum on personal loans that in itself affected many [businesses.]" [#AV905]
- A comment from a WBE professional services company stated, "Very difficult getting going to find financing." [#AV915]
- The Black American male representative of a professional services business advocacy association stated, "How to structure financially. Financially is a key component. If half of our businesses were stock investors or Forbes investors, imagine the capital they can still have coming in, even though they're not in business, all right? So financially how to structure the business during the pandemic and then also the power of marketing, social media, things of that nature." [#FG2]
- The Hispanic American female representative of a professional services business development organization stated, "[I] think it's up to financial institutions and everyone to a degree. Look at how they grant money, how they do loans, because businesses that are really part of our economy are not all the high-tech or big corporate. They're these small businesses, mom and pop shops, hairstylists. And so we need to find better ways, to get them access to capital, that's simplified and understandable." [#FG3]

- The Black American male representative of a minority business chamber of commerce stated, "First of all, there's no access to capital or very little access to capital. And then you have the financial institutions that are normally already tightened up, in some cases, during COVID, rather than becoming more of a cooperative partner or trying to becoming a cooperative partner with Black business people. And so that's a barrier, in itself, and even though, in their distribution ... And I'm talking about the financial institution, now whether it be a bank or a CDFI or whomever was distributing the money, a city government, county government, because they distributed a lot of money as well ... they were not in a position or did not position themselves to be able to assist the Black-owned businesses within the state of California." [#FG4]
- The Hispanic and Native American male owner of a DBE-, 8(a)-, SB-, and MBE-certified construction company stated, "Bonding, financing, insurance are very difficult to get." [#PT5]
- The female owner of a DBE- and WBE-certified construction firm stated, "Access to capital is still problematic for many DBE [companies]. The subtleties of banks who can no longer say, 'I need your husband (who has no involvement in my business) sign on the credit line' (1980s and 1990s) have changed to requiring a more thorough review of DBE applications for credit lines than for majority male owned companies. This comment is not just mine, but has been repeated to me several times by [business organization] members." [#WT5]

2. Bonding. Public agencies in California typically require firms working as prime contractors on construction projects to provide bid, payment, or performance bonds. Securing bonding was difficult for some businesses and thirty-six interviewees discussed their perspectives on bonding [#2, #5, #7, #8, #15, #17, #18, #19, #20, #21, #24, #26, #29, #35, #42, #47, #49, #54, #55, #AV, #AV2, #FG2, #FG3, #FG4, #PT12, #PT5]. For example:

- The non-Hispanic white male co-owner of a majority-owned construction company stated, "Getting a bond, getting collateral, having collateral, personal guarantees- Those things are huge." [#2]
- The Black American male co-owner of a WBE-, MBE-, and DVBE-certified construction company stated, "Been an issue for me recently, with a couple of projects that we bid on government projects. You had to have a bid bond. One of them was of a million dollars. This doesn't happen overnight, so you find yourself in a position where you're trying to partner up with people you've never done business with before, just to get a job. Or just with the hopes of getting a job." [#5]
- The Black American male owner of an MBE-certified professional services firm stated, "You're not going to get bonded unless you have revenue, or bonding's determined based on your financials. So if your financials aren't strong, the amount of being able to start a company, guess what? You're not going to get bonded. And other companies, other bonding companies, [don't] want to cover you, because you have a potential to hurt their bonding capability. So you have to just work, finally get to a point when you have a strong revenue, and then go out and get a bond. So I think that's a misnomer, as well. Number one, you need to train people on what the criticality of having a bond really is, but I don't think small businesses, or new businesses, even understand that being bonded is a lifeblood or a

lifeline, because if you have to exercise a bond, that could destroy your company, and I don't think a lot of people understand that. So the proper information is not properly portrayed, if you will. So my thing is tell me straight while I'm here, and then I'll know how to deal with it. If you tell me I can be bonded, then tell me what I need to do to be bonded, and then tell me and let me know the criticality of, the significance of, the bond that, Hey, this is insurance that you can't ever use, because if you do use it, you'll never get it again. And I don't think that's properly disclosed." [#7]

- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "I would imagine that would be a barrier to get the bond, but we have not done that yet." [#8]
- The Black American female representative of a minority chamber of commerce stated, "One of our small businesses is a contractor and he owns his own truck company that does fleet washing, solar panel cleaning as well as janitorial services. And he was pursuing a contract with the city that was valued about 500,000 dollars, it was a janitorial contract. And he's an African-American man, he's DBE certified and he's small business certified. And in going through the application process, he won the bid, and they put in the bid package that there was a bid bond, and it was at exorbitant costs that his business could not absorb. And we had to advocate on his behalf to talk with the city and identify why that bid bond and bidding included. Because for a janitorial contract, it's not under public works, and public works is where you should have a bid bond be applied. And so if we hadn't been involved in that process, his company would have had to absorb a cost that they couldn't have. It would have bankrupted him and could have closed his business. And that's a barrier that... barriers in access to knowledge, but also access to advocates. He didn't know that that was a boilerplate language, it should not have been included in the contract. He needed our second set of eyes to identify it as a problem. But then he also needed us to advocate on his behalf to make sure that it was removed and that his contract would go forward successfully. We don't see those same kinds of barriers, and we don't see that same need for advocacy when we're working a little businesses owned by white men and white women. We do not see that. write them an irrevocable letter of credit. We don't have very many partners in the Central Valley, Central Valley is capital starved just to begin with, it's not like San Francisco and not like LA, and that there's a lot of banks and a lot of firms that are willing to invest in startup companies. Central Valley being an agriculture-based economy, has not seen much value in investing in small businesses, especially investing in disruptive technologies. So there's not a huge appetite for investment here, so we're relying on our banks and our CDFIs to write these letters of credit, and especially irrevocable letters of credit for bonding. Case in point, one of our small businesses, he's an electrical contractor. When we first started working with him, he only had three employees. In the last three years, he's grown as accounts receivable over 3 million dollars, and now has 20 employees. And as he's continued to grow and gain these contracts, his bonding capacity has needed to increase. But in the last year, because he's had an imbalance in his cashflow, because he's already on so many contracts, his bonded capacity was decreased, and he doesn't have the collateral to put up. There's no institution currently that's providing that collateral that would help him continue to sustain his business. So we see it in a lot of different ways that these barriers exist, specifically for small businesses but are even more impactful for small businesses of color, because there's no resources that speak directly to them." [#15]

- The Hispanic American female owner of a WBE-, MBE-, SCMSDC-, and DBE-certified goods and services firm stated, "That has been an issue for a lot of organizations, yes." [#17]
- The non-Hispanic white female owner of a DBE-, SWBE-, and CBE-certified professional services firm stated, "That's been the biggest challenge for me is making sure I have the bonding capacity. Because you think about, if I bid three or four jobs at a time and three or four jobs are going at a time, that means my bonding capacity, and if each one of them is 3 or 4 million and I have a bonding capacity of 20 million - which sounds like a lot of money, but in this industry it's not - \$20 million goes real fast because they only allow you to bond what they know that they can cover just in case you can't meet your needs, you go out of business for some reason. All of that is also subject to your line of credit. I think one of the problems when they do these big, mega projects and the contract went from - normal contracts are 100 million, 130 million, that's not even a big contract. They might do \$300 million contracts. They've got two general contracts coming together to do those as a joint venture because they, too, don't have the bonding capacity or the manpower or resources, infrastructure to do it. Sometimes they'll ask what your bonding rate is. My bonding rate because, again, I don't have a huge bonding ability, my bonding rate is higher than most people's. It's 25 percent of the total bond. Usually the general contractor has to pay for that. Well, they might have - my competitor might have it down to point-five. So, he's got an advantage over me right there." [#18]
- The Black American male owner of a DBE- and SB-certified and uncertified MBE professional services firm stated, "But number one, on the bonding and insurance for construction contractor, that is one of the major barriers. It is a major barrier. And the thing is that when - and this is for all; this is not only for Black contractors, this is for all. But when it comes to Black contractors, and maybe other minority contractors, they can be very discriminatory. In other words, they can go in and say, 'Okay, where's your back? Do you own your own home? Do you own all of that?' And so next thing you know, it's not about whether or not you can perform the job, it's about whether or not they decide that they're going to give you insurance or give you bonding." [#19]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "Of course it's a barrier. They [DBE firms] have trouble getting bonding to cover the jobs." [#20]
- The Hispanic American male owner of a DBE-certified and uncertified MBE construction company stated, "So bonding, we've only obtained bonding for one project. And I know that some of the projects we're required to provide your bonding rates, and that's been difficult, because as a small business owner and it going through my credit, we don't necessarily have the ability to bond the jobs as easily. Luckily, though, a lot of the contractors don't require us to provide the bond, or they'll work with us where they'll take like a five percent retention on payment until the project is done, and then they'll release our retention. But most of them, for traffic control, for the type of work that we do, they don't require the bond." [#21]
- The Hispanic and Native American male owner of a DBE-, 8(a)-, SB-, and MBE-certified construction company stated, "Bonding, the same exact way as financing, where credit scores are central. Maybe even worse because the bonding company, they even have other, I think, data resources where if you made a mistake eight years ago, nine years ago, ten years

ago, chances are the industry in general, the bonding company industry, the bond industry is aware of that. And it may not be said when they're underwriting your account, but it enters into the equation. And if there's a couple things that are still not stellar - for instance, credit scores or things like that - they can always blame it on those things as being marginal. They're not interested quite yet in helping you. And the bank is the same way. As long as you don't have a bunch of money they can't help you. But as soon as you get a bunch of money then they're happy to help you. for instance, if you're De Silva Gates you're going to get - your bond rate is going to be 0.004 percent. If you're us and you're lucky your bond rate is going to be six percent, seven percent. So, it's a horrendous disadvantage when you're bidding with people that have a bond rate of - a standard one, I would say, is like a one or a two. And if you have a six or a seven on a job that's \$25,000.00 you're already disadvantaged just by buying the bond. I can tell you honestly that it's been more complicated getting a job as sub because a lot of the bigger companies are being more and more aggressive about having everybody supply a bond. And so - and there's a variety of reasons you can't. I don't know if you've ever heard the semantics of it, but you get a bonding line from a bonding company. They're going to give you so much single job. They'll say you can have a million dollar single job or you can have - and three million advocate. So, you can have four \$500,000.00 jobs and a one million dollar job, or you can have one \$2 million job and a one million job. But not more than three total. And so, there could be things where you've got jobs already lined up and the bonding company doesn't want to give you credit back for them, meaning they don't think you're far enough along in the process of being done to count it off of your balance of bonding line for the jobs that you have. And so, they won't give you one for the next one. So, what happens is the prime contractor - and they all say - I always found it interesting on their - everybody sends us the advertisement for the bids because they've got to do it to comply with the good faith effort requirements. And most of it's subbed out. We get calls - I mean, literally 30 or 40 a day - and e-mails, I probably get 100 a day all about 'Do this job with us and we'll supply this and we'll supply that. And we can help with bonding lines, we can help with insurance, we can help with blah, blah, blah, lines of credit, yackety-yak.' And none of them - and I mean none - ever do it or are ever going to do it. They put it in there because they have to put it in there. And it says it because it says it. But anybody that's ever done this for a living for very long knows that if I call one of these contractors and say, 'Hey, can you guys help me get a bond?' they're going to go, 'Yeah, here's the name of our guy. Call him and he'll set you up.' And then their guy gives you the 'Oh, send me over these things, your financial information, blah, blah, blah, blah, blah.' And then guess what? The guy really can't give you a bond. The guy can only tell you that 'It's nice and we tried but it's not going to happen.' Right now the only thing that limits us from running around bidding jobs as a prime is the bond. That's it. We know how to do it. We can do the paperwork. We know how to do the responses. We know how to get online and bid the job online. We know how to do all the pieces. The only thing that keeps us from doing it is a bond." [#24]

- The Middle Eastern American male owner of a construction company stated, "I know that for most contractors one of the biggest barriers is the bonds and getting the bonds big enough for them to be able to do the work. And of course apply the same question in perspective to if I were to get a \$10 million bond for example this is challenging. This I

won't be able to do but if it's within under \$2 million then it's not challenging. There's plenty of work at that price range" [#26]

- The non-Hispanic white female co-owner of a majority-owned construction company stated, "At the beginning, yes, and to a certain dollar amount, but then we're not - of course that would be. You know, we're not looking at million-plus-dollar jobs. Those are for the bigger companies. Again, I thought that, you know, we could maybe break into that, a couple years ago, going the direction that we were, but, you know, things have been stalled. So, because when you require a bond and higher dollar amounts, a million-plus, then you have to have the collateral to substantiate that. And that means personal collateral if the business doesn't have enough collateral to cover it." [#29]
- The non-Hispanic white male representative of a majority-owned construction firm stated, "Financing is the hardest. When you're smaller. I mean, financing means bonding. You have to have certain size bonding bill to bid jobs when you're a prime, small." [#35]
- The non-Hispanic white male co-owner of an SB-, DBE-, and HUBZone certified construction firm stated, "Well, it kind of depends on our ability - or ability to get a bond. So right now, you know, everything's below \$100,000.00 for us. It's a slow process to grow our bonding Yeah, that's the second roadblock. Because it takes so long before they're not - and here's the process that like drags you down. So if you're not already a rich, wealthy person that can show three years of financial reviews for your company, then - which how would you do without being able to bond so they're kind of relying on the private sector to be so good that your business is in this beautiful spot, but to start off in public works you have to use your own personal credit and money. And every time they pull your credit to do a bond it puts a big ding on your credit. And they do it again and again, and after a year they're looking at you, saying, 'Why is your credit so terrible?' Well, because you made me use my personal credit and indemnification to bond, because you won't give me access to bonds through my company until I have three years of financial reviews and show that I'm good and profitable." [#42]
- The Hispanic and Indian American female co-owner of an SB-certified and uncertified WBE construction firm stated, "I think we had just one contract that we were unable to bond because we were a small business, and we had to walk away because we had only one job." [#47]
- The Hispanic American female representative of a DBE-, MBE-, and WBE-certified construction firm stated, "Well, that's one of the things right now that there's some projects out there but they're big and you have to get bond. Our jobs like I said they can go from \$2,500.00 to I think the biggest one that we ever billed is \$4 million. So some of these ones are five and six that you never did before. They don't want to bond you for something that you - even if we're capable of doing it but you don't have nothing that shows that you did it before you can't do it. I think it's still - like I said not to get loans but we still have issues getting bonds for big projects." [#49]
- The Asian Pacific American male owner of a DBE-certified construction firm stated, "Under 400K - Limited bonding Capacity limits size of contracts. There are few jobs that are the size he needs, most are 700-800K which is over his bonding capacity. 'What I am looking for is very specific 400K and less.'" [#54]

- The Hispanic American male owner of a DBE-certified construction firm stated, "Typically it's a cost-prohibitive thing. Bonding is usually you're looking at tens of thousands of dollars, depending on how big the bond has to be. So that can be a problem for a small shop, especially getting started. Once you're established, it's easier. But trying to get started, you know, a lot of people don't have \$10-, 20-, 30,000.00 laying around to get bonded for something." [#55]
- A comment from an MBE Native American-owned construction company stated, "It's difficult getting banking and bonding and I'm part of a Caltrans program that supports that." [#AV153]
- A comment from a WBE and MBE Hispanic American-owned professional services company stated, "It's hard to get bonds for large projects because we are a new company." [#AV30]
- A comment from a majority-owned professional services company stated, "We are just getting into public works and our bonding capacity is limited to 1/2 million dollars." [#AV175]
- A comment from a majority-owned professional services company stated, "Obtaining bonding is always a barrier with a newer company." [#AV228]
- A comment from an MBE Black American-owned professional services company stated, "The other limitation is bonding." [#AV237]
- A comment from a majority-owned construction company stated, "[It's] Impossible for a small biz to get awarded anything from Caltrans unless you are native American, cant post bonds, you require 4 bonds and you don't exonerate them for two years." [#AV8145]
- A comment from an MBE Hispanic American-owned construction company stated, "We have experienced difficulties getting bonded for larger jobs because we don't have any history of doing any large jobs." [#AV8290]
- A comment from an MBE Hispanic American-owned construction company stated, "bonding." [#AV8344]
- A comment from an MBE Hispanic American-owned construction company stated, "On of the biggest issues would be project bonding " [#AV8449]
- The non-Hispanic white female representative of a construction business advocacy association stated, "I'm firmly in favor of the DBE program. I mean, when I started, what it actually allowed for me was to bid contractors and they would waive like bonding requirements and things like that, because they wanted to meet their DBE goals and so they wanted me to be on the job. And that was a huge help because I don't think I had to get a bond until I was five years into the business. And now mind you, when it starts out, you start with 40,000-dollar contracts, then you get a 250,000-dollar and that becomes huge, and it's a building block. You do baby steps." [#FG2]
- The Black American male president of a professional services business development organization stated, "I mean, let's face it, in the real world, especially when we're talking Department of Transportation, this is construction. People get hurt. It's dangerous, right? Insurance and bonding is a big deal, so you don't just want a partner or hire anybody, and that comes from trust. And so that access is big." [#FG3]

- The Black American male representative of a minority business advocacy organization stated, "Some of the barriers that we face, being a minority owned civil contracting firm was, like he mentioned, the insurance, the bonding. That cost us a lot of money. And it's like I can put it on pause. So there is less money coming in, more money going out, which is also just devastating to any company's books, let alone a minority owned company, which only get paid 60, 90 days, from the time that you invoice them, sometimes, 120. So start looking at some of the policies and when paid should be removed. That's a barrier. It's fair to the primes, who has billions of dollars in the bank, but for a company like mine, we don't have billions of dollars in the banks. We don't have millions of dollars in the bank. So creating a process and procedures that allow companies to succeed, small companies to succeed, would be the best method and approach, that I would take. And like he mentioned, that this is a perfect time, perfect opportunity. Let's remove some of the barriers. Let's remove some of the restraints and engage these companies, because they need the work just as much as everyone else. The smaller the company, the more the community's affected." [#FG4]
- The male representative of a DBE-certified firm stated, "A respondent from a virtual public meeting stated, "For the people behind us, they're having to struggle, because they're unable to bond a million dollar project, five million, especially a five million project, to get the bond, to get the financing." [#PT12]
- The male representative of a DBE-certified firm stated, "A lot of these companies advertise, if you need assistance in bonding or financing, 'We're going to help you.' That's just a myth." [#PT12]
- The male representative of a DBE-certified firm stated, "Because no prime is going to help you get the bonding if you don't have the financials to back you up." [#PT12]
- The Hispanic and Native American male owner of a DBE-, 8(a)-, SB-, and MBE-certified construction company stated, "Bonding, financing, insurance are very difficult to get." [#PT5]

3. Insurance requirements and obtaining insurance. Forty-one business owners and managers discussed their perspectives on insurance [#2, #4, #8, #11, #12, #13, #16, #17, #18, #21, #23, #25, #26, #29, #35, #36, #38, #41, #43, #44, #49, #50, #52, #56, #59, #AV, #AV2, #FG2, #PT5]. For example:

- The non-Hispanic white male co-owner of a majority-owned construction company stated, "The insurance side of doing business is continuing to cost more money. Have workers' comp insurance. More general liability costs are increasing." [#2]
- The Hispanic American male owner of an uncertified MBE construction company stated, "They [have] never been a barrier but at the same time it's too much money, a small contract out to put for all the insurances back and forth. That's pretty much with most of the profits go that's for insurance I would say least 40 percent [of my profits go to insurance]" [#4]
- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "We've obtained insurance. We're paying for it right now. It's quite a bit of money, but we're paying for it right now. We pay, it varies. Some clients, when you have one to 1

million, some clients want 4 million, so we're paying for 4 million right now. It's costing about 10,000 dollars a year for the insurance, which is quite a bit of money" [#8]

- The non-Hispanic white male representative of a Native American-owned MBE-, SB-, and Micro-BE certified professional services firm stated, "It's not because we're tenured into a system, but for a newer business. Absolutely. It'd be very challenging. Certainly, they do. Absolutely. It's one of the things that makes us more competitive is we have had a long history, a very conservative business practices, which just means we save our money and we couldn't afford to start my business [if] I started today and be competitive where we are. It's impossible." [#11]
- The Hispanic American female owner of an MBE-, WBE-, and SB-certified professional services firm stated, "It's relevant, because it's also an expense. Yeah. It adds up." [#12]
- The Hispanic American male owner of an uncertified MBE construction firm stated, "I wouldn't say barrier, but it was a little bit of a hurdle, which is the same thing, because I had no experience with the industry. As a new driver, sometimes my insurance premiums [would be] through the roof. I got denied by several insurance companies because of my lack of experience. Once I hit the two-year mark in the industry, my insurance premiums went drastically down." [#13]
- The Black American male representative of a DBE-, WBE-, MBE-, SB-, and Micro-PW-certified small business development association stated, "That's the same thing and [for] a lot of those, it's not a matter of the[m] being accessible; it's a matter of having the finances. And so, you know, a lot of the things are indirectly tied to the ability to be able to obtain the finances to get them." [#16]
- The Hispanic American female owner of a WBE-, MBE-, SCMSDC-, and DBE-certified goods and services firm stated, "I wish there would be some form of concentration to help businesses, [it] is the fact that it doesn't change with workers' compensation. There needs to be some type of modification there and some type of control [such] that people are not overindulging in lawsuits, and many of the lawsuits are not suing. There needs to be some type of regulation that we do not get frivolous lawsuits that are occurring that many of us overall are paying for as a group. I think that there needs to be some controls there, so that way the fees of workers' compensation increases. If we were to correct this problem, then the situation wouldn't be out of hand." [#17]
- The non-Hispanic white female owner of a DBE-, SWBE-, and CBE-certified professional services firm stated, "The Workmen's Comp insurance, if you have any kind of accidents or any kind of problems, your mod rate gets dinged. The higher your mod rate, the more of a risk you seem to be for doing. For example, if I've got a guy, he cuts his finger, goes to an urgent care, and they don't even need to give him stitches. But because he went to urgent care to have it looked at, that has to be an incident that I have to report. Small businesses, the formula for small businesses, it's not good. I mean any time - so, if I had three of those all year long, which doesn't seem like a big deal, that's still looking like I had three incidences of accident." [#18]
- The Hispanic American male owner of a DBE-certified and uncertified MBE construction company stated, "Insurance is a barrier. Two years my insurance premiums were fairly low, or I would say, reasonable, between the commercial auto and the general liability and

everything else that I needed to provide. But a few years ago, two years ago I think, my rates more than doubled, and it's kind of due to one of the requirements on the policies. I had multiple, [be]cause my old carriers dropped me, and they said that they are no longer insuring the type of work that I do, due to the risk. And so, then the rates increased substantially with the new carriers that I found. And a lot of it had to do with the auto policy and one of the requirements on it that were really specific. In fact, like the job that we had for, [you] know, the almost \$1 million, we almost lost it. They wanted to take away the project from us because we weren't able to comply with the insurance requirements. And so, I sent them a letter saying, 'We're in the process of getting this resolved. I'm a small business, [you] know, and please don't take this opportunity away from us.' And so, they gave me a few days. Luckily, we were able to resolve it, but in doing so, my insurance premiums doubled." [#21]

- The Subcontinent Asian American male owner of a Micro- and SB-certified and uncertified MBE construction firm stated, "[I] mean, the insurance part I can say it has been specific to my business that I do. So, a lot of the solutions in the earth retention that are provide are temporary solutions - so, temporary shoring or a temporary retaining wall just so that they can build something else when the earth has been retained. And so, the temporary has been always debated in the court by all the experts. So, it could last anywhere from a few days to two years. So, the real problem is when there is an unexpected event, let's say like an earthquake or something, that hits during this temporary period, then the insurers are not really certain who will pay for it. If the contractor or the client files a claim, who's pocket is it going to come out of? So, that's been the real challenge in the field that I work with. So, that's why insurance has been a question, meaning it has been difficult to get insurance. But I think it has nothing to do with me; it's just the line of work I do because there is a lot of uncertainties with what I deal with. And so, not all the insurance companies actually provide insurance specifically for earth retention civil engineering business. There's very few that actually take the risk and are able to provide - I might have contacted as much as 20 different insurance companies, all nationwide, like big names, but I was able to deduce probably 3 maybe - or I could think of 4 who were willing to provide insurance for this kind of work." [#23]
- The non-Hispanic white male owner of a majority-owned SB-certified construction firm stated, "I mean it's all expensive. If I was going to complain about anything, it would be the cost. But getting insurance is not a problem. That has a lot to do with your track record as well. We try to do a good job managing so we don't have accidents [but] anybody can have one at any time. But, no, I think we're okay there other than it's expensive. Everything's expensive today." [#25]
- The Middle Eastern American male owner of a construction company stated, "Right now I don't have the funds for the insurance, all the workman's comp. All of this is now inactive just because of the 2020 and the aftermath of it." [#26]
- The non-Hispanic white female co-owner of a majority-owned construction company stated, "Yes, they're wonderful. And it was hard - you know, when we were a small company, too, whenever it hit about the whole Obamacare thing, we paid for, and, you know, we didn't have to, it was, like, ten employees or under, you didn't have to pay for their health insurance. That was another hit, too. We paid for their insurance, their health

insurance. And back then it was, you know, like, \$750.00 a month for everybody to be on this policy. It was only \$250.00 deductible, and it was an incentive, it was like a bonus, you know, for our guys to stay with us. [Be]cause we know that they can go somewhere else, like, with a union company, and, have their benefits paid for. So, it was kind of a win-win, you know, we appreciated them, we were able to give it to them, and they stayed with us. When we lost that, because we can't afford both workman's comp because it's, what, last time I checked, I think it was up to \$5,000.00 it would've been, a month, you know, for a health policy, and it's a high deductible, you know, I think at the time it was, like - I wanna say before Covid, so it would've been the year before. So, I check on it, every year, so see if maybe, you know, it'll go down. But, no, you know, \$2,500.00 deductible, now I think it's \$3,000.00, and when they can go and they can buy, you now, their own health insurance for \$200.00 a month versus what we're paying, so that's what they do. And that was kind of a kick in the gut, when we had to pull them off and just, you know - yeah, that was hard. you go to the CSLB website and sometimes I'll tell them, 'Well, you know, make sure the contractor has workman's comp. It'll be listed on their license.' And if they don't, that's a big red flag, [be]cause, what, are they doing the job themselves, you know? Are they just there by themselves doing the job? You know, that's an indicator, but then some of them do, there's companies that - you know, because we're seasonal, so we don't work during the winter. So if we don't work, we don't pay the comp. So, for instance, or if we're down because of Covid, we're not paying that monthly workman's comp bill. We pay it when we work. So, on the weeks that we have payroll, you know, that - so there's the monthly report, then, that's done with workman's comp. So even some of those characters will say that they have comp, but then if they're only reporting they're working, you know, three jobs a year, they only pay on three jobs a year. So, I don't know, it's been very difficult to navigate through all this, so it's not just a standpoint of what's going on with California or the economics of California, but it's also stemming from what other companies or competitors are doing." [#29]

- The non-Hispanic white male representative of a majority-owned construction firm stated, "Insurance is expensive." [#35]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "We actually participated in getting a state law changed on that, with the HCEC, which is the duty to defend. There was an oddball law that said - well, an example was: a larger company than ours did roadway work down in Southern California and then somebody was driving on the roadway and was drunk, got in a wreck and killed somebody. And so, the first thing they did was to call the engineering company up and say, 'Look, you're responsible for this.' And nobody thought that that was a fair. There was a quirk in the liability law that allowed the engineering company who did the design to be sued for this person's untimely death, but it had nothing to do with the roadway or anything like that. It just had to do with [them because] their name was on the list. So, we got that changed so that. [It] took a long time, quite a few years, to get that changed so that they won't be calling the engineering company the first thing. I mean, especially when it has nothing to do with the design, just has to do with human error. And there was no way for companies to get insurance on this because the insurance companies would not touch it. Because it didn't make any sense. And so we struggled through that, the HCEC for five years, and it was finally approved to change that so that engineering companies are not the first people to be called on those oddball

situations. Obviously if it's a design flaw then they're responsible. But that's not what we were talking about. So that's something that did get changed in the legislature, which was a big problem for some of these medium to large-size companies." [#36]

- The Black American female co-owner of a DBE- and DVBE-certified and uncertified MBE construction company stated, "[I] did notice within the last year, I don't know if it was because of Covid, but a lot of my contractors increased their insurance requirement. You know, I even had one that [had] language from the '80s, which was just silly, but, you know, that caused us to have to change our whole insurance policy because it was a multi-year contract that we had already bid on, so it would be nice if insurance requests in California could be universal. Like, this is what you need as a sub, or we look at what you're doing, you know, and this is what you need. And I know everybody, you know, just trying to protect themselves, but we just need to understand that a small business cannot obtain a \$10 million policy, and you - and the thing is, they ask for a \$10 million policy, but they couldn't guarantee me a minimum amount of work." [#38]
- The Black American male owner of an SB- and MBE-certified professional services firm stated, "I think it's just a matter of really looking at how to support those type of programs. because even though I'm a small business - a micro business - you know, I'm still required to carry the insurance liabilities, the professional engineering liability insurance, as well as the other - well, I can't think of the name of it right now, but the other insurances that are required for liabilities in going into facilities and things of that nature - including the automobile liability and other." [#41]
- The non-Hispanic white male representative of a DBE-certified and uncertified WBE construction firm stated, "I think the hardest thing for a small business is that the regulations that are incurred on us, anywhere from the liability from workman's comp to just having insurance for the prime contractor that wants \$5 million worth of insurance, and the challenges of saying, 'hey, we're just spreading water. We're not erecting anything. We're not building anything.' You know?... \$5 million of insurance is really hard to carry for a little mom and pop shop. And the thing that's prevailing in certified wages, and then you've got \$10.00 to \$14.00 of workman's comp on each salary on top of that. And so, I think those are the real challenges that we have, is just the regulation and the amount of insurance that's required." [#43]
- The non-Hispanic white male owner of an SB-, DVBE- and Micro-BE-certified construction firm stated, "[It] was a lot more expensive than I thought it would be. The only issue that we ran into was we were on board with a great insurance company, but our account was too small. So after about a year, they handed us off to another company." [#44]
- The Hispanic American female representative of a DBE-, MBE-, and WBE-certified construction firm stated, "[Lately] a lot of [insurance] companies in California have been closing. So, the ones that [are] still there [are] charging you a lot lately. For a business it's around \$100,000.00 a year." [#49]
- The Hispanic American male owner of an uncertified MBE construction firm stated, "I pay \$1,800.00 a month in insurance alone. The broker demands that I have a million-dollar insurance policy on my truck. A lot of people, the dump truck I tell people how much I pay for insurance and they're like. 'You're crazy? What?' because they're paying like \$700.00 a

month, \$500.00 a month for insurance and I'm paying \$1,800.00. And I had asked the brokers why. They said 'because you just started.' I'm like 'but I've been driving for six years. I've got no accidents or nothing'. They're like it doesn't matter. That's what it is." [#50]

- The Asian Pacific American male owner of an uncertified MBE construction firm stated, "And I think our fuel prices and our insurances for owner/operators, we don't get the price break like the big companies do that have got a couple hundred trucks. They don't have that fleet pricing. So the owner/operator got the highest overhead and the last amount - the smallest margins to make a go at it. it's one of your highest overheads." [#52]
- The Black American female owner of a DBE-certified and uncertified WBE and MBE construction firm stated, "Because I'm my own CEO, the corporation, and I happen to have the license to drive the truck. They want me to have workers' comp insurance. That's another car that I didn't put into my initial startup costs." [#56]
- The Asian Pacific American female owner of a SB-, DBE-, and WBE-certified construction company stated, "I [made a] mistake many years ago. I finished a job, I got paid and I did not save the money I [made]. And after one year, the insurance come audit. They said, 'Oh, you make this money. Here is an extra charge you'll have to pay.' Oh, my God. I have to find the money, borrow the money to pay that insurance money after one year. So, those are the areas, small business did not see." [#59]
- A comment from a majority-owned construction company stated, "The only problem is costs for things like worker's comp." [#AV23]
- A comment from an MBE Native American-owned construction company stated, "The umbrella liability can be quite pricey on a small contractor compared to federal and other agency requirements." [#AV52]
- A comment from an MBE Hispanic American-owned construction stated, "We've tried to do Minor B work with Caltrans, but we can't afford to procure the \$5 million liability insurance requirement and still be competitive." [#AV176]
- A comment from a majority-owned construction company stated, "The majority of work is given to the larger companies small business are usually ignored. It's impossible to get insurance coverage that large companies can get. Even though we have a perfect record." [#AV8180]
- A comment from a majority-owned construction company stated, "Finding employees that are skilled in rod busting and placement of rebar. This last year pandemic caused cost of steel to rise almost 300%. Insurance prices are very high. [The] requirements of insurance can be financial prohibitive." [#AV8218]
- comment from an MBE Hispanic American-owned construction company stated, "It's hard to get work with big companies because of the paperwork and insurance requirements are very high cost." [#AV8269]
- A comment from a WBE and MBE Asian Pacific American-owned construction company stated, "My Primary issue is the cost just to run a business in CA i.e. workman's comp, insurance fees, taxes and environmental restrictions and being non-union presents a big challenge. I am frequently overlooked for contracts for that alone." [#AV8303]

- A comment from a majority-owned construction company stated, “It's tough to expand a business in California when the taxes are so high and another prohibitive area is workman's comp.” [#AV8316]
- A comment from a majority-owned construction company stated, “Bonding, working capital, insurances/cost, sometimes Caltrans’ high liability [is] very expensive.” [#AV 8364]
- A comment from a major-owned construction company stated, “Fuel is super expensive, permits because of COVID are hard to get, insurance has sky rocketed, my family hurts because of this.” [#AV8537]
- A comment from a majority-owned professional services company stated “Tax laws are very prohibitive. Insurance costs also prohibitive.” [#AV8569]
- A comment from a construction company stated, “Not interested in future Caltrans work: Insurance and liability, rates that we have to pay in order to do that work [are too high].” [#AV8580]
- A comment from a majority-owned construction company stated, “Caltrans insurance is too high for a microbusiness.” [#AV869]
- A comment from a majority-owned professional services company stated, “Insurance and required by some government agencies is unaffordable.” [#AV879]
- The non-Hispanic white female representative of a construction business advocacy association stated, "I think insurance is often a huge problem nowadays because underwriters aren't that willing to write, especially Caltrans type work. I mean, the minute you're on a roadway or you're on a bridge, a lot of factors come into play. And then they're dealing with what they consider an inexperienced contractor, because they don't have a track record, it makes a lot of underwriters just walk away from them and not give them any quotes or anything. And then a lot of the problems with Caltrans is you're working, like Caltrans has a burden percentage that is based on the type of work you do, whether you're electrician or electrical or concrete or whatever, and that burden percentage is supposed to cover your costs. It's supposed to cover Social Security and all those additional payroll burdens, but also your liability insurance and your Workers' Comp insurance. And if you can't get quotes that are reasonable, you're not going to cover your costs with their 11 percent or their 13 percent, whatever their burden is for you. And that for a small contractor can be an issue. So, I don't have an answer for any of this but they are small contractor problems.” [#FG2]
- The Hispanic and Native American male owner of a DBE-, 8(a)-, SB-, and MBE-certified construction company stated, "Bonding, financing, [and] insurance are very difficult to get.” [#PT5]

4. Factors public agencies consider to award contracts. Thirty-five business owners and managers discussed their perspectives on the factors public agencies consider when awarding contracts and discuss barriers these factors may present for their firms [#2, #4, #6, #7, #8, #10, #11, #14, #17, #19, #22, #24, #35, #36, #42, #45, #49, #51, #54, #57, #59, #AV, #FG3, #FG5, #PT1, #PT8, #PT9]. For example:

- The non-Hispanic white male co-owner of a majority-owned construction company stated, "I can go into that detail about how crazy that is, because if you're a second bidder, if you're, if you're not low bidder and you're second and you met the goal, but the first guy didn't, I actually lost a job because we got close to the goal. We didn't achieve the goal. We petitioned to give us the job. They said, 'no, you didn't meet the goal.' We said, 'well, we reached out, we did a good faith effort. Everything was totally above board. And we did everything we could.' 'Well, the second bidder met the goal. And so, you should have met the goal.' Well, the reason why the second bidder met the goal is because his price was higher. The reason why his price was higher was because he elected to use more DBEs at a higher price than we did. So where do you draw the line on whether you want to be low bidder or whether you want to be second bidder. Whether you want to use all the DBE that you can, or if you want to use the DBE that's reasonably close to the other pricing that you already have. And if we sit there and look at a price and it's 5 or 10 percent over, we're going to use the DBE. But if we look at a price, when we compare it to non-DBE and it's 25 or 30 percent over normally because I won't get the job. And there's a likelihood that somebody else will. It's really the delivery project delivery message, the requirement to be a little better, that is really creating problems because the second bidder, he probably didn't think he was going to be competitive anyways. So, his alternative strategy was, and this is out there and contractors will confess to this, why didn't they get to the low price? So, I was just going to go put as much money as I needed to make sure I got the goal so that if the first bid or didn't get the goal, I protest the job and I get the job for a higher price. So that's what's happening. And that's what happened to me a year ago on a nice job that shouldn't have happened. That is what we're up against on this program." [#2]
- The Hispanic American male owner of an uncertified MBE construction company stated, "I can't register as the minority, if I get the job against to any minority company, big or small, more competent, less competent, it doesn't matter. But if [it's a] minority it could be 24 percent higher than me, they get awarded the job, I don't, which is not fair. The job should be done accord with the numbers and the competence of the company has to get the job done, not because a minority. I got a lot of cases like that. That's why we kind of give it up on government job. We give it up because anybody in there who could say they are African American or they are from Tijuana, or they are from Mexico City, or they are female, I'm at a dramatic loss 24 percent. I don't even have 24 percent profits on my bid. I try 24 percent, I lose it, they could be 24 percent higher than me, and I lose it." [#4]
- The non-Hispanic white male representative of a majority-owned construction firm stated, "I think if you could make the process less subjective and more objective than I think that would help I think just a scoring system as a whole. It needs to be looked at versus the experience versus price. Value experience over price" [#6]
- The Black American male owner of an MBE-certified professional services firm stated, "I think that people need to be objective when they sit on evaluation boards, and they need to evaluate responses fair and open-minded against the requirements and not looking out for their buddies. And I say that, because I've lost hundreds of millions of dollars because of buddy hookups in this business. And it's pretty sad, because I actually won a contract for 67 million dollars. And through finagling, I never got a piece of work. We outbid on the contract, a 260-million-dollar contract worth 20 million dollars less and we hit all the marks, but because it was targeted for someone else, they came up with some crazy excuse

over 179 dollars' worth of training. That was justification enough to not award us a contract and award it to someone else, 20 million dollars less for 179 dollars' worth of training. Help me understand how that works. That was the government's decision, and the process that they have in place is a joke. You have the reprisal or the government accounting office that, for federal contracts, you file a protest against it. Well, these guys were worried about the scorecards. They were bragging about no contracts are ever sustained. They deny all the protests. So, if you walk in the door knowing that this guy's trying to keep their work high, what are your fair chances of winning a protest? Zero. They don't want to be wrong, which we know, as humans, you're going to make errors and they could be wrong, but the system don't allow for it. And I'm speaking of the federal level. I don't know how the state and local work. It's been a couple years ago. I'm not really sure, but we had a slide presentation. It may have been with SDG&E. I'm not sure. It was either Caltrans or SDG&E. It was all a presentation, and we presented an incredible solution and the reason why we were not selected was because the suit that the presenter was wearing was an issue for the board. It had absolutely nothing to do with our capability. It was a personal decision. And matter of fact, I was using technology, I remember, and I had an iPad of the desk that I was using. And I was dinged for having technology on the desk during an oral presentation. So because of my iPad and because of the suit that this guy was wearing was the reason why we were not selected for their business. Qualifications had nothing to do with it. We were probably the most... As a matter of fact, I think that was the last time that I sat in on an oral presentation, even attempted to do anymore, because I thought that was ridiculous. And how do I know that other than board meetings? Later, [a committee member] stopped me and told me the reason why we weren't picked, and I was disgusted when I found that out. It was enough to just turn my stomach when I found out the rest behind it, and the real kick in the shorts was the chairman of the board was a former classmate of mine in the master's program working for the admission systems. And I guess he drank the Kool-Aid and went along with the party on the decision. It was really a poke in the eye and just pretty bad at the time. And again, I would love to do work with some state agencies. We have a great reputation. We've done great work with some of them. We have exceptional contract and reprisal reports." [#7]

- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "I think the main one is just the other firms are more established the industry... [A project is] set up in a typical capital improvement project fashion, and when it's done that way, it's plan for design bid build. Now a lot of the projects we work on our design, build, I would say what we're doing, we're helping the city purchase, paint, plastic, posts and speed bumps and other types of units that are privately owned units that the city has ownership over and they go implement maintain these ones. And so, this is a very different way of procurement, a way for the city to manage the project because it's more of the city managing stuff internally, like how do we do it with city maintenance crew? And so that's where the industry has headed. As cities are trying to put out work that way, but their procurement process is not designed well to accommodate for that type of work. And so even though the city may want us, they like us, they know we're the ones to do that kind of work, when we compete based on how the procurement process or the point system is set up, these other larger national and international firms are able to beat us at these contracts. And then the client is not happy because this bigger firm has large billable rates and is not really doing what they want, but they were able to win because of the criteria or they are

more established. I'd say that's one of the issues that we faced. We talked a little bit about that, about the years of expertise locally established. For instance, we're not in Alameda County, so we don't get any money from Alameda. We can't get any projects from Alameda County CDC funds, and so for us to do that, we have to set up an office in Alameda County. Then we pay taxes in Alameda County to go to Alameda County, but it's just a barrier for us to be able to do that. So, they have some of these requirements that keep out firms like ours. We don't have the resources to have a small office in San Mateo, Santa Clara, and Alameda. That's not a strategy of ours so that's a weird requirement." [#8]

- The non-Hispanic white male owner of a SB- and ELBE-certified professional services firm stated, "In my sector for the firms that I put contracts out to, i.e. these are contractors. They have to be low bidders. That's what it takes. Low, responsive, responsible bidder. I adhere to that mantra without exception, as opposed to Caltrans, which doesn't. Well, I had a very bad experience with Caltrans who didn't respect low, responsive, responsible, bidders, and awarded the contract erroneously. To the second bidder. Caltrans doesn't always follow those rules. I have a case in point where they didn't follow the rules and it cost me a bunch of dollars, 15,000 hours in attorney expenses because they award it to the wrong bidder. That's the requirement is states it right in the bid specifications. But you don't have to follow it. But when you don't follow it then what you do is, people don't want to work for you. So then all of a sudden you only have two bids out there and you're paying 40 percent more than you should pay for it. Because people don't want to work for you." [#10]
- The non-Hispanic white male representative of a Native American-owned MBE-, SB-, and Micro-BE certified professional services firm stated, "Those can be challenges sometimes. They write the RFQs very specifically to firms. A lot of times their past firms. So, I've been on both sides of this. I've worked for public agencies for quite a bit in my life, so we know what kind of things to put in the RFQ request for qualifications to eliminate firms that we don't feel are qualified. And so, and I mean, that's done very intentionally and it's not malicious. The point is you don't want to waste your time looking through and grading these folks. And so, it's very hard for a firm to get recognized if you're new to the market." [#11]
- The Subcontinent Asian American male owner of an uncertified MBE construction firm stated, "When you bid for a job, some company there tried... I mean, I'm not blaming anybody else, but some people try to cut the corner and try to go lower ball just to get the contract. But we are competitive, our rate is competitive, and we never had any issue, but of course, like I said, some company they want a lower bid. That's their choice." [#14]
- The Hispanic American female owner of a WBE-, MBE-, SCMSDC-, and DBE-certified goods and services firm stated, "For my industry, usually the cheapest is not the best. And I think for a lot of these - some of these bids that are out there, usually when you go for the cheapest the only person that gets - the only one that gets hurt is the organization itself. You go for the cheapest price, it's probably not the best clean that is needed for that location, so they'll end up coming back and paying more. So, I think sometimes going for the lowest bid overall, many of these organizations know that's not really going to be meeting the need of the organization overall. So, I think when - the cheapest is not - I don't know how I would say that, but I think there needs to be another criteria on that. The best responsible bid process instead of trying to get the cheapest, and then you find out that they weren't doing

something right. And we've seen a lot of that, that sometimes they go for the lowest, and you're wondering, 'Well, how are they paying the payroll taxes if it's that low?' So, those are the questionable things I think they need to review, to confirm and make sure that the numbers are appropriate and there's not an area that is failing to what needs to be done." [#17]

- The Black American male owner of a DBE- and SB-certified and uncertified MBE professional services firm stated, "I think on the professional service side a selection board has great opportunity to discriminate. In other words, for instance, like I'm supposed to be writing a paper that you don't select the most qualified, you select the best qualified. So, let's say Caltrans has a project and a big firm will come in, like AECOM, who has done 100 projects like that. Then a smaller firm will come in who has only done 5. But the big firm will put somebody on there, maybe five years out of college, to be the project manager. The smaller firm will put their principal will run the job. So many times, a selection board will select the big firm because if something goes wrong then they can say, 'Oh, AECOM was doing the project, so you're not going to take them on.' But if it's a small firm they'll say, 'Oh, that firm doesn't know what they're doing.' That's discrimination. And the discrimination is that in most cases that small firm for a smaller project - for the small project is better qualified." [#19]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "It is [a challenge] competing with these large companies, full-service companies on the internet. And if you look at their websites, they make amazing claims of what they can do. They could build a spaceship to the moon, I'll bet, if you asked them to. We can't do that. there's only about six companies that can do a really big engineering project in Region 4 of the Bay Area, that's like build the Bay bridges that collapsed. They said what was happening is the six companies would all bid as low as they could, really low, and they'd get the contract. And then of course during the course of a large, multiyear contract there'd be a change over or a modification. And when the modification came they would be astronomically high and they'd be paying through the nose for these. And they just couldn't write the contracts clear enough so that there wouldn't be a modification. So their - and they knew - they were getting really criticized, all their projects, the really big ones like the Bay bridge from Oakland to San Francisco, it took like six years to build and it doubled in price during the time it started at a \$3 billion bid; it ended up being like a \$6 or \$7 billion final thing. And so, the people in the newspaper would constantly criticize Caltrans for being such a wasteful agency and building \$7 billion bridges that were supposed to be \$3 billion." [#22]
- The Hispanic and Native American male owner of a DBE-, 8(a)-, SB-, and MBE-certified construction company stated, "We certainly do an estimate and we do apply some numbers - of productions that we have in past experiences and jobs that were similar, and you go through that whole rigmarole. You get prices from the material suppliers. You put all that together and then you have your price. And then there's the - that's your price at a reasonable rate, and then you have to try to figure out what the market is doing. And so, if the market's horrible then chances are you're going to have to go below your reasonable price to get a job." [#24]

- The non-Hispanic white male representative of a majority-owned construction firm stated, "I mean, low bid is what it is. They give you items that you bid on, come up with a final price, and the company with the lowest final price gets the job. It's as simple as that. It's just: the lowest wins. You give your best effort on what you think a job can cost with whatever markup you wanna have, and that's what you go with. And it is what it is at that point. Sometimes you make money; sometimes you lose money. Low bid's always scary if you're too low you're gonna lose money. You're too high, you'll never get a job. It is tricky. But it also is a lot easier for a small business. 'Cause they don't have to market themselves. All they have to do is win a job. Like you're not trying to market yourself. You're not trying to - all you have to be is low." [#35]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "That's been a topic of discussion also in our field. When contracts should not be totally based on the lowest bid. It should be a combination of low bids and also quality of the company's work, quality of the company." [#36]
- The non-Hispanic white male representative of an SB-certified professional services firm stated, "Obtaining work in the public work sector as a small firm tends to be a little bit more challenging, just because a lot of times on the public work side, they feel that a small firm can't service their needs as quickly or to the level of how much work they have that they need beyond their current staff levels. I have a feeling that that's kind of what's going on right now, is some public agencies are a little overwhelmed with work, and they put out an RFP, and, when we put out our proposal to them, I have a feeling that they feel that our firm is not large enough to service their needs when, in fact, we serviced some of these agencies for years in the past. I just think it's still a barrier that's out there." [#45]
- The Hispanic American female representative of a DBE-, MBE-, and WBE-certified construction firm stated, "I'd like to see that they tried to give the work that is other here and so to have some kind of restrictions on the bids so that if you get it let's say if you're San Diego try to give the work for people in San Diego. Because we're having companies from Arizona, we're having companies from northern California, we're having companies from another state, Texas, bidding stuff in schools and hospitals that are here in San Diego. So right now, there's not enough out there but whatever it is I think if it's local try to keep it with the people that work here. And they should have some kind of restriction so wherever they get it doesn't get out of the US." [#49]
- The Hispanic American male owner of a DBE-, SB-, and DVBE-certified and uncertified MBE professional services firm stated, "I'll give you an example. The ones up north, my understanding, and of course, there's a lot of lack of communication, lack of transparency, but from what I understood, some of the projects where I provided a bid, others provided a lower bid. This is a problem now with the industry and the big players that are out there. Those big players provided a number that was less than my bid. The sale of the energy is number that we were bidding, the amount of the cost of the energy that we would be selling to the State for, in this case, to Caltrans. They would underbid. They would say, 'Okay, I can deliver for \$0.10 a kilowatt hour. I would say, 'It's \$0.12 per kilowatt hour. So, the state would say, 'All right, let's go with the lower bid.' The problem is that they would put the number together - and I'm not going to use any bad words out of - I don't know where they picked their numbers. But then, they would go to the market, which to me is part of the

issue, and I'll elaborate a little bit more. They would put a number. They'd get a contract, and then they never build it because they cannot build it for that number because they never bid the true exercise of doing the full costing of the facility. Versus, in my case, I take the time to get the full cost of the facility to know what the exact cost is going to be so that when we get the contract award, we go out and we build it and we don't have to come back and say, 'Oh, I'm sorry, I couldn't build it for that price.' That's what was happening as well." [#51]

- The Asian Pacific American male owner of a DBE-certified construction firm stated, "Yes, sometimes I put in a bid that is too low, even if they win the bid with the lowest, they cannot do it. People cheat, they cannot pay prevailing wage, so they have to cheat." [#54]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "I've had-I don't know probably by now, forty years of experience doing ecological and environmental work and thirty years as an independent contractor. I understand the contracting world too. So, I'm not able to get contracts. I'm not able to find a way to burrow through or penetrate through the massive, complicated hoops you have to jump through to get a contract. One example is the last one they put out. They put out these very large general service contracts that they-in fact I think one company...I'm not sure how many they selected. It's not explained very well. It looks like they select one very large company to do all the various services they're anticipating. And I'm not able to cobble together a large team. I've tried to do it, but it's a lot of work just trying to set up these relationships and trying to get people to submit. For example, they need an archaeologist, a historian, maybe engineering, CAD design, they want all that. You have all that in your staff of people, and yet I think they are set up there for small businesses too. So, it's not clear to me how a small business could possibly have all of those workers, unless- I think what they do is small businesses will front for large businesses, which is kind of like a...well it's kind of like shielding...really, you're contracting with a large business through a small business. Well, it's really the way the public demanded that if Caltrans is going to do twenty-five percent of their business with small business, it has to be...it's just a front for a large business. Because the way their contracts are set up, a small business is unable to put together a qualified proposal." [#57]
- The Asian Pacific American female owner of a SB-, DBE-, and WBE-certified construction company stated, "I think debriefing of the contract, so it should be more open, like how did this company win the job? You need to be open in processing. Compare apples to apples. [Otherwise,] at the end, they change order because a lot of people come in with lower fee to get the job that they got approved for change order, so I come in low, but I make more or I break even, then there's a trick, someone has approved that and that's not fair." [#59]
- A comment from a majority-owned professional services firm stated, "Public works should be a quality-based selection not just whether a business is big or small." [#AV48]
- A comment from a majority-owned professional services firm stated, "General speaking, because we do not hold a DBE or WBE [certification], etc. we often can't be as competitive." [#AV50]

- A comment from an MBE Subcontinent Asian American-owned professional services firm stated, “Agencies sometimes circumvent the system by proposing lower fees instead of highest quality.” [#AV222]
- A comment from an MBE Subcontinent Asian American-owned professional services firm stated, “There is a lot of prime consultants that have resources to set up satellite office in local jurisdictions but harder for local agencies/firms to do the same. There are a lot of barriers for locals that allow prime consultants to skate by acting like they are local. They set up satellite offices in our jurisdiction and receive priority over us because they act like they're local.” [#AV264]
- A comment from a majority-owned professional services firm stated, “Challenge with Caltrans is experience level. Don't have specific prime experience.” [#AV8237]
- A comment from an MBE Hispanic American-owned professional services firm stated, “We are ask to bid on a job but don't get it. Other companies bidding on the same job don't meet the standards required. We are called back to repair the job. Other companies may get the job but are not able to meet the standards required.” [#AV8360]
- A comment from a majority-owned professional services firm stated, “The selection over the cheapest bid as opposed to the best value has been an issue.” [#AV907]
- A comment from a non-Hispanic white WBE construction company stated, “Competitive bidding is very difficult because often someone bidding against you is in error in terms someone clearly missed something in plans and specifications. Very difficult to get a fair price.” [#AV915]
- The Black American male president of a professional services business development organization stated, “This is the biggest single barrier that minority entrepreneurs face. It's the criteria in the selection process, right? There's lot of these contracts require that you have done this work before. So, when they come out with this huge contract and say, if you never had the opportunity to do this big contract, because of decades, and decades, and decades, of discrimination, right, where the good old boy network had all the big jobs for themselves, so now we have these businesses that have worked hard. And they may have gotten up to 20, 30, 40, 50 employees, but they haven't had the chance to do a million-dollar, 10-million-dollar, 20-million-dollar job yet. But when the criteria says, you have to have done this already, that's when you hear people say things like systemic racism, right, because you're putting a rule in there that says, you're from the underserved community, and we're here to help you, but you can only get the job if you've done big jobs like this before, which for decades, there's been obstacles thrown up in front of these communities, these women and minority owned communities, for decades. So, the selection criteria has to have provisions in it, that allow smaller business owners, to take incrementally larger chunks, a start small but to incrementally larger chunks, of contracts, so they can get to the point where they can say, Yes, I've done a four lane highway before. But until you give them the opportunity to participate in that, which goes all the way back to this holding the primes accountable, then you're never going to get around that, ever. And so the selection criteria is probably the biggest barrier, I think, that any of these businesses face.” [#FG3]
- The Hispanic American female representative of a professional services business development organization stated, “Can you give an opportunity to people that are qualified,

and if you still have to have this barrier in there like, I don't know. Can it be, I guess, like a job, if you have this sixty-day probation, because someone's going to be out here with you every day, and then we're going to sign off, and it's your project. I mean, there has to be other solutions to having oh, I have to have five years of experience of putting in this roadway, when obviously, they're successful enough to have built a business, to even think about competing. So let's really look at what you have and pivot a little bit." [#FG3]

- The non-Hispanic white male co-owner of a majority-owned construction firm stated, "At some point, it's just about low bids not about minority inclusion. When goals are high enough to increase cost, the trade-off is too costly to use the DBEs. [There are] mixed signals on how to be competitive. Caltrans accepts second-bidder who meets goals rather than first who uses GFE." [#FG5]
- The male owner of an MBE- and EB-certified professional services firm stated, "I tried several times, I find that the beating the price is very low. It's very low, if I cannot match them. I don't know how to match that low price." [#PT1]
- A respondent from a virtual public meeting stated, "One of the things that I feel where I have a hard time being part of the project is lack of experience as a company. As an individual, I worked with another company before, and I have like fourteen years of experience in the civil-engineering industry, but as a company-being a startup company I don't know how to show... I could be very well qualified to do a particular, small mission in the project. Let's say for example, a retaining wall or something. Say, like based on my experience I could do it, but as a company-when they ask, when a company asks to have a set number of years for this project, I am unable to show it. Because as a startup company there is not much I could show. So, one thing I've heard from the industry, is like I cannot usually go and participate in Caltrans projects or other government projects until I wait for a certain number of years. Working in the private...I felt like...I don't know what is the right word. If Caltrans is really trying to invite all the people to participate, in all the ways, I would also like to have the startup companies be a part of it. If I'm disqualified because I'm technically unqualified to do the job or if I am lacking the experience as an individual, I completely agree with it. Any company is a startup company in the beginning. Right? There is no company when they startup they have fifty years of experience. That's not...by the very definition, right? Every company, they are given an equal opportunity. As a startup company, I would like to know how I can be a part of the projects." [#PT1]
- The Black American male owner of an MBE-certified professional services firm stated, "I own a HVAC electrical and plumbing, engineering, construction, permit design company and I've been chasing these contracts for a while with zero success. It seems like the engineering side of things goes to the bigger firms, right? We're licensed in multiple states, and I guess the engineering side of things seems like a black hole, whereas, when it comes to the actual labor itself, it seems a bit more transparent. So can you provide some insight into that because we're in most instances we're cheaper and we're faster than the bigger firms. Sometimes public agencies they'll fly a job and the design work has already been done. So, I think every piece of the pie of the project needs to be done or given the opportunity for minority and women owned businesses to even bid on that, going all the way back from the engineering." [#PT8]

- The male owner of a DBE-certified professional services firm stated, "Why shouldn't you be allowed to just throw any resume out there and say and give it to the most qualified person and even if there is a DBE requirement for like a federal project for example, and it's 20% why does it harm an outside entity like such as my firm? Why can't I throw my position out there and allow the states or SANDAG or the regional agency to take the most qualified person and then let them be added?" [#PT9]

5. Personnel and labor. Eighty-nine business owners and managers discussed how personnel and labor can be a barrier to business development [#2, #3, #4, #6, #7, #8, #9, #10, #12, #13, #14, #16, #18, #24, #25, #26, #27, #28, #31, #33, #35, #36, #37, #39, #40, #42, #43, #44, #45, #49, #52, #54, #59, #60, #61, #62, #AV, #PT2]. For example:

- The non-Hispanic white male co-owner of a majority-owned construction company stated, "I think with regard to labor, certainly that's a tough one because everybody needs qualified labor and experienced labor. And if you're a new company and you're a veteran in the industry, you're going to go try it out with a new company, or you can go to an established company that probably is going to get more work year-round and not be at risk. And if you get new workers or people that aren't veterans in the industry, then they're getting themselves hurt a lot more. And then your worker's comp goes up. All those things are out there." [#2]
- The non-Hispanic white male co-owner of an SB-certified professional services firm stated, "Well, the big issue is turnover rate because we're a union contractor. So, it's finding the right employees with the right training is a big challenge at this moment. We do have long-term employees that have been with us. So, I think it's finding the right individuals that have been trained properly to keep us successful and keep us moving in the right direction." [#3]
- The Hispanic American male owner of an uncertified MBE construction company stated, "Workers are very hard to find these days too. Finding personnel is a barrier, training is not. We train them, but they just, we can't find them. I have three ads on the internet, but I can't find nobody to apply for the job. Even on Craig's List I have an ad in there and nobody apply for the job. It's not like I pay a lot, I pay a little, I mean, I pay pretty good average. But the thing is there's nobody applying. Not even qualified or unqualified, we can't find no workers." [#4]
- The non-Hispanic white male representative of a majority-owned construction firm stated, "There's just not as many skilled workers as are required to build the amount of work that is out there to be done. So, we have to train them internally, which we're not a huge company and it takes longer versus getting skilled workers from the local unions that we have. It can be challenging because they don't always again have enough skilled workers. We have to go through the unions for our labor agreements or PLAs on projects. So yeah, they've been challenging as well." [#6]
- The Black American male owner of an MBE-certified professional services firm stated, "Well, it's finding good people is a real challenge. I'm not sure what's going on in the world today or in this country today, but there's this mentality, I think, that's resonating out there, that people have big ideas, big dreams, but no commitment. They don't want to do the work,

but they want high-paying salaries, which I don't understand that. I don't think there's a labor shortage. I think there's a qualification shortage. I think people taking the time to go get educated or position themselves properly for a job, I think that's the problem. This is what I've experienced, that people are not properly qualified, but again wants to be a program manager, but has never gone and taken an organizational management course or prepared themselves to properly understand what program management is all about, being certified or something like that. So again, people are asking for things that they may have envisioned in a dream, but they have done nothing to prepare themselves for it, but they all want high salaries. And that's been my experience." [#7]

- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "Finding personnel that is trained and has expertise and does not want to work for the public sector, is a huge barrier, because you can imagine Bay area cost of living, the cities are competing for staff instead of raising their salaries to try and compete for staff in different cities. So, as you get closer to San Francisco, the salary goes up from San Jose or San Francisco. And so, cities up and down the peninsula, will raise their salaries to try and hire engineering staff. And the private sector is not able to compete with that because the city still wants low rates. Cities raising their internal salaries because of all the tech in the area. Let's say city of Modesto pays a lot less than a city of Palo Alto or Burlingame because of proximity to tech and cost of living and more, but then it adds a huge difficulty for us to get the work, and win the work, and be price competitive because our cost is also high, but the city wants cheaper rates. And so, the issues of them raising their salary actually affects us because not only we have high cost of living and we have to do it at cheaper rates, but we also, it's hard to find staff that wants to work for the private sector at a lower rate, and harder. I don't know what kind of policies can be done for that, but for us who's in the public sector work, we're not riding the market the same way as other industries do because we were having to follow up on what the public sector changes." [#8]
- The Asian Pacific American owner of a DBE-, MBE-, and SB-certified professional services firm stated, "Not a barrier for us, it's just an obstacle because back in the days it seems like there's more people in our business, civil engineering and stuff. But lately we noticed that it's harder to find staff, because either everybody's happy with where they're at, or they just kind of change professions. So, the pickings are really slim out there." [#9]
- The non-Hispanic white male owner of a SB- and ELBE-certified professional services firm stated, "in my prior business obtaining personnel was through unions because Caltrans works on basically union contract wages. It was set up because of the way they picked what is to be certified payroll. And that was all set up because of the way the unions and the state of California determined what would be the wage. They decided to do that on the modal system, the wage that occurs most often, or that these eliminates all of the private contractors who may pay a different wage. Because the wage paid most often was the union scale. If I was inquiring to help, you cannot bring them in off the street. If you're a union contractor, they have to belong to the unions who may or may not accept the person that you want to put into the union. I've had that difficulty. The problem has been the unions when times get busy, cannot supply qualified help. Qualified help has always been a barrier and see it's going to be even more so now, because we have a different attitude amongst our younger generation who would rather receive a 'stimuli' check, as they call it, than go out and work. Sit home and get the 'stimuli'." [#10]

- The Hispanic American female owner of an MBE-, WBE-, and SB-certified professional services firm stated, "That's not so difficult. I have a good partnership with Santa Monica College and get trained candidates when I need the stuff. But again, I think my issue is because I don't have pool of money, I only hire people when I have work, when I have a client. So, it just means that I don't have ongoing staff supporting me in the day-to-day things. So, it just, I guess the burden is really on me to do all roles when if I had funding, I could have somebody else do it instead." [#12]
- The Hispanic American male owner of an uncertified MBE construction firm stated, "Well, finding a qualified driver that has three years plus experience is very difficult. There's a little bit of a shortage of drivers right now. And for me to hire a brand-new driver will not be very cost-effective, because the insurance premiums would be almost double, whereas if I hire a seasoned veteran and get low insurance rates, those drivers are typically hard to find." [#13]
- The Black American male representative of a DBE-, WBE-, MBE-, SB-, and Micro-PW-certified small business development association stated, "It's [a challenge] from two perspectives. One of 'em is that sometimes, when you're developing a business and running a business that you started - you conceived of, and you started - people are reluctant to allow others to come in and - even when they need additional help. It's like, they want to make sure they have control over what every aspect of the business, and sometimes, they don't bring in help when they need it, and then, other times, it's - the myth of how hard it is to find good help. That's really true. It is. I've seen people go out and sincerely try to give opportunities to individuals who didn't appreciate the opportunity they received, so, they kind of were a detriment to the business that hired them. So, it's not easy to find that good help." [#16]
- The non-Hispanic white female owner of a DBE-, SWBE-, and CBE-certified professional services firm stated, "Anybody who's working with Caltrans, for the most part, Caltrans doesn't require that you are union, but any of the general contractors are union. Most of them, any big ones. I don't work with any contractors that aren't union. I would, but most of them are not. I mean, they all are. So, the challenge for us is skilled and trained workforce. That's one of the big things. The unions have - the building trades decided that they wanted to have skilled and trained workforce, meaning there's a requirement, a specific requirement from each union that your workers are skilled and trained. That means they have to have a certificate from that union showing that they are skilled and trained. You have to have a certain percentage of that group there. That's one thing that has impacted us. I think you need an infrastructure that can support everything that Caltrans asks for them to do, meaning you need to have enough people to be able to fill out all the forms right, to be able to respond in a timely manner, to be able to pay your employees. I think it really comes down to enough money. That's it. You need some money. I would say it's a barrier. For us, as a subcontractor and having operators, operators are very difficult to come by. The requirements from the union are difficult. That's a huge barrier. The way you pay them is a huge barrier. I mean, for anybody that's small, if they're starting as a union company, it's a difficult situation. If you're not a union company, it's going to be difficult for you to get big projects because all the big players are union. We don't have a choice. For example, if I wanted to do work with L.A. County, they sometimes will say, 'You have to hire workforce within 30 miles where this project is,' because they want to hire local. It's great in theory,

but I can't even call my union and say, 'Hey, I need somebody in this zip code.' That's not allowed. I don't get - that's not an option." [#18]

- The Hispanic and Native American male owner of a DBE-, 8(a)-, SB-, and MBE-certified construction company stated, "This is the hard part, is - when you're a small company - taking the step. I've been - the first company I owned went from zero startup to \$27 million or something in about six years. And I mean, it ramped up fast. It ramped up so fast that we got graduated out of the 8(a) program in three years. And so, I've seen the whole having to train people and do stuff, and it works great as long as you have constant work blowing through. Right? Once you get to \$20 million you have to hire four or five people in your office, and you've got to hire two or three project managers and you've got to have a superintendent or two. Well, the problem is that nobody wants to come work for you and be part of your team unless you have some sort of - not a guarantee, but if you're - you've got to have steady work now. So, now you're in the old wheel now trying to constantly produce more work so you can pay for all the overhead that you've got. And it's kind of a vicious cycle. The training of people is not really the problem. It's trying to keep them busy and to be able to support them once you bring them on and you commit to them. Because it's not fair to them, obviously. And nobody wants to do that. You can go to work - when times are competitive, and times are good you can go to work for lots of contractors who are going to have all kinds of work for you to do and you don't have to work near as hard if you work for them as you work for me because I - they operate with more people and we operate with less. And that just by definition requires more work by every person rather than less." [#24]
- The non-Hispanic white male owner of a majority-owned SB-certified construction firm stated, "That's an issue right there, for sure. There is a serious shortage of - and it kind of depends on, too, what area you're in. I have good operators. I don't have good labor. I have some. There's not enough. I'm saying there's a shortage. It depends on what you're dealing with, like truck drivers, for instance. There's a serious shortage of truck drivers that are good, dependable, high standard. So, it really depends on what you're looking for. If you're looking for a project manager, that's hard to come by. You're looking for good foremen, superintendents, that's challenging. There's just not an overabundance of them out there that are a lot of experience, really good at what they do that are available. There's a lot of good ones out there, but they've probably already got a job and probably somebody's got them surrounded like that hen with her little chicks going across the barnyard." [#25]
- The Middle Eastern American male owner of a construction company stated, "That's always been a challenge to find a good team. And I think just from sharing with other contractors I think this is across the board all contractors have that challenge. There's plenty of construction workers out there but few are the good ones. Finding the good people and keeping them and their work ethics and their honesty and their hard work, commitment, loyalty, all that comes into effect regardless of the rate. Even if you pay people a lot it doesn't mean that they will come with the factors I just mentioned." [#26]
- The Middle Eastern American female representative of a majority-owned professional services firm stated, "We haven't hired locally as many as we should have and really haven't expanded to other areas that are close to what we currently do. So, I think competition is tough." [#27]

- The Hispanic American male owner of an uncertified MBE construction company stated, "Sometimes you get surprised a little on that. Sometimes, yeah, they pretend they have experience, and sometimes it's not what they promise you. That's one of the things - there's a lot of people out there, yeah, I know I can do this, and I can do that, and sometimes it doesn't, you know. But there's a lot of people out there, you know, they don't have knowledge, but they learn. So, that's just a little tricky part on that end, you know? But so far, we've been good on that end. Well, I think, as the small business, I think the harder part is when you start, and to be able to have the correct help, you know, to, like, your employees, like, you know, he's going to be an operator, so who's going to be pipe layers, who's going to be able to run your crews, your foreman." [#28]
- The male co-owner of an uncertified WBE professional services firm stated, "Definitely, it's been a constant challenge, as I try to grow, is that usually, even right now, ready to hire other personnel, but being a smaller business, you know, trying to compete in Sonoma County, which is a very affluent neighborhood and very high cost of living, you know, with larger firms, it's really hard to try and get qualified people to come work. I do a lot of training, people who are unqualified at the time of hiring, and then training in - you know, I've had a couple of those people, after getting training, leave for, you know, a larger business. We're constrained by staffing, difficulty finding people right now, especially with the cost of living in Sonoma County. I mean, I've advertised and a lot of interest from outside the area, but, you know, once you start talking to them realistically about cost of living, here, then, a lot of that interest dries up." [#31]
- The non-Hispanic male owner of a majority-owned SB-certified construction firm stated, "It's just sometimes, it's hard to - you give people opportunities; they oversell themselves. They don't realize the kind of work that they're doing or how hard it is. I sometimes hire guys that are new to the field - they want to come out and try it out - and they're all gung-ho and excited about a full-time job, but once they got out here and work in the heat and doing asphalt work, they realize this is not what they want to do for the rest of their lives. So, it's hard to find good guys that are competent or wanting to stick this out or do this trade. It's a difficult trade." [#33]
- The non-Hispanic white male representative of a majority-owned construction firm stated, "We used to not ever market ourselves, really. For our main hand laborers and carpenters and pile drivers, we just usually hire outta the union hall. But lately, 'cause it's hard to find engineers and project managers and field engineers, on LinkedIn and stuff. 'Cause, like I said, you usually just hire outta the hall. If you're with a company, 'cause you already owned a company, just brought a lotta the same people over. But if you're brand new to the game trying to start a company with no knowledge of any people in the industry, you're hiring straight outta the hall. Which means if you're hiring right outta the hall, it's people waiting for work. It's not the people that went out and got work." [#35]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "It is to a certain degree. Our location makes it difficult for people to work here. So, finding people who are willing to do a commute - back when things were really horrible with commuting. Because the housing prices are way too high for people to live over here in Marin County. I mean, I don't live here, and I have a pretty good job." [#36]

- The Black American male owner of an uncertified MBE construction firm stated, "Yeah, it's tough. It's tough. The guys who are good enough to figure it out on their own they're doing their own thing and they end up being competition, the guys who are good, and once you employ somebody now you are providing a livelihood for that person, so they're responsible for that person to ensure that you keep giving them work, you keep them employed, so you have to keep that pipeline flowing so people have a job. That doesn't work very well if you get the worker's comp, and you hire somebody for a couple of months and you've got to fire them. So that's also a challenge." [#37]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "The single biggest barrier for us is finding qualified land surveyors." [#39]
- The non-Hispanic white male co-owner of an SBA-certified micro- and WBE professional services firm stated, "I have had a really tough time finding anyone that would be interested in taking this business over when my wife and I are ready to retire. It's funny. There are a lot of engineers that want to do repetitive work - roof trusses, production housing. That is not us. So, the hard part is that we have had, in the past, so much trouble in finding somebody who would want to come in here and take this business over in time." [#40]
- The non-Hispanic white male co-owner of an SB-, DBE-, and HUBZone certified construction firm stated, "Right now it's impossible partially [due to] the pandemic. I mean you have people getting paid to stay home, and a lot of them are just making good enough money where they don't want to work, to stay home. And then when that died off there was a ton of need of work and workers for stuff that wasn't getting done over the pandemic, and not enough workers to do the work." [#42]
- The non-Hispanic white male representative of a DBE-certified and uncertified WBE construction firm stated, "It's hard to find qualified people for what we do, and it's a lot of risk, putting somebody on the freeway with 4,000 gallons of water and worried about liability." [#43]
- The non-Hispanic white male owner of an SB-, DVBE- and Micro-BE-certified construction firm stated, "The hardest thing with that is getting positions for people is the issue. There are talented people out there that are okay with working with a small company, but it really has to [line up with] when they're available and when the positions become available. So, some companies can - if they're larger, they can put them on different projects, or they can just pay them to sit around for a month or two. We can't do that. That's tough. That's tough for a small business." [#44]
- The non-Hispanic white male representative of an SB-certified professional services firm stated, "I think it's actually been more of a benefit most recently, because people would rather be working for a firm that knows everybody and can see everybody, rather than a large firm where there are many offices, and you might not actually know anyone in the other offices." [#45]
- The Hispanic American female representative of a DBE-, MBE-, and WBE-certified construction firm stated, "At the moment we don't have that issue because right now we're kind of slow. But it looks like as far as I spoken with other business owners which is a different, not in construction but like retail and restaurants. They still have that issue. People doesn't want to work because they're making more money staying home." [#49]

- The Asian Pacific American male owner of an uncertified MBE construction firm stated, "There's a possibility I could get another truck, but I know the only possibility with that, and that's guaranteed, you're going to have higher bills. Now you've got two trucks on the road. Double the tires. You've got to find somebody, payroll, workman's comp. And it just goes on and on. Does a guy really want to take that route and deal with the headache, or - nowadays it's hard to find a worker. Nobody wants to work." [#52]
- The Asian Pacific American male owner of a DBE-certified construction firm stated, "As a small business I am worried about financing, labor, materials." [#54]
- The Black American female owner of an uncertified WBE and MBE professional services firm stated, "When they are working with the same type of firms, most of those firms are sole entrepreneurs. They hire crews off of the street that they can do day labor with, or they go to a day labor company or a go-staffing type company that will pay them minimum wage anywhere from \$12, \$15 an hour. Well, quite naturally, you're going to have a hard time with finding good workers to stay at work." [#60]
- The Hispanic American female co-owner of a WBE-, MBE-, Micro-, and SB-certified professional services company stated, "It's really hard because when you think about it, at the time we had 14 employees, so when we lose an employee at a 14-man firm, that's a major part of my workforce. It's actually 7 percent of the workforce, and I lost two people, so that would be 14 percent of my workforce that I lost." [#61]
- The non-Hispanic white male owner of a majority-owned construction company stated, "I have trouble finding employees that work as well. I can't find trustworthy employees if that makes sense. It's hard to find employees. I think it's finding qualified employees, knowledgeable employees. Not so much...as being able to apply themselves and to be able to adjust. You know we work with clients, don't be lazy, and stuff like that." [#62]
- A comment from a majority-owned construction company stated, "It's hard to get personnel to do work." [#AV55]
- A comment from a majority-owned construction company stated, "Local concerns about cost of running a business and attracting employees and personnel." [#AV158]
- A comment from a majority-owned construction company stated, "Being a small company, it's hard to stay consistent and there is a lot of cut throat companies and it's been difficult to maintain a full crew because of what is going on." [#AV161]
- A comment from a majority-owned construction company stated, "The biggest problem in CA is the workforce has depleted in terms of qualified workers--it is very difficult to find someone with experience.[#AV266]
- A comment from an MBE Subcontinent Asian American-owned professional services firm stated, "In California, it's very expensive, so in order to retain staff it's very difficult to keep up with the rates that cities are hiring at, so it is hard to keep up with the public sector. We lose a lot of the engineering community to the public sector." [#AV38]
- A comment from a majority-owned professional services firm stated, "With regard to expansion, our firm has had difficulty finding qualified staff." [#AV121]

- A comment from a WBE and MBE Native American-owned professional services firm stated, “We are in an expensive place to live, so picking up talented employees has been difficult and a barrier to expansion. That has kept me from bidding on jobs I would otherwise have bid on.” [#AV127]
- A comment from a majority-owned professional services firm stated, “It’s hard to find good help now because a lot of people are making money being unemployed.” [#AV160]
- A comment from an MBE Native American-owned professional services firm stated, “Why don’t we pursue work in more areas of California? We do not have staff to support, we are pretty busy.” [#AV186]
- A comment from an MBE Hispanic American-owned professional services firm stated, “If anything we’ve been overwhelmed in the past six months, and it’s been hard to find good personnel to hire.” [#AV308]
- A comment from a majority-owned professional services firm stated, “The challenges are finding qualified talent.” [#AV8108]
- A comment from a majority-owned professional services firm stated, “You can’t find people, that’s the biggest problem. There is a survey shortage in California.” [#AV8170]
- A comment from a majority-owned construction company stated, “We are struggling with labor, like no skill labor. No one can pass a drug test since marijuana was legalized and especially with the demographic of people under 30.” [#AV8169]
- A comment from a majority-owned construction company stated, “The only problem is labor shortage.” [#AV830]
- A comment from a majority-owned construction company stated, “We limited part of our work because we were unable to hire individuals for our available work. There were no applicants interested in working... we had to sell our trucks because we did drug testing.” [#AV8118]
- A comment from a majority-owned construction company stated, “The only barrier we have is finding qualified trained employees who have the specialty skills we need.” [#AV8242]
- A comment from a majority-owned construction company stated, “Finding employees that are skilled in rod busting and placement of rebar. This last year pandemic caused cost of steel to rise almost 300%. Insurance prices are very high. Requirements of insurance can be financial prohibitive.” [#AV8218]
- A comment from an MBE Asian Pacific American-owned professional services firm stated, “With the pandemic restrictions, [we’ve had a] hard time finding capable staff.” [#AV811]
- A comment from an MBE Mexican American-owned construction firm stated, “The only difference we have in expanding our business is when we cannot attract new employees with prevailing wages, especially working with union people and Caltrans are all making union wages except the truckers.” [#AV8207]
- A comment from a WBE and MBE Asian Pacific American-owned construction company stated, “Trouble maintaining eligible, skilled tradespeople.” [#AV8261]

- A comment from a majority-owned construction company stated, "I think the business environment in California is horrible. We are a union company and there are difficulties with labor in general." [#AV8295]
- A comment from a majority-owned professional services firm stated, "Business costs have increased a lot along with regulations. There is a shortage of qualified people for this work." [#AV8302]
- A comment from an MBE Asian Pacific American-owned construction company stated, "We are a small company and we are growing so fast that we don't have the staff to support our growth." [#AV8377]
- A comment from an MBE Hispanic American-owned construction company stated, "Some of my suppliers went out of business which makes it hard for me--also it's hard to find good people to work because they are all getting good unemployment benefits." [#AV8396]
- A comment from a non-Hispanic white WBE construction company stated, "Because of Covid youngsters are getting unemployment it is very hard to get people to work." [#AV8409]
- A comment from a majority-owned construction company stated, "It has been difficult to hire drivers... it's an industry wide issue there is a driver shortage so due to that we have to turn down jobs." [#AV8424]
- A comment from a non-Hispanic white WBE professional services company stated, "It's hard to get good workers--most went on unemployment last year and never came back--also no affordable housing in our area." [#AV8503]
- A comment from a non-Hispanic white WBE construction company stated, "Can't find any decent help--all potentials seem to be addicted to drugs or alcohol." [#AV8540]
- A comment from an MBE Hispanic American-owned construction firm stated, "More work than we handle, and sometimes there is not enough workforce." [#AV88]
- A comment from an MBE Hispanic American-owned construction firm stated, "We have bids and the contractors look for bottom of barrel people and they have don't have the proper requirements, which makes it difficult." [#AV881]
- A comment from a majority-owned professional services firm stated, "Federal government is paying employees to stay home. I have had employees quit and get unemployment." [#AV916]
- A comment from a majority-owned construction company stated, "There's a lot of work to be done in private and public sector. Need to be able to facilitate the work with qualified individuals. Finding qualified employees is difficult." [#AV927]
- A comment from an MBE Hispanic American-owned construction company stated, "We don't have the people to do the work, its tough right now." [#AV932]
- A comment from a majority-owned professional services company stated, "AB5 has created a shutdown of independent contractors and hiring the highest skilled service providers. They want to work on their own. We are needing to hire employees with less or no experience and needing to train them." [#AV941]

- The female owner of a DBE- and WBE-certified professional services firm stated, "It's very hard to find someone to help." [#PT2]

6. Working with unions and being a union or non-union employer. Fifty-three business owners and managers described their challenges with unions, or with being a union or non-union employer [#2, #3, #5, #6, #7, #11, #16, #17, #18, #21, #24, #25, #26, #28, #29, #35, #38, #39, #42, #43, #48, #54, #59, #61, #AV, #PT10, #PT4, #WT]. Their comments are as follows:

- The non-Hispanic white male co-owner of a majority-owned construction company stated, "If you're union, you've got to know how to be sure that you're in conformance with the working rules of the union agreements. There's huge, huge exposure for lawsuits and employee lawsuits relative to travel time, show up time, working through breaks. I mean, massive, massive lawsuits we've experienced that can take down a company if you don't know all those rules—where your office address is and how it's printed on a check, you can lose your company over that. So, there's just all these things that go into the labor side and the contracts that you have to sign as a union contractor. And then if you're a non-union, you have to know how to pay prevailing wage. You have to know how to do work on Caltrans and then pay them more than they probably were getting and doing it in a way where you can produce those documents every month so that the state can pay you and demonstrate that you're paying the prevailing wage, and where do you get non-union workers? I think it plays into everybody's decision when you're looking at work. I think that's why DBEs and small businesses choose not to do Caltrans work, even though they're responding to the disparity study saying that they are, which in my opinion, is artificially inflating the capacity. They're not working on Caltrans projects because hey, they do have to have either union or prevailing wage, which costs them more money. And they're making a conscious decision to work non-union private projects because they're more lenient, they're less restrictive and they're less likely to take a hit like you would with a Caltrans project. And let's say you signed as a union contractor and you're a DBE. Well, now if I'm going to provide, let's say I'm going to go do an underground job for somebody. I mean, as complicated as that might be with knowing the size of pipe and the backfill, the material and the productions and the design and all of that, I also have to, as a union company, I have to have three or four different types of labor unions to do the work. I have to have a labor contract in place to get a labor for that union. I have to have an operator, who's an operating engineer. Who's a separate union agreement. If you are driving a truck, I got to have a Teamster. So, a non-union contractor, he would show up and he would do two or three different jobs with the same guy. He would get on; he drive to the job in the truck pulling a trailer that has a backhoe on the trailer. He'd get on the tractor, he'd drive it off, he'd run the tractor. And when he dug the trench, he'd hop off the tractor and get in the trench in shovel with the guy. So now I took a non-union guy where I had one really good guy. Now I've got to have three guys to do it." [#2]
- The non-Hispanic white male co-owner of an SB-certified professional services firm stated, "The problem we have is the unions battling within themselves. We pay union wages and above scale and it limits us to certain projects we can bid on. I mean, especially in the private sector. Those are prevailing wage jobs but yet union scale is higher than prevailing

wage. So that's always been a battle with us to be competitive in that market. Everybody pay the same rate." [#3]

- The Black American male co-owner of a WBE-, MBE-, and DVBE-certified construction company stated, "You're doing a prevailing wage job, it's a lot more paperwork. I mean, whenever there's paperwork involved, you just have to be terribly, incredibly organized. If you aren't organized, then you're probably not ready for a union project, because they require lots of documentation. They just do." [#5]
- The non-Hispanic white male representative of a majority-owned construction firm stated, "One hand it's because our rates are higher that we pay for labor. I guess you could say that there are some projects that we probably lost because we do pay higher wages to our people through the unions. There's definitely in the private there's more of that disparity than in the public market, with data speaking." [#6]
- The Black American male owner of an MBE-certified professional services firm stated, "I detest working with unions, and I say it like that because I personally believe that these type of unions are overworked. They were probably good in the '60s, but I think in today's workforce, people need to stand on their own and not depend on an organization to try to muscle companies to pay people things that they don't deserve or to try to extort money from companies. So, I personally, and I'm sure there's other details, but I don't see the need for the union anymore. I think people need to be qualified, standing on their own, earning promotions through merit and hard work and do things the right way. I had no choice. When I wanted a contract, it was a union contract. So, I had to keep the union contract, and it's been my biggest pain in the side since I've had that contract, and I've had that contract for six years now. And I have another four years on it, and it's my worst contract that I have because of the union. Because people don't work for my company. They work for the union. So, there's no trust. There's no loyalty. There's no anything, because they know that, if things don't go right within the company, they're treated special, and they get special compensation other than anyone else in the company. And if any little thing goes wrong, they run to a union rep and next thing you know, you're sitting in front of a national labor relations board, bringing in lawyers and all that stuff, because someone didn't like the way you said something, which is ridiculous." [#7]
- The non-Hispanic white male representative of a Native American-owned MBE-, SB-, and Micro-BE certified professional services firm stated, "What's happening is, we're required to work with whatever trade union is we're associated with on a project labor agreement, and they don't have qualified staff. And so, we have apprenticeship requirements, we have project labor agreements that would require us to use union people, but they don't have qualified staff. It's kind of a hassle. The reason is, actually as a business partner and community partner, we support the idea of project labor agreements and community workforce agreements. The problem is they don't fit our business model because it's a very small, licensed business. It's not labor. That's our challenge; working through these project labor agreements is probably one of our biggest things. And then, we have apprenticeship requirements by state law. And we turn in apprentice requests every other day, and we've never had one. And I mean, for years, we've been requesting apprentices and we don't get any. Operating Engineers is the signatory union, they've actually sent us letters saying, quit requesting apprentices. And so, those are our biggest challenge by far. Now prevailing wage

in and of itself is not an issue. If you can afford the financing, it's perfectly fine. The problem with the union is, you're basically sinking your firm to become signatory with the Operating Engineers because of the unfunded pension liability. If you become signatory, your firm is worthless on a resell market particularly in Operating Engineers. Well, if you're not a signatory what they do is they are going to bother your... they're going to create barriers for your non signatory firm on public works projects. And the bottom line is that under our project labor agreement, the union actually steals from your employees. They require the employees to pay into their pension, the union pension, and the employee has no way of ever getting that money back." [#11]

- The Black American male representative of a DBE-, WBE-, MBE-, SB-, and Micro-PW-certified small business development association stated, "It seems as though the union is trying to be a little bit more flexible on some of the requirements because, you know, it was this thing called the 'Good old boy network' where, you know, we were - basically, a lot of the Black workers were not able to get in because of - you know, they just went in as - if you worked by your past experience - we had no past ability to be in it, so, we couldn't - you know, you get in because you have uncles and parents and stuff that's in there and they bring you in. But that has been recognized and I'm seeing a slow change to the availability to the unions from some of the unions in this area. So, it would be nice if it changed a little bit faster, but at least there's a change happening." [#16]
- The Hispanic American female owner of a WBE-, MBE-, SCMSDC-, and DBE-certified goods and services firm stated, "Working with unions, I just feel that - give us the information that we need from the beginning. If this is a fee that we have to pay, then let us know that in advance before we're bidding out things. If this is an amount that - if these are the requirements of the union let us know that. It shouldn't be such a difficult process that we have to start weeding out all this information and trying to find out, so then we're failing in the bidding process. You know what I mean? Spell it out. Don't have us having to go through about ten different websites. The links are there that we have to then - spell it out for us." [#17]
- The non-Hispanic white female owner of a DBE-, SWBE-, and CBE-certified professional services firm stated, "My husband, who is now ten percent of the ownership, was not part of the ownership at all. Now, has become back to part of the ownership and, only actually, not because of anything to do with Caltrans or even myself, it had to do with the union affiliation. He was a union member. We weren't paying in for union benefits. So, they were trying to fine me for not paying his union benefits even though he wasn't working as an operating engineer any longer. He is a field representative, part-time field representative for me. So, anyway, long story short, in order to get out of having to pay an hourly rate just to the union, we put him in as ten percent of the ownership. We are 100 percent union-owned company. So, we are signatory with the five main unions. Anybody who's working with Caltrans, for the most part, Caltrans doesn't require that you are union, but any of the general contractors are union. Most of them, any big ones. I don't work with any contractors that aren't union. I would, but most of them are not. I mean, they all are... So, the challenge for us is skilled and trained workforce. That's one of the big things. The unions have - the building trades decided that they wanted to have skilled and trained workforce, meaning there's a requirement, a specific requirement from each union that your workers are skilled and trained. That means they have to have a certificate from that union showing that they

are skilled and trained. You have to have a certain percentage of that group there. That's one thing that has impacted us. I would say it's a barrier. For us, as a subcontractor and having operators, operators are very difficult to come by. The requirements from the union are difficult. That's a huge barrier. The way you pay them is a huge barrier. I mean, for anybody that's small, if they're starting as a union company, it's a difficult situation. If you're not a union company, it's going to be difficult for you to get big projects because all the big players are union. We don't have a choice. For example, if I wanted to do work with L.A. County, they sometimes will say, 'You have to hire workforce within 30 miles where this project is,' because they want to hire local. It's great in theory, but I can't even call my union and say, 'Hey, I need somebody in this zip code.' That's not allowed. I don't get - that's not an option. So, they kind of contradict themselves. I just don't do work for them, because - but see, that's a barrier, too. That means that you are kind of being discriminated against because you're union, because you don't have the choice to call out who you need or who you don't need. I can't call out, 'I need African-Americans. I need two more because I don't have enough here.' I can't say that. I just have to pick who I get. I can't even say - for us, it would be difficult for anybody who is extreme - if you are morbidly obese, 'You can't work at my work because you won't be able to move as you would maybe be,' but they're going to send me anybody and you have to try them out, and then turn them back and say, 'I need a new person.' So, that's a challenge." [#18]

- The Hispanic American male owner of a DBE-certified and uncertified MBE construction company stated, "With union jobs, a big percentage of the revenue generated goes to payroll because of union wages. The unions are pretty good with us and working with us, and the apprentice school. And so, whenever we need staff, that hasn't been an issue for us in that regard." [#21]
- The Hispanic and Native American male owner of a DBE-, 8(a)-, SB-, and MBE-certified construction company stated, "The unions - picture this organization, right? They're - the unions - and this is all of them, all the ones that I've ever been signatory too - laborers, cement masons, operators - they're all large organizations. They have an accounting company on retainer. They have a legal firm on retainer. Right? So, what they do is they - now, every year they'll audit you. So, when they send you an audit - now, this is an accounting firm - right? - who's got accountants just waiting around for the next guy, and they send you a letter with 48 things that they want to see and you've got to have it to them within a month, otherwise you're in violation of your union agreement. And those 48 things, when we're in the middle of job they take us a while to get. But they only give you two weeks or something. So, they have the same requirements for us as, again, they have for De Silva Gates. When De Silva Gates gets one of those, they ring up their labor compliance people and their - the human relations people and whoever else, whatever other department you need, and tell them to hurry up and they take care of it and that's the end of that and everything's great and everybody moves on. With us it takes about 17 submittals and every time it comes with a threatening letter. And then they go get the attorney if you don't comply to sue you in federal court. And then you have to go spending money defending yourself with an attorney on something that really is basically you can't commit to the time constraint because you don't have enough resources. And so, at the end of the day they don't care. It doesn't matter. The reason for unions to exist I think evaporated a long time ago. On this last job we had a guy coming out from the - one of the unions wanting

to get one of our subcontractors into the union because they weren't. And they don't particularly have to be because they're service. However, they threatened us with 'We're going to have sanctions against you guys and it's going to be up to about - it could be up to \$80,000.00. You either take this deal and we'll reduce it down to \$20,000.00, and if you're nice we could maybe go away. But if not, we're going to take the \$80,000.00. We're going to shove that down your throat and then we're going to sue you anyways.' I mean, that's the kind of treatment you get. And so, from that respect they've lost their sense of purpose. And they certainly have lost any reason for me to believe that they need to exist other than training their workforce. And I'll be honest with you, we can - those guys, most of them that come from the union are probably already worker guys and they've already been - they already know the skills that they need to know for the most part. It's not like the union gives them some kind of special 'Oh, my God, I can just tell you've been from the union.' So, the union brings us almost - in that example, they give you very little benefit other than the fact that they like to take your money. And it's for the guys. If they want to hang in there for 25 or 30 years, they end up with a decent retirement. And they have decent benefits. But the union's got these stupid rules that they don't care - again, it shows they don't care. And the employer can help that or make that worse. Like, for instance, a guy needs 300 hours a month, say, or 200 hours a month in order to keep his benefits alive. And if he works 600 hours in one month and he works 100 hours in the next month they don't add those together and make it into 700 divided by 2, or 350. They make that into 'Uh oh, he only had 100 in that month,' even though he had 3 times as many in the previous month. And they don't apply your benefits equally, and so your health insurance runs out. And it's only because they have these stupid rules because all they want to do is keep the money that we spent, that the employer spent in excess on the employee's behalf for all these silly things that they do that have nothing to do with the benefit of the employee." [#24]

- The non-Hispanic white male owner of a majority-owned SB-certified construction firm stated, "I've had my issues with the union. We are a union contractor, but I've had my difficulties with them, especially if you go work out of your area. Say I went to Southern California and was the successful low bidder on a project and I pull in down there with my crews and my equipment and whatever. There's some games that get played there, for sure. They don't want you there. I'm in the same union. it can be a problem if you're out of your area. It can be a little - what's the word - territorial." [#25]
- The Middle Eastern American male owner of a construction company stated, "Sometimes things don't make sense to the clients but once you know the rules and you follow the rules it's not difficult, especially work with the union reps and they come visit the site. They give a bit of what they're expecting on the job. It has not been a problem. But sometimes unfortunately for example one time we were doing columns and the column was maybe ten minutes of concrete work, maybe something like one hour of concrete work, maybe two hours of filling work, maybe two hours of teamwork. So, we had to bring the three trades inside the union. Things like that affect the cost tremendously. But once you understand it that it's not a big challenge." [#26]
- The Hispanic American male owner of an uncertified MBE construction company stated, "I've been getting invited to be as a union member. I haven't - I've been thinking still about it, but so far, I don't think I'm ready yet, and actually I talked to some of my employees, too, and we thought about it. Some of them, yeah, they think it's a good thing; sometimes they

think it's no, we don't want to do that. And so, but so far, you know, to be on my end, it depends on my employees, what they need and to keep working as a membership. To me, they're like a family. Just not workers, you know; they're a family, you know, how we work together." [#28]

- The non-Hispanic white female co-owner of a majority-owned construction company stated, "We've thought about going union, at one time, but it would not work for, you know, private roads and driveways and what we do, parking lots - it just wouldn't work. All together, we would be knocked out. One of our biggest clientele [is] private roads. And in Marin County, they have city, county, non-maintained private roads. And some of these townships or cities, if you will, have implemented or made a deal with or something - and I don't know how this has happened, but I know it has happened, that nonunion companies such as us, even though my crew is very well taken care of and we do excellent work, that we're not even allowed to bid on the project, because we're nonunion. And these are jobs that, you know - and some of 'em, the residents are paying for the road. That, I believe, is the biggest discrimination. when I'm not offered to even bid on a project or do a project because I am not a union company, and that is a slap in the face. 'Cause, you know, we're nonunion, we bid less, but then we're not taking a huge chunk, you know what I mean? And my guys, like I said, they get overtime overrate, they get double time over 12, and there are sometimes, you know, when we do work a 12-hour shift or 13-hour shift, and their way driving back they're paid. Union companies don't pay driving time. we do. But I'm just saying that if we're not even allowed to bid, because then - our numbers would be lower because we are nonunion. So, I don't have the union bennies attached, if you will, but my guys get bonuses at the end of the year, they get huge checks, and it helps them carry them through the winter, 'cause we know that they're down, you know what I mean? There's certain benefits that we offer that, you know, maybe a union company would. I know that if these guys went to work for a union company, they are not gonna get that and they know that. Even though we pay union, the union companies can't hire nonunion companies. That's huge, I mean, we would get so much work, I am telling you, so much work, if union companies were allowed to hire us to come in and help them. So, on the things that they don't, you know, maybe they need a little bit more, you know - and I'm not saying that their guys aren't as good as ours, but on some of the more clever stuff that our crew can do." [#29]
- The non-Hispanic white male representative of a majority-owned construction firm stated, "It would be [a barrier to work with unions] if they'd never done it. Just because they don't understand it. But you bid your job for paying union wages. So, it shouldn't be an issue. Unless if you don't understand it. Being a union employer would probably be easier, to be honest. Just because, like I said, you have set wages that you bid on, and you're bidding against everyone else that - I think you have to be a union employer to even bid work in California. Or for Caltrans, I mean. I'm not 100 percent sure about that, but 90 percent sure that's the case. And the people that aren't - if you are, it makes it easy to - you know you're bidding the same as far as your man-hour cost. Everyone has the same man-hour cost for the most part. Just depends on what you bid on your man hours." [#35]
- The Black American female co-owner of a DBE- and DVBE-certified and uncertified MBE construction company stated, "Because we're union, so that is one-third, honestly, of the money that we have to pay out as far as labor. Where, on the flip side, it's not on the private

sector. It's still union work; it's just paid at a different rate, and that's the difference, as far as - so we have more of a profit margin. you say, oh, I need six guys. Okay, well, I'm going to go to the Union Hall and grab six guys, but then you only use us for two weeks and this guy is back at the bottom of the list when he could have just stayed there and got on a project that was going to keep him long-term. Like, it's just not fair across the board. Our pricing is folded in, but I can imagine if you are not, it's definitely sometimes triple what you would pay somebody. And so, I can see that being a barrier, because the issue with the union is you report - you get your report in by the 10th of the month, and they want payment by the 20th, and you haven't got paid from your contractor for that month of work. Like, it makes zero sense. The union can be -it can be expensive. I mean, for us it's about, oh, about \$24 for every hour the person works. So, that can be quite pricy in trying to - that can be pricy in trying to come up with that every month, timely. If you don't pay timely, there are penalties, so, yes, it can be a burden. It can definitely be a burden when you're not getting paid on time." [#38]

- The non-Hispanic white male representative of a majority-owned professional services firm stated, "The union's poison to our industry. Our company used to be union and it will never be again." [#39]
- The non-Hispanic white male co-owner of an SB-, DBE-, and HUBZone certified construction firm stated, "So the hardship is the union dues. They kind of own your company and your workers. So, if they don't have work for - so let's say I don't have work for my workers, my workers are not allowed to take another job to fill in for that time, but they still have dues, I still have dues. That's a tough one. I have heard - and this is something I've thought about exploring. They say, you know, get your business going and then open a second business to be a union. Because once you go union you'll [lose] any sort of customer base you did have if you had, you know, any sort of customer loyalty or work source or anything like that, they kind of own your work source and your workers. Over time you start to see the union requirements pop up." [#42]
- The non-Hispanic white male representative of a DBE-certified and uncertified WBE construction firm stated, "We've had some problems with the union, so they went out of business for a while. I don't even know if we have a trucker union right now in San Diego." [#43]
- The Hispanic American male representative of a construction union stated, "What are the safety conditions for each job? Well, we're going to check jobs and if we see something that is not right, we definitely let them know. So, anything we have to have a conversation and fix things that look like not right. So those are the main things. Everybody checks that, even other unions. Everybody checks that whoever works on those public projects they have to be a union member. And it depends on what they're doing they'll fall in there. Let's say you're using somebody to put rebar, go and ask them what union you are, who you are. So I can contact the other union and make sure that guy is a union. And it's the same thing. I receive calls. Hey, this guy is in landscape. Do you know them? I say yes or I say no. And then they know. We're going to go to the company [to see] why they have people. They have to be members when they work in the public projects." [#48]
- The Asian Pacific American male owner of a DBE-certified construction firm stated, "The prevailing wage is too hard to comply with." [#54]

- The Asian Pacific American female owner of a SB-, DBE-, and WBE-certified construction company stated, "So, prevailing wage, it's very hard to control the profit because if the employee timecards do not process right... So, in construction if this technician from home, they drive straight to the job site. Then when they arrive at job site, the clock ticking. But if this employee need to go pick up parts, or they need to go to office, or some people, they stop by office, drive company cars, then from company car, driving time, going to the job, and coming back, it becomes the owner's expense. I'm not a union. I'm scared to be a union. I don't have enough manpower to help me understand union. I want to learn. And I think that union need to be friendly with small business, not always try to get their labor, jobs. Union, they are trained to take care of their own people, and then they don't care. Whoever pay, they call. I think union is like a mafia. They only see who has the need. They do not see the integrity of others. Union, it's only take care of their members." [#59]
- The Hispanic American female co-owner of a WBE-, MBE-, Micro-, and SB-certified professional services company stated, "We're not a union shop, we're not a signatory. And there's a project we were working on that we didn't realize that the prime contractor was signatory. The union found out and they asked us to sign an MOU. But it gets problematic because we don't pay dues to the union, and then the employees have to pay dues to the union. We already pay prevailing wages, which is required for all public work projects when we're out in the field, but working on a project that are signatory to the union you have to sign PLAs, and we have not done that. The principal surveyor at our firm has avoided that just because he's heard about the bookkeeping and keeping track of all the numbers, and we're not interested in going union simply because of the constraints. It's hard to run a business, especially in private development, when you are subject to rates that the union tells you, you have to charge. They're a lot higher than private rates. The union is pretty powerful. We just avoid it. If it's a union shop, we don't typically provide bids. Well, as a non-union firm, providing survey work to a union shop, which most of the contractors that do work with Caltrans are union contractors, it makes it impossible for us to work for a union contractor because we don't sign PLAs. We don't typically do work with the union. So that's kind of a barrier for us, for the land surveying, construction staking side of things. If we work directly for Caltrans, I don't think it would be a problem, it's just a problem when we work for the contractor who's typically union for Caltrans." [#61]
- A comment from an MBE Hispanic American-owned construction company stated, "2 or years ago they came out with a labor compliant requirement--if you are a non union shop you have to hire one union person for every so many workers and you must have a union trade school, we are never going to be a union shop and we do not have a union trade school." [#AV2]
- A comment from a majority-owned construction company stated, "Prevailing wage/union preference that the state holds over everything--if you're a small company it's very difficult." [#AV110]
- A comment from an MBE Hispanic American-owned construction company stated, "We would do work for different town organizations and the union somehow is able to block us, even though we pay prevailing wages. They put a lot of blocks to work that we used to get." [#AV126]

- A comment from a non-Hispanic white WBE construction firm stated, “The unions has been the hardest because we are non-union. In terms of jobs, for freeway jobs they we are not allowed unless we are union.” [#AV145]
- A comment from a majority-owned construction firm stated, “The union is pushing to convert all companies of our type to unions. That doesn't really work for us and it's going to become a big issue very soon.” [#AV230]
- A comment from a majority-owned construction company stated, “The unions are out of control. They keep trying to get raises for their guys but the money just goes to the unions instead.” [#AV333]
- A comment from a majority-owned professional services firm stated, “We are not a union shop and wondering if that could be the problem.” [#AV251]
- A comment from a majority-owned construction company stated, “Prevailing wages, that is a big barrier: because rates vary between private and public work project, especially if not union. Prevailing wages, paperwork heavy.” [#AV8185]
- A comment from a non-Hispanic white WBE professional services company stated, “Only issue we really have prevailing is wage jobs, unions put a huge road block to get that type of work and we are non-union.” [#AV8246]
- A comment from a non-Hispanic white WBE construction firm stated, “Barrier is we are a non-union company. In large jobs primes are unionized and won't use us because we are non-union. Won't sub to us.” [#AV8247]
- A comment from a majority-owned construction company stated, “City legislation limits nonunion contractors from bidding over a million dollars, that's the only thing.” [#AV8320]
- A comment from a majority-owned professional services firm stated, “Unions make it difficult. It's supposed to be protected work, self-performing work. The unions don't enforce the rules. We're considered disadvantaged for our location.” [#AV8332]
- A comment from a majority-owned construction company stated, “The cost of doing business in CA is too high which limits our ability to expand. We would like to work with Caltrans but they only use union shops, and only one guy has all the Caltrans contracts in our area.” [#AV8372]
- A comment from a majority-owned construction company stated, “The unions are creating a problem. The city agencies that are requiring union contractors are making it difficult for the non-union contractors to compete.” [#AV8421]
- A comment from an MBE Native American-owned professional services firm stated, “We are constantly running up against the project labor agreements with public works projects and the outsized role of the trade unions within those agreements.” [#AV8530]
- A comment from a WBE and MBE Hispanic American-owned construction company stated, “Union makes things really difficult. The skilled and trained workforce requirements are increasing upfront costs which make us less competitive.” [#AV861]
- A comment from a non-Hispanic white WBE construction firm stated, “Definitely unions are a big problem. There is discrimination against women.” [#AV883]

- A comment from a majority-owned construction company stated, “Biggest deal is prevailing wage requirements, headaches and hassle that goes into going into that stuff.” [#AV929]
- The female owner of a WBE-, DBE-, and MBE-certified construction firm stated, “I have been for the past couple of years receiving calls from primes, asking if I'm going to bid on a project. And when I asked about number one, like if I have to be union in order to participate, the answer is always yes, well, I'm not union. And I had a very bad experience participating in a project labor agreement with a large prime. It wasn't on the Caltrans project. It was a county project. So, it was a public works. I participated in a project labor agreement, but because I wasn't a signatory, I felt like I was not really helped in getting manpower through the union. I basically got kind of what was left over. It was difficult to utilize and work with these people. And then it was difficult to get them off the job and replace them. That project, ultimately, the prime contractor had a claim against the County for \$50 million. They settled for \$25 million and made all of us participate in the loss. So consequently, I lost \$250,000. And at the time I was a very small business with revenues only at \$2 million. This was the tremendous financial hit to us. So, I'm really shy of how getting involved number one, with a large prime and number two, with having to participate in union matters.” [#PT10]
- The non-Hispanic white female co-owner of a DBE- and WBE-certified construction firm stated, “We have experienced issues because we are a non-union firm and if we are unwilling to sign a union agreement we have lost the opportunity.” [#PT4]
- Written testimony submitted to BBC stated, “We have had issues because we are non-union and union firms want us to sign job agreements and are unwilling. We pay the same prevailing wage, and we think this should not be a factor.” [#WT]

7. Obtaining inventory, equipment, or other materials and supplies. Fifty-seven business owners and managers expressed challenges with obtaining inventory or other materials and supplies. Many firms mentioned new regulations on equipment emission standards as a barrier [#3, #6, #8 #10, #12, #13, #14, #16, #18, #23, #24, #25, #33, #38, #42, #47, #49, #50, #52, #53, #54, #62, #AV, #FG3]. For example:

- The non-Hispanic white male co-owner of an SB-certified professional services firm stated, “I mean there is some cases. I mean, we bid on a big project yesterday for [a City] and when you have large material items, custom material items, they have to be purchased for a project that has, let's say 260 calendar days or working days on it and we have to buy the material upfront. It kind of limits us sometimes because I mean, perfect example is we had to buy some grading, steel grades. You got 500,000 dollars in material and they want it upfront. That's a big hit for us because we're a small business. You have the cities that won't pay material on hand. So that's always a battle.” [#3]
- The non-Hispanic white male representative of a majority-owned construction firm stated, “We've had issue with that with concrete, fly ash, and some other materials throughout the last couple of years. Lumber has gone up. [It] requires industry and owners to work together on what those issues are and be on the same page on how to overcome them and talking to the right people about what we need as an industry to get help to overcome those barriers.” [#6]

- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "That can be a barrier because we don't have the capital for that stuff. We had that issue on one project where we had to purchase a bunch of equipment and I had to front the money because I did not have a way of getting the city to give the money first." [#8]
- The non-Hispanic white male owner of a SB- and ELBE-certified professional services firm stated, "When I didn't have the capital. It's always a barrier. If you have a capital, then it's not a problem. It's a capital-intensive business, asphalt. It's not unusual to have a 150,000-dollar days, of which maybe 65 percent will be cost and materials, which has to be paid at the end of the month. Regardless [of] when the agency pays you." [#10]
- The Hispanic American female owner of an MBE-, WBE-, and SB-certified professional services firm stated, "That's been a challenge again, just because of the initial cost, order minimums, having the necessary space to store inventory is a challenge, and then also like I said, equipment, if I had a van, I feel like I could do more work rather than just waiting until I have an actual client and create the budget for those types of expenses." [#12]
- The Hispanic American male owner of an uncertified MBE construction firm stated, "Getting certain parts for the vehicles or getting certain parts for the trailers, anything. It can be very cumbersome, and yes, it is a barrier. The price of the parts and then, sometimes, they're not readily available. They have to be special ordered. That takes time, so the time that it takes to get a part, the stuff is down, idling or not doing anything, it's not generating any money. I know there's a lot of small companies that offer financing, but these guys are charging 22-29 percent interest. That's a beast." [#13]
- The Subcontinent Asian American male owner of an uncertified MBE construction firm stated, "Sometimes yes, because we get a job that we could not find in the local market, and that particularly items I have to order from the East Coast or sometimes even order from outside the United States. It would go somewhere else... That's something common on our business because a lot of items were built overseas, and they didn't have the manufacturer here. Maybe they don't have the distribution here. So, we have to go search and find it, who made it, where they're selling it. Yes, of course, we'll get into some difficulty on that." [#14]
- The Black American male representative of a DBE-, WBE-, MBE-, SB-, and Micro-PW-certified small business development association stated, "Obtaining inventory, equipment, or other materials and supplies that may relate to the first thing you mentioned, which is access to capital." [#16]
- The non-Hispanic white female owner of a DBE-, SWBE-, and CBE-certified professional services firm stated, "I think, for the most part, everybody, is the technology trend. All of our machinery is now technology based. It's still being run by an operator, but they need to be proficient in technology, meaning GPS technology for all of the things that we do. That's become an expensive and [a]pretty impactful trend for us... I might have six or seven trucks waiting to pour that concrete. We do like 1,100 feet a day. That's a lot of concrete. If I have any problems or I'm slowing down, it costs me a ton of money. Every one of those loads of concrete is over \$10,000.00. So, if I have six concrete trucks waiting and we have a problem and they have to be turned around, that's like \$60,000.00. it's a lot of money. So, every little thing that we do makes a huge difference when we're talking about all of this stuff We get our materials but we don't have to be in charge of getting any, For example, if we are doing

a high-production pour, meaning we're not using ready-mix trucks, we might utilize somebody making our own concrete for us. In the past, we sometimes would include in our bids supplies themselves. Again, all of these - we would do that because it was advantageous for the general contractor. Me, as a DBE, the more that I could perform, the more work that I can perform, the better. Right? Well, now, we just don't do that. We don't include any of that for them." [#18]

- The Subcontinent Asian American male owner of a Micro- and SB-certified and uncertified MBE construction firm stated, "I would say, yeah, there are some really good software out there which can help to understand the issue at hand or, to be specific, the project I'm dealing with. And some of [the] software can be as expensive as tens of thousands of dollars. And there's a time I make the decision when if I need that particular software, if I need to use that to solve this problem or not, and those times, in order to purchase [the] software or to get licensing it could get really expensive. I would say as far as equipment and anything related to getting the work done, it's primarily funding. If I have the money, I have had no issues in the past getting those - any of the stuff related to software or computers or even any other equipment that I need particularly for the projects." [#23]
- The Hispanic and Native American male owner of a DBE-, 8(a)-, SB-, and MBE-certified construction company stated, "Unfortunately, one of our biggest competitors is a non-DBE and he does exactly the same things we do. And he has material sources that we don't. So, we're really at the mercy at a lot of non-DBE suppliers that we have to use that depending on the external market in general may or may not be interested in giving us the prices we need in order to do that. And so, we may just come out of the chute completely non-competitive because we can't get close enough on the prices of the materials, which is a large component of this." [#24]
- The non-Hispanic white male owner of a majority-owned SB-certified construction firm stated, "I mean we could be the low bidder on a big dirt job tomorrow, and all of a sudden, we need certain pieces of equipment that we need to add to our shelf, and equipment, right now, is at a premium. A lot of it has to do with the air quality requirements, CARB requirements. A lot of our equipment that we used to have had to go away. You can't necessarily afford to replace it with something new. Good, used equipment is at a premium because there's a little bit of a shortage. Well, you kind of wonder, because of your size, again, if you're getting as good a price as some of the big boys, because the big boys are obviously buying a lot more volume. So, their - I'm sure it happens, they're given better prices for whatever materials there is, whether it's pipe or - it could be a lot of different things. But yeah, I'm sure. It's a disadvantage." [#25]
- The non-Hispanic male owner of a majority-owned SB-certified construction firm stated, "It was in the beginning. When I first started my business, it was fairly new so, some of the supplier - you know, the asphalt supplier or concrete supply companies are leery of new companies. They want you to establish some sort of history and credit history. So, in the beginning, when I first started the business, I had a hard time getting accounts at some of the bigger outfits like All American and Vulcan. I had to start off with Holiday Rock, which is kind of a smaller asphalt supplier who makes the asphalt. So, in the beginning, I had a hard time getting accounts with some of the suppliers." [#33]

- The Black American female co-owner of a DBE- and DVBE-certified and uncertified MBE construction company stated, "We started at a time in 2009 where a lot of the contractors weren't working, and so they had a lot of equipment sitting around their yards. And so, he would just ask them to rent it from them. And, quite honestly, that's how he started doing business, and he would buy some equipment as he got paid, he would buy equipment. He would buy cones, he would buy some signs as we got paid for jobs. I came home one day, he had traded in one of our cars and got a white work truck. So, that is really how we built up over time, and that's just been his method of adding more equipment, more cones, more signs, getting the trucks. As a job pays us, he buys more things. It definitely was, just because we didn't - we didn't have anything. So, just trying to open up accounts and accounts in our world is really word of mouth, you know, getting references. But when you have none, you're kind of paying COD to begin with, and so that can be - that can be a little pricy to get started." [#38]
- The non-Hispanic white male co-owner of an SB-, DBE-, and HUBZone certified construction firm stated, "Yeah. I mean as a contractor that doesn't do service work we really shouldn't keep supplies, you know, we shouldn't have an inventory. We should plan before each job for the job. I'd say right now the struggle is everything - I mean inflation is insane. So if I had big something three or four months ago when a 2x4 was still \$3.47, and now it's like \$7.00-plus. And then a lot of stores have run out. I mean we were trying to do a project and there was not a single plastic electrical box in the Valley. They were all sold out. They were all made of petroleum or something like that. And they're just - there were none. For weeks. So, we just couldn't do any electrical [work]." [#42]
- The Hispanic and Indian American female co-owner of an SB-certified and uncertified WBE construction firm stated, "Well, that goes to the funding, so yes, I'm going to say a little bit, but it's like a half-and-half. We got it, but it was a little tough." [#47]
- The Hispanic American female representative of a DBE-, MBE-, and WBE-certified construction firm stated, "It was an issue when we were growing because everything that you had to use for the business what we do, it is expensive. And sometimes it's hard to get those kinds of things financed." [#49]
- The Hispanic American male owner of an uncertified MBE construction firm stated, "Well, I just spent \$5,000.00 on tires. So yeah, the capital would be a huge barrier. And I mean my truck is - I have a fan that's going on right now and it needs to be worked on. But it's just taking a lot more fuel but I don't have the money to fix it. It runs but it just, it doesn't run right. So I just can't afford to fix it right now. so my truck in two years, I think a year. I have a year to get a new truck. After a year this truck that I'm in right now it's no good no more in California. I cannot use it in California. I have to buy a new truck, a 2014 or newer that has a diesel exhaust fluid system in it for the air quality. And my truck does not have that. So I have one more year left in California until I have to part ways with my truck. I guess the government is, has something where they know that you have to get rid of your old truck. So they buy the old truck off of you. And put it towards a new one. And I'm going to see about going that route or just saving up, putting all the money towards a new truck from how I'm working right now." [#50]
- The Asian Pacific American male owner of an uncertified MBE construction firm stated, "The best ones to work with [are] ranchers that used to have their own trucks, because the

California laws and regulations of smog and emissions, they had to get rid of their trucks, and they no longer have them. So instead of buying new trucks, they quit hauling their own and hired everything out. It's just - you know, the sad part about it is they're making all of us here within California either retro - but now that's coming to an end - you can retrofit your truck to meet the - or satisfy the requirements, or you can go buy a brand new one, and they'll do their program. You may get \$50,000.00 or \$60,000.00 if you turn in your old one. But a lot of the trucks that are not compliant within California get sold out of California, because it's perfectly fine to run there. They re-register it in Nevada or in Washington, and they come right back to California hauling freight. And the thing about it is, because California's got emissions, everybody's overhead went up, because you had to go buy a new truck, or you've got to put the \$15,000.00, \$20,000.00 into your truck to make it compliant, so now you've got overhead. But the regs don't change, and these guys don't have the overhead, come in and haul it for cheaper because they can. They can afford to do it for cheaper. Whereas California you can't. Between fuel prices and what they're making us do with emissions, it's a struggle to keep a truck on the road. And I think our fuel prices and our insurances for owner/operators, we don't get the price break like the big companies do that have got a couple hundred trucks. They don't have that fleet pricing. So the owner/operator's got the highest overhead and the last amount - the smallest margins to make a go at it." [#52]

- The Asian Pacific American male owner of an MBE-, DBE-, and SB-certified construction firm stated, "I think for me it'd be both really having a good chunk of capital to invest like that, yeah. That would be something that is a hindrance to more rapid growth." [#53]
- The Asian Pacific American male owner of a DBE-certified construction firm stated, "States should buy their own materials. Give small business labor only contracts. As a Small business I am worried about financing, labor, materials. Caltrans would save a lots of money if they had labor-only contracts. Street projects. Asphalt and concrete [are expensive], and hard to store, so that could be bid out but smaller projects could be labor only." [#54]
- The non-Hispanic white male owner of a majority-owned construction company stated, "It's not a variable if you can afford the finances. If you have the money to buy a new piece of new equipment, but I never really had a problem with getting equipment together." [#62]
- A comment from an MBE Hispanic American-owned construction company stated, "It is difficult to compete against the vertically integrated companies that have the material advantage as they don't pay taxes on the materials. They are taking all the work." [#AV5]
- A comment from a majority-owned construction company stated, "[I don't work on Caltrans projects] because I don't have all the required whistles and bells on the equipment." [#AV10]
- A comment from a majority-owned construction company stated, "Carbon emissions stuff is an inconvenience because you need to retrofit or buy new trucks and equipment. [We are] forced to upgrade sooner than we would have liked." [#AV29]
- A comment from a majority-owned construction company stated, "It's very difficult to get your foot in the door (I've been trying since 2008) if you don't have the money to buy a lot of equipment right off the bat." [#AV167]

- A comment from a majority-owned construction company stated, “Materials pulled from out of state are not California certified.” [#AV243]
- A comment from a majority-owned professional services company stated, “Materials are getting very expensive - primarily lumber.” [#AV325]
- A comment from a WBE-certified construction firm stated, “Used to have a fleet 10 trucks and because of the California Bay Resource board now we only have one truck.” [#AV842]
- A comment from a Hispanic American owned WBE- and MBE-certified construction firm stated, “Recently laws related to diesel trucks will not be able to operate in ca, these trucks are apart of our business and this will hurt our operation/business.” [#AV855]
- A comment from a majority-owned construction firm stated, “The filter screwed everybody, it was a big hit, especially in California and had to sell our nice equipment and didn’t get any money back and had to buy better equipment which affected us negatively.” [#856]
- A comment from a majority-owned construction firm stated, “Getting raw materials is difficult right now, mining in Southern California has been essentially shut down which makes it difficult to get materials for construction.” [#AV878]
- A comment Hispanic American owned MBE-certified construction company stated, “Clean vehicle admissions - having difficulty replacing old fleet with new fleet.” [#AV887]
- A comment from a majority-owned professional service firm stated, “CARB Board - had to replace four trucks to meet CARB standards. Cost me \$80,000 per truck. Now I have to spend \$100,000 on another truck.” [#AV916]
- A comment from an MBE Hispanic American-owned construction company stated, “Right now with the covid is affecting the ability because of construction materials have gone up and they are hard to find.” [#AV921]
- A comment from a majority-owned professional service firm stated, “EPA is an issue, had 7 trucks and now have none, smog laws became so tuff that we had to get rid of the trucks. Law in California requires that engines must be 2010 or newer.” [#AV930]
- A comment from a Hispanic American owned WBE- and MBE-certified construction firm stated, “The carb requirement are difficult to meet with our equipment. When we have to bid with companies out of state it’s not a level playing field.” [#AV947]
- A comment from the availability survey stated, “It’s sometimes difficult because we don’t fabricate rebar inhouse. We have to purchase from other fabricators which makes it more expensive.” [#AV8140]
- A comment from a majority-owned construction company stated, “Biggest problem we have experienced is the carb laws forcing us to upgrade equipment before having funds put us in unnecessary debt.” [#AV8151]
- A comment from a majority-owned construction firm stated, “The updating of our trucks to make them compliant has been an expense but we are on the better end of that now.” [#AV8199]
- A comment from a majority-owned construction firm stated, “Finding employees that are skilled in rod busting and placement of rebar. This last year pandemic caused cost of steel

to rise almost 300%. Insurance prices are very high. Requirements of insurance can be financial prohibitive.” [#AV8218]

- A comment from a majority-owned construction firm stated, “Regulations have made tough to stay in business. There are a lot of where we had to buy a whole new fleet just to stay up top the [emission] standards.” [#AV8225]
- A comment from a Hispanic American owned MBE- and WBE-certified construction firm stated, “Yes, California is hard to run a business because of high emissions, California made us change the filters due to high emissions standard and have engines dated before 2010 at 40,000 a piece yes it is hard to operate a trucking business in California.” [#AV8231]
- A comment from a majority-owned construction firm stated, “The [emissions] stuff mandates works because you have to have expensive equipment.” [#AV8421]
- A comment from a WBE-certified construction firm stated, “CA air Resource Board has put significant new requirements in place for our trucks where we had to get new equipment which was costly and time-consuming and made things difficult.” [#AV8244]
- A comment from a majority-owned construction firm stated, “Carb compliance for our trucks has been an extreme burden. For Tier 4 engine compliance. Had to replace all trucks.” [#AV8249]
- A comment from a WBE-certified construction firm stated, “We have an overzealous government, it's nature of biz and size of biz, California i.e. carb regulations are suffocating. It is a one size fits all and for small businesses it just doesn't work.” [#AV8348]
- A comment from a Hispanic American owned MBE-certified construction firm stated, “Some of my suppliers went out of business which makes it hard for me.” [#AV8396]
- A comment from a majority-owned construction firm stated, “Regulation on [emissions]. Need to purchase new equipment.” [#AV8400]
- A comment from a majority-owned construction firm stated, “The regulations are horrendous--First we had to update the emission systems on our trucks, now they want all electric trucks. You have to constantly spend money to be able to work on government jobs.” [#AV8460]
- A comment from a WBE-certified construction firm stated, “Just that carb laws are ridiculous.” [#AV8467]
- A comment from a Hispanic American owned MBE- and WBE-certified firm stated, “State making it a lot tougher to do business because of all the clean air laws. Need to buy all new equipment. Spending money we don't need to spend.” [#AV8486]
- A comment from a majority-owned construction firm stated, “One issue keeping up regulations. [In] two years I bought two trucks.” [#AV8506]
- A comment from a majority-owned construction firm stated, “Complying with the California Air Resources Board has been difficult. Dictating what vehicles, we can operate.” [#AV8512]
- A comment from a Hispanic American owned WBE- and MBE-certified construction firm stated, “Updating my truck and tractor for CA regulations was very expensive. There is a less expensive way to handle the requirements.” [#AV8513]

- A comment from a WBE-certified construction firm stated, “Carb has been a deterrent in expanding and continuing business as has been in the past years. Business has become increasingly difficult in California.” [#AV8574]
- The Black American male president of a professional services business development organization stated, “The other thing, I think, is that the obstacle can be just cost, when other people can buy in volume and other businesses can't, so that it would be really interesting for them to think about extending the state's practicing and agreements for materials to the smaller businesses or making sure that the primes, discounts that they get from volumes, are extended for the small businesses.” [#FG3]

8. Prequalification requirements. Public agencies sometimes require construction contractors to prequalify (meet a certain set of requirements) in order to bid or propose on government contracts. Twenty-four business owners and managers discussed the benefits and challenges associated with pre-qualification [#5, #6, #7, #8, #9, #12, #13, #14, #16, #17, #19, #25, #27, #35, #41, #42, #49, #50, #53, #54, #59, #61, #AV]. Their comments included:

- The Black American male co-owner of a WBE-, MBE-, and DVBE-certified construction company stated, “Some of them are a bit stringent. Some of the prequalification requirements on some of these, if we're talking about getting jobs or obtaining some of these contracts, some of them are things that a person who's never done a government contract would have. How do you get experience, if someone isn't going to give you a shot? Maybe you could lessen some of the requirements for smaller companies, lessen some of the requirements for smaller female and minority-owned companies, whatever anybody can do to make the playing field more equal. Because right now, it's not. It's clearly not. And it's very frustrating knowing that. I mean, you still go out and look after these jobs, but I'll go to another one of these walkthroughs, and what have you, but you know it's already given out to somebody else.” [#5]
- The non-Hispanic white male representative of a majority-owned construction firm stated, “I mean, a lot of the alternative delivery projects that are out whether it be design-build or CMGC, or CM at risk, a lot of times through their prequalification process they want you to previous experience with that to be successful on the job, but you have to build the experience somehow. So, removing that requirement for at least certain projects, so you can get the experience will help remove that barrier in the future.” [#6]
- The Black American male owner of an MBE-certified professional services firm stated, “Back to if it's a bonding job, then that's going to be a prequalification requirement. If you haven't, fine. If you don't, you're not going to get the work. Sometimes, the organization tries to target the work to someone else. They will ask for very, very stringent requirements that they know most people won't have other than an incumbent. That's a major roadblock, because unless you have experience as the incumbent, there's no way you can get on that work successfully. So that, in itself, is a game that's played in the industry, and most people in this industry understand that. That goes back to what I was saying earlier about working with the customer, knowing the customer, knowing the industry, knowing the work.” [#7]
- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, “Sometimes it's difficult. MPC put out a contract earlier that said all folks need to

have 12 years of experience in this space, and that made me, and I was working with a small Black-owned business doing equity based planning, and that immediately cut both of us because we were both looking at each other like, we've only been operating for five years, and so that was very frustrating to her because she'd been talking to a client about that proposal and then that comes out and then suddenly, she's not able to apply for that job at all because of the barrier that was there. So, if they want to encourage small businesses and local businesses demand, you could lower the amount of expertise needed because companies don't have that kind of staff. That's what's so crazy about it because she was the equity person and she writes proposals, and that's why she was very upset by that. It didn't really make sense, but that comes up with a lot of these larger MTC or Caltrans or VTA or BART. A lot of these larger agencies, they just put on that number, and then when we see that, it makes us immediately feel like, oh, they already know. We already know who they're going to hire because there's only two or three firms that actually have expertise that can meet that." [#8]

- The Asian Pacific American owner of a DBE-, MBE-, and SB-certified professional services firm stated, "It's based on experience. So, when I worked for the bigger firm, the bigger firm's been around for longer, 25, 50 years. I'm the same staff whether I work for a big firm or whether I start my own business, so I'm the same person. They're dealing with the same person, but as a small business, they're going to look at my business and say, okay, have you been around for a while? What type of project have you done for you to show that you have experience? Our company is small, we just started five years ago. We don't have projects that we can say, Yeah, this is our project. You have to get a project to be able to list a project. So, we can't get public work projects, we're never going to be able to prove to them that [my company] has experience. I have personal experience working with other, the bigger firms before, but [my company] does not have the project experience. So that's the key is being able to show that on your proposals and stuff." [#9]
- The Hispanic American female owner of an MBE-, WBE-, and SB-certified professional services firm stated, "Sometimes only because they ask for a certain amount of a bid amount, like if the jobs that I've been on before are too small it's almost like you're not qualified enough." [#12]
- The Hispanic American male owner of an uncertified MBE construction firm stated, "I had some trouble getting authorized by a couple of our brokers, because they want you minimum one year in the industry, but if a lot of them are like that, how are you going to gain experience if they're not willing to hire you? Maybe giving a certain percentage of their brokerage to new companies and dedicate it to new companies." [#13]
- The Subcontinent Asian American male owner of an uncertified MBE construction firm stated, "I mean, we went through difficultly with them, but once we show all the document, once we show what we can do, and then, like I say, sometimes they ask for a qualification that maybe over our head that we don't have it on our field. That kind of qualification, of course, we just said, listen, we don't have that qualification, but we do have these qualifications, if that will solve the problem and get the job done, we are willing to do. My thought is they have a right to ask for your qualifications because they are public buildings there. People from all sorts of nature walk in there, so they need to make sure I'm a legitimate, my company is legitimate, safety wise I'm okay, and all the qualification they ask,

we have to provide them. So, I don't feel bad. It's good. They have a right to ask those kinds of questions." [#14]

- The Black American male representative of a DBE-, WBE-, MBE-, SB-, and Micro-PW-certified small business development association stated, "I would say it's a barrier in the - from the perspective of, you know, if you don't have experience because you couldn't get in to that industry, when you decided to get, one of the things they do look for in a lot of the contract work, they do look for past experience in certain areas and so, if you didn't have the ability to get into that industry in the first place, it's hard to come in with past experience. So, what they're doing right now - they're at least suggesting that you fine with - go in and do a sub to a company that a company that's doing it or teaming - team with some other companies. There are some ways that they're getting around it, although it's not easy. It's kind of an uphill battle." [#16]
- The Hispanic American female owner of a WBE-, MBE-, SCMSDC-, and DBE-certified goods and services firm stated, "For example, there was a bid that came out and it said you had to be ISO-certified in order to provide the services, and they were doing an RFI. If those are some of the things that they're asking some of the small businesses to be certified, and they're offering it to the small business because that's what the reach-out was, then give us the opportunity to be able to get that type of certification. Give us the knowhow. Have a - give us the ability to be able to acquire that, or the knowledge, or teach us how to get it before putting those specifications there. You know what I mean? So, if you want this from small business, then give us a door to be able to - or an avenue to be able to connect to get it. That's the way small business could get assisted. That way we're able to actually be a benefit for that organization to be able to provide that service for them. If you know that's going to come up, that that's a component that is needed within that contract and you're trying to give it to small business, or a woman-owned business, or whatever have you, then make sure you're already working that process or working that area way in advance before that bid is out." [#17]
- The Black American male owner of a DBE- and SB-certified and uncertified MBE professional services firm stated, "Why would all of those contractors down there in Los Angeles County, there's a bunch of them down there that thinks that Caltrans is a zero. And they're up here too. So why would you go out there and spend all that time to get - you're not talking about certification; you're talking about prequalified. Why go through certifications, why go through prequalifications when your chances of getting a job is zero?" [#19]
- The non-Hispanic white male owner of a majority-owned SB-certified construction firm stated, "I would say sometimes on federal work. If you haven't done a particular type - a job comes out and it's got, say, an earth-filled dam on it, and you haven't done an earth-filled dam in the last five years, then you might not qualify, which is a shame because we've done lots of earth-filled dams. We had a job come up that that was on it, and we've done lots of them. We know how to do it just as well as the next person, but we hadn't done any in the last five years, and we didn't meet the pre-qualifications. It doesn't mean we're not qualified to do the job." [#25]
- The Middle Eastern American female representative of a majority-owned professional services firm stated, "The prequalifications sometimes they put a lot of things out there

that's really not necessary. So unfortunately, they listen to the consultants and sometimes inadvertently with what they put there they disqualify and limit the competition. I do - I've seen it. I see it every day. And they are for example there was something, LADOT, city of LA just issues. And they specifically said this is the interface we want. Might as well just go and tell them that we want it from this company. Why do you even issue an RFP?" [#27]

- The non-Hispanic white male representative of a majority-owned construction firm stated, "Any company, it's hard if there's a qualification you have to meet to even bid the job. You just don't bid those jobs if you don't meet it. But Caltrans doesn't have too many of those. But they do have a few." [#35]
- The Black American male owner of an SB- and MBE-certified professional services firm stated, "I think I understand that a big part of the problem is the various agencies who wants to work with corporations that have more than five years' experience on the larger projects that they bid on, and for engineering services, it's really difficult to get that type of - it's the chicken and the egg concept/problem, you know? You have the experience, but you can't get these big projects because you don't have the staffing and the resources to fund - to maintain the staff that's needed for a large project like that. And most of the companies - most of the entities - don't want to tear down their engineering design to meet the requirements of the really small engineering firms in the area. I have the - more than 50 years of experience in the engineering industry on facilities' design and construction. And so, most of that experience is just ignored when it comes to applying or trying to get work because, as I said before you were recording, I've done everything in Caltrans except get my financials together. And I supposed that's just a matter of getting an accountant to make sure that the finances are in the order required for review by Caltrans, but it takes time to put that together. I've worked with the Los Angeles Unified School District because I am certified there and I thought I was qualified for a bid to be on their Bench Engineering Team, but one of their restrictions was - one of the requirements was you had to have a staff available for the project. And I just didn't have the staff. So, those qualifications were not possible for me. And I actually had a meeting with some of the management there to discuss that and they realized that I was more than qualified with the technical capability, but just didn't have the staffing requirements to meet their needs." [#41]
- The non-Hispanic white male co-owner of an SB-, DBE-, and HUBZone certified construction firm stated, "At times. You know, mostly because we did our business - you know, we did a ton of all sorts of types of work before our company kind of had a downturn previously. And then they want that work to be more current, which you're going to replicate. I mean there's all sorts of really unique things that we've done, but they're so old now that we can't even reference them. So, starting up again, especially if you - I mean we have the experience, it's just not valuable for some of these projects, 'cause it's too old for that." [#42]
- The Hispanic American female representative of a DBE-, MBE-, and WBE-certified construction firm stated, "Before it was like only these huge companies that they were asking. And the last two years everybody wants you to be able to qualify. And some of them they don't - like for us for financials are in house on QuickBooks. But a few of those companies wants you to pay an accountant to do your financials which is something expensive that not all the small businesses can do." [#49]

- The Hispanic American male owner of an uncertified MBE construction firm stated, "I have to be qualified. My class A, I have to have a commercial license. My truck has to be DOT, up to date with DOT like has to be working properly. What other stuff? I have to go through a drug consortium. I have to get my own drug consortium to get me drug tested to - I have to go to a place and whatnot like to get drug tested. And then they speak with the FMCSA, the federal administration in order for me to drive with my DOT number. That's I guess that's qualifications." [#50]
- The Asian Pacific American male owner of an MBE-, DBE-, and SB-certified construction firm stated, "I experienced that once, when first I tried to bid on a public works job. A \$200,000.00 job here in my own city. And part of the qualifications was that we had to have done the same amount of work, the same amount of dollar amount. And I'm like, 'How am I supposed to break into this if I don't have this experience?' It was my first time. Because like this job here with the state that we're bidding on and is due on Monday, with the state hospitals, they just wanna know references of who you've worked with, and similar jobs. You didn't have to have done half a million dollars' worth of concrete on a public work job, or anything like that. Some of these municipality jobs, I think they need to change how they qualify small businesses like ourselves, especially for easy stuff that we're licensed to do. But then they create a hurdle by throwing in things like, y'know, 'You have to have done this size of job three times, and show us the proof, y'know?'" [#53]
- The Asian Pacific American male owner of a DBE-certified construction firm stated, "School districts have more prequalifying requirements than Caltrans." [#54]
- The Asian Pacific American female owner of a SB-, DBE-, and WBE-certified construction company stated, "I think prequalification is great. It help people to understand themselves. Prequalification is preparing us to not fail." [#59]
- The Hispanic American female co-owner of a WBE-, MBE-, Micro-, and SB-certified professional services company stated, "I think it weeds out the people who can't really perform the work. So, if there's a pre-qual, you get on the list and then you get selected and then you prepare a proposal after you get selected. I think that's like the most efficient way to go through the selection process." [#61]
- A comment from an MBE Hispanic American-owned construction company stated, "Sometimes the requirements are pretty strict as far as experience, capital and bonding." [#AV39]
- A comment from a majority-owned professional services firm stated, "The problem is bidding on jobs particularly for the public sector requires prior company experience of doing public work and not necessarily relying on the experience of a professional engineer as individuals." [#AV8210]

9. Experience and expertise. Thirty-two interviewees noted that gaining the required experience and expertise to be competitive in the public sector can present a barrier for small, disadvantaged businesses. Experience is often compared to the requirements for prequalification [#5, #6, #7, #10, #11, #16, #18, #22, #23, #26, #27, #34, #35, #41, #44, #45, #47, #53, #55, #59, #AV, #PT1, #PT3, #PT9]. For example:

- The Black American male co-owner of a WBE-, MBE-, and DVBE-certified construction company stated, "It can be hard, because it's so time-consuming... time moves on, and your mortgage is still due, bills are still due, kids are getting older. Everybody has different needs, and sometimes you don't have the time or the energy to chase after something that you're not really sure is going to help." [#5]
- The non-Hispanic white male representative of a majority-owned construction firm stated, "That's been an issue in the past, especially with the alternative delivery." [#6]
- The Black American male owner of an MBE-certified professional services firm stated, "It's a major due. I mean, you can't get a job unless you have cross-performance. You can't get cross-performance unless you have a job. So as a new company, you're at the mercy of trying to become a subcontractor to someone in order to get your foot in the door, and the buying contractors are saying, What do you bring to the table? And if you say, I'm a new company, they're saying nothing. So you're not to bring anything to the table. Therefore, why should I bring you onto my team? So it's very interesting, again checking on a Möbius loop situation you have to try to figure out, yes. I know people and I had to go to a trusted mentor to sit me down and explain, and so I personally am not a mentor-protégée relationship, but a personal mentor that's in the business and understood the business sat me down and explained it to me. And then, just again, my past experience, I've seen the type of pricing. I know how the government price things, understand where the government estimates, and then just try to hit the marks, knowing what the issue will be." [#7]
- The non-Hispanic white male owner of a SB- and ELBE-certified professional services firm stated, "Well, as an owner of a business if you don't have that experience, you can try to hire it. But when you hire somebody, it's usually because they don't have a job. Because he's available to hire. Well, the question then immediately becomes, 'Well why doesn't he have a job?' The answer is you'll find out once you hire him, the flaws will show. And so you relied upon somebody else for that type of experience is foolish. You need to have it yourself or a team that has it. Well it depends what kind of task. If you're talking about raking asphalt, that has, that is a skill set, which is above shoveling asphalt. But if you're talking about financial management, that is a whole different task, which requires a lot of experience or former education, you know? The trouble is education usually happens after you've made the mistake. So if you make a big enough mistake, you're out of business." [#10]
- The non-Hispanic white male representative of a Native American-owned MBE-, SB-, and Micro-BE certified professional services firm stated, "It really is. They really struggle with all the paperwork and the requirements. They'll just make it easy as the big firms that get the work. They know how to basically prepare very nice statements of qualifications. And they're very well-tailored by people that have marketing degrees and things like [that]. For a mom and pop who can't afford to pay a full-time marketing person and maybe doesn't know how to prepare these kinds of materials, it's very difficult for them." [#11]
- The Black American male representative of a DBE-, WBE-, MBE-, SB-, and Micro-PW-certified small business development association stated, "I've been gearing towards contract assistance... [I] was at an event and was talking to some of the engineers that were there from the city and they were talking about looking for more minority contractors. And during the conversation, they told me is that a lot of the minority businesses have a real big challenge on how to identify contracts, how to negotiate, and how to execute contracts. I

realized that sounded like a good niche since my daughter went to law school and came out with a degree in contract law. So, we discussed it... [and are] building our business toward offering small contractors the ability to assisting with their contracting administration. Plus, it's kind of institutionalized from a perspective of things that has happened in the past. We talked a little bit about the fact that when you go in - and part of what is needed is an understanding or some experience or something to show that this is something that you've done before, and you can't show that. Even if you open the bidding up or open the contractor up to anybody - part of what you're looking at is experience for having done it and you're bringing in somebody that has never done it because they've never had the opportunity. Then, you know, it's easy to say, 'Well, this person has more experience than you' without acknowledging there's no way they can get that experience because they never get a chance because it's required to have experience." [#16]

- The non-Hispanic white female owner of a DBE-, SWBE-, and CBE-certified professional services firm stated, "A lot of these small companies, they're trying to do everything. He's the guy out there driving a piece of equipment or out there bidding and helping perform and organize his crews with two or three people in the office. It makes it difficult. I think it's difficult. For me, it's been 33 years and I sound like I know what I'm doing, but I finally learned a lot about it and I want to retire in 10 years. So, I barely got it in time. So, it takes time to learn how to do work with people... California continues to build their infrastructure. It's lowering, but we know that we're going to still have work probably. We know that there's going to be competition coming from other states to do work here. Those people have no idea how hard it is to work for Caltrans or any of these entities. Metro's the same way. The paperwork alone will bury you." [#18]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "It could be remote sensing, could be satellite imagery, it could be GIS. GIS is huge, that's Geographic Information Systems. Archeology seems really big on a lot of Caltrans [lists]. Yeah, so I can't go out and do that. I have to have a degree in archeology with certifications, again, because they don't trust me to be knowledgeable about, which maybe is a good idea [crosstalk] wouldn't do it. So having those types of specialization or access to them that I could bid on probably more projects, so yeah, I could bring in an archeologist. But it's a little bit hard to call up an archeologist. I've done it, and they say, 'Yeah, I might work with you,' but I don't get any projects for the next six months and the contact kind of grows cold a little bit, or I even forget about it. So, it doesn't really all get together at the right time. And I was kind of sketchy on how to put together a price. So, I would be careful; I didn't want to lose money. And I would never get one - I guess other people were bidding lower. They knew a little better, you know, the nature of their relationships and how they'd do the work. So, I never got a job out of that one." [#22]
- The Subcontinent Asian American male owner of a Micro- and SB-certified and uncertified MBE construction firm stated, "[I] strongly feel like the connection that I am trying to establish has been difficulty only based [on] because I am a fairly new company, as a startup company. I still feel it has been a roadblock to me just to let other contractors or public agencies, like Caltrans and several other ones like Metropolitan and the train services, everybody to know that I'm here to help out in case if they have any engineering or earth retention-related engineering problems or anything. That has been my impression, I would say. So, the way I thought about this - let me go back a couple of years, or even two and a

half years when I was deciding to start the business. At that point of time I felt like I had sufficient technical knowledge to do the business in terms of providing the engineering solutions from my career experience. However, I didn't have much of a business knowledge: how to conduct business, who to approach, networking, and so on. But I wanted to understand the business [aspects] really well. What if something fails in the contract? How does insurance kick in? What are the mitigation problems? And so on. And that's been the factor that stopped me from approaching public agencies, because of when I want to get in I want to be fully knowledgeable and be aware of what I'm doing instead of just trying to get a piece of the bread. Which is always nice, but when bad luck strikes I'll be in real trouble. So, that's where I thought maybe I'll try to learn more about the business side of things, the administration, how contracts work, how do the relationships between the prime contractor and the general contractor work on a public process, which is very different from a private project from what I've sensed and experienced. So, I wanted to get a little grasp on things" [#23]

- The Middle Eastern American male owner of a construction company stated, "It is a challenge. But I think it comes with experience because being competitive is not just providing the better cost but... also being able to be efficient and lower your cost to pass it on to the client. So that just comes with experience of learning and planning ahead." [#26]
- The Middle Eastern American female representative of a majority-owned professional services firm stated, "I think it's hard for them to be honest. I mean sometimes when we are sub[s] to them on projects we try to do a lot of heavy lifting as far as doing the proposal, helping them with graphics, marketing materials, and things like that because we have the resources and they don't. So they [the sub] would provide just a two pager or something to a prime so they'd put them so they don't have to invest anything as far as proposal building and putting that together and being a prime which is shifting now... I think there might be some challenges for them to put a decent proposal, quality proposal together." [#27]
- The non-Hispanic white male co-owner of an MBE-, SB-, and DBE-certified professional services firm stated, "I would say that that was a concern when we started as a company [for] year one [and] year two. As we've grown our practice and we've gotten those projects under our belts, that has become really a non-issue. But I could see that being a real challenge for someone starting out." [#34]
- The non-Hispanic white male representative of a majority-owned construction firm stated, "Yeah. I mean, that is sometimes about who you hire. Other times, if you're new, it's about going through the gauntlet and bidding on some jobs and winning and teaching yourself. Most people who have started their own companies aren't coming in with cold feet [having] never done a job. They probably have been a project manager or a superintendent for a company and decide they [want to] do it themselves. Not too many just jump into construction cold feet. If you jump in cold feet, then I could see that could be a problem. If you look at Caltrans specialty, it's two huge books and they're standard plans of the book, and then each job gets another book with plans and other special provisions is what they call it. If you're a small business and you have just seen it for the first time, you probably won't even bid a Caltrans job. Like I said, that's all we do so we pretty much know those books pretty well. We aren't scared of [them] anymore. But to first start out, you'd probably be a little frightened of it." [#35]

- The Black American male owner of an SB- and MBE-certified professional services firm stated, "It probably is because I'm not really sure that I'm responding in a manner that makes me stand out as a competitive organization." [#41]
- The non-Hispanic white male owner of an SB-, DVBE- and Micro-BE-certified construction firm stated, "I don't know [if] there are any seminars out there that kind of review how to read and look through an RFP to make sure that you're being responsive. I was working in the industry over 25 years, before I started my own company, so exposed - some of it, unfortunately, exposed to some things that I knew I didn't know, and you just had to figure it out, you know." [#44]
- The non-Hispanic white male representative of an SB-certified professional services firm stated, "I don't think it's been a barrier. It's obviously a learning process, and preparing and executing RFPs, SOQs in response to them, it's an ever-changing thing." [#45]
- The Hispanic and Indian American female co-owner of an SB-certified and uncertified WBE construction firm stated, "It was challenging as a small business, yes. It didn't hinder us too much, but it was challenging." [#47]
- The Asian Pacific American male owner of an MBE-, DBE-, and SB-certified construction firm stated, "The frustrating thing is that it took me so long to get to this point, but that's just because my lack of trade experience... I was never a concrete person to begin with, so it took longer for me than if I was. I had the same business background that I did, I'd probably be a lot further along, you know, instead of taking me 13 years to finally break through." [#53]
- The Hispanic American male owner of a DBE-certified construction firm stated, "For small companies it can be because you might only have one person on staff that's been in the field. It's harder to bid on projects when you have basically one person with the knowledge because you can't send people to school to learn what they need to learn so that you can grow because it's cost-prohibitive." [#55]
- The Asian Pacific American female owner of a SB-, DBE-, and WBE-certified construction company stated, "Learn how to package. I know it's not fair especially for the younger company, but [for] a lot of younger companies, the owner's experience, knowledge, and skills count." [#59]
- A comment from a majority-owned construction company stated, "The only issue we have had with obtaining work was with alternative delivery. As owners have gone more to alternative delivery, it has been hard for us to get that experience when, typically, the experience is already needed to get the jobs." [#AV66]
- A comment from an MBE Hispanic American-owned professional services company stated, "Not having the knowledge of obtaining some of those contracts and the processes that go into submitting proposals or bids." [#AV164]
- A comment from an MBE Black American professional services company stated, "The difficulty is having a major prime or government agency have the confidence to allow us to get a foot in the door to prove ourselves." [#AV237]
- A comment from a majority-owned professional services company stated, "Lack of client relationships and lack of past experience working with particular clients." [#AV284]

- A comment from a WBE and MBE Black American-owned construction company stated, "I want to bid on things, but the bidding process is a little complex and I don't know how to break down and get my bids in. The lack of precisely knowing how to bid is a problem. Once you get the bids they expect you to be experienced and no one shows you." [AV8101]
- A comment from a majority-owned construction company stated, "Being a new business it's sometimes hard to build historical data with municipalities because we've only been in business for one year." [AV8119]
- A comment from a WBE owned construction company stated, "A lot of our work is word of mouth. We have a small work force just me and my husband. Since we are a small business with no history doing huge jobs it's hard to get a foot in the door." [#AV8285]
- A comment from a WBE non-Hispanic white American-owned professional services company stated, "It takes years to learn how to navigate the bid boards as a small company. We are competing with huge companies that have departments to do that for them." [#AV3]
- A respondent from a virtual public meeting stated, "I have submitted some proposals with the subcontractors and it does seem like it's just that difficult [and] it doesn't even matter if you have a minority business, it's just difficult to get in as a one person business just because they are looking for more stability or businesses that have a proven record as company and not as a professional experience." [#PT1]
- A respondent from a virtual public meeting stated, "I don't know exactly how to go out there and win jobs. I feel like I'm still stuck there. Instead of the resources there that could help me... like know how I can win contracts or be able to put bids and all this. There are places where I go and look for the actual projects. One of the things that I feel where I have a hard time being part of the project is lack of experience as a company. As an individual, I worked with another company before, and I have like fourteen years of experience in the civil-engineering industry, but as a startup company, I don't know how to show [I'm qualified for] the project. Let's say for example, a retaining wall or something. Say, like based on my experience I could do it, but as a company-when they ask for a set number of years for this project, I am unable to show it. Because as a startup company there is not much I could show." [#PT1]
- A respondent from a virtual public meeting stated, "Creating the rate for these projects and contracts has become a very difficult process to create an internal cost rate. Jumping through hoops and such, she said that although she's been successful in getting those rates to potential primes, she can understand the onerous task for new business owners, small business owners, and such to get through that process. She's hopeful to get some streamlined ideas as to make that less difficult." [#PT3]
- The male owner of an LBE-certified construction company stated, "Well, I mean a lot of the best DBEs that we work with are those folks that understand the industry and are seeing [the] general contractor perspective. Maybe they came from a general contractor, they've worked closely with the general contractor, and they had some prior ones on firms like that, then they go and they start their own business or the DBE firms. And that's good, in terms of how we have a DBE contractor that knows what they're doing, but also to really look and tell you that the intent, because then it's just going to incentivizes folks that are already making good money in the industry. Now they're an owner, which is good, different levels

of money-making, but it was a double canned deal and just creates this inside track for people that know how to navigate the process.” [#PT9]

10. Licenses and permits. Certain licenses, permits, and certifications are required for both public and private sector projects. Fifteen interviewees discussed whether licenses, permits and certifications presented barriers to doing business [#11, #13, #15, #18, #24, #42, #44, #46, #50, #52, #54, #AV, #AV2, #AV3, #FG3]. For example:

- The non-Hispanic white male representative of a Native American-owned MBE-, SB-, and Micro-BE certified professional services firm stated, "Because it requires us to use one for one. Now here's our challenge. One for one, meaning one of our staff and maybe a signatory staff. Well, our people are specialized and trained. We get our work through qualification-based selection, which means that we have intrinsic guarantees to our client that we have these minimum competencies. That's why we get hired. We're not warm bodies putting in hours. And so, when we have to get rolled up in a project labor agreement, then it's hard for us to meet our obligations, I mean, to our clients as qualified. Meaning, we have very special licensing requirements and inside of Local 12 Operating Engineers, there's nobody licensed. And so, we're put in a no-win situation. Yeah, if the trade unions through the apprenticeship programs offered more training, it would be very helpful." [#11]
- The Hispanic American male owner of an uncertified MBE construction firm stated, "It was difficult, because the State of California kind of makes you go through a few hoops to obtain certain permits and licenses, especially it's the IFDA. That was a little hard to get, but I got it now, but it was kind of hard to get... They could simplify their website, because their website is all over the place. That's pretty much it, because I had to navigate through that thing, and it just kept redirecting me from one site to another to another to another, but I finally got it. The websites weren't user friendly." [#13]
- The Black American female representative of a minority chamber of commerce stated, "Not being able to list their DBE number and the additional licensing that's required by Caltrans is an impediment to securing contracts directly with Caltrans. So, case in point for someone who's an electrical contractor: without having a general contracting license, they cannot do work for Caltrans as the prime contractor, they must do it as a subcontractor. Same thing for someone who's a fencer. And most of our small businesses that are eligible to do that work are only eligible as subcontractors, not eligible as primes." [#15]
- The non-Hispanic white female owner of a DBE-, SWBE-, and CBE-certified professional services firm stated, "Yes, those are tricky, too, because you don't always know what the requirements are in certain areas and what you need. Sometimes you find out last minute. But, again, it all comes down to having somebody in your office that can help you do it. If you're doing it by yourself, it's a tricky thing." [#18]
- The Hispanic and Native American male owner of a DBE-, 8(a)-, SB-, and MBE-certified construction company stated, "Most Caltrans work, there's nothing you have to get in that regard. Everything is already supplied. You just show up and go do the work" [#24]
- The non-Hispanic white male co-owner of an SB-, DBE-, and HUBZone certified construction firm stated, "Well, when you're doing public works and you're in a small town like us, where we don't have enough work to provide for [our bills], and we have to go to other cities, the

added expense that makes it hard for us to sometimes be competitive is that every place we go we have to get a business license there to do the work there. It's like the, you know, Riverside, they might require me to get one for the city of Riverside and they might require me to get one for the county of Riverside, and that could be \$500.00 to \$700.00 added on to my quote that somebody else doesn't have to worry about 'cause they're local. And I'll have to do it again if I work in the next township over." [#42]

- The non-Hispanic white male owner of an SB-, DVBE- and Micro-BE-certified construction firm stated, "I think one of the restrictions should be that if you're a micro small business, you need to have expertise in the professional service that you are providing." [#44]
- The Middle Eastern American male president of an WBE-certified professional services firm stated, "Licensing wasn't an issue for me. The way the system is set up here in California could be a problem for some people because not only you have to have a degree and not only you have to take tests that last two days, but you also need to have other engineers recommend you. So, that could potentially be a problem for someone who doesn't know many licensed engineers. And that was one of the things I helped my friends with. When I trained - like, I know of two cases that I trained two good engineers and when they took - they wanted to take the test to become certified engineers - licensed engineers like me - they only knew me. They didn't know anyone. So, I introduced them to my friends - my other friends, my other engineer friends, and they were able to get the recommendations they needed. But I think you have to know at least two other engineers that would sign and recommend you to take the test, otherwise, you will not be able to take the test. One of them told me he really had a hard time - one of my friends told me he really had a hard time getting people to sign for him to go take the test." [#46]
- The Hispanic American male owner of an uncertified MBE construction firm stated, "Because I didn't have nobody to teach me how to do that. YouTube was my best friend." [#50]
- The Asian Pacific American male owner of an uncertified MBE construction firm stated, "Licenses and permits, it is what it is. It's California. You've got - there's no ifs, ands, or buts. We've got to pay it. But other states register trucks a whole hell of a lot cheaper than California." [#52]
- The Asian Pacific American male owner of a DBE-certified construction firm stated, "The law requires if you bid on a job over 500 dollars you must have a license which requires 4 years of work experience and participation in state apprenticeship program. Getting a license is not easy." [#54]
- A comment from a majority-owned professional services firm stated, "Government agencies are stricter for permitting laws." [#AV183]
- A comment from a majority-owned construction firm stated, "Yes I wish to discuss, I am a convicted felon and was denied a license based on California licensing board. I have completed my sentence paid my restitution & been released from my probation. Yet I am not allowed to get a license for 7yrs." [#AV241]
- A comment from a majority-owned construction firm stated, "Plans and permit fees for all the entities we work for are going through the roof." [#AV333]

- A comment from a majority-owned professional services firm stated, "Renting time at airfields is extremely difficult. There is difficulty obtaining local government permission and too much paperwork. The owner is a service disabled veteran, officially titled." [#AV813]
- A comment from a majority-owned construction firm stated, "The problem lies in getting the permits from various agencies and dealing with the bureaucracy. Regulations make it very difficult to do any business." [#AV860]
- A comment from a majority-owned professional services firm stated, "Not interested Caltrans Work: most of [our] inspectors are not qualified to work for Caltrans." [#AV937]
- A comment from a majority-owned construction firm stated, "Permitting [process] in CA is difficult." [#AV8137]
- A comment from a majority-owned construction firm stated, "Permitting is very difficult and that is why we can't expand, it is definitely not Caltrans' fault by any means, you are the easiest company to work with." [#AV8141]
- A comment from a majority-owned construction firm stated, "The permitting processes are getting a lot tougher. All the regulations that are going now with public works jobs is making it more difficult for compliance." [#AV8297]
- A comment from a WBE-certified construction firm stated, "California is one of the most expensive to do business because for the permits are time consuming." [#AV8391]
- A comment from a majority-owned construction firm stated, "Permitting any new sites cost a lot of time and a lot of money.:" [#AV8297]
- A comment from an Asian Pacific American owned WBE- and MBE-certified construction firm stated, "We are spending 2 years with getting our painting licenses to paint bridges. The state says they did not get the paper work but we have documentation to prove that they got it." [#AV8534]
- A comment from a majority-owned construction firm stated, "Fuel is super expensive, permits because of COVID are hard to get, insurance has sky rocketed, my family hurts because of this." [#AV8537]
- A comment from a majority-owned construction firm stated, "Covid has decreased permits." [#AV8547]
- The Black American male president of a professional services business development organization stated, "And for people of color, of general, they've been historically financials, right, have been the obstacle in getting the licenses and the permits and the educations from the schools that people look at when they're trying to make decisions about hiring and partnering with businesses." [#FG3]

11. Learning about work or marketing. Forty-two business owners and managers discussed how learning about work is a challenge, especially for smaller firms [#5, #8, #11, #12, #15, #16, #17, #19, #22, #23, #26, #27, #30, #31, #35, #36, #37, #38, #40, #42, #44, #45, #47,

#49, #50, #52, #53, #55, #59, #AV, #FG2, #PT12, #PT2, #PT4, #PT5, #WT3, #WT4]. For example:

- The Black American male co-owner of a WBE-, MBE-, and DVBE-certified construction company stated, "Those pop-up companies that come in and do their own marketing. You see the ads on Facebook, you see them all the time. For ADUs, and even Home Depot and Lowe's have gotten to the business where they get jobs and they farm them out to general contractors who may or may not be licensed but are willing to do work for very little money." [#5]
- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "I think that's because the larger firms have capacity to already work the clients like lobbyists, to get the knowledge of the project way before we get the knowledge of the project, because we don't have the resources to, to spend on investing into a region like that. They'll have a marketing person just focused on San Jose cities and they just go, we're talk about the cities until they get something, but we don't have that. Marketing and lobbying is a big part of it. A lot of these firms, they would have a marketing person at lot of city meetings, a lot of city council meetings to go talk to council or go talk to city staff. They show up to public meetings, as well, to talk to city staff. They're at all of the pre-proposal meetings. And so, this is a person who's not necessarily an engineer, but just purely a marketing or a political lobbyist. And that makes it very difficult to do work because they have so much more resources to be in front of all of our clients. You can imagine it, if I take Santa Clara County by itself, it's like 10 cities. Each of those cities have maybe like eight people that we need to know and each of those cities, right. And then to be able to build those relationships and maintain those relationships with those 80 people in every county is a work that dedicated staff would be able to capitalize on more than we would." [#8]
- The non-Hispanic white male representative of a Native American-owned MBE-, SB-, and Micro-BE certified professional services firm stated, "It really would be for a lot of people because for small businesses, just to help maybe tell you, because they come to me and they asked me how we are able to be competitive and basically, they don't have the overhead structure to be competitive and they have to work 50 hours a week in their business and learn to do a program like Adobe to do very nice marketing material to be competitive. That's very challenging for small firms." [#11]
- The Hispanic American female owner of an MBE-, WBE-, and SB-certified professional services firm stated, "I think it's hard for me even to write about stuff in third person. I had the hardest time even just with my bio because you want to list everything, but you also don't want to be bragging about yourself. So there has to be a fine balance, but I don't think that marketing is my strength at all. I've had some really high-profile clients and a lot of times I'm not able to disclose who they are because of NDAs, so the work that I have listed on my website it's still very really, really great, but if I had some package or deck or something, again, I think people would understand the caliber of work that I'm able to perform, but because it's really... I keep it low-key and I'm not really advertising or specifying what I did on a job, I think it might be hard for other people to understand what it is that I do, unless they know me or have been directly referred to me." [#12]

- The Black American female representative of a minority chamber of commerce stated, "Identifying open contracts and the bids, because there's so many different online portals, there's different places where they post it. We have served as an aggregate and being able to collect those, keep them and distribute them to our members so they know what opportunities are available. So that's one of the biggest plays that we've helped our small businesses. It's just letting them know what's out there and what's available." [#15]
- The Black American male representative of a DBE-, WBE-, MBE-, SB-, and Micro-PW-certified small business development association stated, "It's not a barrier for me and the only barrier would be for the clients that I work is the time it takes, because they're small businesses, so, they don't have - they can't hire anybody to do it and they don't have the time to do it themselves." [#16]
- The Hispanic American female owner of a WBE-, MBE-, SCMSDC-, and DBE-certified goods and services firm stated, "I think it is for small firms, because the small firm not only is doing the work out there, then there's not a lot of hands that can be - there's not a lot of hours in the day that they can constantly be trying to find what opportunities are out there." [#17]
- The Black American male owner of a DBE- and SB-certified and uncertified MBE professional services firm stated, "It would be good if Caltrans just e-mailed the minority firms, you know, the DBEs, e-mailed them upcoming projects. One way to help get past Proposition 209 is the outreach. My first thing on the outreach is to just simply send out an e-mail every time a project comes up. Well, you know, they may only have about ten projects come up a month, and if they had everybody on an e-mail blast, they could just, every time the project comes up and is aware, send out an e-mail. Small businesses don't have time; they don't have the staff to be in there looking at a website every other day. We used to, when we put out a contract, like a water and sewer contract, our Seattle office used to do that. The city would pay us to bring in all the minority contractors and women, all the minority and women contractors, and the others could join if they wanted to. And we would break the contract down and show them what it's all about, how they need to be careful, what the columns were made of and who could construct them and roughly what the dollars would be. And that's how we got the full participation of such." [#19]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "I always had to sort of like cast about and spend maybe even 20 to 30 percent of my time looking for jobs, as opposed to even just doing them." [#22]
- The Subcontinent Asian American male owner of a Micro- and SB-certified and uncertified MBE construction firm stated, "I approached the traditional method. I know there is the modern approach too, but let me talk a minute about the traditional approach, which is basically looking up a company, or I would say just going to search engine like Google and looking for civil engineering companies or anything around me and trying to extend that radius in several searches, and get the first information of a contact about a company maybe through their website or through their telephone number and give them a call, or look for who is the contact person through their website and write them an e-mail just to let them know the services provided by [my company] and the availability and so on. So, this has been the traditional approach, and this is what usually I've adopted. I know the modern approach is - there are marketing companies that are sort of [a] middleman who kind of, if I

approach, help to - help me to get in touch with the companies. But I haven't really taken that approach yet. However, I have not been very satisfied with that method since the output from that has not been dramatically helpful. Like I mentioned before, you e-mail, like, a hundred people, probably 10 or 15 might get back to you, and out of which 2 or 3, even if they have some project to give, they might contact you. So, the work that is involved, like you alluded to, is a lot of work and you put in a lot of effort, but the output has not been satisfactory at all. I'm trying to learn how other companies do it. I'm pretty sure they are not approaching this method because this is time-consuming and laborious, and I couldn't see how they are being successful if they adopted this method." [#23]

- The Middle Eastern American male owner of a construction company stated, "The number one [way to learn about work] is to, whether it's an in-house person that looks at leads on the portals of whether its Caltrans or any of those. Or if it is a firm that provides the leads. These are probably the primary source for finding jobs. It helps a lot being in the field, being in the right place at the right time. And that comes by being already involved. If I'm already on a Caltrans job, there's a very good change I will hear about the other Caltrans job. More clear probably earlier than if I was doing my own searching online or through a portal." [#26]
- The Middle Eastern American female representative of a majority-owned professional services firm stated, "I think the biggest challenge is that a lot of times agencies actually don't know about us. Sometimes - in general responding to an RFP, short duration if you're not aware of the opportunity, short duration to respond to. It's always - we try to respond but sometimes that's just a little bit of an issue." [#27]
- The non-Hispanic white male co-owner of a majority-owned professional services firm stated, "The two previous services I worked for had a lot of mouths to feed. So, there are permanent people who are out there all the time just doing marketing and promotion. And a lot of the money goes towards paying those people. I've always not wanted to have a marketing department or whatever, and whatever marketing or whatever we do is in response to someone asking." [#30]
- The male co-owner of an uncertified WBE professional services firm stated, "Just starting out, really hard building a customer base, yeah, it took over a year, very, you know, lean, not having a whole lot of clientele, and scraping by." [#31]
- The non-Hispanic white male representative of a majority-owned construction firm stated, "Not in the low-bid world. 'Cause, like I said, you're really just trying to be low bid. And a lotta companies like us reach out to DBEs as well. All you have to do is be on the list and you'll get e-mails from every single contractor looking for a DBE." [#35]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "Marketing the firm is something that definitely could be improved." [#36]
- The Black American female co-owner of a DBE- and DVBE-certified and uncertified MBE construction company stated, "I guess, again, somebody with experience, it may be a little bit easier, but when you go to Caltrans' bid openings, you see who the plan holders are, but you don't understand how you can help them. You know, so if a contractor is building a bridge, then that contractor knows what to do to build the bridge. But Caltrans doesn't put, oh, these are the subcontractor services that may be needed. They don't do that. And that

would be great if they can do that. Again, I go back to Metro, so when they put their open - so, when the primes send out their information, they say, oh, we're looking for these particular subcontract areas. So, it helps you know is this something I can even offer you." [#38]

- The non-Hispanic white male co-owner of an SBA-certified micro- and WBE professional services firm stated, "It takes a fair amount of time to stay current on that. There's lists of these projects and narrowing them down to where it could be something we'd be interested in, it takes a lot of time and effort, which we really don't have." [#40]
- The non-Hispanic white male co-owner of an SB-, DBE-, and HUBZone certified construction firm stated, "Oh [our growth], it's been super-slow. I think part of it is just we have trouble finding these contracts a lot of the times one of the things is that they used to - back in the day when we first started this all the advertisements used to be free, you know, and publicly available, whereas now - and of course you had to still look at them and go to procurement. But half of California you have to pay for e-bids or a Planet Bids, or one of these bidding. And they're not huge - I mean they're not hugely expensive, but if you want - so like us, where we travel for work, a lot of these are areas; they're divided up in areas." [#42]
- The non-Hispanic white male owner of an SB-, DVBE- and Micro-BE-certified construction firm stated, "I think during non-COVID times, I think one of the things that agencies can do is to have - especially if they're trying to keep the small and micro small businesses, they have their proposals in the evening, or the pre-proposal meeting. BART has done it for some of the - some of their projects. But most of the pre-proposal meetings are during the day, and when you're a small business, you need to be earning money. And generally, small business owners are working on a project, earning income, not just in an office, with one or no employees in the field. Same thing with professional associations. Some of them have meetings during the day, and it's extremely difficult to get to those. Most have meetings in the evening, and that's where you can go start and maintain personal relationships and do your best to get on the teams. Or RFP - if the agencies can do RFPs in the afternoon or early evenings, that's the best, because that enables small companies to work during the day and then attend these things in the evening." [#44]
- The non-Hispanic white male representative of an SB-certified professional services firm stated, "It's always a challenge to market to new people. For us, we've been trying to concentrate more on our relationships and if they need help anywhere else, and/or if they want us just to take a look at a project, we're more than willing to do that to help them out." [#45]
- The Hispanic and Indian American female co-owner of an SB-certified and uncertified WBE construction firm stated, "Not for the field but for the office, it was a very huge learning curve, yes." [#47]
- The Hispanic American female representative of a DBE-, MBE-, and WBE-certified construction firm stated, "I think just getting work. It's really hard for a small business to survive when there's not enough work out there which I think that's the situation at this moment." [#49]
- The Hispanic American male owner of an uncertified MBE construction firm stated, "I talk to other drivers to see what brokers they go through and usually they don't like to tell you

because you're just going to be crowding their spot. Like I tried to find out about the Caltrans thing, and nobody wanted to tell me nothing. They're like 'Oh you should look it up' or something and nobody really wanted to give me information. So, I'm trying to get like - right now I'm trying to find like a lot of these bigger companies they have a lot of, they have a lot of people that they know that have land that they dump the dirt at. So, they sell the dirt to these guys. Instead of dumping it and getting charged for it they're getting paid for dumping the dirt over there. It's their kind of like connection. So, if I'm charging a customer - if I'm going to go try to get work myself like for me it's going to be way cheaper with them because you have to think like they're cheaper and they have more trucks and they have that connection of the dirt getting sent over there. They charge the customer a lot less so it's hard to compete. Whenever I drive home in my personal truck home and I see construction going on I stop and I get off the truck and I go ask them. Hey, are you guys going to need any dump truck services? I own a dump truck. I own a company. I have one truck. And they're like well, we only call - we call this broker, this person and they give us all the trucks. I'm like would you guys be interested in just going through me? Oh no. We already have a broker. So that's everywhere I've been to, everywhere I've asked they have a broker. So, it's kind of locked up. They have it locked up." [#50]

- The Asian Pacific American male owner of an uncertified MBE construction firm stated, "I've got a private dispatcher that works for me. I concentrate on driving. She concentrates on finding me loads. That's why I hired that dispatcher, because she knew about the industry, and she knew how to get loads. So that I went that route, and she takes a percentage of what the truck makes, but you've got to work with somebody to get your foot in the door. A lot of these guys who don't know nobody, you know, they've got to go on the load boards on their own, and find their own loads, do their own paperwork. And if you're driving and you don't have somebody - I don't know where they find the time to dispatch themselves, do their paperwork, rate confirmation, get a percent - you know, a truck don't - you don't have the luxury of office machines that you do in an office. So, you've got to make that extra stop at the truck stop to send your paperwork off. I don't see how a guy could do it all by himself. You'd almost - you'd have to have somebody helping you." [#52]
- The Asian Pacific American male owner of an MBE-, DBE-, and SB-certified construction firm stated, "In the public works and commercial segment, there're these platforms, if you wanna call 'em, or websites that advertise these public works, and advertise commercial work. And there's so much work - it's really amazing how much work there is in those two segments right now. And so, you go on these websites, you look at the jobs, and a lot of 'em will email you. They'll send me bid invites to bid on their site concrete work, and so really, there isn't really a whole lot of advertising." [#53]
- The Hispanic American male owner of a DBE-certified construction firm stated, "I have to try and work with the providers of the service. What should be happening is I should be getting in front of the agencies because regardless of who the sub - the contractor is that's providing the service, it's the agency that should want to know how those companies are representing their service to the public. I haven't really done any work with Caltrans at all. I haven't really seen anything on the website that is in our wheelhouse. But I do know that most agencies get Caltrans money, so I would think at some point that that would become an issue for Caltrans. So, it's just there's not a lot of websites to go to for RFPs. When companies are looking for DBEs or whatever, there's no place to go. So, if I don't know that

[a regular prime] is bidding on a project or I don't know that one of the others that has used my name in the process, there's nowhere for me to go to put myself out there. So, if, say, Santa Barbara is putting out an RFP for service, there's nowhere for me to go to know when I should apply, when the pre-meetings are. If I don't have an in, then I'm strictly locked out. There's no website for RFPs to say, 'If you're in the transit agency or in the transit business, here's a website or here's a place you can go to see what RFPs are open.' So maybe I could bid as a provider, not a subcontractor, if there's an RFP out there for employee evaluations or consulting for IT services for transit-related software, things like that. There's no place for that. If I don't know somebody, then there's really no chance for me to grow. I'm sure they [Caltrans] do but, again, I'm not aware of it so it doesn't - it's not advertised so unless you know, you don't know" [#55]

- The Asian Pacific American female owner of a SB-, DBE-, and WBE-certified construction company stated, "I think marketing is important for business owner to understand. It's not only what we know, we need to deliver what we know to the people that doesn't know us. Specially in construction we know how to do but we don't tell people." [#59]
- A comment from an MBE Hispanic American-owned construction company stated, "The opportunity to actually find the work, for us to be interested in doing work, would be an easy access portal to check on a frequent basis to see if there are opportunities within our parameters to propose on." [#AV207]
- A comment from a majority-owned professional services firm stated, "It's tough for a new business to find work with public agencies." [#AV174]
- A comment from an MBE Hispanic American-owned construction company stated, "We don't talk about bids and it is all about word of mouth." [#AV8116]
- A comment from a WBE and MBE Black American-owned professional services company stated, "Honestly, it is, everyone experiences some form of barrier because of the opportunity to participate in a bid or contract. The main difficulty is getting an invitation for a bid." [#AV8235]
- A comment from a majority-owned construction company stated, "Finding work is hard. Especially with COVID and because we are not minority it is hard to find work." [#AV8337]
- A comment from an MBE Hispanic American-owned construction company stated, "We are isolated where we are. We don't have the opportunities that well-populated cities do so it's harder to find work where we are." [#AV8436]
- A comment from a non-Hispanic white WBE professional services firm stated, "Most of our business is word of mouth, advertising is expensive, getting your name out there difficult, so much competition." [#AV8468]
- A comment from a majority-owned professional services firm stated, "It takes a lot of advertising and depends on the economy." [#AV939]
- The Black American male representative of a professional services business advocacy association stated, "One of them is, I hate to say it, but social media. A lot of our businesses, especially in this area, and we're learning state-wide, they may have a store, it's great, they're booming in their community. Or even in their region. But they're nowhere near

social media. And right now, during this pandemic a lot of folks can't get out, right? Social media is the key aspect of keeping them alive. And that is one element." [#FG2]

- The male representative of a DBE-certified firm stated, "The other one is, on all these emergency projects... You know, there's a little slide with a little pipe and a little bit of guardrail or a little bit of paving? Why don't they solicit... All these emergency jobs are all from all these big companies in that area. Why can't they reach out to small companies, especially DBE companies, to be prime on those projects also? The ones that are able to finance that project and have the means to do that project. And we have a record track to doing that type of work. I don't understand why they never reach out to small companies." [#PT12]
- A female representative of a local agency stated, "Is there a centralized place/dashboard/forum for local agencies to share bids and RFPs to DBE/SBE/DVBE firms?" [#PT2]
- The Black American male owner of a DBE-, MBE-, and SB-certified construction firm stated, "I am a certified Black-owned structural steel supplier and have challenges receiving opportunities because we are not a fabrication firm. How can suppliers only bid?" [#PT4]
- The female owner of a DBE-, SB-, and Micro-BE-certified construction firm stated, "Prior to any excavation into the floor, we need to mark all the markings. And so, I thought, look Caltrans' doing the roadways and started digging into doing, trying to get business from us. So, I certified the company and everything they could get. And I was excited to get in on it because I thought this is the way to do it. Build the relationship, tops gave me the three primes. I call the primes and they already had in houses that they work with. So, when is the process of me getting in supposed to be with, even with Caltrans on jobs like that, is it at the beginning design build stage? Is it in the process when they've been awarded? Where is that? Where is the best place for the MBE to start?" [#PT5]
- The female owner of a WBE-, DBE-, and SB-certified professional services firm stated, "We would never have known of Caltrans training opportunities because your bidding process usually only sends us notice of highway building projects, never planning or training RFPs." [#WT3]
- The Black American male owner of a DBE-, MBE-, and SB-certified construction firm stated, "I believe Caltrans should provide small business the takeoff information from the plans for structural steel requirements (quantity, detailed description, etc.). This will allow my company to expedite all quotes and provide materials that are accurate to your specifications." [#WT4]

12. Unnecessarily restrictive contract specifications. The study team asked business owners and managers if contract specifications presented a barrier to bidding, particularly on public sector contracts. Twenty-eight interviewees commented on personal experiences with barriers related to bidding on public sector and private sector contracts [#1, #3, #5, #7, #8, #10, #13, #15, #17, #18, #22, #25, #28, #34, #36, #39, #42, #44, #46, #54, #61, #AV, #PT, #WT]. Their comments included:

- The non-Hispanic white female owner of a WBE-, DBE-, UDBE-, and SB-certified professional services firm stated, "Caltrans makes it extremely hard to work for them

because small businesses already have low hourly rates, and to make any type of profit, they need to charge competitive rates. Small businesses usually have very low overhead since they pay their bills on time and have a low debt rate, and monthly costs (such as rent, utilities, etc.) are lower than the larger firms whose offices are in high-rises and/or expensive buildings. So, when small and disadvantaged businesses have to conform to the FAR it oppresses their ability to compete for contracts with Caltrans. As an example, if our standard rate is \$100 an hour which is lower than our larger competitors, by using FAR, we will only be paid for \$68 an hour for the same work we can get with our standard costs with other agencies. Yet, the large firms will charge \$300 for the same services and receive between \$250 to \$300 an hour because they know how to work the system with their larger overhead costs. This means their 10% profit brings in a lot more money. So, they end up getting the contract yet we are the best value. Therefore, many small businesses do not work on Caltrans projects anymore because they lose money. Small business profits are very lean, and even at the supposed 10% profit allowed in FAR, there is so much less of a chance of making money than those of larger firms. We still hold 4 active Caltrans contracts in which I hope we are never called to do work because we will lose money. I am not talking about breaking even, I'm talking about losing money. We have lost a lot of money every time we have had a Caltrans project. Between the reckless disregard in understanding how small businesses work, and the fact that Caltrans initial paperwork is so extreme that it may take weeks to prepare, it is just not worth expending the energy to possibly not receive the contract. The monthly paperwork, which we cannot charge for, is also oppressive and costly. Additionally, since we can't charge for mileage to/from project sites, we have to absorb those costs which we can charge for on every other agencies projects. It clearly is not worth working with Caltrans for small businesses." [#1]

- The non-Hispanic white male co-owner of an SB-certified professional services firm stated, "I mean there is some cases. I mean, we bid on a big project yesterday for the City of Hayward and when you have large material items, custom material items, they have to be purchased for a project that has, let's say 260 calendar days or working days on it and we have to buy the material upfront. It kind of limits us sometimes because I mean, perfect example is we had to buy some grading, steel grades. You got 500,000 dollars in material and they want it upfront. That's a big hit for us because we're a small business. You have the cities that won't pay material on hand. So that's always a battle. There's certain cities within the San Francisco Bay area that require 50 percent local business and 50 percent employment within their city. So we're a small business. We have a set of employees that have worked with us for 20 to 30 years and to bid on these projects, they're telling us that we've got to employ more people within their cities and sit our employees at home and I don't think that's right." [#3]
- The Black American male co-owner of a WBE-, MBE-, and DVBE-certified construction company stated, "I've seen some, and I can't think of specific examples right now, but I've seen some where you had to have, your company had to be worth X amount of dollars. Or, it had to have done this project X amount of times, this type of project X amount of times before. Yeah. It seems like some of the restrictions that are placed are just designed to keep smaller companies out." [#5]
- The Black American male owner of an MBE-certified professional services firm stated, "Since I've been in the government and since I used to be [a] contracting officer rep, I

understand when a performance work statement is written. I can read how it's written. It will determine if it's truly an open opportunity and soliciting real solutions, or it's targeted for someone. The way they target it is they make it very, very restrictive. And so, you can take your shot at it, but your chances of winning is zero. All the time, regularly, daily. You see it all the time to the point to where you go, nope, I'm not bidding on that, because that's wired for someone. So you see that all the time." [#7]

- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "Yeah. I'd say they are a huge barrier for two reasons. One, they restrict us from who we are, two, the larger firms know that language better than we do and sometimes can even ask better questions or clauses than we do. A lot of times, these larger firms are the ones negotiating the terms and agreements more than the smaller firms are because we do not know what we're getting into as well as they would, and so yeah, I'd say that's a huge barrier for firms. We would go after a lot more Caltrans jobs if the barrier issue was a lot less." [#8]
- The non-Hispanic white male owner of a SB- and ELBE-certified professional services firm stated, "You have to understand what they're requiring, but basically I think Caltrans tries to put together a competent project. But for years they put projects on the street, requiring that you get a specific smoothness, but did not give the contractor any information about the existing smoothest. And then they decided that, well, we're going to fix this one overlay one two tenths stick overlay. And you're going to bring it from 180 inches a mile back down to 60 inches a mile and one opportunity. And multiple contractors call me for consultations as to what to do about the fact that they had all this must grind out on the street. When the contract that was put out for bid, couldn't be accomplished. It was an impossibility. Even though maybe they tried, because this new mantra for smoothest came out, so Caltrans says, okay, you're going to overlay the street. And you're going to get this smoothness out of it when you're done. Finally, after years and years and contractors having to spend millions of dollars in regrinding the roads to make them smooth, when it wasn't their fault, other than the fact that, they bid the project. They were blindsided, for some reason or other. I refused to let my firm bid a project up on Highway-88, there back in '15 or '14 or whatever. And they wanted to, the estimator wanted to bid it. I said no, you're not going to bid that job. And he said, why not? I said, because you can't do it. It can't be done. They want rubberized hot mix asphalt at 7,000 feet on Highway-88. And the nearest plant is 40 miles away. You can't haul rubberized hot mix asphalt 40 miles and put it down and get density. It's impossible. The contractor that got it had a big fight." [#10]
- The Hispanic American male owner of an uncertified MBE construction firm stated, "With the public agency, no, but with some of the brokers, on occasion, we do have to kind of haggle the rates that they offer versus what's cost-effective and what's beneficial to both parties. For example, I may have a load come in from California from the East Coast, that may pay 6, 7, 8,000 dollars, whereas coming back from the East Coast to California, they only pay 4,000 dollars, the exact same mileage but different directions. So we kind of got to haggle and negotiate a little bit, trying to get more going out or trying to get more coming back in." [#13]
- The Black American female representative of a minority chamber of commerce stated, "One of our small businesses is a contractor and he owns his own truck company that does fleet

washing, solar panel cleaning as well as janitorial services. And he was pursuing a contract with the city that was valued about 500,000 dollars, it was a janitorial contract. And he's an African-American man, he's DBE certified and he's small business certified. And in going through the application process, he won the bid, and they put in the bid package that there was a bid bond, and it was at exorbitant costs that his business could not absorb. And we had to advocate on his behalf to talk with the city and identify why that bid bond and bidding included. Because for a janitorial contract, it's not under public works, and public works is where you should have a bid bond be applied. And so if we hadn't been involved in that process, his company would have had to absorb a cost that they couldn't have. It would have bankrupted him and could have closed his business. And that's a barrier that... barriers in access to knowledge, but also access to advocates. He didn't know that that was a boilerplate language, it should not have been included in the contract. He needed our second set of eyes to identify it as a problem. But then he also needed us to advocate on his behalf to make sure that it was removed and that his contract would go forward successfully. We don't see those same kinds of barriers, and we don't see that same need for advocacy when we're [looking at] little businesses owned by white men and white women. We do not see that." [#15]

- The Hispanic American female owner of a WBE-, MBE-, SCMSDC-, and DBE-certified goods and services firm stated, "Well, I often wonder when you do some of these proposals why they say they have to have a certain font. Things of that nature. But I figure it's because they get tired of reading all these things and they're all different fonts. But I've never questioned it, in a sense. I think some of the organizations are getting better at this, especially when it comes to monitoring the addendums and things of that nature. So, I don't think I could comment on that as much because I think they've improved a little bit on those areas, some of those areas." [#17]
- The non-Hispanic white female owner of a DBE-, SWBE-, and CBE-certified professional services firm stated, "When it comes to contracts. You'll probably be asking me - and that's probably one of the other biggest challenges is negotiating your contracts. When you get a contract with a - a subcontractor gets a general contractor contract with them, they are strong-arming you every single time they give you a contract. My contract negotiation probably lasts on an average of three months. So, they'll give me the contract and we'll go back and forth three or four times before I sign it. It used to be that I would sign anything because I felt like I had to. I've met with my team over and over again. We do a thorns and roses at the end of every contract. We talk about some of the nuances of what has happened so that I understand that - for example, for our business, and this is technical but we have - we sometimes will exclude traffic control. We'll exclude washout stations. We'll exclude a lot of things that they'll want us to cover. Even things as simple as where the bathroom is located. Because we need to make sure that our crews - our concrete - when I'm pouring concrete, I might have six or seven trucks waiting to pour that concrete. We do like 1,100 feet a day. That's a lot of concrete. If I have any problems or I'm slowing down, it costs me a ton of money. Every one of those loads of concrete is over \$10,000.00. So, if I have six concrete trucks waiting and we have a problem and they have to be turned around, that's like \$60,000.00. It's a lot of money. So, every little thing that we do makes a huge difference when we're talking about all of this stuff. I would say that, on a regular basis, and this is what we're trying to eliminate by partnering, but on a regular basis, they strong-arm us

every single job. It might be on scheduling. It might be on what we are supposed to perform versus what they think we're supposed to perform. Again, it comes down to the contract - 'We'll exclude,' 'We won't include'. We just had the conversation upstairs when I was leaving that meeting of the scheduling about contracts, because we have three contracts that have not been finalized because they did not include any of our inclusions or exclusions at time of bid in their contract verbiage. So, when I go to bid something, I bid it specifically saying, 'I exclude bonding.' They know that I'm not going to include bonding. I will still provide a bond, but they have to pay for it. They know that I have to have a three-week notice to be put on a schedule, and there'll be people call five days ahead of time and say, 'You better get your ass out here or we're going to self-perform this and do a back charge on you.' They can't do that as a DBE. They really are going to get in trouble with that. That is an advantage of being a DBE. But as a subcontractor, that's what you deal with general contractors. So, yes, they constantly - I think that's a huge issue, especially for someone who doesn't know what they're doing or hasn't had enough experience to know when to pushback and not. I mean, I can tell you, when I'm sitting in DBE meetings, when we talk about short payment or not getting paid, or waiting more than 60 or 90 days, or - in my contract, I have to be paid within 10 working days of them receiving their money." [#18]

- The non-Hispanic white male owner of a majority-owned professional services firm stated, "The engineers, [I knew that] worked with Caltrans, I started talking to them more about how things worked there, and they said there's only about six companies that can do a really big engineering project in Region 4 of the Bay Area, that's like build the Bay bridges that collapsed. They said what was happening is the six companies would all bid as low as they could, really low, and they'd get the contract. And then of course during the course of a large, multiyear contract there'd be a change over or a modification. And when the modification came they would be astronomically high and they'd be paying through the nose for these. And they just couldn't write the contracts clear enough so that there wouldn't be a modification. There was always - especially environmental things, new animals were getting listed and they had to do a survey. And it slowed them down because it slowed them down. They have to modify the contract, and the days of work. So their - and they knew - they were getting really criticized, all their projects, the really big ones like the Bay bridge from Oakland to San Francisco, it took like six years to build and it doubled in price during the time it started at a \$3 billion bid; it ended up being like a \$6 or \$7 billion final thing. And so the people in the newspaper would constantly criticize Caltrans for being such a wasteful agency and building \$7 billion bridges that were supposed to be \$3 billion. So Caltrans, in response to that, would try to write these really careful contracts and they started getting me as a biologist involved in how I had to write the specifications for how the - I don't know, and they had to write it in this - there was a certain template in these languages that I had to use. And then the lawyers reviewed it, and I saw it from the other side, how this gets out of hand like that, because of the low bidding, because of the modifications, and because of the fear that the government was getting taken advantage of their response was to make it a more restrictive and more prescriptive contracts, not letting the person decide. So, I don't know, I don't really have an answer for that one but it was really interesting to see how this thing just got ballooned out." [#22]
- The non-Hispanic white male owner of a majority-owned SB-certified construction firm stated, "I think for the most part, the descriptions are pretty good, but I think every once in

a while, it feels - not so much with Caltrans, but some of the city/county, yeah, it's like they didn't put much engineering into it and you're having to take more risk and, obviously, they didn't - it feels like sometimes they're being lazy and putting it on the contractor rather than actually designing and engineering something that'll work. We see those jobs once in a while. Not with Caltrans. Caltrans is pretty consistent. But with public works, I'll say it's mostly smaller municipalities, probably don't have as much experience or as much staff, I'll say." [#25]

- The Hispanic American male owner of an uncertified MBE construction company stated, "Some of those projects sometimes we got into, yeah, it could be a barrier because either you have to be a union member or something like that." [#28]
- The non-Hispanic white male co-owner of an MBE-, SB-, and DBE-certified professional services firm stated, "My biggest thing is it's really hard to want to work on a project with the county or with Caltrans when we have to work with the Safe Harbor rates. And when I say that, it doesn't mean that we're - it's not economic, well, it's not as economically viable for us as working for some of our other clients here who are accepting our rates, our market rates, which are usually 35 percent below average market rates. And when we look at we're at Safe Harbor, we're usually about 50 to 75 percent below market rates. And so, you're comparing that kind of drop in \$30 to \$40 an hour of our regular revenue, and, you know, it's not our fault we run a lean organization, you know? And I feel like that is the biggest head, or biggest wedge in wanting us to do bigtime Caltrans design work, having a 25 percent role in a major infrastructure project down here is because we just won't make the same kind of money. And, you know, I don't - maybe that's a selfish pitch, but, you know, the market demands what the market demands. The Caltrans cost plus structure is geared toward large firms making a lot of money on them, and just stealing money out of our - stealing money out of small businesses' pockets, and that's why they're not getting small business to participate the way they want to participate. I think either raising the Safe Harbor rate or letting a discounted bill rate on what the prime consultant is, like a 25 or 35 percent per classification would be great. I would have to hire, like, six people to do basically nothing so that we could have the overhead structure to make the same amount of money. And that doesn't just, I don't know. That doesn't make any sense, and it sounds very risky." [#34]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "I guess the big thing is trying to find work with the state and not really feeling like we understand how to do it. Like we feel like we might be wasting our time or something like that if we try to pursue it. Or the requirements may forbid us from doing it. There might be some requirements that we don't qualify for. So it's usually safe for bigger companies who have the personnel to take it on." [#36]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "[Contract specifications are] one of the reasons we don't work much for public sector." [#39]
- The non-Hispanic white male co-owner of an SB-, DBE-, and HUBZone certified construction firm stated, "I mean it takes a lot - there's a lot of paperwork. The hardest thing is you - like in California you have to have your list of subs and you don't get to deviate from that afterwards if you're awarded the project. If one sub doesn't come through with a number

and you either have to come up with a number yourself and then you're required to do it in-house, that thing, or you don't get the project. And you could have 10 or 20 or 30 man hours into bidding a project, including the work of getting a bid bond and, you know, again, putting yourself out there and your credit out there - so you could have all that and then one sub, you know, doesn't come through on a price and you either can't bid the project or you have to go with a budgetary number that means that you have to do - perform that project in-house. That's - yeah, that's tough hard submission bid, we have to be there. So that also is an extra accrued cost sometimes, where we have to be physically on site to hand in a bid. And it's common - the practice is commonly known. These subcontractors are so busy that generally if you're getting the bid from them, the cost or the proposal for them, you're getting it like that morning. So you have to travel the day before to an area if you really - and that makes us have to be a little picky and choosy on what we bid. We have to really want a project to put out, you know - it has to be really in our wheelhouse to speak to us to want to put out the funds and so forth to even bid the project." [#42]

- The non-Hispanic white male owner of an SB-, DVBE- and Micro-BE-certified construction firm stated, "Some agencies - I can't speak for all, but like for BART, they have - when they do micro small business set aside, they will lower the restrictions for companies to meet. So they tend to accommodate the smaller businesses. But the proposals can still be considerable. It can cost upwards of \$1,000.00 to print five books, with resumes and things like that. So there are things they can do to make it easier for small businesses." [#44]
- The Middle Eastern American male president of an WBE-certified professional services firm stated, "I want to say access to government contracts. That would be very beneficial to us. Usually, smaller firms like mine, we don't really have access to it. And if we do, the requirements are onerous, so, we can't really qualify. If they could make their requirements a little more lax, we could compete against bigger firms. And bigger firms - usually their overhead is much more than us. So, we can beat their prices any time. We can beat their fees." [#46]
- The Asian Pacific American male owner of a DBE-certified construction firm stated, "Some of the projects they have restrictions, like you have to have certified electricians, union workers, that is a barrier." [#54]
- The Hispanic American female co-owner of a WBE-, MBE-, Micro-, and SB-certified professional services company stated, "I didn't prime it but I was talking to a colleague who's a small business, and they were priming a small contract with a local agency here. And one of the requirements was the insurance company had to be an A-rated insurance company. And small businesses, a lot of times we shop the car based on premium prices. So the insurance companies that she had were not rated the rating that it needed to be, and she was like, oh my gosh, this is the company that I use. And she was in the process of bidding, she was in the process of putting a proposal together. We have a really good insurance broker, but I haven't come across that. But that is a really.... That's a really restricted, that's a really particular requirement, thorough [and] particular, I've never heard of that requirement." [#61]
- A majority-owned professional services company stated, "I think the single hardest plan is getting into Caltrans build up rate. They are typically less than other municipal projects and [their] rate is less desirable than others." [#AV113]

- A majority-owned professional services company stated, “We have been trying to get Caltrans work. We met all the criteria and they said we were non-responsive because some of the people we put forward did not meet their requirements. For example, they required someone with 5 years of experience.” [#AV8105]
- The female owner of a WBE-, DBE-, UDDBE-, and SB-certified professional services firm stated, “It's funny because every time they backed down, [it was] because I don't pay myself. One of the comments before was, what about that you don't have the same rate. Well, what I did is, I don't pay myself. I give myself a draw when we have extra funds in there. So, I can survive off of that. So, it will never be a payroll with me on it. So, I've just told, well, when you're in the audit portion, it is too late to get out of it and they know it. So, what I've just told the auditor is take it or leave it. I don't care. I don't want the project if I'm going to have to go through this. And, they usually say, 'Well, yeah, yeah, okay.' But it's horrendous. It's not fair for small businesses and I literally, this is the only agency that I do not want to have anything to do with, even though I've got those contracts.” [#PT5]
- The male representative of a DBE-certified construction firm stated, “When Caltrans has change orders, sometimes these change orders will end up getting into disputes and they'll go through. So, for instance, in our line of work, we do traffic control. There's never a dispute on whether or not traffic control was performed. The work is always done or it's not right. So a contractor, just to give an example, a contractor will say, 'Hey. This dig out depth on this demolition work or whatever this is, is deeper than you guys said it would be. This is going to be a change order work.' And they'll include the traffic control as part of that request for change because it's materially different. Well, they don't, what they would say is, 'We're not paying for traffic control at all, because the work we did that day is not change over, it's all extra work.' Okay, well, nobody's disputing whether or not traffic control was done.
- But Caltrans may have a dispute with whether or not that other work was actually change order work. So what ends up happening is we get dragged into these very long, drawn out arguments about whether or not some other piece of work that's not actually our work was change order work. And we end up eight months down the line without a payment. If there was a way that we could not be involved in that. And I realize it's probably more of a contracts issue.” [#PT11]
- The Subcontinent Asian American male representative of an uncertified MBE professional services firm stated, “Caltrans does not allow us, back to the safe harbor, does not allow us to bid with our standard-industry competitive rate. Where every other transportation agency allows us to do that. So, that's the problem with the safe harbor and everything else. As an example, if I bid out on a project for 100 dollars an hour for my top person, because of safe harbor we get 68 dollars an hour. Well that just doesn't cut it, we just can't compete on that. That's an issue.” [#PT3]
- The female owner of a WBE-, DBE-, UDDBE-, and SB-certified professional services firm stated, “Let's say I normally-- my normal billing rate is \$100 an hour. Caltrans gives me \$68 per person on that normal \$100. So, it doesn't do me any good to be a part of Caltrans as a small woman owned business when I can get it from any other transportation agency.” [#PT5]

- The male owner of a goods and services firm stated, "We've been working for 10 years to make contact with anyone at Caltrans to get a job. At this point, it feels like a pattern of discrimination. Before starting this company, I worked for 7 years as an executive for another auctioning firm, so I have the experience. The Department of General Services often utilizes us for their auctions, but we can't get a contract with Caltrans. Part of why we can't get these contracts is that the requirements set on auctioneers in Caltrans' contracts are illogical. For example, when Caltrans disposes of units, there may be up to 600 put up for auction each year. The criteria they set in place to auction these items are not in line with the requirements across the country. In the RFP, they ask for 5 available acres of line but won't list the number of vehicles they plan on auctioning. They ask for an acre for parking. Well, generally, each auction has between 20-30 pieces and other agencies across the country, and in California like DGS, only require one acre for the same number of vehicles and have no requirements for making parking available. It feels like this criteria is targeted to exclude my firm and allow them to pick the same firm over and over again. Especially given that their current firm earns almost 13% commission from the auctions, when firms like mine charge 6% commission. On top of all that, the firm currently used by Caltrans doesn't follow all of the state regulations around diesel trucks, and doesn't offer nearly as many additional services as my firm does." [#WT7]

13. Bid processes and criteria. Thirty-eight interviewees shared comments about the bidding process for public agency work; business owners or managers highlighted its challenges [#1, #2, #5, #8, #9, #12, #15, #16, #18, #22, #24, #25, #29, #31, #37, #39, #40, #41, #42, #52, #54, #57, #59, #61, #AV #FG3, #PT1, #PT10, #PT3]. For example:

- The non-Hispanic white female owner of a WBE-, DBE-, UDBE-, and SB-certified professional services firm stated, "It's a waste of time for Caltrans. It's literally a waste of time, because it takes so much energy to comply with the RFP and getting everything, all the documents together, that if you aren't going to get the project, it just is totally a waste of time. And so I have other clients, so only two left or three left, that I will work on a Caltrans project with that already have my documents ready and they just submit them. I mean, I've literally had a Caltrans project for an environmental firm that they use something that I gave them like the year earlier. I was like, okay, but don't you want me to update it? You know that would be good. But Caltrans is too needy and they are, and I hate to keep saying this, they're predatory. It's almost like they want you to lose and they don't help you, and they don't answer questions. When I had questions before they would say, 'Oh, go back to your prime.' Well, my prime doesn't know what I'm asking them. what happens is, they said they wouldn't allow us to have the job unless I show my employees at what rate. Well, I can't do that. Because some of our at-will employees that are there to help me may not have worked for a whole year. So how do we do that?" [#1]
- The non-Hispanic white male co-owner of a majority-owned construction company stated, "I think that that's the biggest challenge that some of these contractors face as DBEs, is how do you bid a Caltrans job? Make sure you have a bond, make sure you have insurance, quote the job in conformance with the way we're bidding it, And we know what you're bidding, and we have a final call. All those things. So, that's where Caltrans... They want to make this a sustainable program and actually build and grow it, they have to do that for pretty much all of those businesses Caltrans really needs to look at what they're up against, and their

level of aptitude and skill to be able to be successful at doing that. We're not even talking about just being competitive, we're just talking about being able to put together a proposal where they can live by the unit price that they submit. A lot of DBE firms want to just give you a price for their crews and say, this is our cost per day. And sometimes they don't even know what kind of production they might get with that crew. So the general contractors start trying to figure out, okay, well, I'm going to have to take a gamble because once I submit my price, I'm stuck with it. And at the same time, this DBE sub may not get that same production that I estimated or think they are capable of getting. And yet I still owe them for so many days with such a crew with so much money. So it's really, really tough for these DBE firms to know how to put a bid together, a bid proposal, look at what's in the standard specifications, and it's like 400 page book for Caltrans. And there's so much that influences what's required. Let alone the plans and specs, and then what stages you do, the work in, and what traffic control you have to have and the hours of work and the finished product. And it is really, really daunting. So what could Caltrans do? They can't do a lot because they're forcing us as the prime bidder to make the DBE firms submit and align with the bid proposals. There was no way of really carving them out and saying, oh, you guys go use these guys and we won't make them have to give proposals to you like we are asking you to give to us. You know it's all a flow through really. So I have had a suggestion and a proposal to that... And some of these DBE contractors we've heard back feedback, and I know it's in Caltrans records as well, a lot of times they don't even have a full crew. They don't even have the capacity to do a full complete item of work. When you think about commercially useful function for Caltrans, you have to do like one of six or seven different things. You have to be able to move dirt. You have to be able to place concrete. You have to be able to pave asphalt, put in underground, striping, electrical, landscaping. Those are pretty much the main categories. And a lot of these DBE firms, they'll have a couple of guys and a backhoe and a truck. And they'll say, this is what I have, how can you get me work? And it's like, well, I can't just let you dig a trench and then I have to go and get another non-DBE firm to actually put the pipe in the ground and back fill it and all that. So now I've got to coordinate two different proposals. I don't even know who the other non-DBE subs are that I could suggest that you could piggyback or work with, because I don't know who's low bid until like 20 minutes before our bids are due. So I've got five non-DBE companies providing underground pricing and I'm not going to know who is the low bidder until 20 minutes before the end of the bid time but meanwhile, I've got a DBE firm out here that says, hey, can't you have me help dig the trench for one of your non-DBE companies and then I can get utilization that way. Well, A, does the non-DBE company actually want to take that risk because it might slow their production and their pricing. And B, I don't even know who it might be until 20 minutes before. So, all these things are so complicated when people think, you know, why don't we do this, why don't we do that? You've got to really be in the driver's seat and know what it takes on bid time to put a job together, to be able to provide a realistic solution or an alternative." [#2]

- The Black American male co-owner of a WBE-, MBE-, and DVBE-certified construction company stated, "None of this stuff is hard to fill out. It's all information or requirements, and usually it's a box. Check yes or no, and then, reply with the documentation. So, it's not a burden of paperwork. The process seems to be streamlined enough. It's just, even if the process is streamlined, that you know it's streamlined, just because it gives the appearance

that the entity has done what they need to do to make things look fair, but you know it's not there, because you know it's already going to someone else. There needs to be more disclosure. All the cards need to be laid on the table. And yeah, so streamlining, not necessarily, but really, once again, to go back to what I was saying before, maybe putting a limit on how many contracts that a person can get, in a specific period of time.” [#5]

- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "I've found it's very, very difficult as a small firm to go after the RFPs and RFQs, because they're typically there are a lot of behind closed-door conversations about those RFPs. And so, by the time an RFP comes out, we're already too late for the project because it's already, these established firms are already working in the city or [with] the client. And so, a lot of the work that we've been able to get, because it's so difficult for us to compete in the RFP, RFQ process, because it's also a lot of work to prepare an RFP and RFQ, if somebody likes us and they want us and we've been going after them. Now, we have not had success only after through the regular RFP, RFQ process because either our proposals aren't at the same quality as the larger firms are, our expertise [does] not meet the same levels as the larger firms are who can have fly out staff from different cities or states and lastly, because when we go after the jobs, we collaborate with a lot of other small, local, minority owned firms is how we operate. So, when we go after a job, the job typically has five or six small local minority owned or women owned companies that we go after. But that doesn't help in any form of criteria because I'm already a minority owned company. And so when we go after it, if I have like five, six companies that were all from San Jose area, and we all registered in San Jose and we're going after a local project, a big company, like AECOM or Kimley-Horn can come in and they have all of that expertise in house, and then they knock us out of the park with that. And then they're doing, and then they're knocking it out of the park, not for an interchange project, but they're knocking this out of the park for all of the bike lanes, striping projects. So, they can work all the clients in the region to eventually get to interchange [projects]. And so, we, as a small company, are being pushed out on regular bike lanes and sidewalk projects because the larger firms have a massive strategy to do a lot of small projects in the area to be ready for the big project. I'd say the bidding process has been very [challenging] in a few different aspects. One, preparing a proposal and going after [proposals] was a barrier; two, expertise years and pricing has been a barrier, pricing meaning that either our rates are lower, but we have more hours on the job [than] they do or vice versa, and sometimes weird stuff happens. Sometimes weird stuff happens where a client will put out a job for RFP for a week, and it makes you wonder who did they already have in mind if they're only putting it up for a week? So, we don't really bother with that. It'll come out and nobody would know about it and it's just there for a week and it goes away. So we're just like, oh, they just put it out there just to show that they're putting it out there. It's not really for us, and so sometimes that's a barrier because we see the 20 large firms that go after that. Getting on-call contracts is also a barrier because the on-call is the first phase of getting introduced, and a lot of times, the bigger firms get on the on-call very easily because of what we just mentioned. They do all the expertise in house and so it's easy for them to just submit their same qual and get on the on-call, but for us, we have to find four or five local firms to put together to get onto the on-call contract. It's just a different strategy that we have to do. I think a lot of what you've asked me has been about projects, project delivery, but I would say that there's a whole change

happening in project type and delivery right now. Things aren't always happening in a very Design-Bid-Build way where we do our design in a box, the bidding happens in a box, right? And it gets built and owned by the city. The part that we face, because it's a blame game, is a blame-game between the engineer and the city, it's a blame-game [between] the city and the bidding process, [a blame-game] between the contractor and how much they bid for, right? And so, what cities are getting towards now is more of a Design-Build approach where they have augmented staff, or they buy material and they move the material around in their city. And that does not meet or fit into any of these procurement processes or strategies that we [talked] about today. But cities are looking to [do] that. So I believe California allows for design bidding or last year. And I know some agencies that are looking to [do] that for some of their facilities and more. But I think a lot of the questions you asked, for me, are more related to the Design-Bid-Build process whereas the Design-Build process evolves and changes. We'll have different questions or different issues that may come up when working with minority or prime contractors that we may not fully understand right now. So, I'll just give you two cents of that. The process is changing quite a bit and things can come up. I guess some of the things that can come up is like a small business could be asked to front a material and then that material is not being utilized or something, right? And different things like that can really, really affect businesses quite a bit. And we do not know all of those things yet." [#8]

- The Asian Pacific American owner of a DBE-, MBE-, and SB-certified professional services firm stated, "The reason is I haven't bid enough to have an opinion on [the bid process and criteria]. Because a lot of times, like I said to you, is once we read the RFP and stuff like that, then it's just too much for us to handle. And we don't get to being able to bid on anything because it's just too overwhelming, or we don't think we have a chance to win so therefore we don't waste money on doing the marketing package to submit." [#9]
- The Hispanic American female owner of an MBE-, WBE-, and SB-certified professional services firm stated, "I think preparing the presentations or preparing a proposal can be challenging because, again, I only have one person that's helping me part-time, and that availability also is seasonal for that [staff] person. So, again, if I'm doing a million other things, finding the time to create a proposal that's detailed enough to be able to get the award can be a challenge only because I'm not able to spend as much time as I would want on something." [#12]
- The Black American female representative of a minority chamber of commerce stated, "When I first started working with the chamber, I came on as the business adversity coordinator, and my number one responsibility was working one-on-one with our small businesses to help them with their back-office services. So that's paperwork and filling out bids. And specifically in the public works and contracting area, bids, and the paperwork that's required, is one of the biggest barriers to growth for small businesses. We know the small businesses run into challenge in receiving capital from banks or from loan institutions, that the only other way that they can expand their business is by increasing the receipts in their accounts receivable which is through contracting. And we know that public works contracts, government contracts, anything outside of the private sector is stable income that can grow their business. But there's that lack of preparedness for going after a bid. Sometimes these bids are 200, 300 pages, they have to be printed on paper. They need to be done in two copies, you can only do them in a certain color. They have to be bound

and then mailed. And a lot of times our small businesses are not aware of all of the requirements that go into completing a big package, but more importantly, completing it successfully. So in that time when I was doing that, I would help them print out the bid, go through the pages and make sure that we had every single one of the required documents, the proper formatting, enough copies. And a lot of times, we absorb the cost of printing two sets of the bid, so they have [one] they can submit and also having one that they could have as their record. In the four years that I've been doing this, it is amazing to me how many entities do not have an online option for submitting bids, and that they pass on the exorbitant costs of doing that to the small business who often doesn't have the resources, whether that's having the person in their office to do the paperwork or just having the money for the paper and ink to print these huge bid packages. It's kind of crazy. Not kind of, it is. It's crazy. And so going into that, helping them go through and make sure that even the spelling is correct, that they got the pages in the right order. There are so many things that can have your bid thrown out and not being considered responsive that you have to go through with a fine-tooth comb. And we provide that in our technical assistance services on an hourly basis. But for a small business who doesn't have someone in their office to do that, it's a barrier to growth that they cannot get over on their own. So in the bid process, that's one." [#15]

- The Black American male representative of a DBE-, WBE-, MBE-, SB-, and Micro-PW-certified small business development association stated, "I wouldn't say that I see it as a barrier. For the most part, from my perspective, it's a lack of experience." [#16]
- The non-Hispanic white female owner of a DBE-, SWBE-, and CBE-certified professional services firm stated, "I think the bidding overall is okay. It's pretty good. One thing that I know that is a barrier that Caltrans seems to be doing more and more, and it might be because of COVID, is - recently - is they have been advertising bids and, a few days before a bid is supposed to be bid, they will postpone it for a few weeks. That's a real problem. Because as soon as - within a - a couple of days before the bid, even as soon as a week before the bid, I start giving some numbers, some preliminary numbers to my people. Well, as soon as they stop that bid, and then it goes elsewhere, now everybody's got my numbers. So, being competitive is very difficult." [#18]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "The forest inventory field was pretty competitive and there's people very skilled in bidding that and learning to do the bidding was really difficult. How do you bid a fixed price on something you've never done and you can't see the site and you don't quite know the methods? And often people would describe it as loaded with pitfalls that if you did low on a - because they generally took the low bid - you bid low on it and then you didn't realize that, 'Oh, they want you to go out and measure every single tree, not, you know, estimate' I don't know, something like that. And they would try to get you to go back out and measure them again. I tried really hard [to] put one together at Region 2 but we decided last minute not to do that. So that was a barrier just assembling it all, I guess." [#22]
- The Hispanic and Native American male owner of a DBE-, 8(a)-, SB-, and MBE-certified construction company stated, "No. I would say it changes somewhat. And you'd be surprised how many ambiguities are in the contract bidding procedures, which Caltrans as a prime - because now it's - for the most part it's all online. Right? And we've been in a

couple scenarios where you had to have gotten a password in advance of something, and you try to get it at the time you're supposed to be getting it and it doesn't work, and all of a sudden you don't have all the things you need that you thought you had when it comes time to bid. And you can't get it fast enough. And we actually have missed an opportunity. We would have been low but we didn't have - we thought we had the right stuff and we didn't. And I think that we are probably more sophisticated and capable than a lot of people out there. So, I don't know what other people might have struggled with but - and I think it's been around long enough now, but it feels like they could have done it in a simpler way. And you're asking for a small contractor to have exactly the same technical wherewithal and minimum equipment required in order to bid a job. There's no - you know how this COVID thing started and a lot of kids didn't have access to laptops and things like that and the school district issued them. Maybe that's a place where they can actually try to level the playing field a little bit, is that maybe Caltrans issues them to - and has a training class for the small companies that don't have the resources to go do it themselves. And then, the requirements post-bid, as far as timing goes, there's - again, go back to the same thing. Requirements for making - let me see. The penalty and the possible punishment, which would include rejecting your bid are the exact same for the small business guy as they are for the mega company. So, the mega company that has six people in the bid room making sure they don't screw their things up when they submit their bid documents, they have exactly the same time frames in order to submit bids and submit follow-up paperwork as the DBEs or SBEs do. Right? And so, there's another place that Caltrans - I mean, they can't do it because, I think, they know they're going to get sued and they'll probably lose. But it would be helpful, I think, to many small businesses to get at least - give them another day to submit paperwork. Or give them - there's so many ambiguities if you've ever followed the - now they post - they post everything on the internet now. So, when there's a bid protest the - whoever protested it, his letter is on the internet and you can go read it. And then, the guy that responds to it who's being protested, his letter is on the internet and you can go read that. But basically, what Caltrans does - and they've admitted it - they just let them guys go at it, back and forth, back and forth, back and forth until they're - everybody's made their case and exhausted all the things, and then Caltrans determines what they want to determine after that. Basically not getting involved, just letting the two parties go back and forth. If you're a large party, a big company, and you're a small company you don't have the same opportunities. And Caltrans doesn't get involved. So, they do it at the end because they determine it, but the back and forth can be a huge disadvantage because from the scenarios that I've already - kind of the conditions that I've already thrown out there, I might be working all day on a job or all night. I don't have time to go do that. This guy at De Silva Gates, he's got six estimators and two attorneys working in his office and they're responding back with their letter about why my bid is screwed up. But I didn't get a chance to go do anything about it because maybe I, number one, don't know. And maybe number two, physically it's impossible because I can't dedicate the time I need to because I've got to go to work tomorrow, to go do my job that I bid. So, it's a little uneven on how it could be set up." [#24]

- The non-Hispanic white male owner of a majority-owned SB-certified construction firm stated, "Well, I did miss a \$6 million dollar project just about 6 or 8 weeks ago. It was federal highways. You have to mail your bid or hand-deliver it to Colorado. We chose to

send it overnight. We sent it overnight on a Thursday, the week before it was due, the Tuesday of the next week to make sure it got there, and it never made it. So, we were the low bidder, but it didn't get there on time. So, we were disqualified. Next time, we'll probably put somebody on an airplane and hand-deliver it. It's just been an unfortunate sequence of events. I have other contractor friends of mine, right here in our same area that mailed it and it got there. Some of them mailed it on Friday, the day after we did, and theirs got there. So, it just wasn't meant to be, I guess. But that was kind of frustrating." [#25]

- The non-Hispanic white female co-owner of a majority-owned construction company stated, "It's overwhelming, when it comes to state or, yeah, state projects." [#29]
- The male co-owner of an uncertified WBE professional services firm stated, "As far as, yeah, going through and trying to solicit work, a lot of the applications for doing, you know, public work, just, you know, the fact [is that as] a small business, it's probably gonna eat up, you know, 20-30 hours of nonbillable time. Then you're taking that risk of, you know, whether you're gonna get the job or not. It could just all be lost time, so, that's another thing that's gonna keep me from pursuing that more." [#31]
- The Black American male owner of an uncertified MBE construction firm stated, "There was a time when they were doing upgrading housing, getting rid of abatements and improving housing in Los Angeles, and they had a program for contractors to participate [and] just to submit a bid you had to have a degree of sophistication with software. That excluded all the small guys right away. That's why I stopped participating. I just felt it was impossible for me to work in. [I] don't have the background with it but the LACC, and there was a housing thing that LA had going on that was just - my God, it was impossible to even get past the first [step]- to even - to comprehend. I mean when the guys [talk] - they wanted - I think it was they were converting some building, doing something to some building and they needed a building renovated, essentially. But I mean I couldn't even understand what was required to get a bid in. So, it was like, all right, if you guys want to do it that way I guess it's not for me." [#37]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "Well, we do such little public sector work. I just know that every time we try to bid, the administrative overhead required is detractive from our other work. I don't like pouring six or eight hours into a bid, when the opportunity cost of chasing that bid is too high." [#39]
- The non-Hispanic white male co-owner of an SBA-certified micro- and WBE professional services firm stated, "To be square, every time we reach out and put the time and effort to creating a response to a solicitation or an RFP, it's tough for us. The last one I did, I took a shot on doing a moderate-sized bridge. It was an interesting project for me, and it would've been something I would've really enjoyed doing. We put over two weeks of time and effort to it. When it got right down to it, we don't have the - well, you'll get into that in a minute. We just don't have the public relations, the graphic artists, the sweet-talking suede shoe. We just don't have that. So, my wife and I have decided we just simply can't do that. If you call and tell me you're interested in having me take a look at something, I'm there for you. If you're asking me for an RFP and I've got to put together something that's going to take color photographs, rip through all of the archives, we just [don't] have the salt for that. I recognize there are companies out there that they'll throw proposals out and proposals out

and proposals out. They only expect to get one in ten jobs. But then if they've got all that flow going through the office, well then it makes sense for them. We can't do that. If we go shoot for a job, we need to have a high likelihood that that is going to turn into work." [#40]

- The Black American male owner of an SB- and MBE-certified professional services firm stated, "I can do anything, but, you know, I have to have the proper resources to prepare for something like that. And, at this point, I'm beginning to wonder whether or not it's a good effort of my time to go after those types of projects." [#41]
- The non-Hispanic white male co-owner of an SB-, DBE-, and HUBZone certified construction firm stated, "It definitely can be [a barrier]. And those are the things about the bidding process that I had mentioned before, having to use the sub that you list on your bid; having to hand in the bid, a hard submission in person. Those are all things that can be barriers for us." [#42]
- The Asian Pacific American male owner of an uncertified MBE construction firm stated, "It depends on what you're bidding on or what type of bidding. I don't know how Caltrans or any other agencies do [bids], but I do know if you're bidding for government work, it's a pain in the butt, and it usually discourages anybody in placing bids for the government, the US - the federal government. It's just like three different programs you've got to go through just to submit a bid. You've got to have a DUNS number. You've got to have this. I mean, it's ongoing, but once you get in the system, there is a lot of money to be made from the federal government, working for them." [#52]
- The Asian Pacific American male owner of a DBE-certified construction firm stated, "[You] have to submit 20 bids to win one. Waste of my resources and time, I cannot afford it. Big companies can sink the resources, prepare for the bid, and win one 100- 200 million dollar bid and that covers the cost of all of them. Harder for smaller business. I had to pay a big price and I have only 2-3 contracts. I have no time for no life, for no family, no church, no girlfriend. No, it's not worth it." [#54]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "I find it really confusing and complicated to bid with Caltrans. And I don't think it should be, I think it should be much simpler. I've had-I don't know probably by now, forty years of experience doing ecological and environmental work and thirty years as an independent contractor. I understand the contracting world too. So, I'm not able to get contracts. I'm not able to find a way to burrow through or penetrate through the massive, complicated hoops you have to jump through to get a contract. One example is the last one they put out. They put out these very large general service contracts that they-in fact I think one company...I'm not sure how many they selected. It's not explained very well. It looks like they select one very large company to do all the various services they're anticipating. And I'm not able to cobble together a large team. I've tried to do it, but it's a lot of work just trying to set up these relationships and trying to get people to submit. For example, they need an archaeologist, a historian, maybe engineering, CAD design, they want all that. You have all that in your staff of people, and yet I think they are set up there for small businesses too. So, it's not clear to me how a small business could possibly have all of those workers, unless- I think what they do is small businesses will front for large businesses, which is kind of like a...well it's kind of like shielding...really, you're contracting with a large business through a small business. And after trying to do it, on I think two of them, I gave up. It was just too

much work-plus the insurance requirements, the proof of bookkeeping, or bookkeeping activities, record keeping....it just became enough of a drag on trying to show we had all those things. Which I don't do, I just do my own bookkeeping, you know I'd like to do work, I think I could do really good work, I think I could do it cheaper than a much larger company if I don't carry the overhead. But it's impossible for me to respond to the bids the way they are organized. It's too large. They ask too much at the front end for a small business to be able to respond to all those things. And they don't really provide good guidance on, well you don't have to do that or anything." [#57]

- The Asian Pacific American female owner of a SB-, DBE-, and WBE-certified construction company stated, "The pre-bid meeting is already [has] the job walks, right? The job walks, but the job walks sometimes, if they have incumbent, so the previous person [is] already in there, they know the system, they are in the system, they have overhead already. So for them to repeat, receive the job, it's easier and [for] an outsider, a newcomer, it's hard." [#59]
- The Hispanic American female co-owner of a WBE-, MBE-, Micro-, and SB-certified professional services company stated, "Well, putting a proposal together versus sending someone your files always takes more time. So for me, I understand why we have to put a bid together, but if the prime already won the project, it makes it a little more... [it] incentivizes the sub to put the bid together. But if the sub has to compete with others, it gets discouraging because you keep preparing these proposals for the same prime, and you never win work. And it's like, well, I'm not going to give you another bid. Because it's kind of like it takes time to go through project documents and prepare a proposal." [#61]
- A comment from a majority-owned construction company stated, "Come out with bids sooner." [#AV215]
- A comment from an MBE Subcontinent Asian American-owned professional services company stated, "The main issue is the bidding process is not very well regulated. You bid on a project, you are the best bidder, your prices is right, and it gets awarded to someone who has a connection." [#AV83]
- A comment from a majority-owned professional services company stated, "Difficult to find public projects because proposal and bidding process is not easy." [#AV213]
- A comment from an MBE Hispanic American-owned professional services company stated, "It is quite competitive; it's expensive to do business in CA- the bidding process is time-consuming and cumbersome with complicated paperwork." [#AV267]
- A comment from a WBE and MBE Hispanic American-owned construction company stated, "I don't know how to submit bids, need help." [#AV8103]
- A comment from a majority-owned professional services company stated, "The contracting process has become more difficult- there are a lot more requirements and many primes require subconsultants to comply with federal regulations." [#AV8367]
- A comment from an MBE Hispanic American- owned construction company stated, "It's difficult to get into the actual contracting when you don't have a foot in there. There is quite a bit of paperwork that you get lost in." [#AV8385]

- A comment from a majority-owned professional services company stated, “The RFP process keeps getting more onerous and drives up the costs for us and therefore for the government.” [#AV8389]
- A comment from an MBE Asian Pacific American-owned construction company stated, “Being Asian owned I'm kind of new to the industry. I don't know how to bid or do any of that, that's why I only do subcontracts.” [#AV8546]
- A comment from a majority-owned construction company stated, “Getting familiar with the bidding process has kept me from pursuing contracts in this area although this is the area I work in.” [#AV865]
- The Black American male president of a professional services business development organization stated, “Last minute RFPs, RFPs that are so big and so complex that if you're a small business, it takes a disproportionate amount of your staff to respond versus a big business.” [#FG3]
- The female owner of an uncertified DBE and WBE professional services firm stated, “Once we get certified... Well even if you're not certified and you're bidding on any of the Caltrans projects, they have so many questions that someone like myself who hasn't gone through it don't understand the question. [That's] why I asked if this program will have how to go through this project, the bidding process of writing. What are they asking for when they're asking this? And that would be a huge help for someone like me because I don't know what they're asking. When I was going through the Safe Harbor paperwork for the first time, I was... I looked at it blankly for a few hours.” [#PT1]
- The female co-owner of a DBE- and MBE-certified construction firm stated, “We've been working with brokers that are constantly getting these contracts. They're asking us to keep our DBEs but we're not getting the work. I was trying to move from working with brokers into doing our self-contracting but there's just no information on how we can bid and for these contracts. I don't know how to write up a bid. I don't know how to respond to RFP. And it's just, I can't find any resources being DBE. We from the state, the County, all these programs, it was things that came up but they're not either accessible like down in San Diego and then they have these things where you sign up and then you have to be chosen. And it's just never, the last four years, just never had the opportunity to just get the information that we can move from having to be at the mercy of these brokers that don't necessarily get us the work. They use us to bid to say they have these DBEs but then they don't give us the work. So where are the resources for us that do become certified so we can procure some contracts? Because they're just, I haven't found any that worked out for us in the last four years.” [#PT10]
- The Subcontinent Asian American male representative of an uncertified MBE professional services firm stated, “The first part is, it's the only agency that uses the safe harbor issue and we only have three days to get our documents in when we bid. It's impossible to get all our regular documents...to be able to prepare in time to not be stuck in the regular safe harbor part.” [#PT3]

14. Bid shopping or bid manipulation. Bid shopping refers to the practice of sharing a contractor’s bid with another prospective contractor in order to secure a lower price for the

services solicited. Bid manipulation describes the practice of unethically changing the contracting process or a bid to exclude fair and open competition and/or to unjustly profit. Twenty-three business owners and managers described their experiences with bid shopping and bid manipulation in the California marketplace [#3, #10, #11, #17, #18, #21, #23, #26, #29, #33, #35, #37, #38, #39, #41, #42, #47, #49, #54, #55, #60, #PT11, #PT5]. For example:

- The non-Hispanic white male co-owner of an SB-certified professional services firm stated, "I've been on a project with the County of Alameda. This is a few years back and we were the apparent low bidder but there's a clause in their specifications that states that there's a good faith effort that you have to do to get yourselves to bid. And we have to submit this documentation after we bid the project and we were thrown out of the project because we did not basically in good faith negotiate with a subcontractor on a public bid. I actually even went to the board of supervisors and one of their meetings and had to stand up and explain that, This is not a private job. This is a public works job. We're not to negotiate with subcontractors. We're not. That's good shopping to me. There's no way I can call this guy, his company and say, Well, what do you think? Can you drop your price, then he's going asking me questions. Well, okay. Well, where am I at? Well am I 5 percent, 10 percent higher. And once I tell him that he's 10 percent higher, that's bid shopping to me But there is perfect example, is electrical contractors. I mean, we are getting sub prices from the electrical subs and we can see what's happening because within a half an hour later, they're revising their prices and they're 3 percent below the low bid that we received earlier. So we it's notorious within electrical subcontractors." [#3]
- The non-Hispanic white male owner of a SB- and ELBE-certified professional services firm stated, "I've experienced a lot of that bid shopping. In the private market." [#10]
- The non-Hispanic white male representative of a Native American-owned MBE-, SB-, and Micro-BE certified professional services firm stated, "What happens is we're subject to prevailing wage and we pay prevailing wage. So, there'll be firms that come in that clearly could not be paying prevailing wage just based on their rates and the agencies don't audit those firms, and they don't have the technical capacity. But somebody like Caltrans could or a bigger city, but your typical public works agency, they don't even understand prevailing wage. And so, the manipulation happens when we have firms that low bid and there's no audit process on their prevailing wage system." [#11]
- The Hispanic American female owner of a WBE-, MBE-, SCMSDC-, and DBE-certified goods and services firm stated, "I will say something that I've always - that has always discouraged me, and I think it's - sometimes small businesses are taken advantage because of it. And I think if we all put our heads together maybe we can improve the system. When there's an RFP that comes out and some of the subs are... actually putting their names in the hat because they want to be a subcontractor to the prime, the prime is required to reach out to many DBEs or subcontractors saying, 'We're going to be bidding on this. If you're interested please give us your certification... let us know that you are and give us your numbers. This is the scope.' And often it kind of troubles me when I get those, and only because... I don't know what's going on, if they're just taking my information and then using it in order to use it. And so, the person, the small business is spending all this time getting this information, compiling it, putting it together, submitting it to them, and then there's no commitment there. And then you find out that you weren't even put on the bid. And it's a

risk and a chance that you're going to take if you want to do, if you want to work with some of these primes. But there needs to be a system in there that some of our information is held confidential and - or that once the information is given, if they choose to go with you - there needs to be a system that's there if they're choosing to go with you that you've not having to give them everything on this contract, or maybe just the pricing, and then later they're... I mean, something has to be done because many times what they do is they take the information, they say they're going to go with you, and then later when they go through the process you're not on it. You're not on the contract. And I think it's gotten better, but it hasn't - there's still a lot of area that needs to be worked on." [#17]

- The non-Hispanic white female owner of a DBE-, SWBE-, and CBE-certified professional services firm stated, "I know that they bid shop, I mean, for sure. It doesn't matter that I'm a DBE. They want me to - I don't have - I can't go out there, not that I should, but I can't - I'm the only person who does this type of work in Southern California, but I have a competitor that comes down from Northern California and some of the general contractors will perform their own work. They're always shopping my numbers, always. I know they share my numbers with people." [#18]
- The Hispanic American male owner of a DBE-certified and uncertified MBE construction company stated, "Like a month ago we had bid on a project, and the estimator, a new person I hadn't worked with, called and said, 'We got a different bid in, but we can give you the work. We haven't worked with you before, so that might be an opportunity to kind of start some work with you. But we need you to bring down your price to this, and on these items.' And I said, 'Hm, okay.' So I've experienced it from that regard, but actually not many times." [#21]
- The Subcontinent Asian American male owner of a Micro- and SB-certified and uncertified MBE construction firm stated, "I've had a couple of experiences like that. Not very many. But again, like you mentioned, it's been all on private projects. Nothing on the public agencies. After I give the preliminary design and my fee and so on, the contractor used my solutions and approached somebody else who was able to - yeah, did a little more cheaper than my fees. And like they say, everything is a learning curve." [#23]
- The Middle Eastern American male owner of a construction company stated, "I've seen this often and I've seen the contractor that has no intention to use that sub but wants a price from the sub to list them." [#26]
- The non-Hispanic white female co-owner of a majority-owned construction company stated, "Yes, actually, that has happened - more so than what I know about, I'm sure." [#29]
- The non-Hispanic male owner of a majority-owned SB-certified construction firm stated, "I mean, it happens in this business. You know, for instance... I've done bids for people and they like somebody else, they prefer somebody else, right? There may be friends or something. Who knows? Or they've done work with them for a long time. Like, a lot of general contractors will have numerous companies bid, you know? They'll get five or six different bids from different companies and you know, sometimes, I'll bid jobs really cheap just to see if they're being honest. I'll bid it cheap enough where I know like, most people won't do it for that price. And just to see if I would get the job. And I never get the job with

some people. So, I just stop bidding to them because it's a waste of my time. They're using me for bids so, yeah, I have been used for bids." [#33]

- The non-Hispanic white male representative of a majority-owned construction firm stated, "We're a company that refuses that. So I don't - I'm sure other companies do it. I heard other companies do it, which would make it pretty hard. Bid shopping is when we get a price from three companies; we don't really like company B; we like company A, so we call company A and tell 'em, 'You need to be lower than this, company B's price.' What happens when a company does that: right before the bid ends, they'll send their new bid price to everyone and they'll be low bid so now they're lower than everyone. And that hurts both ways. It hurts the company that never win a job but it also can hurt a small business or a DBE 'cause they're trying to use the DBE, and they basically call the DBE and will tell them, 'Hey, you need to be at this price for us to use you.' Which they may not be able to do for that price." [#35]
- The Black American male owner of an uncertified MBE construction firm stated, "And the problem with bid shopping is you could end up - because the guy who you won the contract with, he probably got everything; you get a cheaper guy to come in, he didn't cover everything. And now down the road you're stuck. Bid shopping is just a horrible thing. I have never been subjected to bid shopping. I studied for my license and I know what bid shopping is, and that's the thing, it's you just don't do it because you never know if the guy you are replacing, the guy who has everything is he going to do as good a job as the guy who you used to win the contract. And secondly, it's just unethical. It's not fair to the guy who took the time to sit down and evaluate the project and come up with the numbers and submit the bid. So then to use his number to win the contract and then go around and shop it around to get it cheaper, from that I can tell I think it's kind of a prevalent process around, but it's just not cool. It's like robbing Peter to pay Paul." [#37]
- The Black American female co-owner of a DBE- and DVBE-certified and uncertified MBE construction company stated, "I've seen where a contractor gets the full bid for, say, \$100,000, and then he - and then he goes out and shops the subs and see what the best thing he can get." [#38]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "That very rarely has happened where someone will come to us and say, 'Hey, we got this bid from your competitor. If you can cut that price, we want you to do the work.' That happens occasionally. Yeah, not very often, though." [#39]
- The Black American male owner of an SB- and MBE-certified professional services firm stated, "I know I align myself or made myself available to larger corporations, but whether or not they've actually used me or not, I don't know. I've never been informed that that's happened." [#41]
- The non-Hispanic white male co-owner of an SB-, DBE-, and HUBZone certified construction firm stated, "We've noticed that a lot of projects that we've lost, they've been awarded just to the lowest bidder. Then we find out that you go back and there's just a ton of change orders, 'cause they just - a lot of firms will go and say, 'Okay, the government didn't cover this, they didn't cover this, they didn't cover this' and they're going to rely on winning the bid with a really low bid. And sometimes RFIs can draw that stuff out before the bid

process, but some of these projects bid so fast that there's no time to look everything up. Especially, like you said, our small firm, we don't have the resources of some other firm that just has people in the office looking for things like that. We have to look at the project and bid it knowing what we know about that type of work, whereas somebody else could be bidding it and just looking for the change orders that they can get after their awarded. That's how the bidding gets, and that's kind of become a popular thing in the public works. And people just lowballing projects and getting the money back out of them afterwards, and they know how to do it and they know what to look for." [#42]

- The Hispanic and Indian American female co-owner of an SB-certified and uncertified WBE construction firm stated, "It's a big issue for small businesses because it does happen, but you have no evidence to say that it's happened." [#47]
- The Hispanic American female representative of a DBE-, MBE-, and WBE-certified construction firm stated, "That's what happened with the private projects. Because that's what happened that you send in a number and then they get other numbers and then they start shopping around and they want you to lower your bid. It's hard. I'm pretty sure that they also do some of that on the public one but when you do it, I think they do a lot more on the private section and that's why sometimes it's harder. And yeah, that's one of the reasons there's some contractors that we don't work with because that's what they used to do. They used to list an invitation. Then you take all the time to do the bid, send it to them and then they start shopping around with your number. And you never heard back from them. You know that someone else is doing the job." [#49]
- The Asian Pacific American male owner of a DBE-certified construction firm stated, "That happens sometimes. Yeah it happened to me once. They use your bid without submitting your bid." [#54]
- The Hispanic American male owner of a DBE-certified construction firm stated, "Well, it is so there are contractors out there that will bid on a project. And then they'll turn around and go—once they win a contract, they'll go, 'Oh, we really can't do it for the amount that we said we would. We need more money.' So now the agency's having to come up with because they're basically being held hostage by the contractor. So that seems to be really prevalent in transit so they'll bid on a project and they'll say it's \$2.50 a mile. And then they'll come back and go, 'Well, we really can't do it for that. We got to do it for \$4.00 a mile.' And so either the agency coughs up the additional money or the contractor kind of holds their service up. So, yeah, there's a lot of manipulation when it comes to bidding on contracts." [#55]
- The Black American female owner of an uncertified WBE and MBE professional services firm stated, "The second issue is that they continuously deal with firms that they are so accustomed to [it]. So, what is commonly known I'm might be new to their firm and they'll say, 'Well, can you send me a quote?' 'Okay, sure. I can do that.' Well, they'll take my quote and they'll send it to their commonly known client that they already are familiar with. 'Can you beat this pricing?' So I never hear another thing from them because they've taken my information and sent it to someone else that they know, 'Can you beat this?' So I never hear anything else. So then I started asking for letters of commitment, 'Oh, wait a minute. I don't want to do not a letter of commitment.' 'Why?' Because that puts you on a hook with me, which means you can't bitch at me, which means I have skin in the game. So when there's

no skin in the game, why am I sending you a bid so you can bitch at me? No. I'm not an ally for you. You go to the ones that you know. So when I have all of these huge outreach and these empathy, there're just trying to meet that quota to move to the next level so that it can be shortlisted. So the game just continues and no one is willing to stand up and say, 'We're not doing this anymore.'" [#60]

- A respondent from a virtual public meeting stated, "I've been at a job for Caltrans. I was a low bidder and I picked up a [DBBE]. Put the name into my bid pack and everything sent it up, but the DVBE forgot to give me a paper to put in the bid. So, Caltrans didn't contact me on nothing, threw my bid out two or three days later. Put it back out the bid, put all the numbers out where everybody could see all the bids. And that's a practice that needs to stop." [#PT11]
- A respondent from a virtual public meeting stated, "I try to stay away from general contractors because I bid at another job where the general contractor gave my numbers, I was a low bid. And they called me and told me to say we were low bid, but we forgot to put your number, can you change the number? I said no, I'm not changing my numbers. So they proceeded to dismiss me and all that." [#PT11]
- The Hispanic and Native American male owner of a DBE-, 8(a)-, SB-, and MBE-certified construction company stated, "New firms aren't going to woo the DaSilva's, Bay Cities, they will never get used. They always use the other guy. If we quote 'em our number gets out." [#PT5]

15. Treatment by primes or customers. Six business owners and managers described their experiences with treatment by prime contractors or customers during performance of the work was often a challenge [#7, #18, #21, #43, #52, #55]. For example:

- The Black American male owner of an MBE-certified professional services firm stated, "You have some primes that only bring in a team just to get the check in the box and lets them win the contract, never getting any work. Or if they do have an agreement with you and they give you the work, they give you the lowest aspect of the job, just enough to keep you going but not enough to be profitable. So, I think it's horrible. I think it needs to be social and fair guidelines incorporated and say, look, if someone's going to be your sub, then you have to treat them a certain way. And if not, they have some sort of recourse to notify somebody to say, hey, my prime is not holding up their end of the bargain." [#7]
- The non-Hispanic white female owner of a DBE-, SWBE-, and CBE-certified professional services firm stated, "Some of these other people, if you get with them, they don't invite you to the partnering meetings. They don't look at you as a partner. They just look at it as their partnership between Caltrans and themselves. The reality is if you have a \$100 million project, you're going to probably have 50 subs on that project. All of those subs have the right to be part of that partnering and should be part of it. Now, they don't need to be working directly with Caltrans and flooding that situation, but there's got to be something there, even if it was that Caltrans gives, as part of the partnering is you have to include your subcontractors and you have to show proof that they were part of that. Whatever it would take so that the smallest subcontractor could be heard would be great. Most general contractors do not look at subcontractors as a partnership. They look at it as a means to an

end. They're looking at these contractors, these subcontractors, small contractors as something they have to deal with, not something they want to partner with. They're only looking for the relationship to last with that project. They're not thinking about five years down the line or even the next project they might want to bid. We are trying to change that. I think some general contractors see a value that a lot of them do not. So, if you give them too much power, we already feel as if we are sometimes strong-armed by a general contractor. If you give them too much power, that is just causing even more problems for a small business. I would say that, on a regular basis, and this is what we're trying to eliminate by partnering, but on a regular basis, they strong-arm us every single job. It might be on scheduling. It might be on what we are supposed to perform versus what they think we're supposed to perform. Again, it comes down to the contract - 'We'll exclude,' 'We won't include'. We just had the conversation upstairs when I was leaving that meeting of the scheduling about contracts, because we have three contracts that have not been finalized because they did not include any of our inclusions or exclusions at time of bid in their contract verbiage. So, when I go to bid something, I bid it specifically saying, 'I exclude bonding.' They know that I'm not going to include bonding. I will still provide a bond, but they have to pay for it. They know that I have to have a three-week notice to be put on a schedule, and there'll be people call five days ahead of time and say, 'You better get your ass out here or we're going to self-perform this and do a back charge on you.' They can't do that as a DBE. They really are going to get in trouble with that. That is an advantage of being a DBE. But as a subcontractor, that's what you deal with general contractors. So, yes, they constantly - I think that's a huge issue, especially for someone who doesn't know what they're doing or hasn't had enough experience to know when to pushback and not. I mean, I can tell you, when I'm sitting in DBE meetings, when we talk about short payment or not getting paid, or waiting more than 60 or 90 days, or - in my contract, I have to be paid within 10 working days of them receiving their money. Normally, that is something that they will talk about a little bit because we'll talk about - people will complain about all of these people not paying them. I'm just like, 'You can't bid to them anymore.' They're like, 'Well, we don't have a choice.' I'm like, 'Well, there should be a choice. They shouldn't have the ability to dictate the fact that you won't be able to stay in business unless you bid to them, or that if you do bid to them and you get the contract, that they're going to manipulate the contract so that you have zero rights.' Which is what they try to do. So, it's not rocket science, but they have to be willing. I mean, we've gone - in this relationship building aspect, we've gone to general contractors that keep asking us for numbers, and we go meet with them directly, and they literally like, 'We're not really sure why we're meeting with you.' We're like, 'We're just trying to build relationships. We're trying to make sure that this is going to be a good partnership piece.' Not just he, several of them, were like, 'All we care about is your number. If you're the lowest, then that's what we're going to take.' I said, 'Yeah, that's not going to work for us.'" [#18]

- The Hispanic American male owner of a DBE-certified and uncertified MBE construction company stated, "Most of the time we've performed work, we haven't had any major issues. Sometimes there's a question where they want you to do something extra. I can think of like the big project, they wanted us to - Y'know, we sent billing for the first few weeks, and then they called and said, 'Hey, y'know, your billing's wrong. This is not the way we're gonna pay you.' And I was like, 'What do you mean it's wrong?' He said, 'Well, we didn't know that you

would charge us this way. 'And so, we want you to revise your billing.' And I was like, 'Well, but that's the way the contract language reads.' And so they're like, 'Okay.' But the gist of what he was trying to tell me, he was like, 'Okay, so if I asked a striping company who bid on like striping 1000 feet that, because they were here already on site, that if I asked them to stripe 1050 feet, that they wouldn't charge me for the extra 50 feet because, well, you were already here.' And I was like, 'Who's gonna do extra work for free, just because we're already there, y'know? There's materials, there's labor. I don't think it works that way.' They were just trying to pull a fast one, in a sense, of trying to get more for less. I was able to go back to our contract and show the language. And then, y'know, I know he wasn't too happy about it and so forth, but I said, 'I'm here to work with you. We want to have a good professional relationship, but I just can't give something away for free, just because we're already there on site, y'know?' We haven't worked with them again, but I don't think it's because of that. And we did complete that project, and at the end we gave them, 'cause the project manager had made an error on his side, and they had gone over [the] money allocated. So, we gave 'em like a, shoot, it was like \$24,000.00 in discounts that we gave him to kinda help him out on his side." [#21]

- The non-Hispanic white male representative of a DBE-certified and uncertified WBE construction firm stated, "Now we have before - we went out, and we even worked for other big prime contractors, and sometimes we didn't have a really good outcome on a Caltrans project, and then somebody promised us or had a contract for so many work hours, and then they didn't complete it. And being the little guy, we would call up and say, hey, you need to finish the contract, and they just kind of shoved us aside, and didn't - you know? And then you go to the SANDBAG, which is the San Diego local - and they didn't - they didn't stick up for us. They didn't do anything to these prime contractors. And this prime contractor was so big that they just kind of sloughed us aside, and we didn't get our promised work, our contract didn't work, and it was really discouraging." [#43]
- The Asian Pacific American male owner of an uncertified MBE construction firm stated, "I think there is, depends on what the circumstance is. For example, not that long ago, a couple of weeks ago, I did a load from Kentucky to California. I loaded on a Wednesday, thinking there was no way I'd be able to unload by Friday, so I set everything up to unload Monday morning. I was [going to drive there] and then drive back down and get unloaded on Monday. But on the way over there, I said, well, shoot, if I kick it in the butt, maybe I can make Friday morning. So, I said, well, I'm not going to change nothing until I know if I can get closer. So, I ended up in Bakersfield Thursday night. And then - and I showed up at this guy's place on Friday, 8:00 in the morning. And then he says, hey, it's going to take three or four hours to unload you. Friday's our busy day. I said, well, that's fine. Just understand that after two hours of me waiting, you're going to have a standby charge for me to sit here. And it's not going to be cheap, \$100.00 an hour. And he just - he got mad, and he said he was doing me a favor by unloading me. And I said - on a Friday. And I said, no, you're not. I'm doing you a favor because I showed up early. You got your product here, and we don't have to do it on Monday. But he went on and on and on, and it was just one of those things to where I got cussed out, and I didn't think I deserved it, you know? You try to do somebody a favor. And I told my dispatcher, don't ever book another load for me with that person. I'll haul it for the company, but I will not do another load to [that] franchise or to that store." [#52]

- The Hispanic American male owner of a DBE-certified construction firm stated, “The issue there is that's kind of, unfortunately, a personal relationship. So, if you have a good relationship with the agency, it's great. But if you're doing the job but you have kind of a personality clash, they're just looking to get rid of you. That's based on relationships, instead of just the performance of the work. I've been on contracts before ... so my livelihood is dependent upon how well the general manager gets along with the agency. If the general manager that I work for or subcontract for, that sours, then I'm out of work because when they get rid of him, they get rid of me. My work can be impeccable, but I don't get the benefit of the doubt. I'm at the mercy of somebody else.” [#55]

16. Approval of the work by the prime contractor or customer. Three business owner described their experiences getting approvals of the work by the prime contractor or the customer [#1, #5, #17]. For example:

- The non-Hispanic white female owner of a WBE-, DBE-, UDDBE-, and SB-certified professional services firm stated, "It's actually an issue with, there is so much paperwork that Caltrans demands that... there's so much like I can't bill for me to fill out the paperwork, which would normally be part of making sure the contract runs right. So, I waste some hours a month to do the paperwork that is required for my prime to be able to submit it to Caltrans so it's not worth it. It's just not worth it.” [#1]
- The Black American male co-owner of a WBE-, MBE-, and DVBE-certified construction company stated, "Well, the personal factor for me is, one of the pitfalls of being a business owner is that, particularly at residential, if anything goes wrong, everybody is quick to grab a lawyer. And from the job we did in 2015 for a developer, he didn't make as much money as he felt he should've made. So, he actually sued me for fraud. I won my case, but that was still 22,500 dollars that we had to spend on legal fees.” [#5]
- The Hispanic American female owner of a WBE-, MBE-, SCMSDC-, and DBE-certified goods and services firm stated, "The prime is usually the one that has the communication with the client, right? And it's usually not the subcontractor. The subcontractor doesn't get involved in that because that's not really initially their client So, they're not on the day-to-day. So, whatever the prime says about the subcontractor is what the client is going to believe. And sometimes there's more information that they are not aware of. And I feel many times the prime manipulates that process to their benefit. I mean, there's others that are not like that. But in due case, a lot of the primes do play - like I said, they play with that purse. So, they'll put the blame - if there's something that they're getting caught on or something that's not working they'll put the blame on the subcontractor before they put themselves in jeopardy.” [#17]

17. Delayed payment, lack of payment, or other payment issues. Fifty-six business owners and managers described their experiences with late or delayed payments, noting how timely payment was often a challenge for small firms [#1, #3, #5, #6, #10, #11, #12, #13, #14, #16, #17, #18, #20, #21, #24, #25, #26, #29, #30, #31, #32, #33, #35, #36, #38, #44, #45, #50, #52, #54, #59, #61, #AV, #FG3, #FG4, #FG5, #PT1, #PT10, #PT11, #PT12, #PT2, #PT3, #PT5, #WT5]. For example:

- The non-Hispanic white female owner of a WBE-, DBE-, UDBE-, and SB-certified professional services firm stated, "Let's say I worked in November, here it is December. I will turn in my invoice to my prime, say the third of the month or whenever the last week when I get my stuff from my employees. I turn in my invoice, say the third to the fifth of the month. Well, the prime usually isn't prepared because they have other subs. And so they put off turning it into, like Caltrans, and so because of that, it's automatically over a month before Caltrans even gets it. And then by the time Caltrans gets it... I mean, I have work that I still have not been paid for and that was last year and there's nothing I can do about it and I won't be paid for it. So I just have to write it off. And Caltrans isn't the... It's all agencies. I mean, I have some from the city of Los Angeles, I haven't been paid since last February. And so it's just an issue with lead agencies and the inefficiency of the staff. And I know that it's not, I mean, some of it's their fault, but there's no checks and balances to ensure that everything is done as per contract." [#1]
- The non-Hispanic white male co-owner of an SB-certified professional services firm stated, "some of these agencies, especially now in these times everybody working at home, people are on vacation. So by law, once my invoice is submitted to the public agency and approved by the city engineer and the accounting department, they have 30 days to pay me or I can charge them interest, which I don't, but we just have to make several phone calls constantly to make sure that we're getting paid on time. We get the excuse that, the head accountant is on vacation. Well, that's not my problem. Somebody should be in there to pick that person's position and make sure that everything goes out in a timely manner and that doesn't always happen." [#3]
- The Black American male co-owner of a WBE-, MBE-, and DVBE-certified construction company stated, "sometimes that's a problem, but for the most part, if it's a sizeable contract, we make sure that whatever money that we make for that, the total amount of the money is put into an escrow account. So we know that the money's there and then we know that everybody's going to get paid once they take care of their part of the deal. Although we just had that happen where... Man, I lost 15,000 dollars because the lady suddenly decided she didn't want to pay anymore. And so we couldn't continue work without getting paid and she still hasn't paid me. So what are you going to do?" [#5]
- The non-Hispanic white male representative of a majority-owned construction firm stated, "Yes, because of the extensive compliance requirements by the state and different local agencies. It's very difficult with our small subcontractors or vendors to get all their paperwork turned in timely, which ends up holding up our payment, which holds up ultimately them getting paid from us. So, there's a big issue there, in my opinion. Same thing with processing of change orders. It takes very long to get some of this paperwork turned around and it's definitely a huge barrier for payment" [#6]
- The non-Hispanic white male owner of a SB- and ELBE-certified professional services firm stated, "It's not unusual to have 150,000 dollar days, of which maybe 65 percent will be cost and materials, which has to be paid at the end of the month. Regardless of when the agency pays you. Well, you don't have to have it [them money to pay for materials] up front, but when your clients think 60- and 90-day payments are called current payments, it gets extremely difficult. You run out of capital because you spend money very, very fast. Six months is not current. Pay it quicker. If you want good prices and you're a true partner and

you pay quick, you will have more competition than you can believe. But when you think 60 days is current, that doesn't work. When you create all kinds of hoops that you have to jump through in order to get your payment... The more difficult you make it for a contractor, the higher the price you're going to pay for your work. Does that sound reasonable? I think it's reasonable." [#10]

- The non-Hispanic white male representative of a Native American-owned MBE-, SB-, and Micro-BE certified professional services firm stated, "Public Contract Code says they're supposed to pay quickly. But what happens is when you're a sub-contractor particularly, they put you on a paid when paid. And small businesses, the kind of business you're trying to reach out to no way they can afford to go 60 days without payment or 90 days. And then the primes, a lot of times they withhold that payment. And then when they do get it, they know that the subs and smaller businesses need the money. So, they negotiate a lesser rate. A lot of the smaller businesses aren't sophisticated in understanding what their rights are." [#11]
- The Hispanic American female owner of an MBE-, WBE-, and SB-certified professional services firm stated, "I've had issues with that before, but I've since changed my contracts to request half of the amount before the event rather than having it be paid in full after." [#12]
- The Subcontinent Asian American male owner of an uncertified MBE construction firm stated, "One time that there was a company offer as... It was a prime from Southern California. We get the job done and they don't pay us. We went through a lot of difficulty in order to get our paycheck back from them. That's the only one time happened to us." [#14]
- The Black American male representative of a DBE-, WBE-, MBE-, SB-, and Micro-PW-certified small business development association stated, "There was a stamp I learned about. When you certify business as small business, a lot of businesses were not aware that you can buy a stamp as a certified small business, and when you send your invoice to them, you stamp 'em with that certified small business stamp and that was a signal to whoever received it that they had a certain period of time if they didn't pay in a certain period of time, they were gonna get fined. But most of the business didn't know about the stamp so, they weren't using it." [#16]
- The Hispanic American female owner of a WBE-, MBE-, SCMSDC-, and DBE-certified goods and services firm stated, "One recommendation is to hold the primes accountable, that they pay them on a certain time frame. I know there's a seven-day that they're supposed to pay, but a lot of them ignore that. Start auditing them, making sure they're doing it. Is the money going out there? And a small business should get paid, shouldn't have to wait 30, 60 days. If the organization is making us wait because we're a small business, we should be able to get paid quicker. And many times, what could be speeded up is that - I know we're the sub, and yet making sure that the sub gets paid on the - if they're on the contract and it's not being generated by the prime. The commitment that the prime has put on the contract should be - we shouldn't have to be negotiating that in the future. That's a commitment and that's what they said they were going to pay. Honor it and make sure it gets paid on a monthly basis if they provided the service. one thing I think would be really good, and maybe this is stupidity on my end, maybe there's something out there already, is you know - to know the information when the prime has gotten paid. If there's an alert from the organization

saying, 'We have just paid your prime,' now we know when the seven days has - we know the seven days are - have come up." [#17]

- The non-Hispanic white female owner of a DBE-, SWBE-, and CBE-certified professional services firm stated, "We were a subcontractor with the biggest contract that we'd ever gotten. It was about \$10 million total. It was over a two-year span up in the border of Oregon and California. The general contractor that subbed us out was a contractor that was - at the time, we didn't realize it, but they were a contractor that was a sub-business from a large conglomerate. They came into California never having done California work. Long story short, they stiffed us about \$2 million. At the time, I could not find anybody at Caltrans to help me get payment. I sold everything. I almost lost my house. I literally called dozens of people at Caltrans and every single person there said they couldn't help me. It was out of their hands. So, I finally got myself involved so that I could know the players, understand what was going on. I did that through an association called the Southern California Contractors Association. They gave me the opportunity to sit on these committees. The very first committee meeting I went to in Sacramento, they passed around a partnering booklet, and they were talking about how great their partnering banquet was, and that, 'Here's an overview of it.' I opened it up, and the contractor who stiffed me for the \$2 million had won a partnering award with Caltrans. They won that award, even though I was one of ten people that put a stop notice on that project because they did not not only pay me, they didn't pay a lot of people. That's what I'm talking about, that Caltrans - they partner with their general contractors, but they leave the small subcontractors out in the lurch. I would have gone out of business had I been a normal - if I would have just started in my business and I would have just thrown in the towel. I mean, we literally sold the building we were in. I sold my cars. I sold anything that I could get cash for. It took me about four years to get out of that financial devastation mess. I settled for about \$900,000.00 with the company when all was said and done. We finally did a settlement out of court, even though we were almost in court. It cost me almost \$200,000.00 just to threaten them. We finally did that. That wasn't even enough to pay my taxes on that. When I'm sitting in DBE meetings, when we talk about short payment or not getting paid, or waiting more than 60 or 90 days, or - in my contract, I have to be paid within 10 working days of them receiving their money. Very, very often, and that's just on prompt payment. That's not even just a Caltrans - that's not Caltrans. That's not even me. That's the law in California. Very rarely do I ever get my money in ten days. About four years ago, I had a contract. It [was with] a large company. We do several contracts a year with them. In one of the particulars, we had money that we were not getting - on one of these jobs, it was one of the short-paid, then it was this problem, that problem. It came to the point where we were owed about \$65,000.00. It went months and months and months. The processes in my office have gotten better and better, but at the time, the process was, 'Well, let's not make anybody angry. Let's just wait for the money.' Well, I couldn't wait any longer. Plus, the sheer fact was I shouldn't have to wait. So, I simply told the girls in the office, 'Send them a letter letting them know that if they don't pay within - and give them a date, like the next ten days that we don't get that money,' even though out of all the contracts we had with them, this was a small portion of it, that if they didn't pay that they were going to get a stop notice put on. Now, a stop notice, everyone's like, 'Well, you could always put a stop notice on a project.' As soon as you as a subcontractor put a stop notice on a project, the relationship you have with that person is gone. It's done. They

are so angry about it, it makes - so even though you have the right to do it, if you do it, you're in trouble. So, I said, 'Just threaten them with it. They'll probably at least respond.' Well, I didn't get a response. So, I had her fill out - in the ten days, it didn't happen. We sent another email. No one responded. Four or five people got the email. No one responded. We sent them the stop notice. Now we did not put the stop notice to the owner, but we sent it to them so that they would know - they thought it probably went to the owner, because that's usually what you do, to the owner and to them. I got a phone call from their general - I think he's like a general superintendent over it, and he worked well with us. He got on the phone, and he said, 'You need to take that off.' I said, 'We need to get paid.' He said, 'If you don't take that stop notice off, I will make sure you never get paid.' He said, 'That \$60,000.00 that you were trying to get, I'll make sure it takes us 4 or 5 years to get it to you and we won't do any more work with you.' I've relayed this story, without naming names, in a DBE meeting. But that is classic and it's not unheard of. That is not like a one-off. That is something that happens all the time. That's against the law. he still didn't pay me for like two or three weeks. But yes, we took it off. I expected an apology of some sort, even a 'Hey, I might have spoken out of turn.' There was two people in the room that heard him say that because - I was glad because you can't make this stuff up. I thought, 'If I ever have to go to court or something, I want somebody else to have heard that.'" [#18]

- The non-Hispanic white male representative of a majority-owned professional services firm stated, "I've seen companies that are slow on paying, or they'll offer to pay you pennies on the dollar, just to get you to take the money. But there's a real problem, I think, in getting paid, and paid properly and timely." [#20]
- The Hispanic American male owner of a DBE-certified and uncertified MBE construction company stated, "We experience it occasionally. It depends on the customer. Some customers are great. I mean, their office staff is great to work with, and, I mean, payment is timely. It's seems like it's 30 days exactly, and we got a check in the mail, or a direct deposit or something. Other contractors, it's sometimes difficult, because they'll have different people responsible for different tasks. Especially the larger companies. This person's in charge of just the actual cutting of the check. That person's responsible for the certified payroll. This person's in charge of making sure that you have a, y'know, a status that are in the system. So, when they start to get separated out too much, you get - Your actual payment sometimes is difficult, because it's a little disjointed from them internally. But that's, y'know, it varies. I would say the biggest place we have a delay in getting paid are actually extra work bills. Like Caltrans is supposed to pick up the extra work. That's actually where we get the biggest delays in payment. Caltrans is generally the one who has to approve if they're gonna be the one paying for the extra work. But just the process to get paid on those is very time consuming." [#21]
- The Hispanic and Native American male owner of a DBE-, 8(a)-, SB-, and MBE-certified construction company stated, "We just now got an issue resolved on a job. It was worth about \$75,000.00 to us. Took a year to get it on the map. We've been in other jobs just recently where we've had issues that were straightforward, should have been easily done as far as determined and concluded, and it took eight, nine months to get paid. And we're talking about \$30,000.00 to \$60,000.00, which is - for a big company it's not the end of the world. For a small guy it's the difference between payroll and not making payroll." [#24]

- The non-Hispanic white male owner of a majority-owned SB-certified construction firm stated, "I will say this. It's somewhat dependent on who's the project manager, who's the project engineer. I've had some of them that are just great. They understand and get things done properly, and I've had some bad experiences where they're just not getting it done. Instead of getting paid in 60 to 90 days, it turned into 120. I've had as much as six months, and there was no reason for it, other than somebody wasn't doing their job. Yeah, you start becoming the bank, and it can be burdensome. But you've got to keep paying your bills and paying payroll. you definitely got to have some financial strength. Because even in the normal conditions - you start a project today, you're not going to see money for 60 days, 90 day. Pretty common." [#25]
- The Middle Eastern American male owner of a construction company stated, "We understood you submit the payment application. It doesn't mean that even they'll say 30 days it doesn't mean that you're going to get it in 30 days. Probably you're going to get it in 60 days. There might be some questions. There might be some revisions, some documentation from labor compliance that has to be resubmitted to be able to - there's a lot to it. But I know that people who are not familiar with public works they don't want to get into public works because they fear that they are not going to get paid on time because they don't have the sustainability to keep going for three, four months without slowing down the client's project without being paid." [#26]
- The non-Hispanic white male co-owner of a majority-owned professional services firm stated, "There's some clients we've had over the years that they were so slow that we just refused to do any more work for them. Y'know, when you're at four months or something like - I mean, we have bills to pay every month, and we can't wait that long, so... There is a couple of clients, more than a couple, that they just can't pay within 60 days; then we don't wanna work for them." [#30]
- The male co-owner of an uncertified WBE professional services firm stated, "Trying to get work out of the office in a timely manner, sometimes you get quite a ways out in front of where the clients are paying up, and then taking that risk of either they're just not gonna pay or, you know, take a month, two months to pay. And then, as a small firm, that's a big hit, sometimes." [#31]
- The non-Hispanic white female owner of a DBE- and SB-certified and uncertified WBE professional services firm stated, "I do have some cities that are horrible at paying. And that's one thing with private development. It seems like I get paid a lot quicker with private developers than I do with certain cities. I'm not going to say who." [#32]
- The non-Hispanic male owner of a majority-owned SB-certified construction firm stated, "Sometimes, in the private industry, with the general contractors, they sometimes take, to pay us, 90 days sometimes. And when we have material and equipment costs, 90 days is a long time to push off other vendors that have supplied us materials. They want their money within usually, 45 days. So, that can be a problem." [#33]
- The Black American female co-owner of a DBE- and DVBE-certified and uncertified MBE construction company stated, "One of the things that's a big problem is that primes often don't pay or pay subs late there are some who are just, you know, from the beginning, just out to, like, find a problem, you know, whether it's, you know, hours that you're billing, even

though they know if the union says you have to bill, what the state says you have to pay, you know? It's always somebody who wants to knock off hours, and it's not really... it's the labor, but I've already paid the labor, you know? I've already paid them, and you haven't paid me, and you're waiting 60 days to come and tell me you have a problem with the bill. It's not right." [#38]

- The non-Hispanic white male owner of an SB-, DVBE- and Micro-BE-certified construction firm stated, "Generally, all of our - currently, all of the primes that we're working with are - they're heroes. They're paying us before they even get paid from the agency. The agencies are horrible, even though it's a law. They're horrible about paying promptly. They're horrible about making the progress payment process easy. But we've managed to deal with a couple of - not a couple, several companies that we put in our invoices. Thirty days later, whether the owner/agency has paid them or not, they'll pay us. And that is huge. And I just had this conversation recently with one of our primes. That makes us work a little harder for that prime, and a lot of loyalty goes with that. We know how - we know and appreciate what that does for small businesses." [#44]
- The non-Hispanic white male representative of an SB-certified professional services firm stated, "Definitely not on the public sector. On the private sector, there have been some delays here and there, but I think it's more along the lines of ensuring that we have the proper channels to send out and receive invoices." [#45]
- The Hispanic American male owner of an uncertified MBE construction firm stated, "What else is holding me back really is what's really hard is that I go through, I go through brokers that I get paid every 90 days, 90 to 120 days. So, I have to float my own business, my own company I've gone through like two companies already that I've worked. I worked for them, and I still haven't got paid from them. So, it's really, it's extremely hard. It says it in the broker contracts too, 'If a company decides not to pay, then we are not obligated to pay you.'" [#50]
- The Asian Pacific American male owner of an uncertified MBE construction firm stated, "Yeah, you can get a lot of those, slow payment. not discrimination. It's just people want a service right now, but they want you to wait 30 or 60 days to get paid, you know. In a way, it's discrimination, because we've all got - our trucks need diesel, and we put diesel in every day. And it needs tires, and maintenance. But some of us who are owner/operators, we don't have that 30, 60 days to wait for a check to come in. We're operating every day. We need that money now so we can pay for fuel. But some of these guys will drag you out up to 90 days." [#52]
- The Asian Pacific American male owner of a DBE-certified construction firm stated, "I have to wait 30 days. I have to back it with loans. A lot of pressure." [#54]
- The Asian Pacific American female owner of a SB-, DBE-, and WBE-certified construction company stated, "The bigger job, the lower pay. Right? You have to finish the job. It's a big job. They say it's a 50,000-dollar job it's going to involve a lot of material and labor. Then this being after I invest \$30,000 dollars material, almost 20,000 dollars labor I have to pay for it. And then I waited for 30 days to 45 days after invoice approved and I'm all clear. So, I take small job because... Especially these last few years, everyone take credit card. So, once you finished a job, they pay you. Faster payments. Pay faster and then pay deposits. Like

when we do a job, we ask customer to pay deposit so we could start the processing. It would give a little bit more room, like purchasing equipment. Whatever you do, everything is upfront already. When you start performing the contract, all the material need to be on site. Right? But when you finish the job, then you submit the invoice. So, the owner already carry [the costs]." [#59]

- The Hispanic American female co-owner of a WBE-, MBE-, Micro-, and SB-certified professional services company stated, "Sometimes as a sub consultant we get paid a little bit longer, because the prime it's up to them to submit our invoice to the agency. So, sometimes that can be problematic. It just takes longer to get paid." [#61]
- A comment from an MBE Black American-owned construction firm stated, "The most difficult is to be paid timely with contractors that work with Caltrans and Caltrans doesn't seem to have a follow up with subcontractors so that they get pay timely." [#AV109]
- A comment from a majority-owned construction firm stated, "I like being paid for my work, and have encountered difficulty of being paid by the state of California." [#AV115]
- A comment from a majority-owned professional services firm stated, "Payment terms is a barrier. Sometimes the payment terms can be 120 days. That's a long time." [#AV265]
- A comment from a WBE and MBE Hispanic American-owned construction firm stated, "Lack of payment from our customers is a problem." [#AV841]
- A comment from a WBE and MBE Asian Pacific American-owned professional services firm stated, "Getting paid on time having enough cash flow especially as a sub-contractor." [#AV8431]
- A comment from a majority-owned construction company stated, "Some of the delays and regulatory rules with government entities are time consuming and off putting such as getting paid late." [#AV8568]
- A comment from a construction firm stated, "[We're] not interested in future Caltrans work [because] they pay too late. We wait 6 months." [#AV8582]
- The Black American male president of a professional services business development organization stated, "Not getting paid on time, in a timely manner, making sure that the primes are being held accountable, that they're paying their subs in a timely manner. Oftentimes, those multimillion-dollar businesses, if they don't get paid for six months, it's no big deal. But a lot of times, there's those practice well, I pay my subs when I get paid. Well, those smaller subs can't handle that. But that's a big obstacle." [#FG3]
- The Black American male representative of a minority business chamber of commerce stated, "The issue that we spoke to is a problem, has been a problem, and I stopped trying to participate in that activity, because I couldn't afford to wait 45, 60, 90 days to get paid. I almost lost my house one time messing around, without getting the money, even though the contract says, we will pay you within 15 days of your submission of invoices. So that is something that absolutely needs to be improved upon, the payment schedule and even the cogs in the businesses, to not be able to participate in the game are running them out of the game, because of that. So those are very significant pieces, and the monitoring, the compliance monitoring, I don't believe that the fox can monitor the henhouse. And when you have internal Caltrans folks monitoring, for compliance purposes, the contractors, that

in some cases are good partners, they're not going to ding them. And so that's the real side of it, and I'm saying it from experience, both as a contractor with the state of California, on highway projects and as a person that ran a minority business program in the local government." [#FG4]

- The Black American male representative of a minority business advocacy organization stated, "There was a period in time that my firm alone joined forces with other firms, to speak up about paid when paid. We wrote to assembly members. We wrote to Congress, not Congress, but state and local officials, because some of our contracts went well beyond six months of not getting paid. We end up getting paid, a year later, for the one particular project. But the years after, because we did complain, I want to say we got blackballed, if that's the right word. My majority owner of my firm, my partner and I, he did lose his house. We had to sell his house, in Los Angeles, so we can put the money back into the business, to make payroll during that period." [#FG4]
- The Hispanic female representative of an MBE-certified, Hispanic American-owned construction firm stated, "A revolving payroll loan has been suggested as one solution (for all small, not just DBEs)." [#FG5]
- A respondent from a virtual public meeting stated, "I have never been paid in an appropriate amount of time with any Caltrans projects I've had. Basically, because as a sub, Caltrans goes through all the time it takes to pay the prime, which means we get another month after that. So, I could go literally six months without a paycheck, and a small business can't do that. Caltrans needs an even take-if they have a disadvantaged business, even maybe pay those on their own if they get the invoices and pay the rest for the prime. Because it is horrible. I literally tell people that Caltrans is a predatory agency because they want all of us, and they scoop us all up, and then they just chew us up and throw us out." [#PT1]
- The female owner of a WBE-, DBE-, and MBE-certified professional services firm stated, "I'm sure everyone can attest to the fact that payment is slow, but also it's slow because pal trends and local agencies don't pay promptly. So, if I'm going to get paid by the prime contractor, I need to know that the government are paying the contractors timely because otherwise if their snowball effect is I don't get paid for months, potentially seven, eight months, because again, the government hasn't paid the contractor timely." [#PT10]
- The male representative of a DBE-certified construction firm stated, "Our biggest hurdle at this point is probably on the after or the post award stuff, especially with Caltrans. Two major experiences that are very negative, getting paid after the fact from prime contractors. There is, and this is not necessarily unique to DBE, but there's not much assistance that it's available to contractors to get paid from prime contractors outside of potentially damaging relationship by filing stop notices, things of that nature. Obviously it reaches a point to where that's what you have to do, but it seems to me like there could possibly be a way to more easily or better facilitate a relationship between the prime and the sub. Especially being a DBE. If there was a way that there could be some further involvement, and there was an attempt by Caltrans to verify that prime contractors who were paying their subs via document that had to be submitted monthly. A couple of years back, that document kind of fell flat. While it was starting to be implemented, it was basically put on, Caltrans said, 'Prime contractors, you guys need to submit this document monthly for reporting

purposes.' And the prime contractors said, 'Okay, perfect. Subcontractors, you're not going to get paid unless you fill out this form.' 'So, well, what do we put on the form?' 'Well, you put on what we paid you,' like, 'Well, hold on, when did we get paid?' They kind of got the cart before the horse there. So, it was like, 'We're not signing anything until you pay us.' 'Well, we're not paying you until you sign the form.' It's still a little bit of confusion about all of that. So, a way to facilitate a more timely payments would be great." [#PT11]

- The male representative of a DBE-certified firm stated, "The thing of it is, back in the day, I've been certified since back in the nineties when you were able to go into a Department of Transportation building without no security, no beds, no meeting, no nothing required. There used to be a gentleman named Tyrone Bowman. I don't know if you've heard of him, but he used to run the DBE program. And when I didn't get paid, I used to go see him and I say, 'Hey, Tyrone, I'm not getting paid.' He says, listen, 'I'm stepping out of my bounds and I'm picking up the phone. I'm going to call [the prime] and ask them if they could please do me the favor to get you paid.' And I always got paid. But people like that, they're a thing of the past. And when you do have problems getting paid and you go to Caltrans, Caltrans doesn't want to get involved. That's between you and the prime. And that needs to be changed. That's one of the first things out of Caltrans about that's between you and the prime. And if they want the program to work, they need to get involved to find out why, if we've done the work and it's fast inspection and they've been paid our work, Caltrans need to find a way to twist the prime's arm to get us paid either by holding their money. I have one job right now in Treasure Island. I'm not going to name the prime contractor, but we've been over a year not being paid. We need help from Caltrans there. And, when you have these programs and there's no support for them, like a gentleman named Tyrone Bowman [to] go out of his bounds to pick up the phone and call somebody to try to get you paid. That's a thing of the past. To make the program work, we need to find people. We need to have resources to help us try to get paid in a better, timely manner." [#PT12]
- The Asian American male owner of an uncertified MBE firm stated, "Is it normal for getting payments over 3 and 6 months?2 Can Caltrans project manager be required to follow up with the subconsultants to understand the payment status directly as part of a disparity process?" [#PT12chat]
- The Hispanic American female owner of a WBE-, MBE-, SCMSDC-, and DBE-certified goods and services firm stated, "I think if there's something that could be done that the tier two, the subcontractors are aware when the prime gets paid. Because what happens is they, even though that they have only about seven days to go ahead and turn around a check, some of them don't do that as fast. And so, you're not really sure when they get paid. So, I mean, the agency goes in and sends out a payment has been made, then we already know when to start counting those days to find out, okay, payment's going to be in. The next seven days when they receive it, which would be helpful for a lot of the subcontractors that are waiting, and they're told that the agency hasn't paid them yet. I think the agency should at least alert the tier two say, 'We paid you.' One of the things that a lot of the primes don't understand, the money that has been set aside for that small business, disabled business, veteran business, the percentages, that's not their money, that's been set aside and agreed on when that contract was signed and blinded by them and the agency. And, they have to understand that and a lot of them don't. They think that that's their pool that they can play with." [#PT2]

- The Black American male owner of an uncertified MBE construction company stated, "Primes that violate payment terms repeatedly should be banned from bidding on contracts. that would protect smaller firms from suffering." [#PT2]
- The female owner of a DBE- and WBE-certified professional services firm stated, "Is it possible to require prime bonding that can be used to ensure DBE/sub accountability and that the bond is only released on proof of timely sub payment?" [#PT2]
- The Subcontinent Asian American male representative of an uncertified MBE professional services firm stated, "The primes don't pay us on time, we give them our invoices-by the time they get around to it we get paid six months or longer afterwards." [#PT3]
- The Hispanic and Native American male owner of a DBE-, 8(a)-, SB-, and MBE-certified construction company stated, "Currently doing \$15 million of work, very complicated. Plenty of issues with Caltrans waited 7-8 months to get paid. They dispute everything on your invoice and then you have to eat it. We often don't have direct access, it's through the prime. It's very challenging. The jobs with payment issues, we've never had a partnering meeting during the entire time, because the Resident Engineer [RE] is a challenge. Haven't had anything come from partnering. How to manage the RE from other Caltrans staff. Had a \$70K invoice dispute for 8 months, an extra 10-12 shifts for traffic control. They agreed to payment, but the prime wouldn't submit the extra work invoices. After 6 months, Caltrans doesn't have enough money. It turns into my problem again, because of their issues. Need an independent party to adjudicate invoicing. Need an ombudsman. Change condition on a current job in February that costs at least \$100k. We are still trying to get them to pay. They have agreed that there are legitimate issues to be paid for, they say they don't understand, so they won't pay." [#PT5]
- The female owner of a DBE- and WBE-certified construction firm stated, "Some WCOE members have also stated that they have stopped performing Caltrans work because of payment delays. Small companies need the cash flow to run consistently, and this is sometimes not the case. If there is a dispute, it is not resolved in a matter of days or weeks. Instead, Caltrans takes months to resolve issues. Such delay impacts the abilities of DBEs to work on these projects. There should be an expedited process when DBE funds are being held." [#WT5]

18. Size of contracts. Thirty-four interviewees described the size of available contracts as challenging. [#6, #7, #8, #9, #16, #18, #20, #22, #27, #29, #31, #32, #33, #35, #38, #39, #40, #41, #42, #49, #50, #52, #54, #55, #59, #AV, #FG5, #PT11, #PT4, #PT5] For example:

- The non-Hispanic white male representative of a majority-owned construction firm stated, "It can be, if they're so large that we can't bid them because of bonding. So, some of those projects come out too large where it does cut certain people out of it." [#6]
- The Black American male owner of an MBE-certified professional services firm stated, "Some [contracts] are too small. I mean, sometimes it's not worth the energy to go out, let's say, 100,000 dollar five-year contract. That's 20,000 dollars a year. That's a waste of time, because you can't even find somebody to do that kind of work for that low of a pay. So sometimes, that comes out. I haven't run up against anything too large." [#7]

- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "There's not really a lot of jobs that are small enough for us to actually go after [with] Caltrans so we have not gone after it much at all, just because it's mostly larger firms for larger companies or planning projects for planning firms, but not really small projects for small engineering firms like ourselves. There's not really a size of projects that come out of Caltrans that we would be able to compete well on I'd say that it is across the board for all public agencies, but for the private sector, it may not be their best strategy to go after those. Sorry, let me explain. So, the public agency may put out a project and it may be too small for a large firm to go after, but they will still go after it because it makes sense for their overreaching regional marketing strategy, and so for us, a lot of these jobs are too big for us to go after. It's a huge barrier. The few that are even small, we still have to compete with these huge companies because it's part of their overarching marketing strategy." [#8]
- The Asian Pacific American owner of a DBE-, MBE-, and SB-certified professional services firm stated, "Never too small, but always too big. So, the bigger the contract, the least amount of chances you're going to be able to win as a small company. I think the ideal contract for a small business would be maybe a half a million to 1.5 million. But anything that goes way too big, then a lot of times the agency will probably give it to a medium or a large company to work on instead of a small company. Less risk for them. Usually the Caltrans, even the contracts are so big we wouldn't even try to put a... It's hard for a small business to put a team together, because there's a lot of stuff we can't do. So, we're limited, so therefore we don't even try. So, unless somebody asks me, 'Hey, you want to be on this team to go after, whatever the freeway project,' then I would say yes, but I would not attempt to bid for a Caltrans project, no." [#9]
- The Black American male representative of a DBE-, WBE-, MBE-, SB-, and Micro-PW-certified small business development association stated, "I think there are. But a lot of factors that I think are really true factors, I have to confess, that it may not necessarily be on the industry to correct so much. I mean, you know, like - 'cause I have a couple of businesses that want to get into the highway business, and one guy wanted to buy a water truck. He wanted me to help him get a contract. And when I went on, I had to come back to him and tell him, 'You know, Caltrans is not going to contract with you with one water truck. They have major jobs going on. And as passionate as you are about getting it done, if you have five water trucks, they may not go work with you, but one water truck is not gonna make it.' So, it's that kind of mental understanding of the industry that I think some of these business owners need to get into. And it's just a matter of - they're working at the level that they exist, and they see what's going on at some of these major projects and they want to get involved without appreciating what it's gonna take to get there. And even when they do - 'I want to open a trucking company' - well, you have to have maybe 8 or 10 trucks. Well, where you get the money from to go out and buy 8 or 10 trucks?" [#16]
- The non-Hispanic white female owner of a DBE-, SWBE-, and CBE-certified professional services firm stated, "Well, it's changed over the years. I think that's one of the challenges for some of these small businesses. Caltrans - they're not the only one - RCTC, all of these other entities, these owners have chosen to do mega projects. L.A. Metro is notorious for this. So, I would say I've seen a trend in the last ten years go from - we would be bidding stuff, anywhere between 300,000 to a couple million would be a big job for us. Now, our average jobs are way over a million dollars and somewhere between \$1 and \$5 million is

pretty common for us to be bidding. The challenge for that is, anybody who's doing that has got to have the bonding capacity in order to do so. I think one of the problems when they do these big, mega projects and the contract went from - normal contracts are 100 million, 130 million, that's not even a big contract. They might do \$300 million contracts. They've got two general contracts coming together to do those as a joint venture because they, too, don't have the bonding capacity or the manpower or resources, infrastructure to do it. I mean, you're looking at them doing these mega projects and it causes not only problems for the small contractor, but it also causes problems for the general contractor who, again, has to partner with somebody else. It eliminates the ability for them to bid. Let's say they do a \$300 million project. There's a lot of contractors that are good contractors that are mid-size. They're not going to be able to do those. So, then you're relying on the Granites and the Flat Irons and the Lane companies and people who have these huge - they're owned by offshore companies. They're owned by European companies or other conglomerations. Again, it makes it hard. When we're working with Caltrans, they don't have the resources to oversee it either. You can really tell that happens because the field people that they have, their R.E.s and their quality control people, they're not good. They are difficult to work with. That goes to the point of that trickledown effect of they're not effective, they're not good to work with. When I say that, I mean there's a lot of times when they'll miss quantities. I've placed 1,000 feet. That's just an example. When it comes down to the monthly, they're going to capture the quantities. They've missed 200 feet of it. So, I get short paid." [#18]

- The non-Hispanic white male representative of a majority-owned professional services firm stated, "We only have so much bonding capacity." [#20]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "Invariably their [Caltrans'] projects are also very large; they still require a large group of people. There's very few projects for somebody like me as an individual, as a so-called expert in the field, like advise them. They seem to want the entire thing done. Sometimes - the other type is we want you to bid - get on an IDIQ with Caltrans to be an environmental services company that, for all of our projects, you'll do the entire SEQRA, NEPA, the archeological surveys, everything. And maybe even do the GIS and engineering, some engineering work. And these companies, engineering firms, which used to do that, now seem to have budded out and they're building their own environmental sections within the engineering firms, and they do it themselves, it seems like. So, they're able to probably look a lot better on paper, and I have to say that's a barrier." [#22]
- The Middle Eastern American female representative of a majority-owned professional services firm stated, "Because we're kind of a medium size company we can't really go on prime \$100 million project. So that's where we kind of - the size of the project and also the expertise that's needed. So, if the project is a \$200 million engineering we'd never prime that. We'd go under somebody who is a true engineering firm, and we can provide those expertise areas under that." [#27]
- The male co-owner of an uncertified WBE professional services firm stated, "I see solicitations for larger projects. I would love to work on those, like, larger public projects. I've passed up on quite a few of them, 'cause they would be so much of my time, and I don't currently have the staff to be able to handle large projects, you know, large public projects. That would completely take me out of working with anything private, and I'm afraid of, you

know, that base that I have drying up, if I started doing that. We just can't really, you know, devote the staff and hire enough people to go after that, right now." [#31]

- The non-Hispanic white female owner of a DBE- and SB-certified and uncertified WBE professional services firm stated, "It's just my company is so small. I don't even try and go after the projects they put out because they're so big typically." [#32]
- The non-Hispanic male owner of a majority-owned SB-certified construction firm stated, "I don't really go after the huge jobs because I don't have the bonding capability and I don't really want to take on those bigger jobs. It's too big for me. It's out of our capability. You see these people doing the freeway interchanges and the big bridges and you know, the bigger, huge jobs - I can't do those. I'm not designed to do that. I'm just more of a small, paving contractor. I do repair work, remove and replace." [#33]
- The non-Hispanic white male representative of a majority-owned construction firm stated, "Too big, they won't even be able to get the bonding; too big, they might not be able to execute. If they win too many jobs, they won't be able to do 'em 'cause they don't have enough manpower to do 'em successfully. That's part of the whole mentorship: you need someone to kinda: 'Hey, slow down. You don't have enough people to do this work.'" [#35]
- The Black American female co-owner of a DBE- and DVBE-certified and uncertified MBE construction company stated, "I believe it is. Like, I have where, like, I have contracts that are very small, and they want you to have a whole bunch of paperwork and a whole bunch of insurance to make, you know, \$2,000, but your out-of-pocket five. And then, you have some large ones where, you know, maybe you - you are handling it, but they're not paying you. So, it's like there's no purpose to having a large contract and have all these invoices stacking up when you're not getting paid." [#38]
- The Black American male owner of an SB- and MBE-certified professional services firm stated, "That's where the real barrier is - is the projects, in most cases, are too large. And even when I considered a joint venture, often times, it's more than the group that I'm affiliated with can handle - unless there's some consideration for the time to pull the team together and actually get started." [#41]
- The non-Hispanic white male co-owner of an SB-, DBE-, and HUBZone certified construction firm stated, "They can be because of the bonding requirements. We can't bond for it, even if we're capable of doing it. We can't bid it." [#42]
- The Hispanic American female representative of a DBE-, MBE-, and WBE-certified construction firm stated, "The stuff, the projects that are out there to bid, a lot of them are too big for us so even if we want to - unless they make it like I don't know, they separate or make it smaller for a small business. It's hard for us to compete with big companies" [#49]
- The Hispanic American male owner of an uncertified MBE construction firm stated, "Some brokers what they do is like I had told you they sell the dirt. So, they get a lot of trucks and they make us go far so we waste a lot of fuel. I'm talking about like \$200.00 to \$250.00 a day in fuel alone. They have their own trucks. These brokers, they have their own trucks. But they put their own trucks on the easier jobs that waste little fuel like local jobs. So, they have yes, less wear and tear, less fuel. And they send all the littler guys on the jobs to travel far and they don't give us as much hours. You know what I'm saying? So it's like seven

hours, six hours sometimes. But there's multiple trucks. A lot of trucks of just little guys.”
[#50]

- The Asian Pacific American male owner of an uncertified MBE construction firm stated, “I mean, there's times I wish I had more trucks. There's work, but when you only have one truck, it only can be in one space at one time. With multiples, you could be - I could have a truck in California and a truck in Nevada or a truck in Oregon. But at the same time, you start doing that, you start doubling your cost for everything, fuel, tires, overhead. And so, the owner/operator, it's tough to do that.” [#52]
- The Asian Pacific American male owner of a DBE-certified construction firm stated, “Size of contracts in public sector are too large, not really geared towards small businesses.” [#54]
- The Hispanic American male owner of a DBE-certified construction firm stated, “So if you have a big agency and they only require you to do a small number of employee evaluations. So, let's say you're Los Angeles County and they've got 3,500 employees, but you only have to evaluate 10 every month. There should be something that's a little more representative of the agency as a whole or the employees as a whole so the bigger the agency, the more evaluations that should be done. Same thing with smaller ones: if it's a smaller contract, then maybe you do 10; maybe you do 20. But the bigger agencies, they tend to skirt it by, like I said, not even having any evaluations done at all so...” [#55]
- The Asian Pacific American female owner of a SB-, DBE-, and WBE-certified construction company stated, “The bigger job, the lower pay. Right? You have to finish the job. It's a big job. They say it's a 50,000-dollar job it's going to involve a lot of material and labor. Then this being after I invest \$30,000 dollars material, almost 20,000 dollars labor I have to pay for it. And then I waited for 30 days to 45 days after invoice approved and I'm all clear. So, I take small job because... Especially these last few years, everyone take credit card. So, once you finished a job, they pay you.” [#59]
- A comment from a majority-owned construction company stated, “I don't work in other districts because the project isn't big enough for me to go that far.” [#AV78]
- A comment from an MBE Hispanic American-owned construction company stated, “We are not interested in Caltrans work [because they are] bigger jobs. We are very small.” [#AV313]
- A comment from a majority-owned professional services firm stated, “Working with the state, most of the contracts to bid on are beyond our reach. Includes items that we do, but also items we don't do. Difficult to find subcontractors to work with on contracts we would be a prime on. We are a micro-business.” [#AV8264]
- A comment from an MBE Asian Pacific American-owned construction company stated, “Problems with Caltrans projects because they are so big that we can only do subcontracts. Prime contractors are not technically qualified to work on special communications, but they always have partners that they've worked with for a long time and prefer.” [#AV8425]
- A comment from an MBE Hispanic American-owned construction company stated, “As a DBE, some jobs were larger than we can handle, unsuccessfully, we asked for smaller bite of the job, but no offer, bonding capacity was [set] higher than we [can] to achieve.” [#AV884]

- The non-Hispanic white female owner of a DBE- and WBE-certified construction firm stated, "Design builds are easier for DBEs than 'bid build' projects." [#FG5]
- A respondent from a virtual public meeting stated, "I think Minor B contracts give DBEs more power. And I hope that Caltrans would come out with more Minor Bs because I don't want DBEs to be looked at like we are separate class. We're second to none. The only difference is the big companies got more money. That's the difference, it's nothing else." [#PT11]
- The Hispanic American male owner of an uncertified MBE construction firm stated, "I am looking for small projects as prime not sub." [#PT4]
- The female owner of a WBE-, DBE-, UDDBE-, and SB-certified professional services firm stated, "I've had probably 12, 14 Caltrans contracts in the last 10, 15 years. The problem is I'm always a sub. I'm a woman owned business. I have 13 certifications with over 40 agencies, including Caltrans. I've done high-speed rail, at Los Angeles, Metro. I do all the big transportation projects, but what I'm finding is the problems are that these primes are only interested in getting their own money. And so, what they do is they low ball us for hours." [#PT5]

19. Bookkeeping, estimating, and other technical skills. Twenty-four interviewees discussed the challenges back office work such as bookkeeping, estimating, and other technical skills present [#1, #8, #9, #16, #21, #22, #31, #35, #38, #40, #41, #42, #43, #44, #46, #50, #52, #53, #54, #59, #62, #AV, #FG3]. For example:

- The non-Hispanic white female owner of a WBE-, DBE-, UDDBE-, and SB-certified professional services firm stated, "If you don't have to pay for it, because why would we pay for something we can do ourselves. And small businesses basically don't have the funds to have an outside service that they have to pay for each kind of contract." [#1]
- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "As a small business, we have a lot of small contracts with a bunch of different agencies that are small, and so doing the billing and bookkeeping and invoicing for all of that is quite time consuming. It's just small business stuff, but if we were in a larger firm and we were on larger jobs, then we could bill a lot to that one job and sit on it, but for us, a lot of our jobs are anywhere between 5,000 dollars and 10,000 dollars, and so we're really counting our hours and doing a lot of the invoicing and everything ourselves, and so it can get very, very time consuming and a drag to be honest, to be frank with you, and so that made us to not go after certain jobs that may add to complexity over it, or scratch off too small jobs. It just makes it very difficult for us, and so, yeah, it's been a bit of a barrier." [#8]
- The Asian Pacific American owner of a DBE-, MBE-, and SB-certified professional services firm stated, "As a small firm, we went with Safe Harbor rate, so that's kind of through Caltrans. So there's a certain number you apply your raw rate to that number and we get paid based on that. But eventually Caltrans and SANDAG, with their accounting, they want all the business to have an accounting system that chart and track all the overhead rates and stuff like that, so that at the end of the day you could justify your rate. But we went with a Safe Harbor rate because we don't have all that stuff in place. So one of the obstacles is having an accounting system in place. So if you're a small company, how can you afford

accounting time sheet system in place when you're not guaranteed to even win anything from Caltrans, or SANDAG, or any agency. So it's hard to spend money when you don't have the project. Whereas on the private side, they don't require any of that stuff. A lot of the stuff is fixed fee. You do this set of plans for me, you get paid this amount. So there's no, we don't need to have the advanced accounting process, if you will." [#9]

- The Black American male representative of a DBE-, WBE-, MBE-, SB-, and Micro-PW-certified small business development association stated, "We work with a lot of businesses that were not able to take advantage of some of these programs – COVID assistance programs - because they all required a business to have their financials in a certain order, and most of the businesses that I know really wasn't working with an organized financial setup." [#16]
- The Hispanic American male owner of a DBE-certified and uncertified MBE construction company stated, "After the fact, post bid, you know, you're working on a project and you're needing to submit your certified payroll. Companies wanna know what everybody else uses, but like myself, a small company, I use QuickBooks to do all my accounting and to do my payroll. However, when I have to submit certified payrolls for a project now, the state uses LCPtracker to submit their certified payrolls. But LCPtracker doesn't work with QuickBooks, so every week when I do my payroll, I have to manually go type all the same information into LCPtracker so I can upload my certified payrolls, because there's no like electronic connection between them. So from that perspective, it's extremely time consuming to do something that's required by the state, but yet we don't have the tools that we need." [#21]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "Well, I told you I tried to bid - assemble bids for those very large, full-service, environmental services contract. But I wasn't able to assemble enough people and respond to all the requirements. And I don't remember what requirements were difficult to do. You had to...actually show these financial statements for like two years. And I didn't have them. Well, there are things I didn't have. I would have had to have an accountant maybe tell me what that is and do it for me, and I didn't have that kind of information at my fingertips." [#22]
- The male co-owner of an uncertified WBE professional services firm stated, "I'm actually looking for some office staff to help me with the business. And it's been a while to growing up to that point and, you know, at first learning how to do my books and everything that I possibly could, run payroll and everything that I could, to save money with the business when I'm starting out. And then, slowly, trying to get help in those arenas as I grow." [#31]
- The non-Hispanic white male representative of a majority-owned construction firm stated, "It is a barrier. Larger companies have tons of people that do all that kinda work. When you're a smaller company, you have to do all three a lotta times. I know a lotta the newer companies, they do the bidding, the payroll, and the work. The owner's out there building the job." [#35]
- The Black American female co-owner of a DBE- and DVBE-certified and uncertified MBE construction company stated, "Yeah, it definitely is, because usually, you don't have, you know, anybody. I mean, when my husband started, he was doing it, because I was - I was

working full-time. He was like, okay, I need help, and then I'm doing it. But, still, there's no help. It's just you figuring it out. And if you're a person just starting off and maybe you don't have somebody to help you out or somebody who can't quit their job and help you, you're doing everything. So, I remember my husband starting. He would be out in the day setting out cones, then at night he'd be doing the paperwork. And I still know a lot of contractors who do that." [#38]

- The Black American male owner of an SB- and MBE-certified professional services firm stated, "I've done everything in Caltrans except get my financials together. And I supposed that's just a matter of getting an accountant to make sure that the finances are in the order required for review by Caltrans, but it takes time to put that together. And most of my work over the last 20 years has been less than \$70,000.00 so, I don't have a whole lot of income and so, the books are probably really simple if I had a good accountant to do it. But that's not my forte. And I've maintained them well enough to do my taxes, and I thought that submitting the taxes would be sufficient in previous years, but it wasn't. And so, I just kind of - and now, at 74, it's really difficult to get back and redo and go through all the materials that are necessary in order to show capability. And I'm not certain that I have the capability anymore. Not from my technical ability, but the ability to be build a staff and move a company in the direction that would support some of the projects from Caltrans. If the contract came in, I'd make sure I hired an accountant to make sure the books were maintained as needed. In fact, I've had a contract with the [a] County Community College District, and because of that contract, I set up the books and made sure that everything was in order to track the expenses associated with that project and there was no problem with it. But, for my daily work, it wasn't necessary, and I just haven't maintained that process with everything, although I should. And I keep telling myself I need to get started with it and move it ahead, but then, I get busy, and the work is more important so, I never finish getting it done." [#41]
- The non-Hispanic white male co-owner of an SB-, DBE-, and HUBZone certified construction firm stated, "Yeah, it can be tough. And to get through to find competent people to handle - I mean last year we went through I can't tell you how many people - we tried bookkeepers that just messed up our books one right after another, because we were trying to get a review done. And every time we sent it to the CPA they're like, 'What is this?' So, you know, finding the people that handle certain things, so you don't have to worry about them is, yeah." [#42]
- The non-Hispanic white male representative of a DBE-certified and uncertified WBE construction firm stated, "So that's the hardest part I think that we incur every single week or day, is that she wants to be performing the job, which is in the truck and driving, and doing that, but so much intense paperwork with certified payroll, and just non-compliance if you're not - if you're not on that job anymore, you still have to turn in the certified stuff." [#43]
- The non-Hispanic white male owner of an SB-, DVBE- and Micro-BE-certified construction firm stated, "That is kind of more for contractors. However,... it's tough for small professional firms, because you have to get in touch with a lawyer to help you write subconsultant agreements, and to review the contract with the prime. But you also spend a lot of nights and weekends working on invoices, you know. I just wish there was some way

to make it easier for a small contractor going after a prime contract, where you're going to be using other small businesses on your team, but you have to undergo the pain if you want to grow." [#44]

- The Middle Eastern American male president of an WBE-certified professional services firm stated, "Before Covid, we - I did have a full-time accountant in the office that would take care of all the billing and sending proposals. But now, we - I mean, we don't have that. But we're hoping that we can get a full-time person in here soon." [#46]
- The Hispanic American male owner of an uncertified MBE construction firm stated, "Oh yeah. [My] girlfriend who has been helping with the emails. She helps me out with that but it's still very hard especially since I'm working two jobs." [#50]
- The Asian Pacific American male owner of an uncertified MBE construction firm stated, "Well, we're not - I've pretty much figured out how I can... My filing system and paperwork probably ain't the best, but it gets me by. I got that gal that - everything we do is almost on her computer, so I've got my records, and that's pretty much all I got." [#52]
- The Asian Pacific American male owner of an MBE-, DBE-, and SB-certified construction firm stated, "Estimating and bookkeeping, just keeping organized books on QuickBooks and stuff - yes. The first quarter was challenging. I think I solved the estimating problem, so I'm now working on the administrative thing. I mean, I keep okay books, but it's like I need somebody there to assist me with better, how do I say? Managing like our accounting, and our receipts come in; they enter in QuickBooks, add 'em, and it's hard to do that one. I don't have that back-up. And that way you can see the overall health of your company at the end of the year." [#53]
- The Asian Pacific American male owner of a DBE-certified construction firm stated, "Yes it is! Bigger businesses can afford to hire people. It becomes a major expense, the size of the contract. Say it costs 250 to do payroll. My contract is 100,000 but it still costs so much for payroll. Payroll costs does not change much regardless of the cost of the contract. [It] becomes a major disadvantage." [#54]
- The Asian Pacific American female owner of a SB-, DBE-, and WBE-certified construction company stated, "The owner, the small business is responsible. If you don't know... If I only know how to make sushi, I should not try steak. I think human resource is a general area that we don't have enough knowledge." [#59]
- The non-Hispanic white male owner of a majority-owned construction company stated, "It has because I usually work in the field and then I do the bidding and stuff like that, so yeah, sometimes I do get charged." [#62]
- A comment from a WBE and MBE Subcontinent Asian American-owned construction company stated, "It is very difficult to start business in California, funding part is very difficult for a business. I don't have access to capital so I have factoring service & it will charge me 2% on my invoices to client." [#AV58]
- The Hispanic American female representative of a professional services business development organization stated, "Even though they simplified the process, I think, to the bare minimum, which is really applying for it, there were some businesses that we went to bat for, because they didn't have an ITN number. They were doing it with social security

numbers. And for the city, who is not as familiar with those small businesses and how they work, they were unsure about that, but we were able to get some of those across.” [#FG3]

- The Hispanic American female representative of a professional services business development organization stated, "If you've never updated your business plan ... Let's pretend you had one. You've never updated it, this is the time, because when we get all through this and you're still here and you want to grow, financial institutions, everyone, are still going to ask for this. So take advantage of the fact that we have all these resources now, that we have all this opportunity, for you to learn how to do this in the correct way. Let's help you formalize things. PPP loans were another thing, too. The challenge was not so much that people didn't need it. And... as much as we teach people, here's the way you're supposed to do things, and people go, Well, I pay people like this or a little different. So they didn't have the paperwork in order. So we're like, This is the time, now that you've taken a breath and go through this. Let's get your paperwork in order. Let's make your business plan is up-to-date, because you know what? That is what being a business is. And so there's challenges here, but we're going to prepare you as best as possible, so that you can continue to meet them and getting the access you need.” [#FG3]

20. Other comments about marketplace barriers and discrimination. Twelve interviewees described other challenges in the marketplace and offered additional insights.

Size of firm. Sixty interviewees discussed how the perception of a firms' capacity based on its size and other issues with firm size presented challenges for their businesses [#4, #9, #12, #24, #28, #31, #35, #36, #40, #41, #45, #46, #50, #51, #52, #54, #61, #AV, #FG5]. For example:

- The Hispanic American male owner of an uncertified MBE construction company stated, "I never get a chance to be at any public work and they've never been offered to me, they always get offered to the big general contractors. The specialty contractors, they lose a lot on between, because agencies like Caltrans, counties, cities, they go for the big contractors. They don't care about the small contractors like me. All the public work up there, they constantly get more and more with the big company. I don't have no shot. They don't give me a shot. They're supposed to give to the specialized contractors, like a carpenter contractor, concrete contractors, roofer contractors, landscape contractors, they're supposed to give a chance to all those small ones, individual contracts. Now all they give are big contract to a big general like [large contractor names], those big companies. And then they get pretty much all the public works. And then if we get from there we go for [large prime contractor names], all those companies pretty much get in there and take [the contracts] because our government don't do what they're supposed to do. They don't give a chance to the small-specialized contractors. Doesn't matter if I'm union or not, if I'm not unified prevailing wages. We've been doing some jobs prevailing wages, that's not the problem. The problem is they don't want to be bothered with the three, four contractors on them because they want it to stay and have a nice and easy [project]. Because if they have a three or four contractor [project] not one, oh, they have to do something. They have to check with [individual contractors] what they do, this way they hire one general contractor and they don't check it, that it was their responsibility to check everything else is just to make it easy for them. That's exactly the point.” [#4]

- The Asian Pacific American owner of a DBE-, MBE-, and SB-certified professional services firm stated, "We've been trying to get our foot in the door with the agency, with the public sector, with the city, SANDAG or Caltrans, but a lot of times we find that our company's just too small, so the resume and stuff doesn't really show well. It's hard for the local agency to give you a project when they know that your firm's only five people, and currently you're already working on the private stuff. So now you're probably down to two people that you can offer up, so doesn't make sense that way." [#9]
- The Hispanic American female owner of an MBE-, WBE-, and SB-certified professional services firm stated, "You know what I mean? I just can't. There's too much to do, and again, if I'm working on a proposal, while completing a report, while trying to do social media, I just need somebody on staff basically to help me full time, it's just too much responsibility for the size of my business now." [#12]
- The Hispanic and Native American male owner of a DBE-, 8(a)-, SB-, and MBE-certified construction company stated, "But we as a tiny business have to comply with the same exact rules as all of the larger companies, right? So, we can't go work if we don't have the proper PPE for our people. The large contractors who have departments of people to go get stuff and have lots of access to other stuff that we don't, they obviously have an advantage in being able to get to things and comply better. And the penalties are the same whether you're a little company or a huge company. If we don't follow the rules and the social distancing - and some of the operations are hard to do that way - we just - and we don't have a team to send to the job to go make sure we're in compliance all the time. And then, OSHA started - most recently OSHA started kind of being the enforcement arm for the state, because they previously didn't have any way to enforce COVID rules. So, they brought them under the umbrella of the OSHA side, and then they have OSHA inspectors now weaponized basically to go out to job sites and they can start issuing citations. And as a DBE company you don't have the same resources to deal with it. You don't have the same capacity to absorb the fines and the penalties and all of those things that come with being in violation like the large contractor would. And I'm talking about a large contractor - when I say that I'm talking about somebody that does \$300 million, \$400 million, \$500 million, \$600 million a year. And we do \$10 million. So, it's just not even close. But that's not just true in COVID; that's true in lots of things. The unions deal with us the same exact way. And I think it's unfortunate but it's true. We have to comply with the same requirements within Caltrans. For instance, labor compliance. If you get somebody that decides to put you on their radar and cause an audit for labor compliance, we have exactly the same time requirements. We have exactly the same data to submit. We have the same paperwork we've got to give them. All in the same rulebook. There's no separation. And that's really in general - not just COVID, like I was saying, but in general we have a huge disadvantage because there's only one set of rules for paperwork and submittals and whatever they are. There is none for, okay, if you're a DBE and you're the guy actually on the job and you have to do the administrative stuff and you don't have a whole staff and maybe your wife helps you out on occasion or whatever, you still have to submit it in the same amount of time as the place where they pick up the phone and ring up the department that does that and they supply the paperwork in short order. So, that's been overlooked everywhere. In every aspect you can think of from a small company we just don't have the resources to be able to apply like those others do. And then the penalties come and they're the same for non-compliance for

the little guy as the big guy. So, you get it from both ends. That's just the tip of the iceberg on how onerous the treatments inside Caltrans are. Or how they're - they're not onerous if you're, again, a mega company necessarily. Their work every day, you've got to go argue for things that you shouldn't have to argue for, but at the end of the day the lack of money not flowing in doesn't impact you like it does a small business. And so, you've got to fight the fight. So, getting back to uneven playing field, we don't have the resources to go fight that guy when he wants to be dug in. I'm the same guy that's on the job and I do - we used to go to weekly meetings with those guys and they'd bring it up and they'd go 'Yeah, we'll look into that.' And then nothing happens. And nothing happens. And nothing happens. Well, if you're the prime contractor and you're a large guy, your guy is in there every day beating on him. We can't go every day. It's just not possible. So, they've got lots of things internally that they could actually - without, I think, too much cost to implement. But they've got to have somebody that's paying attention to it and enforcing it. The problem with Caltrans and many public agencies - not just them - there's no penalty for saying no. There's no penalties for saying, 'No, you're not going to get paid, and you have to file a claim.' Because filing a claim, everybody knows, takes way more work than just trying to get it worked out. And so, when we've got to go file a claim we're more likely to surrender or take a huge discount in what we should be paid or what we think we're owed because we can't last long enough to go toe-to-toe with these guys. If you're [name of large construction company] you can go toe-to-toe as long as you want because you've got two attorneys and four area managers and three project managers and two project engineers, and they can all go attack the Caltrans guy. And if it takes two years, then you just charge more interest and you just charge more money. But they're going to get paid. We have to make a decision. We're either going to go out of business, not make our payments till whenever, or we have to take less because we don't have the resources." [#24]

- The Hispanic American male owner of an uncertified MBE construction company stated, "As a small business, I think sometime it's a benefit to being small. Sometimes you be able to control your business better. You do smaller projects, but you finish your projects sooner. You have the opportunity to be able to manage all your expenses, all your duties you have to do. I mean, sometimes you get a bigger project, I mean, even to get a bigger project, you have to be really sure what you bid. But if you make a mistake, it's a lot of - after you make the mistake, well now you have a project. After you have the project, you have to finish it. And you have to rush it up, and when you rush it up, that could be mistakes. And I think on the smaller business, the smaller projects, you should be able to manage it and give it more quality work." [#28]
- The male co-owner of an uncertified WBE professional services firm stated, "I guess just balancing running the business and being, you know, the one that's having to look at, as the prime engineering, having to look at all the work for at least my office stamping it. And finding that balance, you know, to continue to try and grow and go after new business and, you know, be involved in pretty much [every] aspect of the projects before they leave the door, here." [#31]
- The non-Hispanic white male representative of a majority-owned construction firm stated, "If you're not a DBE and you're just a small business, no one uses you. Because we'll use a DBE company over a small business. Even if they're lower bid. We have a lotta small

business companies that are struggling because the DBE goals are so high that you just skip over all those people.” [#35]

- The non-Hispanic white male owner of a majority-owned professional services firm stated, "Well, primarily because of our size. We're smaller. So there's certain things we can't do in the public sector. Because we don't have extensive personnel. So that limits our range - what we can do. And that's primarily it. Even though we're sure that if we had the opportunity that some of the public-sector jobs we probably could take on a lot more. If there was an easier way to get involved. [The] reason why private [sector work] is easier [is] the public sector has more of a layer of complication than the private work. I'm not sure how to describe that because it depends on the job of course. Bigger companies have the staff and personnel to take care of all of those - I don't wanna call them idiosyncrasies but all of those details." [#36]
- The non-Hispanic white male co-owner of an SBA-certified micro- and WBE professional services firm stated, "The firms that I would be, say, working with or competing with, now they generally tend to be much larger. So, we have this issue of we're always the little guy. Sometimes folks don't want to work with a little guy. It's getting the acceptance of having a small business get equal footing or acknowledgement that their skill sets are equal to or just as equal to the larger companies that have the sales team. Because when we go look for a job, we're telling you that, 'Here we are, ready, willing, and able,' and you don't get all the fancy-- we don't have a lot of fancy forms. If you want a memo from us, you're going to get a memo. It may be handwritten. It's not all fancy. It is an impediment because we just simply can't put all that time and effort to making sure that everybody gets included in the email. I think part of it is there's a bias against having a microenterprise being brought to the table. Unless there is something special about that project for which the agency or the client is interested in having you, then it's almost not worth the effort to go out there and stroke for the job. It's just a waste of time, after a while. Like I said, on the bridge I went after, or the bridges, on two separate projects, it cost us - we were out of business for two weeks on the one bridge. We didn't even get an interview." [#40]
- The Black American male owner of an SB- and MBE-certified professional services firm stated, "Helping people understand that even though we're a small business, we can - if we're given enough time and enough lead time and guarantee of funds, we can pull the team together and do much larger projects. Well, you know, the challenge is helping the agency realize that even though I'm a small organization, there - it's the - if we do the work that needs to be done within their organization, there's probably something that I can do for them. But if they're only looking at the multimillion-dollar awards and aren't interested in giving up the work so that small companies like mine are included, there's not a whole lot we can do." [#41]
- The non-Hispanic white male representative of an SB-certified professional services firm stated, "Obtaining work in the public work sector as a small firm tends to be a little bit more challenging, just because a lot of times on the public work side, they feel that a small firm can't service their needs as quickly or to the level of how much work they have that they need beyond their current staff levels. I have a feeling that that's kind of what's going on right now, is some public agencies are a little overwhelmed with work, and they put out an RFP, and, when we put out our proposal to them, I have a feeling that they feel that our firm

is not large enough to service their needs when, in fact, we serviced some of these agencies for years in the past. I just think it's still a barrier that's out there." [#45]

- The Middle Eastern American male president of an WBE-certified professional services firm stated, "To get contracts from national firms...There are a few national firms that do mostly bigger project. They're still in the private sector, but let's say they develop a shopping center, or they build 2-to-300-unit apartment buildings. Usually, these national firms - they deal exclusively with a few other national firms that happen to be engineers or architects. They do not deal with small companies. That's the toughest thing I've done - is to be able to work with them and convince them to give us a chance. Once they see you're a small company, they prefer not to work with us. They prefer to work with subcontractors like us, but they're bigger firms - much bigger firms. They have 50 to 100 employees. Large companies. I understood what the system is like. They have a few bigger companies. So, if they want to do design work, they go to them. If they want to do concrete work or they want to do plumbing, everything - they only deal with a handful of larger companies. They're all private companies, but they're large." [#46]
- The Hispanic American male owner of an uncertified MBE construction firm stated, "I'm experiencing, since I'm a small business, a lot of people are not contacting just me because the more trucks, the more a broker is going to call one person for ten trucks rather than ten people that have just one truck. I've been having that since I'm very small. So it's a lot cheaper going with the bigger guys too 'cause they have more trucks. There's a lot of jobs I can't take on because like I said they'd rather contact one person for 20 trucks rather than 20 people for 20 other trucks." [#50]
- The Hispanic American male owner of a DBE-, SB-, and DVBE-certified and uncertified MBE professional services firm stated, "I think the hardest part has been the bigger business underbidding and then not delivering. That has been, I think, the most frustrating item that I've seen. This is a bigger company that ended up going bankrupt. I told the State that they were going to go bankrupt because I was reading about the manipulations that they were doing. These were publicly traded, or they were big stock market type, trade companies that - we're talking about big, multi-billion-dollar type companies that would essentially be more interested ensuring that they have a portfolio of projects rather than the construction of those projects. In other words, in their balance sheet that they have two gigawatts or two-billion-dollars-worth of projects. That they have been awarded was more important [to them than] actually [building] those projects. So, that way, they could affect their stock price and some other things. They ended up going bankrupt because they could not build those projects, just as I had stated to the State. So, that's very frustrating." [#51]
- The Asian Pacific American male owner of an uncertified MBE construction firm stated, "There's a possibility I could get another truck, but I know the only possibility with that, and that's guaranteed, you're going to have higher bills. Now you've got two trucks on the road. Double the tires. You've got to find somebody, payroll, workman's comp. And it just goes on and on. Does a guy really want to take that route and deal with the headache, or - nowadays it's hard to find a worker. Nobody wants to work." [#52]
- The Asian Pacific American male owner of a DBE-certified construction firm stated, "Caltrans and public works are not designed [for] small businesses, they are designed for big businesses." [#54]

- The Hispanic American female co-owner of a WBE-, MBE-, Micro-, and SB-certified professional services company stated, "As a small business, we don't have the breadth and depth as a large firm. Some of these global A&E's, they've got every service under the sun. So it is hard for a small business to compete when you have limited resources or experience. So the project we submit on is usually as a sub consultant, providing our niche service on the team. For example, to prime a large contract, because we don't have all the services that we self perform. And if we subbed it out, we should be able to perform more than 50 percent of the project, otherwise, why prime it? And the larger projects are usually, larger firms are usually going after this kind of projects, so it's really hard to compete going as a prime with your team on those larger projects because of that." [#61]
- A comment from an MBE Hispanic American-owned construction company stated, "It's difficult to compete with the small subsidiaries of large international companies. It makes the playing field a little less even." [#AV]
- A comment from a WBE and MBE Hispanic American-owned construction company stated, "The companies want [to] go with bigger companies rather than smaller." [#AV177]
- A comment from a majority-owned professional services company stated, "Our biggest issue is that we are, from the perspective of demand, a small consulting business that has a lot of work. We run a fairly tight, lean organization so we stretch pretty thin. We are experiencing growing pains." [#AV282]
- A comment from a majority-owned construction company stated, "[We're] not up to that size and not willing to bring in more equipment. [We're] not interested in Caltrans work." [#AV335]
- A comment from a WBE professional services company stated, "It is difficult to do work for Caltrans unless you are one of the larger firms that they typically use." [#AV3]
- A comment from a majority-owned professional services company stated, "Too small to compete." [#AV4]
- A comment from a majority-owned professional services company stated, "There's more work going to small business. We're a medium sized business, neither large nor small; it can be difficult to find work for a mid-range sized company." [#AV48]
- A comment from a WBE professional services company stated, "We are a small company. Competition with people working in their garage [can] undercut us because they have no overhead." [#AV76]
- A comment from an MBE Asian Pacific American-owned professional services company stated, "[A] disadvantage of [being a] small business working under bigger firm is finding a prime that is willing to work with smaller company." [#AV141]
- A comment from a WBE professional services company stated, "Since we are a micro firm we are often looked at as unable to do the work that we get. There is a bias clearly of us based on other companies that have the marketing, graphics, and glitter to sell [themselves] like other companies." [#AV201]

- A comment from an MBE Asian Pacific American-owned professional services company stated, "State agencies choose the major large firms--being a smaller firm is a challenge to get in the door." [#AV224]
- A comment from a majority-owned professional services company stated, "Being a small business, we have to compete for our work part of the competitive process." [#AV232]
- A comment from a majority-owned professional services company stated, "It's difficult to get government work competing against larger companies." [#AV236]
- A comment from a majority-owned professional services company stated, "We've had difficulties getting government work because it's always given to larger businesses." [#AV260]
- A comment from a majority-owned professional services company stated, "Some contracts are out of our reach because business was seen as too small." [#AV272]
- A comment from a WBE and MBE Asian Pacific American-owned professional services company stated, "We're a small business so it's harder for us to compete with larger engineering firms. We end up being subcontractors. Larger companies have more resources, so we often don't do well in comparison." [#AV274]
- A comment from a majority-owned professional services company stated, "I am a small operation with one principal engineer, limiting my ability to bid for larger project. Wish I had some partners." [#AV276]
- A comment from an MBE Black American-owned professional services company stated, "The program is really geared for organizations that have staff that can actually support long term projects without concern for capital or resources and I'm a small business. We are able to handle large projects but we don't really get the work because it usually [goes] to large organizations. [#AV293]
- A comment from a majority-owned professional services company stated, "It is difficult for a smaller firm to get into contracting with the government because we are considered a micro-business as opposed to a small business." [#AV249]
- A comment from a WBE professional services company stated, "Over the years, in the early 90s, Caltrans was open to hiring small, specialty type firms. Once the big firms found out there was money at Caltrans, the big companies decided to go after the money. I don't have the resources to take a Caltrans guy out to lunch every day, I don't have the budget for a full-time marketing guy who can knock on doors at Caltrans. I don't have the resources to hire a very high up Caltrans ex-District Director or head of department. I like to believe we should be selected for our capabilities and not who I can hire." [#AV317]
- A comment from a WBE professional services company stated, "The biggest barrier for me is people not recognizing the value of the small business and what they bring to the table. The large firms tend to dominate especially in the Sacramento region." [#AV319]
- A comment from a majority-owned professional services company stated, "Large firms versus small firms, with government agencies having a bias for large firms." [#AV320]
- A comment from a WBE and MBE Black American-owned construction company stated, "It is very difficult to be awarded contracts due to fleet size and company size." [#AV8133]

- A comment from an MBE Asian Pacific American-owned construction company stated, "I would say [a challenge is] obtaining work because the primary contractor wants to do business with companies that have multiple trucks." [#AV8149]
- A comment from a majority-owned professional services company stated, "No Comments, Not interested in future Caltrans work: I'm a single source provider and I don't have a big firm so I don't think I am capable of providing the services they need." [#AV8177]
- A comment from a majority-owned professional services company stated, "Because we are such a small company, we do not have the manpower." [#AV8179]
- A comment from a majority-owned construction company stated, "The majority of work is given to the larger companies; small business are usually ignored." [#AV8180]
- A comment from a majority-owned professional services company stated, "We are small business and sometimes it's hard when larger contracts are awarded to larger companies. We don't manage to be considered for work. Larger companies have a greater presence." [#AV8190]
- A comment from a majority-owned construction company stated, "No Comments, Not interested in future Caltrans work: We are a real small company. Generally, we work for other trucking companies. We wouldn't have the availability to work with a big company like Caltrans." [#AV8222]
- A comment from a majority-owned construction company stated, "No job listings. Jobs being offered to bigger companies. Less access for smaller companies to bid on jobs." [#AV8308]
- A comment from an MBE Hispanic American-owned construction company stated, "For a small minority company, [we're] not given to the opportunity to prove ourselves, they [are] asking for million dollar companies, we just want small piece of the pie." [#AV8333]
- A comment from a majority-owned construction company stated, "We are a smaller company and go to find work where it's needed. Other than finding concrete work, we don't do much big projects since we only have two pumps to use." [#AV8366]
- A comment from a WBE professional services company stated, "Part of the problem is that we're a small business and can compete on a high level with our high equipment but get overlooked just because we have a small company even though we can do the work just like the larger companies." [#AV8397]
- A comment from an MBE Hispanic American-owned construction company stated, "Hard to get work due to the industry being dominated by big companies." [#AV843]
- A comment from a majority-owned professional services company stated, "We have had barriers to entry as a smaller business. Haven't had gender or race based barriers to entry." [#AV8466]
- A comment from an MBE Subcontinent Asian American-owned construction company stated, "Big Companies always are obstacles, because I am a small company. Most of the time I have to go through the larger companies to get work." [#AV8482]

- A comment from a WBE, MBE, and DBE construction company stated, "It's just the fact that we keep [large mill company], and all of the mills, from taking jobs away from small independent contractors. We are a small contractor that cannot compete with a Mill. Caltrans allows the huge mills to compete in our industry." [#AV8522]
- A comment from a WBE professional services company stated, "Why not work in regions? Manpower to apply." [#AV904]
- A comment from a majority-owned professional services company stated, "Why not work in regions? Capacity, we are a small business [and] did not over extend ourselves." [#AV909]
- A comment from an MBE Hispanic American-owned professional services company stated, "Difficult as a small business to get larger contracts. Stigma of not being large enough to service their needs. As a minority business it is always challenging. Particularly when competing with larger companies." [#AV925]
- A comment from an MBE Asian Pacific American-owned professional services company stated, "Not interested Caltrans Work: Because we are very small and I have no capability do any other jobs." [#AV936]
- The Hispanic female representative of an MBE-certified, Hispanic American-owned construction firm stated, "Smaller firms have higher markups." [#FG5]

Repeatedly utilized firms. Twenty-five interviewees discussed difficulties in obtaining work in the public sector when competing against repeatedly utilized firms [#3, #5, #9, #15, #19, #21, #22, #24, #46, #60, #61, #AV, #FG1, #FG2, #PT11, #PT2, #PT4, #PT6]. For example:

- The non-Hispanic white male co-owner of an SB-certified professional services firm stated, "I think Caltrans has a set group of contractors that bid on their projects and these guys are set up to do that work. So, it's kind of hard to jump into that market beginning, because most of it is at night work. Most of it's on the highway. So, they've kind of got their key guys that always bit their work and it's been a history of the same guys for years. I think the main problem is all the night work." [#3]
- The Black American male co-owner of a WBE-, MBE-, and DVBE-certified construction company stated, "The bidding process could be made fair by more transparency, by, look, if you got five contracts this year, you can't get ... Maybe putting a cap on the ones that the big guys can get, whether it's a financial cap, or the amount that they can get, but it's just not fair for the rich that keep getting richer. Maybe I would feel differently if I was one of those persons, but damn, there has to be a limit. You can't raise cattle, and only one of the cows is eating. What's the sense? So, they try to put that process up as being fair. And it's never fair, because these projects always go to the same people." [#5]
- The Asian Pacific American owner of a DBE-, MBE-, and SB-certified professional services firm stated, "I think the goals are there, it's just a matter of whether it's spread out for everybody, or it's just only a handful of people always get awarded for that. For example, let's say there's 100 small firms, but if this one survey firm, they're always on everybody's team, so they're always going to win something. And it's good for them, but then other smaller firms doing the same business that they do don't get a chance to be a part of the team." [#9]

- The Black American female representative of a minority chamber of commerce stated, "There's about five contractors that get all of the work for the Central Valley for Caltrans and they have their prime subcontractors, and I call them prime subcontractors and that they are who they always contract with. They don't even check the DBE book looking for someone else." [#15]
- The Black American male owner of a DBE- and SB-certified and uncertified MBE professional services firm stated, "Right now, today - this is important - my count is that 80-percent of all Caltrans work is done by eight firms. Okay? And there are hundreds of firms on the list. And I just put that question to District 4 the other day, said, 'You happy with that? Here you've got public money you're spending, and you let eight contractors, big contractors eat up all the work.' That's even against national security, because what happens if those eight contractors can't do the work? You're supposed to have another 100, 200, or 300 who can do the same work." [#19]
- The Hispanic American male owner of a DBE-certified and uncertified MBE construction company stated, "With the type of work that I do being so niche, again, we run into the problem with, it doesn't seem like it's a level playing field out there. I don't wanna put any names out there, but if research is done, you'll see that a lot of the DBE minority work that gets awarded generally goes to one, sometimes two of the companies in the industry." [#21]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "The engineers, when I worked with Caltrans, I started talking to them more about how things worked there, and they said there's only about six companies that can do a really big engineering project in Region 4 of the Bay Area, that's like build the Bay bridges that collapsed." [#22]
- The Hispanic and Native American male owner of a DBE-, 8(a)-, SB-, and MBE-certified construction company stated, "This is one of the things that's wrong with the Caltrans thing, is keeping the popular DBEs popular and full of work and keeping the rest of them without any opportunities. It's that Caltrans will allow a bidder, a prime contractor, to name their subs at bid time. It requires it, right? It's required by state law. And so - however, you don't have to meet the goal at that point. You can meet the goal when you submit your paperwork the next day or the day after, whenever it's due - I think it's two days later. And at that point most prime contractors will 'Uh oh, we got the job. We're low.' And then they go to their non-DBE subcontractors and go 'Hey, do you guys want to get this job? If we're going to get this job, we need to make this goal. So, you need to drum up some DBE participation as a second-tier sub.' Then all of a sudden, from what it looked like on bid day based on who got named as a primary subcontractor, all of a sudden there's a slew of the regular names that always get used for either traffic control or - and they name them under one of those prime contract subcontractor categories. And so, that allows them to actually meet the goal, and then they get the job. And so, they didn't necessarily have the job or name the DBEs at bid time, but they allow them to do it after. And in my opinion that process is being abused. Unfortunately, it's all done by the totals at the end of the day, because I've heard the reports about a million times in these meetings that I go to with the DBE - when there's a DBE report about the DBE program. 'Oh, good news. We're supposed to be at 17 and we're at 16.9 right now.' And then you're like 'Yeah, okay...' I'm sitting in the room going 'Yep.' And it's always the same ones all the time doing the same exact things. And the scopes never get

expanded. And some of the guys that are running around trying to make a living and grow their companies never get used because it's just too easy to keep using traffic control guy.” [#24]

- The Middle Eastern American male president of an WBE-certified professional services firm stated, "Even in Southern California, Caltrans' jobs, if you look around, you see most of the work goes to one or two big contracting companies that do large projects. And I know when they want design work, they go to these national companies. They don't come to me. They go through national companies that they know, and they work with them before." [#46]
- The Black American female owner of an uncertified WBE and MBE professional services firm stated, "They continuously deal with firms that they are so accustomed to. So, what is commonly known I might be new to their firm and they'll say, 'Well, can you send me a quote?' 'Okay, sure. I can do that.' Well, they'll take my quote, and they'll send it to their commonly known client that they already are familiar with. 'Can you beat this pricing?'" [#60]
- The Hispanic American female co-owner of a WBE-, MBE-, Micro-, and SB-certified professional services company stated, "If an agency doesn't just stick with the same company in awarding the contract, that would be helpful to get more consultants servicing that agency." [#61]
- A comment from a majority-owned construction company stated, "Getting into some agencies, getting your foot in the door is difficult because of established companies that they have already worked with." [AV283]
- A comment from an MBE Black American-owned professional services firm stated, "When it comes to government projects, there have been some challenges there. Just from my experience and research, a lot of the development projects are done by the same 2% of the contractors out there. They keep it open for bidding, but they're happy keeping it to their small handful of contractors." [#AV238]
- A comment from a majority-owned professional services firm stated, "The competition is stiff and some of the areas are a bit parochial. They tend to use the same people." [#AV304]
- A comment from a majority-owned construction company stated, "It's not a fair game and dirty general contractors are choosing their own subcontractor and not giving small businesses a fair shot." [#AV8224]
- A comment from an MBE Black American-owned professional services firm stated, "Caltrans gives no opportunities to minorities or vets, they only give work to Parson, or other white businesses, or big corporations, trying to limit work to veterans, they put caps on contracts knowing that we cannot bid on those contracts." [#AV8254]
- A comment from a WBE and MBE Hispanic American-owned construction company stated, "I have submitted lots of bids for work but have not seen any returns on them. Seem to go with companies already working all the time." [#AV8321]
- A comment from a majority-owned construction company stated, "The cost of doing business in CA is too high which limits our ability to expand. We would like to work with Caltrans but they only use union shops, and only one guy has all the Caltrans contracts in our area." [#AV8372]

- A comment from a non-Hispanic white WBE professional services firm stated, “It seems like there are predetermined favorites and the bidding is just perfunctory.” [#AV8435]
- A comment from an MBE Black American-owned construction company stated, “Seems like same people are getting the work and the contracts, it’s hard to break in, industry is competitive. Not sure how to get into these jobs.” [#AV8518]
- A comment from an MBE Hispanic American-owned professional services firm stated, “Biggest obstacle in transit is we are such a small sector they tend to reuse old or friendlier companies; new companies don't get a foot in the door.” [#AV912]
- The female owner of a WBE-certified construction company stated, “The same DBEs get work, other DBEs don't get work.” [#FG1]
- The Asian Pacific American male representative of a minority business advocacy association stated, “What I find really is Caltrans is very unlikely to welcome firms that hardly have done work for Caltrans in the past. So, the obstacle is how is Caltrans going to help the firms that has hardly or never done work with them? This is dealing with both prime and subcontractor role. And in particular, they coin a term called emerging firms. And then define emerging firms for DBE firms that has little or no more than five contracts with Caltrans in the last several years. And they have not been really making headway in helping the emerging firms. And that is a major obstacle for firms trying to break into Caltrans contracting opportunities.” [#FG2]
- The female representative of a DBE-certified professional services firm stated, “I'm a DBE, brand new, trying to be a sub for the prime. But all the prime prefers to use their existing sub or the subs that they'd been using prior to the new proposal that came out. How do Caltrans encouraged those primes to use different subs every time? Because it seems like they're sticking with one sub and they're using it over and over. So new people like me have no chance to become a team member. It's really, really hard for me.” [#PT11]
- The female representative of a business development organization stated, “The Good Faith Outreach say they've reached out to a number of firms, but then they'd go back to using the same subcontractors.” [#PT2]
- The Hispanic American male owner of a DBE-certified and uncertified MBE construction company stated, “Please review how often certain DBE contractors are repeatedly provided subcontracts.” [#PT4]
- A respondent from a virtual public meeting stated, “She has been very, very successful in the DBE program. And as a matter of fact, she's no longer a DBE because she 'graduated'. You know, she exceeded the size limit, but I believe that she got up in front of the group and was commenting that she had been in the program for like 27 years and was very successful in all of that. Then we had a lot of behind the scenes, we had a lot of the DBEs that haven't been able to get their foot in the door were really frustrated with that, because of the fact that, she taken up all the contracts that we're trying to just at least get one, type of things.” [#PT6]

Good Faith Efforts. Ten interviewees described their challenges in complying with regulations regarding Good Faith Efforts [#2, #3, #24, #27, #38, #AV, #FG1]. For example:

- The non-Hispanic white male co-owner of a majority-owned construction company stated, "In the last couple of years, they have basically said, 'you are not going to get a job unless you meet the goal.' They've taken away the good faith effort and the good faith effort is an absolute joke anyways. And it's a huge waste of time and resources and is not even utilized by Caltrans as a resource to help improve the system. But if you didn't get a job on making the goal, then you probably didn't get the job. When the contractors are sitting here on bid day going, 'I'm dealing with the same DBE contractors year after year, nobody's coming into the industry.' When I call and do my good faith effort, and go through all the lists, there is so much information about how many companies tell you, 'please stop calling me. I don't want to do Caltrans work. I don't want to be solicited by you. I'm getting calls and faxes and everything, stop bothering me. I'm not going to do it.' And so that's telling us that the system isn't working because what you guys say has capacity or telling us they'll never do the work for Caltrans and don't want to be a part of the program. So, we're wasting our time and energy. How many numbers do we have [that are] disconnected? They're out of business. I mean, all these things go into this good faith effort and that's my point about this whole thing. The good faith effort isn't used to really to determine if we're doing everything that we can to provide an opportunity. That's the intent and my understanding. Did we reach out to the community, and did we make every effort to give them an opportunity? I believe that's the limit of our responsibility as a general contractor, is to say, 'Hey, I'm going to go out to the contracting community for the DBE group and I'm going to make sure they know I have an opportunity and that I'm bidding and I'm willing to look at their bid and help them, see if they can get work.' So that's what we do basically under the key to good faith efforts. So, we create these 600-700 page documents, which is basically a bunch of time and energy to check the box. I called this company. I called that company, what happened? Well, they said, I didn't want to work. Did you call them the second time? Did you follow up on the fact that they had, disconnected number? Did you reach them somewhere else? How did you get? So, we go through all this effort, and it doesn't really have any value because, like I said, we're not getting jobs based on good faith effort. What was in my mind, a good faith effort designed to do? It's designed to say it, listen, there's not enough DBE contractors that have bid competitively enough to achieve the goal but here's my demonstration of my efforts to do the outreach, to promote that they were given the opportunity. And for whatever reason, we didn't get to the percentage that you guys put in there. So, give us the job anyway. What are they doing with that information? Other than looking at it to say, we're not awarding you on good faith, or we are awarding you on good faith. Are they using that information to go back and look at their database and say, 'Hey, we had this company here. They said they were interested. We've got to take them off the list. They're out of business.' Or the good-faith effort here says that the owner of this DBE company said, 'I never want to bid Caltrans work again. Stop calling me'. Well, why are they still on the database as a company that we should be contacting? So, that cleanup needs to happen. And at the end of the day, I'm sitting here thinking, how many people are saying they're in the program right now? 3,000, 4,000? Who in Caltrans' Office of Civil Rights has ever called them up individually and said, 'hey, we're with the government... We're here with Caltrans, and we're trying to improve our program. Number one, have you ever done Caltrans work? Number two, are you interested in Caltrans work?' I think some of that information is out there, but I think it's done through this disparity study, but I don't think

it's connected to the database that Caltrans is using because out of the 3,000 or 4,000, or whoever's in that database, only 400 are showing up every year to do work." [#2]

- The non-Hispanic white male co-owner of an SB-certified professional services firm stated, "I've been on a project with the County of Alameda. This is a few years back and we were the apparent low bidder but there's a clause in their specifications that states that there's a good faith effort that you have to do to get yourselves to bid. And we have to submit this documentation after we bid the project and we were thrown out of the project because we did not basically in good faith negotiate with a subcontractor on a public bid. I actually even went to the board of supervisors and one of their meetings and had to stand up and explain that, This is not a private job. This is a public works job. We're not to negotiate with subcontractors. We're not. That's good shopping to me. There's no way I can call this guy, his company and say, 'Well, what do you think? Can you drop your price?' Then he's going asking me questions. 'Well, okay. Well, where am I at? Well am I 5 percent, 10 percent higher.' And once I tell him that he's 10 percent higher, that's bid shopping to me." [#3]
- The Hispanic and Native American male owner of a DBE-, 8(a)-, SB-, and MBE-certified construction company stated, "Everybody sends us the advertisement for the bids because they've got to do it to comply with the good faith effort requirements. And most of it's subbed out. We get calls - I mean, literally 30 or 40 a day - and e-mails, I probably get 100 a day all about 'Do this job with us and we'll supply this and we'll supply that. And we can help with bonding lines, we can help with insurance, we can help with blah, blah, blah, lines of credit, yackety-yak.' And none of them - and I mean none - ever do it or are ever going to do it. They put it in there because they have to put it in there. And it says it because it says it. But anybody that's ever done this for a living for very long knows that if I call one of these contractors and say, 'Hey, can you guys help me get a bond?' they're going to go, 'Yeah, here's the name of our guy. Call him and he'll set you up.' And then their guy gives you the 'Oh, send me over these things, your financial information, blah, blah, blah, blah, blah.' And then guess what? The guy really can't give you a bond. The guy can only tell you that 'It's nice and we tried but it's not going to happen.' What they basically do is they let you look at their plans in their office if you wanted or they give you - now everybody gives you a link to where the plans are. But none of the things that they say they're going to do in those big advertisements is really available. And I don't know why nobody knows that, but it's just not true." [#24]
- The Middle Eastern American female representative of a majority-owned professional services firm stated, "I actually did it myself too because one project in California they wanted to be five percent and they wanted you to do an event to bring in to do a marketing and advertise and bring all the DBEs that are interested. You have to prove that you've gone out of your way and you have marketed and these people showed up. You interviewed them and then you selected this many. I've seen a lot of that happening. I [have] attended one a couple months ago. Engineering firms, that's one way they do it to make sure that they have one event, and they can advertise what they're looking for." [#27]
- The Black American female co-owner of a DBE- and DVBE-certified and uncertified MBE construction company stated, "I compare to Metro. So, when I'm on Metro jobs, the prime contractor sends us a letter and tells us exactly what their goals are, and they tell us that they want to exceed the goals. So, my though process, for them to want to exceed their

goals, there has to be an incentive for Metro, has to be. There has to be, and, of course, there's a penalty if you don't meet it." [#38]

- A comment from a majority-owned professional services company stated, "The minority DBE requirements are very difficult and onerous to achieve. The good faith effort that used to be in place was a tool to get DBEs to bid on the work." [#AV8307]
- The non-Hispanic white male co-owner of a majority-owned construction company stated, "[When looking for subs,] primes feel fatigue too, especially in fielding calls from DBEs. Primes only have capacity for minimum GFE efforts required for DBE outreach. [It takes so much time, that the DBE] program wastes hundreds of hours... trying to show we're doing the right thing." [#2]
- The non-Hispanic white male co-owner of a majority-owned construction company stated, "[To improve GFE, the] Opt-in program [can be expanded to be] dual opt-in [for both primes and subs and] should eliminate GFE or shorten it" [#2]
- The female owner of a WBE-certified construction company stated, "Why should primes be spending time to come up with GFE stuff when DBEs can do some of the work too?" [#FG1]
- A respondent from a trade group focus group stated, "[Here is an] idea: Develop an incentive - if a DBE and prime 'opt-in' simplify the Good Faith Requirement Letter process to incentivize participation - this could help overcome the barrier where some DBEs may not 'Opt-in' because it reveals they are bidding to their competition. Current Good Faith Effort Requirements are super burdensome for both primes and DBE firms. Primes need to contact many firms to achieve the DBE Goal or demonstrate that they have reached out sufficiently. DBEs are getting contacted daily with emails and phone calls and the primes reaching out often don't even know what they do or where they like to work. The GFEs on projects mean that primes reach out to certain DBEs on EVERY contract. This requires a dedicated staff person for both the DBE and prime to manage the requests. Also, many DBEs are just getting papered because the primes can't see they type of scopes they perform - they are relying on the database, the NAICS code and/or Works Codes. DBEs typically get repeated work through referrals rather than cold calls - we need a way to make the requests from primes more specific so its relevant for both the prime and DBE." [#FG1]

California regulations. Forty-six interviewees explained difficulties their firm experienced related to California regulations [#10, #15, #17, #18, #21, #29, #52, #AV]. For example:

- The non-Hispanic white male owner of a SB- and ELBE-certified professional services firm stated, "When they throw all these barriers against you, it's real hard to make it. The last one took me out of business. The last barrier. Yeah. That was CARB, air resources board. When they told me my diesel oranges were killing people and I had to buy all new stuff. That was in June of 17 when I said, No, I don't, I quit. I sent 20 people home, in closed van doors I joined with CARB as an industry spokesperson to understand what it takes to replace assets in a very expensive business. One piece of equipment would cost you three quarters of a million dollars. And because it's six years old, you have to throw it away. Oh, well, it's not reached the life expectancy. That's too bad. Let's just rebuild the engine. You can't rebuild the engines in these specialized piece equipment like you can a truck. You can pull an engine out of a truck, put the new engine in it, it doesn't work on off-road

equipment. So I spent three years attempting to educate CARB, and failed. So I sued CARB, and failed. But that's all out of principle because I'm all done. But now it's all principal... These are the marching orders. And we're going to support you by penalizing those that don't meet up with the requirements. Well, I asked him and he said, 'Well, nobody will give us their financial statements, so they keep saying, we can't afford it, we can't afford it.' I said, 'I'll give you mine all three years'. I did. And I gave him three weeks, and I called him up and I said, So you looked at my financial statements? Yes. I have How am I going to afford to buy all this new stuff? And he said, 'Well, you're going to have to raise your prices.' Wow. So simple. Why didn't I think of that? you have to be competitive, a low bidder. And then, you got to be good enough to make a profit, in my world that I was living in. Granite Construction Company works in just about a state in the Union. California has these rules and regulations that your piece of equipment is four years old, you got to get rid of it, you got to go get a new one. Well, Granite buys new equipment every year. Every year they buy new equipment. Well, the new stuff comes to California. They take their California stuff and they take it to Nevada, just across the border, or Arizona, or Idaho. It costs them zero to meet these requirements. Zero. It put me out of business." [#10]

- The Black American female representative of a minority chamber of commerce stated, "The regulatory environment, unfortunately. We've got some heavy taxes. Our business incorporation tax as well as our franchise tax. We've got taxes that if you can't afford them could put you out of business, but also it's a lack of knowledge of the regulatory process and what actually applies to your business. There's different fees and different license structures required for an LLC versus a sole proprietorship. And so a lot of our small businesses when they open, they don't know the right incorporation status that will help them along the way to make sure that they don't run into some of those regulatory and fee based issues. the last has performed work for Caltrans within the last 10 years, but they say other regulatory agencies has issues as an additional impediment to working with Caltrans, including Air Pollution Control Districts." [#15]
- The Hispanic American female owner of a WBE-, MBE-, SCMSDC-, and DBE-certified goods and services firm stated, "I think one of the things that did hurt or has killed a lot of us through this process is the wage increases, minimum wage and things like that. I think it would have made it easier if the whole state of California all at once would have done it instead of pockets of different phases for all different cities. It made it very difficult for the small business to be able to track all of that all over the place. Before, if everybody knew that we were on a certain amount per hour it made it easier for competition. And then, it started - things started changing that everybody was in a different playing level and there were some cities that decided that they were going to do five days a week for sick pay, and then others were 'No, we're at the same three days.' It was just - it made things a little bit more monotonous and it didn't put everybody on the same playing field if they didn't have that information or there was - it was a little bit more frustrating in order to be able to do try to acquire all this information from different cities, and that - yet, cities with different names would fall under another city instead of their own guidelines. For an example, the city of Los Angeles. Some other counties - cities around there followed the guidelines of the city of Los Angeles, and if you call them up they'll say they follow the state, but it follows the guidelines of the city of Los Angeles. So, not everybody is on the same playing field." [#17]

- The non-Hispanic white female owner of a DBE-, SWBE-, and CBE-certified professional services firm stated, "The other thing is AB5. AB5 is a trucking - it's basically the - it was the Dynamex ruling that went to AB5, and it was basically independent contractors. It's a problem because trucking is kind of like the lifeblood for this industry. You think from supplies to concrete, anything that you're getting is coming by truck. The trucking is a problem. That AB5 kind of ruined our industry. It's caused shortages and problems for everybody. So, for example, we sub all that out, but we go with anybody who is usually a truck broker. Well, truck brokers no longer can be in business, basically, because you can't have independent truckers as your employees. You have to be their employer. Well, they don't want to be your employee. They want to be independent. That's why they bought their own truck. So, now there's no such thing as that, and people are getting fined. People are just trying to figure out how to make that work." [#18]
- The Hispanic American male owner of a DBE-certified and uncertified MBE construction company stated, "One thing that I guess would potentially be an issue is just the new California emissions laws were difficult. I'm a small company; I only have five trucks that I own. And this year I can't use three of them. I have to sell them because they don't comply with the California emissions laws anymore And what is kind of challenging about that is that California offered some funds for owners to be able to get rid of their older trucks, which mine weren't that old, but 2007. The problem with it is that with the three trucks that I'm referencing, they don't drive a lot of miles. They only drive maybe about 10,000 to maybe 15,000 miles a year, tops But the funding for those programs require that you drive more miles than that, so I didn't qualify because of the amount of miles that I operate the trucks So I couldn't get any assistance to replace the trucks. And they said, 'Well, you can file for an exemption if you only drive them 2,000 miles a year.' It's like, 'Well, I don't drive them 2,000 miles a year; I drive them 10,000.' So, you know, there's no options for me, essentially, so that does make it difficult." [#21]
- The non-Hispanic white female co-owner of a majority-owned construction company stated, "We have purchased a dump truck to replace - a dump truck, actually, we just donated [it] last year. And when we purchased the dump truck, it was used, but it's a very good dump truck - we did all the research on if it was carb-compliant and it was... because that's what you're doing, you're replacing something to be carb-compliant, because you want to keep that piece of equipment, when you're making a large investment. So, last year when all this hit and being closed down, I received a DMV notice saying that we have until the end of 2022, next year. At the end of next year, we lose that truck. And that truck is a main - it's like a main vein to our business. If we lose that truck, we have no replacement, we're done, we will have to fold. And it's very hard, after 31 years, and that will be 32 years, to fold a company up because you can't run a dump truck. And it's even harder because we live in a county that has stricter CARB rules than, say, you know, 15 miles out of our area, they're allowed to use it. And we can sell this dump truck to someone who, you know, a business that's in that area and they can use it there, but yet, we can't use it where we're at." [#29]
- The Asian Pacific American male owner of an uncertified MBE construction firm stated, "And the thing about it is, because California's got emissions, everybody's overhead went up, because you had to go buy a new truck... or you've got to put the \$15,000.00, \$20,000.00 into your truck to make it compliant, so now you've got overhead. But the regs don't

change, and these guys don't have the overhead, come in and haul it for cheaper because they can. They can afford to do it for cheaper. Whereas California you can't. Between fuel prices and what they're making us do with emissions, it's a struggle to keep a truck on the road. well, I'm on the road every day. But if you realize how many trucks burn up on the road because of the emissions, it's really unfair. I've got a friend bought a brand new Freightliner. His truck burned to the ground, because of the emissions. Yeah, with the burner on - yeah, it got too hot and burned to the ground. Brand new truck. he went out on his own, bought a truck, and it burned down, and he couldn't afford to go get a new one. But that's just one person. I know many more." [#52]

- A comment from an MBE Hispanic American-owned construction company stated, "All the regulations in California make it tough to do work for public agencies." [#AV41]
- A comment from a majority-owned construction company stated, "[It is a] Difficult place to do business." [#AV42]
- A comment from a Minority Hispanic American-owned construction company stated, "I am 100% against AB3018. It's a huge roadblock. I'm against AB219 as well." [#AV51]
- A comment from a WBE-owned construction company stated, "Regulations in the state make it hard to survive. Not a friendly state for business." [#AV53]
- A comment from an MBE Hispanic American-owned construction company stated, "There are a lot of barriers in the way such as many regulations and requirements that are needed to operate legally and also the money involved." [#AV99]
- A comment from a majority-owned construction company stated, "It sucks to work in the state of California, the state of California destroyed a 73-year-old family business which I own." [#AV115]
- A comment from a majority-owned construction company stated, "The cost of doing business in California is mind-boggling." [#AV124]
- A comment from an MBE Hispanic American-owned construction company stated, "There are a lot of issues, especially here in the Bay Area. Starting with CARB rules with vehicles changing every year." [#AV126]
- A comment from an MBE Black American-owned construction company stated, "California is heavily regulated -- it should be more navigable--to navigate being able to work in Los Angeles is an expert's job." [#AV139]
- A comment from a majority-owned construction company stated, "It is definitely difficult to start a business with the regulations that are in place in California." [#AV169]
- A comment from a majority-owned construction company stated, "State of California is holding company back due to fees and vehicle weight restrictions." [#AV218]
- A comment from a majority-owned construction company stated, "Our company took away our trucks due to the state of California environmental restrictions." [#AV219]
- A comment from a majority-owned construction company stated, "Regulations in general-- too costly, too many, hard to be compliant with everything they require." [#AV219]

- A comment from a majority-owned construction company stated, “The regulations and burdensome fees have made it more and more difficult on a yearly basis.” [#AV261]
- A comment from a majority-owned construction company stated, “Bureaucracy. Environmental and vehicle challenges.” [#AV240]
- A comment from an MBE construction company stated, “I think that there are a lot of barriers in CA with conditions and laws, they make it very hard to purchase certain equipment to meet emissions law.” [#AV330]
- A comment from a majority-owned construction company stated, “State income tax is too high. Tax on Gas is too high.” [#AV333]
- A comment from a minority-owned professional services company stated, “Registration fees for vehicles in CA are through the roof. Emission standards are insane. We had to get rid of our whole fleet and get all new trucks in last 18 - 24 months to meet emission standards that no other state on the west coast has. Taxation regulations [have] prohibited us from participating.” [#AV59]
- A comment from a majority-owned professional services company stated, “It’s not a business-friendly state.” [#AV100]
- A comment from a majority-owned professional services company stated, “[It is] difficult to do business in California.” [#AV101]
- A comment from a majority-owned professional services company stated, “California is getting harder to work in due to political measures and red tape.” [#AV107]
- A comment from an MBE Native American-owned professional services company stated, “It is very difficult to run a business in the state of CA.” [#AV186]
- A comment from a WBE professional services company stated, “The rules and regulations [California] has put on the contractors for emissions and workers comp and payroll tax fuel.” [#AV187]
- A comment from a majority-owned professional services company stated, “It’s not easy to work in CA with all the regulations. The regulations serve some purpose but they slow down progress.” [#AV273]
- A comment from a majority-owned professional services company stated, “The amount of taxes CA charges [is hard].” [#AV297]
- A comment from a majority-owned construction company stated, “Typically to many regulations that detour us from bidding those jobs.” [#AV8110]
- A comment from a majority-owned construction company stated, “The company is shut down due to [the] pandemic. [Our] Trucks were old and difficult to get registration. 70 % of our business is in California. The green requirements caused many businesses to lose money or go out of business. Air filters cost about 13,000 - 15,000.” [#AV8121]
- A comment from a WBE construction company stated, “AB5 working with owner/operators. They have their own trucks and we’re being told we can’t use them because of AB5. They are independent contractors. If we contract with Caltrans and then hire them we can get in trouble because we are a trucking company.” [#AV8135]

- A comment from a majority-owned construction company stated, “Because of AB5, it places owner operators as employees that work for you. If you need more trucks to do the work and you have other companies to help AB5 considers them your employees and they do not like that. They want to be their own separate.” [#AV8184]
- A comment from a majority-owned construction company stated, “[There are] too many regulations. Yes, California stifles us.” [#AV8189]
- A comment from a majority-owned construction company stated, “It’s very difficult to work in this state--it’s almost impossible. Regulations and taxes are very prohibitive.” [#AV833]
- A comment from a WBE construction company stated, “California has way too many fees and taxes. I don’t want to receive a notice from the board that we have yet another fee to pay.” [#AV8382]
- A comment from a majority-owned construction company stated, “Regulations make it extremely difficult to remain profitable.” [#AV8457]
- A comment from a majority-owned construction company stated, “California is a very difficult state to work with far too many regulations. Our competition is going out of business and that leaves us with more work.” [#AV849]
- A comment from a majority-owned construction company stated, “My industry is overly and heavily regulated, so yes there are constant barriers to getting work done and expanding.” [#AV8491]
- A comment from a majority-owned construction company stated, “There are numerous barriers in every aspect and every turn that you make in California. Regulations for air quality, starting a new business, Covid, applications are not replied on by anybody.” [#AV8543]
- A comment from a majority-owned construction company stated, “Regulations are getting tougher and tougher on the transportation side, 90 percent of ways we remediate are going out of state and we have to go get it. It’s cheaper out of state than it is in CA.” [#AV862]
- A comment from a majority-owned construction company stated, “The regulatory restrictions make it difficult to work in California.” [#AV865]

Difficulties networking and developing relationships. Ten interviewees discussed the importance of networking and the difficulties associated with developing relationships with other business owners [#15, #23, #32, #51, #52, #53, #59, #AV]. For example:

- The Black American female representative of a minority chamber of commerce stated, “Relationship management is one of the big things that we work on. And having relationships with your bankers, having relationships with local CDFI, having a relationship with the small business administration, anyone and everyone who has access to resources for your small business, you should have a relationship with. Including your locally elected, your state elected and your federal elected, because sometimes when application processes go up the food chain, you need an advocate in the right position to help you do that.” [#15]
- The Subcontinent Asian American male owner of a Micro- and SB-certified and uncertified MBE construction firm stated, “So, the networking, I feel like - I don’t know how far this is

true, like I mentioned earlier, but I feel like it is a possibility it's because I started late in this business, so I haven't been able to network as much as many other people in the industry do." [#23]

- The non-Hispanic white female owner of a DBE- and SB-certified and uncertified WBE professional services firm stated, "And this may not [be] discrimination but I feel like there are some companies that only use some companies because they already have that relationship with the company. And so for me to try to get in to work with them sometimes is impossible. And that's ok. So I feel like there is some of that - and I don't know. Everybody is going to pick who they want to work with. And I do feel like sometimes companies won't even give me a chance or cities won't give me a chance because they're so set in on working with the people they've always worked for before" [#32]
- The Hispanic American male owner of a DBE-, SB-, and DVBE-certified and uncertified MBE professional services firm stated, "For my big projects that I'm working on, the networking is usually how I establish my partners. So, people whom I've done business in the past. So, I don't advertise. I don't have any advertisements whatsoever. Usually, it's through networking. Then, prior contacts and specially when they change companies, we keep in touch. So, networking is really how I get my main core business going." [#51]
- The Asian Pacific American male owner of an uncertified MBE construction firm stated, "You know, in this industry, you've got to be the one that talks to everybody, says hi, asks [questions] just because you want to know, you want to learn something. And a lot of it for me, I ask a lot of questions, because I want to know who not to do business with, so I don't end up being that person that gets burned. You have [to know] how's this guy to work for, or should I trust this guy? Because a lot of people you know have - and a lot of people will be honest with you. They'll say, hey, stay away from that company, or don't do no business - or no, go ahead and do it. That guy will treat you really well. You've just got to get out there and talk. Some people are just too shy to do it, and so just keep to themselves, and it's tough, you know." [#52]
- The Asian Pacific American male owner of an MBE-, DBE-, and SB-certified construction firm stated, "When we do land jobs, I build those relationships by really outperforming their expectations, and then word just kinda gets around about [my firm], and the crew, and their safety habits. But getting the work is not hard. It's really being able to build the right relationships. That's really the key." [#53]
- The Asian Pacific American female owner of a SB-, DBE-, and WBE-certified construction company stated, "I took the class, How to Talk to a Stranger, because I'm not as outgoing as I should be. I take the class in [a local] College. The class title is How to Talk to Anybody, Any Place, Any Time, and it's an evening class. So I say, Oh, I should take this class. So after I settled all the children, cooking and... I go take the class and I hate the teacher because he make me practice, speak to stranger and ask questions. So I start practice what my instructor teach. I go to someone in a corner and give them my business card and ask their business card. And just to calm myself down, I look at the card because you are nervous. I'm nervous. So I look his card or her card and I say, Oh, you are from Torrance. You are from Glendale. So I repeat what's their address. And then I would say, Hi, I'm from____. And I practice hundred time in so many night, so many meetings. And people think I know everybody, but I don't. I only start the first move. So now I'm not afraid anymore." [#59]

- A comment from a Subcontinent Asian American owned MBE-certified professional services firm stated, “Typically with those areas in our experience, there are some big players that hold those areas close and when we go there, our work is typically too urban or they want us to work as a sub for companies they already work with. We have more success in denser urban areas. We found it difficult to build relationships there because it’s so established.” [#AV38]
- A comment from a Black American owned MBE-certified construction firm stated, “I only worked in areas that I followed a contractor.” [#AV74]
- A comment from a majority-owned SB- and DVBE-certified construction firm stated, “People have called us and we meet with them, exchange business cards, and then they don’t return calls. Unless you know someone in the area you want to work in, you can’t get in. We are listed as small business and disabled vet and still can’t get in.” [#AV140]
- A comment from a majority-owned construction firm stated, “It’s hard to get bids up here because everyone already has their set businesses that they want. It’s very difficult to get your foot in the door (I’ve been trying since 2008) if you don’t have the money to buy a lot of equipment right off the bat. The big contractors up here seem to have working relationships with other companies that have both a DVBE and a DBE.”[#AV167]
- A comment from a WBE-certified professional services firm stated, “Relationships.” [#AV202]
- A comment from a Subcontinent Asian American owned MBE-certified professional services firm stated, “A lot of our work tends to be more urban and we don’t have a lot of relationships in the more rural areas. A lot of the relationships they have in those regions are for larger firms than ours. For us to go set up in those areas is a huge barrier.” [#AV264]
- A comment from a WBE-certified professional services firm stated, “Mostly the relationships and connections to compete with existing contractors in the area. Basically, I’m throwing my money away by submitting.” [#AV317]
- A comment from a majority-owned construction firm stated, “Building relationship for a younger firm very difficult.” [#AV854]
- A comment from a Hispanic American owned MBE-certified professional services firm stated, “It’s been a challenge to get everything up and running, you have to know people and if you don’t you don’t get anywhere.” [#AV933] A comment from a majority-owned construction firm stated, “It’s difficult for a small, young, emerging business to network and build relationships. We are currently trying to forge those relationships which can be difficult sometimes.” [#AV8388]

Work and North American Industry Classification System (NAICS) Codes. Two interviewees described other challenges in the marketplace and offered additional insights [#FG1, #PT12]. For example:

- A respondent from a trade group focus group stated, “It is very difficult for DBEs to add NAICS Codes - even when they are performing these scopes regularly. The NAICS Codes are often selected by the DBE when they are setting up the business, which ignores how most small businesses adapt over time. It needs to be easier to add additional NAICS Codes

and/or Work Codes. The database needs to be maintained - If a DBE has not bid work in a NAICS code over the previous four years - there should be a way for the NAICS code to be removed (or removable) from their profile, to avoid overreporting on unused NAICS Codes and Work Codes. If a DBE has struggled in a particular work code - DBE program could provide mentoring, support, or other guidance to help them be successful. DBEs often have to select their NAICS codes and Work Codes before they are well established. Training on which work codes and NAICS codes to select for common and in-demand Caltrans scopes would help new businesses with a critical step as they are trying to build a book of business." [#FG1]

- A respondent from a virtual public meeting stated, "Because of some certain DBE firms, the qualifications of owners is not tied to the right NAICS code mainly in our professional services. Some of the firms, they are DBE, but the owners, they don't have the qualification as such as the PE and certifications, and still they're getting those NAICS code and participation and getting that DBE code. So, firms like us are being thrown out to get those work because of some of those DBE firm, they're getting benefits without the proper certifications Some of the firms, they are getting those benefits without having the proper NAICS code, because owner, even 51% owner, they should have the principal. Those should have the PE or the certificate to get that kind of work and they are not getting it. So, example, one of the Asian woman, she's not PE, but still they are doing the professional services in our Caltrans inspection or engineering work. Those firms, they are DBE, but they are not in that area of professional services. So, example, like certain people come and do the engineering inspection work, which is, they're still DBE but they cannot do that work. So, they're still there getting the benefits on that one. So, get us, restrict us to participate in the right of area of work. So that's the question I have. We like the Caltrans to look at those firms and identify before awarding the contract." [#PT12]

Other comments and insights. Fifteen interviewees described other challenges in the marketplace and offered additional insights [#1, #10, #12, #29, #35, #36, #39, #47, #48, #49, #60, #AV, #AV2, #PT7, #PT8,]. For example:

- The non-Hispanic white female owner of a WBE-, DBE-, UDBE-, and SB-certified professional services firm stated, "There's also a huge issue that nobody is even actually tackling nowadays. And that is, these five-year contracts for on-call contracts to be able to, you put in all the time to get the documents, you win the contract, but you win it with like seven other like-minded type firms. And then they supposedly rotate and you may in the five years not get any work at all. So, it's prohibitive for a small business to even waste their time." [#1]
- The non-Hispanic white male owner of a SB- and ELBE-certified professional services firm stated, "I feel that the biggest discrimination is discriminating against people that have merit to do something but are precluded because they don't meet the requirement in a box. That's the biggest discrimination in the government's attempts to level the playing field by holding somebody down, instead of helping the other person up. Supposedly it's purported to help the other person up... is discrimination personified. So when you asked me about this discrimination, that's my answer. When you discriminate... When you say that you have to meet these standards, that can't be changed... In other words, you're Caucasian or you're

Negro, or you're Hispanic, or you're Italian. You can't change those things. But when you say that anybody that has this unchangeable situation? I can't change my whiteness and they can't change their color, but to give them special dispensation because of something that can't be changed... I can't go and earn a minority or a woman owned business. I couldn't change that. There's nothing I can do. So that's discrimination, personified." [#10]

- The Hispanic American female owner of an MBE-, WBE-, and SB-certified professional services firm stated, "Only one, which I think is like the obvious one, but the roles and responsibilities of a mother, especially a single mother. I think that often gets overlooked because men do not have the same responsibilities that women do, like in a household generally speaking or stereotypically speaking. For instance, when I was married, my husband's company was a priority and mine took a back seat, because I was responsible for everything having to deal with the kids, doctor's appointments, games, cooking dinner, homework. You know? So. I think it's like women or single mothers carry an invisible burden, and even just again, access or having the funds to pay for childcare. I remember when my kids were really little, preschool is \$13,000 a year." [#12]
- The non-Hispanic white female co-owner of a majority-owned construction company stated, "It is challenging, too, because we pay our employees payroll, and we know that there's a lot of companies that are, you know, I would say pretty much the same size as we are, that do not. They pay them cash. ...It's hard to talk to people, potential clients, about this, 'cause they're seeing, like, a lower dollar amount, they're not understanding that, 'Hey, these are taxes that have to be paid, or this is workman's comp that has to be paid.' And of course that goes, you know, into the overall cost of what the contract is. The other thing is, too, is that our employees are paid time-and-a-half over 8, so from 8 to 12 hours they're paid time-and-a-half, anything over 12 they're double time. And we pay turnkey, so the minute they get to the yard to the minute that they get back is when they're on the payroll." [#29]
- The non-Hispanic white male representative of a majority-owned construction firm stated, "I think one of the biggest issues with DBEs, and the reason why not a lot of 'em get on jobs, is 'cause they all do the same thing. They do something with water pollution control or something like that, traffic control. You don't get too many of 'em that're actually part of the construction portion of it. When you do, those companies get a lotta work. Like there's a concrete pumper who're the only DBE. When you're in the Bay Area and you need a DBE for this position, you use those guys. 'Cause - I know they get a lotta work. There's been companies that became huge because of it, that actually do the construction portion of the work. Companies like [a construction firm], who's now one of the biggest paving companies. And I believe they're a DBE. [Firm A is] a bridge company that were a DBE and now they're a huge bridge company. So I think that's the biggest issue: a lotta the DBEs all kinda congregate into the one - what they think is the easiest way to get into a company. Maybe just what they know. But it's oversaturated I guess. Like when I say water pollution control, that's basically someone that - they write a plan, they do inspections for you and that kinda stuff. But every bid we'll probably get like 20 companies looking for a job. And it's not a very big portion of our job. It's less than one percent of any job. But you have 20 to 30 companies bidding that portion of it. We've noticed there's less and less of the companies that actually do the work. I shouldn't say actually do work. 'Cause technically the other stuff is work too. But I'm talking about actual building." [#35]

- The non-Hispanic white male owner of a majority-owned professional services firm stated, "[I] think the only thing that's come up is that there seems to be quite a few companies from out of the Bay Area that are trying to come in and do the work. And I'm not really familiar with these companies that do this but it does seem to be problematic. I mean, there's no way for the local people to get the work if there's so much competition coming in. But there doesn't seem to be any attention towards local companies at all. In other words, not that we're wanting gifts or anything like that, gifts of jobs or anything like that. But there doesn't seem to be enough conscientiousness of supporting the local business people." [#36]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "In [my county], we have really struggled with boundary surveys. And when I say that, I specifically mean to comply with California state law, surveyors have to file either a corner record or a record of survey with the [local] County Surveyor's Office or with whatever county you're in, with the county surveyor's office. Those maps have to be then reviewed by the county. We work back and forth until they're approved, and then recorded, and made publicly available. It has been extraordinarily difficult to make good business out of boundary surveys in [my county] due to many factors, specifically with the tough map checking in the county. Now we tried various sub consultants to help us with these boundary surveys, and I may have hired something like seven or eight separate surveyors to do these boundary surveys as a sub to us. And at the end of the day, there's only been a very small handful, namely two to three surveyors that can actually do the work in a timely manner, can start the job, complete the job, submit the map, and get the map recorded in any sort of reasonable time. So I don't know. That's just a glimpse into the struggle of the surveying in [my county] and we successfully found a couple of sub consultants to help us with that nearly impossible task." [#39]
- The Hispanic and Indian American female co-owner of an SB-certified and uncertified WBE construction firm stated, "I would have to say the only thing I find difficult is the lowest bidder, it's not always easy for the subcontractor to know if you've been selected by that prime, and, if they were awarded, if you're the lowest bidder. Sometimes that's not that easy to get." [#47]
- The Hispanic American male representative of a construction union stated, "[A barrier to the union members is] traveling when they're going far away from home or things like that. When the people had to drive far away from home or stay over there. So there is an agreement. And the agreement the workers, members." [#48]
- The Hispanic American female representative of a DBE-, MBE-, and WBE-certified construction firm stated, "And one of the issues that we've been having is the - because we're in southern California really close to the border a lot of the companies that do what we do they've been getting all projects like for schools or something like that and then they send all the steel down to Mexico to get fabricated down there. And which is really hard to compete because we have employees that live here and they earn a lot more than someone that lives in Tijuana or Mexico and they have to pay a lot less. So that's one of the issues that we've been having in the last year that it's really hard for us to compete because when your shop is in the US, your employees live in the US what we have to spend is a lot more than someone that just bids the project and sends it down to Mexico to fabricate and pay a lot less. We were bidding a job for [a local hospital]. And you're only allowed to bid with them

if you are within 60 miles from the project. And that was one of the things that it was really funny that you cannot get the job and send them somewhere else. It has to be here in like it was in [City A] so it has to be in [City A]. So I know that there is a way to do something about that where is it's a government project and we the tax payers are paying for it most of the time that they should keep the job locally not only for the field guys because that's when the unions get involved and they say oh you have to use our guys and everything which is ok. But they also need to think about the fabrication process at least what we do that we also have employees in our shop that we can have stuff ready for the field guys. So I know there's ways to maybe have a little bit more restrictions about how they do this stuff. But at the moment it is - it's one of the things that's been affecting us. A lot of bigger companies are getting all these jobs and sending them down to Mexico and then they just bring them back to install it. But they save a lot, a ton of money doing that." [#49]

- The Black American female owner of an uncertified WBE and MBE professional services firm stated, "But here's my biggest piece, is when most of these firms come in from other States and they bring their entire work force or a third of their workforce from the city that they're located in to come work here in the state of California. The first thing they've done is remove the local requirement. If I go into another state and I've won a contract let's say Kentucky to do my so-called pre-apprenticeship program in Kentucky. I know that is imperative that I hire the resident of Kentucky so that their dollars can stay within their communities and filter back to their families. When you bring that outside company, because they're notorious for hiring because they're looking for people that will take responsibility for their projects. I get it, I follow all of that. However, when you allow them to bring in their full own staff from where their business originates out of, they move here, they live here, but their families are still in their original state. So where does the money go? Back to their families and the original state because the wife still has to maintain the house, the mortgage, food. So what you've done is you remove the money out of our local communities in the state of California and you now just send out money let's just say the Las Vegas. So, it leaves us in a burden that we have so many people that are unemployed or that are willing to work for 12, \$15 an hour. You're not going to find those that are willing to go beyond that because no one wants to pick up trash at 12, \$15 an hour. For when they know they should be making more money than that and they're still starving or they're on the verge of homelessness because those dollars are not recycling in our community they're going somewhere else. So you leave our homelessness at a higher rate. So that's one of their issues. I've been saying for the past 10 years, you now need a local requirement that anyone, they can come from wherever but the workforce will be local. because Caltrans is a state and [our local government] looks to them because they received money from them. The city received some Caltrans money, the County and the municipalities, they received money from Caltrans as well. So Caltrans is the hub of all of it. So they can tell people, 'You must now start putting a local requirement on your bids.'" [#60]
- A comment from a majority-owned construction firm stated, "I think it is a little more difficult as we don't have those minority standings." [#AV136]
- A comment from a majority-owned construction firm stated, "The regulatory environment is challenging. It takes a tremendous amount of time to get things going. It is sometimes difficult to convince regulatory agencies that by cleaning pipelines it can actually be better for the environment and surrounding flora." [#AV853]

- A comment from a WBE-certified construction firm stated, "One of the barriers we've experienced is that progressively there have been more and more truckers coming to the area and growing their businesses and some are able to expand at a faster level by taking shortcuts regarding compliance and legal operations." [#AV8113]
- The Black American male representative of an uncertified MBE professional services firm stated, "95 percent of African-American businesses as sole proprietors. So when you got to doing this report, are you taking that number into account? Are you taking into account that there are other groups who have sole proprietors as well, and how we create a different culture amongst the sole proprietors in each group? So maybe we bid together in a rainbow coalition and build allies versus adversaries so that we're not fighting over the same dollar so to speak." [#PT8]
- The male owner of an uncertified MBE professional services firm stated, "I'm not an engineer, but so I know that every project has infrastructure that's going to include IT, whether it's a data center, whether it's ruggedize computers or Wi-Fi on a site or whatever. So I never see an opportunity or have not and of course I'm registered with the various agencies and there's the very little opportunity if you will to get in there, whether as a sub and certainly prime is out of the question." [#PT8]

I. Information regarding effects of race and gender

Business owners and managers discussed any experiences they have with discrimination in the local marketplace, and how this behavior affects minority- or woman-owned firms.:

1. Price discrimination;
2. Denial of the opportunity to bid;
3. Stereotypical attitudes;
4. Unfair denials of contracts and unfair termination of a contract;
5. Double standards;
6. Discrimination in payments;
7. Predatory business practices;
8. Unfavorable work environment for minorities or women;
9. 'Good ol' boy network' or other closed networks;
10. Resistance to use of MBE/WBE/DBEs by government, prime or subcontractors;
11. MBE/WBE/DBE fronts or fraud;
12. False reporting of MBE/WBE/DBE participation; and
13. Other forms of discrimination against minorities or women.

1. Price discrimination. One business owner discussed how price discrimination effects small, disadvantaged businesses with obtaining financing, bonding, materials, and supplies [#38]. For example:

- The Black American female co-owner of a DBE- and DVBE-certified and uncertified MBE construction company stated, "I mean, pricing, I would say the issue with that is really from our customers. I feel like they try to nickel us down, and they wouldn't do that to anybody else." [#38]

2. Denial of the opportunity to bid. Eight business owners and managers expressed their experiences with any denials of the opportunity to bid on projects [#1, #5, #8, #10, #11, #44, #AV]. For example:

- The non-Hispanic white female owner of a WBE-, DBE-, UDBE-, and SB-certified professional services firm stated, "What happens is I'll call them and say, 'Hey, are you bidding on this? I'd love to bid with you and this is why.' And they said, 'Oh, we already made up our team a year ago.' And that was previous to even the RFP coming out. And they do that a lot, because what they do is they have people they use on a lot of different things. They don't even want to give anybody else a chance. So, I know which firms they are. What I do is I just know that if I see something that comes through, just ignore it because they don't mean it." [#1]
- The Black American male co-owner of a WBE-, MBE-, and DVBE-certified construction company stated, "Where was this firm's name, they were in Santa Monica, very big, big firm who works on a lot of projects and I was introduced to them, and one of the... Someone at the company and they pretty much told us, no thanks, we have enough. Sometimes people will say no in more creative ways." [#5]
- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "They're asking for it too fast. They're saying, hey can you get this to us tomorrow? And I can't think about that project, with a good price." [#8]
- The non-Hispanic white male owner of a SB- and ELBE-certified professional services firm stated, "I was denied the opportunity because I didn't fit the ethnicity that was required or couldn't get the percentage of ethnicities required in order to fit, fill all those boxes on the job. So, yeah. I've never been denied for any other reason." [#10]
- The non-Hispanic white male representative of a Native American-owned MBE-, SB-, and Micro-BE certified professional services firm stated, "Only in reverse of how you're asking it, where they have DBE quotas that prior to being a DBE, we would not qualify." [#11]
- The non-Hispanic white male owner of an SB-, DVBE- and Micro-BE-certified construction firm stated, "You know, it's as simple as that. All agencies - I mean, it's state-sponsored and state-approved discrimination. For whatever reason, they have put their preferences based on race and gender, and we do our best to do what we can. But there's no denying the fact that for whatever reasons, they're discriminating - it is what it is." [#44]
- A comment from a WBE and MBE Subcontinent Asian American-owned construction company stated, "Big brokers sometime don't let us work." [#AV8312]
- A comment from an MBE Hispanic American-owned construction company stated, "Because I'm a minority contractor I have not gotten a contract awarded. They don't give me a chance. I went out of my way to become DBE contractor and a SBE contractor and have not received any contracts. I would like to get an opportunity to get a project." [#AV8567]

3. Stereotypical attitudes. Thirteen interviewees reported stereotypes that negatively affected small, disadvantaged businesses [#5, #17, #27, #30, #32, #41, #42, #43, #5, #50, #59, #8, #AV, #WT5]. For example:

- The Black American male co-owner of a WBE-, MBE-, and DVBE-certified construction company stated, "Well customers, buyers, suppliers, they always think as a minority, you can tell that, that you may not have all your ducks in a row." [#5]
- The Hispanic American female owner of a WBE-, MBE-, SCMSDC-, and DBE-certified goods and services firm stated, "There's many times that I've gone to some of the functions, even some of our - we do work with Metro as a sub, and when they've come to review and do conduct audits, some of them - sometimes they would ask the reviewers, is 'Who else helps you run the business?' I think it was kind of a little bit astonishing for them to see that a woman was able to take it to a level of 160 employees." [#17]
- The Middle Eastern American female representative of a majority-owned professional services firm stated, "It's getting a lot better. I mean I've been in this business for a long time as a woman and minority, being [in] an engineering profession I had to fight. But this is different than what it was 25 years ago The last year and a half too I mean the focus on diversity and making sure there is a true equal opportunity. It's not just the buzz word... It's amazing what happened. Sometimes in the US in general because I used to work for another company which was French owned. A lot of times doing business if you're not an American owned company - like even here it's Canada which is North America. [there] shouldn't be any problem. But sometimes you feel like there is a little bit of what you call it? You're not American. There is always that. So that's where we were talking about putting the prequalification things related tightly to projects in North America or I mean projects in US. I mean not even North America. It's really they're limiting themselves. They're limiting themselves. And that's I think they're realizing that. They're realizing that. So it's getting changed slightly." [#27]
- The non-Hispanic white male co-owner of a majority-owned professional services firm stated, "We have one client in East Palo Alto, California, a water utility that has about 600, 700 services, and they're all Black. And I've observed that other people have kinda see them as standoffish towards them. But we've been very lucky to work with them all these years, and never had any problems with it." [#30]
- The non-Hispanic white female owner of a DBE- and SB-certified and uncertified WBE professional services firm stated, "I think the biggest thing that I feel is the gender thing [about] being a woman is that we're expected to really be the caregivers of a family. Yet you want to be career, have our careers too. And so I mean I feel like it's almost impossible for a woman these days to work full time and be a good mom and wife. Because it's just too much. I have ran into a few people when I talk to them on the phone that very few I would say - most men are super nice to me, like to work with me. But the ones that I have run across and I feel like they're older men that are more discriminatory. Like you don't know what you're talking about because you're a woman kind of attitude. But once we get talking most people I can win them over because I do know what I'm talking about and I feel women can do the same job that men do if not even maybe better and more compassionate maybe." [#32]

- The Black American male owner of an SB- and MBE-certified professional services firm stated, "I think it's high time that we really start paying attention to the problems that we have, because too often, there are too many stereotypes out there that suggest that an entire group of people is unwilling to take care of themselves, and that's not true. It's unfortunate, but the wealth of this world has been divvied up long before many of us had an opportunity to know that there was wealth in the world." [#41]
- The non-Hispanic white male co-owner of an SB-, DBE-, and HUBZone certified construction firm stated, "One of our employees is a woman and she's gone on job walks before for us and it's almost like it was uncomfortable for her. So I think that's probably in the construction... [where] women have probably the hardest time I've seen. Or the only thing I've seen is like that, you know, yeah, there are definitely people, men especially, that are discriminating against their ability to fulfill contracts and things like that." [#42]
- The non-Hispanic white male representative of a DBE-certified and uncertified WBE construction firm stated, "For me, it's been - well, it just depends. Like I guess at the beginning stages, when I was working with other companies than who I'm with now, I had some challenges with some of the men in the field, because, you know, just me being a girl, they just like frowned on it a little bit. But after years went on, after I got more experience under my belt, and got a little bit more familiar with what I was doing, it got a lot easier." [#43]
- The Hispanic American male owner of an uncertified MBE construction firm stated, "... I'm Mexican. I look Mexican. I'm half Mexican. I don't speak Spanish. So I get crap from 'Why don't you speak Spanish?' And these guys that only talk Spanish sometimes at the job sites they don't want to call me back because we don't understand each other. And either that or I don't get calls back to those jobs. Yeah. The way I look especially all the guys that have the good jobs they've got nice white guys that have nice trucks and stuff. And I'm still small. I've been discriminated against my skin color. I'm dark I think. Big time. But yeah, from both sides. Exactly. The way I look and then I don't speak Spanish. It's not my fault." [#50]
- The Asian Pacific American female owner of a SB-, DBE-, and WBE-certified construction company stated, "So as a Taiwanese woman, when I start in construction, the men tell me to go home because I did not announce my divorce. Because I don't need to announce my divorce. Right? And people... When I go try to in [a] construction job, I try to meet with other contractor, try to get jobs. And they say, Go home, call your husband. So I did not want to tell them I don't have a husband because people assume you have to have a husband. Especially in security construction field. Even women put me down too. Because most women have a man next to them. Right? So I hold my own license. I raise my children. I live. So many of my competitor friend... So the ladies are also kind of jealous and upset because their company is licensed by their husbands. And my company is licensed by me. So I am proud of it. But I didn't want to make a big deal because they all feel like, oh, [she] has to take care of the children and do this by herself. So people feel pity for me. 20 years ago. I worked on a LA school district job. I do a briefing meeting early in the morning. And a guy... I'm the only woman, and I'm the only color woman. So a man coming is talking to me and he said, you are not dark enough. Because I wasn't Black and I wasn't Hispanic, and as an Asian. Asian men was trained to be an engineer, doctor, anything in more higher education. But most Asian men don't train their boys to be a handyman, auto mechanic, get their hands

dirty fixing things. The parents do, but they all want their sons to hold pens not a tool. And now it's different. Now it's different. In the security industry we have conventions. We have business conventions in security business. And when I go, I go to the conventions. But there is a program for girls to go shopping so they don't go to the class, they go shopping. They go have fun. When I go to the conventions they all assume I will go to the girl clubs, go shopping and have fun for the tools. Because when a man go to a business meeting the wife they go to a bus and they go shopping. And they assume I will be the one going to the shopping. I say oh no, I am the owner of the business. So, that just to catch up on what you say in my industry. They still assume if I go, I am the wife. So when people introduce me, this as this is Mrs. In the Asian way they will introduce you as a Mrs. Right? So I will say, I'm Miss I still have my ex-husband's name but I am Miss. They will say oh you are the boss's wife, wife of a boss. And now I will say Oh, no, I am the boss. I am not the wife of the boss, I am the boss." [#59]

- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "[I] have heard conversations from public agencies about certain people in the community and based on gender or race in the community when it comes to project planning or outreach. Just community outreach that have irked me. Like for instance, certain agencies say that, We want the meetings to be at three o'clock. So less people show up to the meeting. And I look at them like, What? So I've seen stuff like that, but not anything that has to do with the procurement. I guess I have seen saying it like they don't want to work with certain community-based organizations because of history with certain communities and I felt that was weird sometimes. It's like generalizations and hitting on a community organization because of something, some history, but nothing that has to do with the actual procurement. I wouldn't want to think that if anybody would scope in and working with the community more than they would be rejected because of some attitude. I don't want to believe anything like that. I might've had a couple of times where people think because I am of Indian descent that I would know about certain things that I do not know about such as like sensors or self-driving cars or other stuff, but I may not know as much about that kind of stuff. But no, I haven't seen anything like that, no." [#8]
- A comment from an MBE Hispanic American-owned construction company stated, " At the beginning it seemed minority owned businesses had a more difficult time getting jobs. It was hard to grow. Overtime things got better there is less stereo typing minorities now.:" [#AV3931]
- The female owner of a DBE- and WBE-certified construction firm stated, "I would also like to note that discrimination is alive and well in the construction industry, which is where CCMI gets its work. While the discrimination is not as blatant as it was 40 years ago when I started into this work, it is there is subtle ways. Contractors having outside events that only their 'buddies' are invited to (not any women). When we are at an outreach meeting I still see some of the men presume the women at the event are not owners, asking ' who owns the company', or 'should I be talking to your boss'. These questions are rarely or never asked of the other men at these events." [#WT5]

4. Unfair denials of contracts and unfair termination of a contract. Fourteen business owners and managers discussed if their firms had ever experienced unfair termination of a

contract or denied the opportunity to work on a contract [#3, #7, #8, #10, #13, #23, #24, #PT11, #PT12, #PT2, #PT3, #PT5, #PT8]. For example:

- The non-Hispanic white male co-owner of an SB-certified professional services firm stated, "I've been on a project with the County of Alameda. This is a few years back and we were the apparent low bidder but there's a clause in their specifications that states that there's a good faith effort that you have to do to get yourselves to bid. And we have to submit this documentation after we bid the project and we were thrown out of the project because we did not basically in good faith negotiate with a subcontractor on a public bid. I actually even went to the board of supervisors and one of their meetings and had to stand up and explain that, this is not a private job. This is a public works job. We're not to negotiate with subcontractors. We're not. That's good shopping to me. There's no way I can call this guy, his company and say, well, what do you think? Can you drop your... I mean, I'm asking him to drop his price, then he's going asking me questions. Well, okay. Well, where am I at? Well am I 5 percent, 10 percent higher. And once I tell him that he's 10 percent higher, that's bid shopping to me." [#3]
- The Black American male owner of an MBE-certified professional services firm stated, "For an example, we sit at the table and the current project was, okay, so you're going to be X, Y and Z, and we're going to share the personnel once you win the contract. Well, when the contract is won, they come up with excuses as to why you get all the low-paid employees, and then they cut back and they say, well, we're not going to give you the whole percentage now. We'll give it to this contract, and all the games that are played once the contract is won." [#7]
- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "We had one situation in [city] that got me very upset about a job where we were asked to do the engineering for a project. It was [project name] shared through the city. And when we were engineering, we found a bunch of locations that are flooding areas, where the pipes weren't done properly and they're going to upgrade the ramps. And so we gave our engineering recommendation about how they should modify the pipes and the area so they could not flood that part of the community. And then the prime and the client decided that they don't want to fix [the pipes] on the job, and then we were like, then why are you doing civil work if you're not going to fix that? This is unethical for us, do all this work here and not fix the drainage problems there. And then the prime and the city kind of made us shut up about it. And then we didn't get work continuing on the job because we were kind of beating our chest about this drainage issue that was in the community. And so we were kind of scoped out of the work after that because we brought up an issue. And then they end up building a project and it floods now. And so it was just like... Yeah that's one of the jobs where I wanted my name off of the job, where I was like, we gave you our recommendation. And people in the community know me, I went to the community outreach meetings and I told them we're fixing the flooding, right? And then the city didn't fix the flooding, and the prime didn't fix the flooding and so now I don't want to be part of that job anymore because you didn't... And they didn't give us any more work, they didn't finish the scope of that job either. We were supposed to do more engineering and they basically decided that they don't want to do that. Same thing with the other one, same thing with the other project in [city] where we were supposed to do a few pilot projects as part of a [project] master plan,

and we were supposed to do a few pilot projects, and we told the community, we were going to have a couple of pilot projects in the summertime. And the prime ran out of money for the pilot projects during COVID and more. And so then the city, instead of getting more money to complete what they were told the community you're going to do and re-scope it, they decided to scope us out of the job. And so I look at them both and I'm like, now you're embarrassing yourself in front of your community. You didn't do what [was] in your original scope, and you're not doing the original contract. But I can't do anything about that because I'm a sub. I think I've seen some of that. I've dealt with some of that. I hope it doesn't have to do with race or gender. No, I don't. I think it just has to do with them just mismanaging projects." [#8]

- The non-Hispanic white male owner of a SB- and ELBE-certified professional services firm stated, "I had that experience as a consultant from a governmental agency and they just terminated [my company's contract] because they didn't have the proper amount of money budgeted for proper inspection. And I was on an hourly contract and I got up one morning at 4:15 and my phone went off and there was a text that was sent the night before said, 'You've been fired. Don't come to work.' So I wrote him a letter, and it's the [government agency], saying you didn't properly fire me. You have the right to fire me but with 48 hours written notice, which you did not give, but that's all right, because if you don't want me to working for you, I don't want to work for you. Well then, they didn't pay me, so I had to sue to get paid. It costs me 8,000 dollars to collect 30,000 dollars. And there was attorney's fees in the contract and they had no right to withhold my money and I would've won in court. I just didn't want to go through it for another year and a half. So I took the hit, but I won't go back." [#10]
- The Hispanic American male owner of an uncertified MBE construction firm stated, "Well, the unfair termination of contract, I don't think that was anything that was racially motivated, but we have been terminated of a contract, based on availability of product, based on an error on the broker's part or the shipper, receiver's part. And we're ready to go. We signed the legally binding contract, which is the bill of lading. And we get terminated. And the only thing we get paid is a small bit of finances for just not using the truck, truck order not used." [#13]
- The Subcontinent Asian American male owner of a Micro- and SB-certified and uncertified MBE construction firm stated, "Sometimes I feel like there have been areas where it was not fully disclosed the reasons why I didn't get the project or why I wasn't being able to get something for the work that I've done and so on. And I honestly don't know if it all means because of my ethnicity or my - yeah, any of the, yeah, personal reasons. I do know there has been projects where friends of mine have got the same project, who are also individual business owners, and even though they were almost the same price as me. And just because they were friends they were able to disclose how much they - I mean, their - yeah, their cost for the project is and so on. So, yeah, we are really good friends. But how were he - he is a White person and a Caucasian, and I don't know if that really mattered or anything else, even though we have very similar experiences in terms of career experience. He's just one more year experienced than me and I don't know if that makes a difference. And the specific contractor, even though he approaches both - or, I don't know how many he approaches - I know both of us, and he gets an estimation from both, and a couple of times he has gone with that person. And it is a very [tricky] situation because he is also my friend." [#23]

- The Hispanic and Native American male owner of a DBE-, 8(a)-, SB-, and MBE-certified construction company stated, "Although they were handled with zero deference to minority status or DBE status or anything like that, we've had it where there was a change in management for a very short period of time on the jobs and we had a couple incidents that weren't necessarily - I mean, they were - we had a [vehicle safety incident], but it was such a fluky accident and it was inside the lane closure, and it - one of the guys took over a can. Anyways, we had been fine with this contractor halfway through the job and probably a month or so into it, two months into it, and then the next guy that called, I guarantee you - now, of course I can't - I mean, how do I prove it. Right? He didn't say the words. But he was so onerous about expelling you that I know he wouldn't have started like that, with cancelling your - 'We'll cancel your contract and sell you down the road' and - over what happened. And I had to stop him and say, 'You need to back up because I've been doing this for a long time and this doesn't qualify for what you're telling me. And I don't know why you're telling me that. But I think this conversation is going to end if you don't stop.' And so, he kind of didn't stop. And luckily, the guy that was doing it before him came back. But we've had situations like that before where they thought, 'Well, you know, what are you going to do about it? We're going to -' because a subcontract is a very powerful thing and they have lots of rights in those contracts." [#24]
- The male representative of a professional services firm stated, "We did some work for Caltrans. So it was a deliverable based contract. We have 12 different deliverables. Each deliverable was completed on a timely basis. So for about 11 deliverables in 11 months, we completed one. And the 12th deliverable which is the largest one, which we were working on it for a while and we completed it all. So Caltrans did not wait, and they hired some, they hired another company which they decided to pay them. In fact they took all the remaining contract. So, and then we disputed the fact that they said we hadn't completed our work and telling we had, they said, 'Well there is something wrong with the document so we can't fix it.' And [we're] like, 'You can tell me what is wrong, then we'll fix it for free.' And they wouldn't say what is it. They would not say what is wrong. They said, 'No your time is up.' And that's it. But the times wasn't up I think because they extended the contract for several months. And the due date is not really until July. They artificially picked up the [due date]." [#PT11]
- The male owner of an ACDBE- and DBE-certified goods and services company stated, "I was a sub, ACDBE sub for the payphone contract at [airport]. And payphones were becoming less. It was still profitable, but it was more cell phones came in, they became less and less profitable. And I contacted the airport to find out about when it was coming up to bid. It was one of those airports that was small enough that I actually could bid directly on it, but I was a sub with [company], who had the prime contract. And so it was coming up to be, what do you call it? Coming up to bid and [the prime contractor] said, 'Hey, we're going to try to negotiate with the airport directly, get better terms, make it more profitable for everyone, and we'll let you know how it goes.' And I said, 'Well can I be part of the discussions? I'm a sub here, and I liked to be part of it.' And, and they said, 'No, no, we're going to negotiate it. We're going to come back. And I think they're going to give us some better terms, and they don't want to go through the whole trouble to put this up to bid.' And so I said, 'Okay.' So they came back, [the company] came back and said, 'Hey, we negotiated with [the airport], and they are going to drop the DBE requirement for this contract.' And as a revenues, it just

didn't meet our financial model for being able to have this with another sub on this and so it wasn't going to be feasible for us to even have a contract with this DBE requirements. So the airport dropped it. So basically, we'll be taking over your phones and your locations. And I said, 'Hey, this isn't fair. It was supposed to go out to bid, and you said you were going to negotiate on our behalf to extend the contract.' And they did, they extended the contract, but then they dropped the DBE requirement. So I went to the airport, and I said, 'Hey, this is not appropriate.' And they said, 'We just felt it was in our best interest to drop the DBE requirement.' And basically, they didn't say much. So everything, every correspondence I had, I took down. I said, 'Well, I'll bid on it, put it out to bid, let me compete. It's a public sector contract. Let it compete.' They said, 'No, we've already made a decision not to put it out to bid and stay on the bid list maybe next time, we'll put it out to bid.' And so then I went to the FAA Office of Civil Rights and said, 'Look, this is what happened. They were supposed to negotiate this to extend the contract with me on it, and instead, they kept me out of the room, and they negotiated me out of the contract to make it more lucrative for themselves, and the airport went for it, despite this DBE requirement.' And then I even went to the airport and said, 'Hey, I'll compete. Let me compete, put it out to bid.' And they refused to put it out to bid. And I sent all of this documentation to the FAA Office of Civil Rights, and they were a toothless tiger. They just basically said, 'The airport can do what they want to do with it being in their best interest, and they still have a DBE program for other things. And as long as they meet their goal, that's all that counts.'" [#PT12]

- The female owner of a DBE- and WBE-certified professional services firm stated, "What happens if the prime fails, loses the contract and subs are not paid? Can bonding be used to ameliorate that issue?" [#PT2]
- The Subcontinent Asian American male representative of an uncertified MBE professional services firm stated, "The other thing is that they renege on their commitment to the contract. What happens is, and I'll give you a pretty good example of a contract I had out in [county], at the [location]. That is, we originally had equivalent- I'm just getting the numbers out here, we just had equivalent to 400 hours of work. Then three years later, and it's a four-year contract, they decided they didn't want us to do the amount of work we did. Then they put us on what I would say, equivalent to 50 hours of work. That's a huge difference. Just as of two weeks ago they told us we had five hours of work. That is not even- I spent more time preparing the documents for the bid because the enormous amount of documents that Caltrans requires. It's not worth it." [#PT3]
- The female owner of a WBE-, DBE-, UDBE-, and SB-certified professional services firm stated, "I lost half of my contract because Caltrans keeps adding on things that they wanted us to do, but wouldn't pay us for it. And I just got out of one for [county], basically, because it was something that should have taken about 500 hours of work. And then they cut it down to two days of work and then they cut it down to five hours of work." [#PT5]
- The Black American male owner of an MBE-certified professional services firm stated, "I've gotten public work in [city]. It was associated with the [construction project], with the shopping center and you had to be MBE certified, right? So there is only one game in town when it comes to getting certified for that. And I ran into an issue where the head engineering firm wanted us to do work out of scope, and I refused to do it. So they got rid of us on the project, didn't pay us and hired some other firms. And the MBE organization,

there was zero recourse. They didn't help, wouldn't respond to emails. So I'm almost hesitant because it seems like the minority participation goals, they're there to look nice, right? There's no real advocacy there once you actually get into it. So, that's really my biggest gripe." [#PT8]

- The Black American female owner of an uncertified MBE professional services firm stated, "I actually just had a contract that was pulled because the organization, what they said was, we've decided to go in a different direction. The issue, in truth, was part of the process we were doing for business process re-engineering was pointing out we could fix your technical problem, but you have eco-system problems. You don't know what the requirements are, this whole issue. So, we were holistic in our approach. The executive director loved what we said, but we were reporting to one of his direct-reports and she practically freaked out and lost her mind. So, they needed us. One of our partner vendors was like, you know you scared them to death, right? Yeah, but when we're talking about taxpayer money why wouldn't you want the best and the brightest to bring that information to light. It doesn't make any sense. With [industry], since this is Caltrans you guys can take this in. I went to a meeting where they were doing the relocation services. The way that RFP was written was that you had to have a PMP on your proposal. So, I drove from southern California to Fresno and I was the only PMP in that bidder's conference. So of course, I was courted by everyone. So, this one team, they won, and I was on their team as a PMP-and they put it in writing, this is how rude they are. Well, we know we used you to get the contract, but we have someone who just got certified as a PMP. Now they've been certified for three months, I've been certified for ten years. They swapped us out. I went to the [government agency] and put it all in writing and said, absolutely not. And the [government agency] did nothing. They said, oh yeah that's wrong. They didn't hold them accountable in any way. They didn't cancel their contract. They didn't reduce their contract by the amount that should have come to me as a small business. Just offensive. The fact that they let them swap out a PMP that had been certified for ten plus years, who is adjunct faculty in the subject matter, for someone who simply passed the exam three months ago...are you kidding me." [#PT8]

5. Double standards. Eleven interviewees discussed whether there were double standards for small, disadvantaged firms [#5, #10, #23, #26, #35, #38, #45, #55, #59, #AV, #PT8]. For example:

- The Black American male co-owner of a WBE-, MBE-, and DVBE-certified construction company stated, "Always. You always feel you always have to go in there, not just as a contractor, but it's got to have some other skill that may not even be related to what the job is. Like, sometimes if I walked in these places tap dancing, that might make them hire me." [#5]
- The non-Hispanic white male owner of a SB- and ELBE-certified professional services firm stated, "I know people that have gotten away with things they shouldn't have gotten away with and done very poorly on performance. I think that happens in a lot of cases and I don't know why that is, but I don't believe that they perform per the requirements, but they got away with it. So yeah, I guess there's some double standards out here." [#10]

- The Subcontinent Asian American male owner of a Micro- and SB-certified and uncertified MBE construction firm stated, "When I try to work through other contractors on a public project, let's say Caltrans projects and so on, typically the answer I received - and there's not very many actually; there's been only two or three projects where I showed interest that I wanted to get into the Caltrans project with the contractor. And typically, they felt like the experiences, or the career experience, which is about 13, 14 years now, that I have may not be sufficient to work with Caltrans. And I really didn't understand that response. I don't know if that is true, if Caltrans looks for a specific number of years of experience for a design engineer to be subcontracted on a - or with a prime contractor or somebody who's not even directly in contract with Caltrans, but still they kind of require that kind of experience and asset. I do not know. But I don't think that is the case because I've known other people who have worked on Caltrans projects and they have only the same experience as mine, not anything different." [#23]
- The Middle Eastern American male owner of a construction company stated, "I have observed women being treated as a less knowledgeable or less applicable than men by the supplier for example. For example, the lady in front of me is asking for some materials. And I kind of understand what she's asking but the salesperson would undermine her as if she doesn't know what she's talking about when in reality she did. So, did I personally experience it happen to me? No. To clarify the answer to this question I believe that there is double standards at the level of performance. However, if the minority does a good job does not give the chance for any criticism or double standard. Maybe I'm a little too harsh being a minority myself. I've always tried to make it better so that there is no excuse of anyone pointing out even the smallest thing. But I've always believed double standard that if you had done a better job nobody will catch you on it because this is the standard I put for myself personally." [#26]
- The non-Hispanic white male representative of a majority-owned construction firm stated, "With the performance of work. I know that the DBE sometimes - they get a - I don't know how to say it. An inspector will see that it's a DBE company and they will expect less already. If that makes sense. know that I've seen it. I've been on jobs where they do that. And then they - I don't know, sometimes they seem to push 'em harder than then would a normal - a non-DBE company. Not push. They're just more strict with how they perceive the spec. Because they don't think they know. And they think they're trying to teach 'em something. But really, they're just making their life hell. when people see that DBE moniker on people's names, that's [all] sometimes some people view." [#35]
- The Black American female co-owner of a DBE- and DVBE-certified and uncertified MBE construction company stated, "Definitely double standards in performance. Again, we know a lot of people do the same job we do, and, you know, we [have]taken over for them or they were taking over for us, and there's different expectations. So, we may be working this block of the project and they're working three works over for the same contractor... different aspects. We will drive through closures, and, you know, we'll look - my husband will always say, oh, that's not set up right, that's not right. But they get away with it, whoever they are. There's no - but, you know, if it's us, the inspector's out there, like, it's just a whole thing. So, definitely there's a different standard, for sure." [#38]

- The non-Hispanic white male representative of an SB-certified professional services firm stated, "I think it sets us apart a little bit, both in a good way and in a bad way, as I previously mentioned. In the bad way, I feel like some agencies or clients feel that being an SBE, 'Are they capable of getting the work done?' I would say that it's more along the lines of they don't necessarily feel that we can perform to the level that they're needing." [#45]
- The Hispanic American male owner of a DBE-certified construction firm stated, "I think there's a double standard when it comes to performance. Some of the smaller agencies that do in fact employ minorities tend to get passed over the second time around in favor of those that are predominantly White. So, the management was made up of multi races, but when I came time for the rebid or for the RFP to come back out, they were passed over for a company that's predominantly White." [#55]
- The Asian Pacific American female owner of a SB-, DBE-, and WBE-certified construction company stated, "It is happening, it will not show in public, in outside. But I know as a Asian woman, Chinese woman, Taiwanese woman, in general, people doesn't think woman can do security system, building safety. Like a Black man or a Black woman can be in security guard, but it come to intelligence, because security system is an intelligence system, people doesn't take it right away. If a white male and a color female, it's very easy. People just think So a woman doing this? I not say it out loud but it is happening. I, myself, even now, after all these years training and working. I still have people say, oh, you know how to do it? You know. I say, yeah. If I study, I can be a doctor, right? If I study, I can be any professional. I think better now or because I am mature. I'm older. So, people... I can talk smarter, better express myself and I can joke about it or be serious about it. But I see whatever, the negative comments. So far people, some say it out loud. they say, oh, you can do this? Especially when I take a phone call and then people ask, who is coming? I say, I am. This morning, we got a call. We don't know who this is, and this person insist to talk to the head of technician. The head of technician, and I take the call and say, I can talk to you. And he hang up phone. Can't someone think I am the head of technician? They assume. And it happen before. So, my office staff say, this must be a sales person." [#59]
- A comment from a WBE and MBE Hispanic American-owned construction company stated, "It is hard being a young company even though you've had the years' experience too. Especially with bidding because you have to prove yourself to the primes to let them know you're qualified because they don't know who you are." [#AV8311]
- The Black American female owner of an uncertified MBE professional services firm stated, "The problem I see is that we're still treating small businesses, and especially small businesses owned by Black people in particular, like it's some kind of affirmative action request. When we come to the table with the same credentials and experiences. Sometimes superior credentials and experiences. And until you start to use that messaging within an organization, we're going to continue to have problems. So, for example, I had-I'm a certified project manager, I'm a PMP, I teach project management. I worked for the big eight back in the day. I came out of corporate America. I'm capable. Have a graduate degree, some graduates work, they still want to act like I'm somehow not as qualified. Like I went through all those institutions, and they just gave me credentials and it's ridiculous, it's offensive. So, I had an instance where a white gentleman said, well I'm not a certified project manager, but I've managed lots of projects. I've gotten old and I just don't have the tolerance for it,

and I said, well I've managed lots of projects, I'm a certified project manager and I'm an adjunct-faculty in the subject matter. So what discussion are we really supposed to be having? Like I've been working high-speed rail for at least a decade. Every time I see stories about how it's going badly-or poorly whatever the right word is, it irritates the hell out of me. Because as a project manager, even not being privy to everything in the process of getting a project moving, I know there are things that are wrong. I could probably put my finger on them, and I have the technical background and the disposition as a truth-teller to help them straighten it out. I can't get a toehold, I can't get people to listen, they want to act like they don't understand. Well, what is it that you do? Really? Well let me tell you what I don't do, I don't mess up the way these people who have been in charge are messing up stuff. they're not respecting that we are qualified as commercially useful functions. I think it's particular to professional services, but I think it's true for construction too. Particularly for professional services because you don't have to belong-when what we do is intellectual work. I don't have to be a part of a big firm for that. Right, because your brain is your property. Because it's not even a question, it is the attitude of the people in the organizations where they, for whatever reason, don't see it. It's been messaged to them like it's some sort of affirmative action. It's not, it's about equal opportunity and getting people to recognize that in some cases we have better skills, qualifications, capabilities than the people they think look like project managers. Or look like the outreach people. Part of the issue is they spend so much time trying to make us ready and I'm like, I need billable time. I don't need to be coming to your workshop. Your workshops are not going to supersede what I've learned at UCLA or Carnegie Mellon or working at [the big eight], it's not. Start firing some of the people who are in procurement, who are in the way. Or holding them accountable or holding the people within the organization accountable. Because it can't be because the other thing that happens is, oh we'll include you, but you're a note-taker. I've got 80,000 dollars' worth of education, 20 years' experience. Because I need to live in doors...but that, it's just disrespectful. I don't know how...it's got to come internally from their organization. And then when you get in there it's even worse. You have to prove you're competent and you threaten the people that work there. You get pushed into a corner. So, you're caught, you're either treated like you're some dumb affirmative action hire or if your skillset really do stand out then your client is like, oh you're smarter than we really wanted." [#PT8]

6. Discrimination in payments. Slow payment or non-payment by the customer or prime contractor was mentioned by five interviewees as barriers to success in both public and private sector work [#5, #12, #38, #50, #55]. For example:

- The Black American male co-owner of a WBE-, MBE-, and DVBE-certified construction company stated, "All of the other vendors were building a house in Studio City on Laurel Canyon and all the other vendors got paid, but me. To the point where I had to put a lean against the guy's property. You run into larger vendors who, and maybe this is because they don't know you, I don't know, but who will require different forms of payment, or won't extend you the same credit opportunities that are given to other businesses." [#5]
- The Hispanic American female owner of an MBE-, WBE-, and SB-certified professional services firm stated, "Not [sure that] it's really discrimination, but I've had clients for instance, where they haven't paid for two, three, four months. Again, I don't know if that's

because I'm a woman, I don't know if that has anything to do with it, but sometimes I feel like if I was a man and I sent her a reminder, it might be taken more seriously or it might be addressed more promptly. Whereas I feel like sometimes, and again, maybe I'm just trying to tailor my answer to fit the study, but I sometimes do feel that things would be different if I was a man, same thing with my rate. I remember when I first started doing this, my rate was pretty low and I had several even just clients telling me like, 'Hey, well, I know a guy that does this and he charges twice what you do.' So that had to be slowly ingrained or had to adapt to that and be like, 'Hey, I actually can charge more.' And I don't know what if that's just the way I valued myself or what... But I do feel like men are able to more confidently ask for a higher rate, altogether and then maybe work their way down, whereas I feel like maybe as a woman I didn't feel as confident doing so, but again, I don't know if that's a woman thing or if that's my own personal thing." [#12]

- The Black American female co-owner of a DBE- and DVBE-certified and uncertified MBE construction company stated, "Definitely, I feel like I'm dealing with a guy right now." [#38]
- The Hispanic American male owner of an uncertified MBE construction firm stated, "I haven't got paid yet from other jobs and that's about it. I haven't got paid for a couple jobs that I worked for I haven't got paid yet. I mean the guys; they were all white guys that were there at the job site. And like another Mexican dude, the guy that was there and I think that they - I feel like they could just get over on us and we couldn't do nothing about it because we were small and we were Mexican. We don't know anything." [#50]
- The Hispanic American male owner of a DBE-certified construction firm stated, "So my only issue is like right now is they're not great at paying every month on time. So, they're usually late even though they're a multibillion-dollar company. As a small business, I have two invoices right now that are 30 days ... that are just past due, and I don't even have POs to get paid. So that's the other thing that they do is to weed out those of us that are DBEs, they'll wait us out because I have vendors that I have to pay. But they're not - there's no incentive for them to pay me on time. So, I send off my evaluations, and then whenever they decide that they want to pay, they pay. But in the meantime, like myself, we tend to go under because we can only hold out so long before we get paid. So that's the big thing is that they don't understand, or they don't care to understand, that a DBE is a small business that needs every dime they can get, so if they're providing a service, they need to be paid on time. And I get that they may have to wait on their money from whatever property or service that they're providing. But they're a multibillion-dollar company. They can pay the small businesses that are providing their services so they can continue to operate. But there's no incentive for them to do that because they're not - what am I going to do? Take them to court? I can't afford that. They have an army of attorneys. I don't have, you know, I'd have to hire a law firm or whatever. Typically they're usually pretty good about paying the contractors. But I think that the more predominantly white ones get paid faster because they have, obviously, better relationships. They're less likely to cause a problem. Let's put it that way." [#55]

7. Predatory business practices. Sixteen business owners and managers commented about their experiences with predatory business practices [#8, #17, #18, #24, #37, #50, #AV, #PT12]. For example:

- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "That happens. Sometimes that can happen even because there is an augmented staff person from that company already with the agency. So there is somebody who's augmented staff helping with the proposal or reviewing the proposal or helped with previous proposals or is part of the agency already. So we've seen some of that. We've seen some of folks who know about a project coming up through just connection. We've seen projects rebid when they're not happy with the bid results. It's interesting because some things that larger firms can do that we did not know were possible as they propose on stuff. We had a firm once who proposed in an add-alt. They just said that we could do this thing for this additional price and it was unrelated to any of the scope, it was only something thing that a large firm like theirs could do. So then they won the job, but I wouldn't call that manipulation, they just were better. I can think some more, but different things, all kinds of stuff happens Just like large companies kind of controlling what the agency puts out by also being augment staff with the agency? Super weird how that's allowed sometimes. Like VTA, for example, a lot of staff is augment staff and they hire the same company for the prime opportunities and all the projects go over budget. And so it's the same people. And then if someone from the public agency leaves, they get hired by the private agency because it's all one big... They even got audited by the, what's it called? The California... What is it? And they got caught for doing that and they're trying to get away with... So I see some of that. I also sit on VTA citizen advisory committee so I see this all from a different lens as well. So VTA does a lot of weird issues augmented staff. Also, same companies also doing the work. And we see that in the auditing, that's a separate conversation. That happens a lot with big agencies like that. Other malpractice, we talked about a lot of it already, I would say." [#8]
- The Hispanic American female owner of a WBE-, MBE-, SCMSDC-, and DBE-certified goods and services firm stated, "It was resolved. It was a large struggle and the situation was that the prime was saying that I was overcharging. And I was not...I handed up a bunch of different quotes in the process. The prime had done that to make it seem that way, but the actual thing is they were requesting different quotes for different things. We had already been awarded the job and we were doing the service and they kept on changing the scope of work. And so, every time they wouldn't sign the agreement. You have so many days to have to sign an agreement with each other and it had already gone on a year. Even though that I was awarded the amount they refused to sign the agreement. Because there was nothing signed, they felt that they could go ahead and petition to remove us from the contract. And I have to go back and explain to them 'This is the scenario.' And it went through a public hearing. I won the public hearing. But it wasn't a situation that was easy, and I think it had to do with a lot because I was a minority woman business. They felt they could take advantage of me and I had to show them that that wasn't the case. And I needed to come up with having the organization itself to be able to see and then resolve the situation completely and telling the prime to stop doing what they were doing, that there was a contract that was in place and they had less than 11 days to make sure that the agreement was signed. But that shouldn't have happened. The agreement should have been there already once it was already - once the kickoff of the organization started to do the work, there should have already been something in place. Me not knowing it and being a small minority business and being in the situation that I was in, I didn't have a lot of clout to be

able to say something at the beginning until I started learning and finding out as the contract got - was launched and in place.” [#17]

- The non-Hispanic white female owner of a DBE-, SWBE-, and CBE-certified professional services firm stated, "About four years ago, I had a contract. We work a lot with Flat Iron. It's a large company. We do several contracts a year with them. In one of the particulars, we had money that we were not getting - on one of these jobs, it was one of the short-paid, then it was this problem, that problem. It came to the point where we were owed about \$65,000.00. It went months and months and months. The processes in my office have gotten better and better, but at the time, the process was, 'Well, let's not make anybody angry. Let's just wait for the money.' Well, I couldn't wait any longer. Plus, the sheer fact was I shouldn't have to wait. So, I simply told the girls in the office, 'Send them a letter letting them know that if they don't pay within - and give them a date, like the next ten days that we don't get that money,' even though out of all the contracts we had with them, this was a small portion of it, that if they didn't pay that they were going to get a stop notice put on. Now, a stop notice, everyone's like, 'Well, you could always put a stop notice on a project.' As soon as you as a subcontractor put a stop notice on a project, the relationship you have with that person is gone. It's done. They are so angry about it, so even though you have the right to do it, if you do it, you're in trouble. So, I said, 'Just threaten them with it. They'll probably at least respond.' Well, I didn't get a response. So, I had her fill out - in the ten days, it didn't happen. We sent another email. No one responded. Four or five people got the email. No one responded. We sent them the stop notice. Now we did not put the stop notice to the owner, but we sent it to them so that they would know - they thought it probably went to the owner, because that's usually what you do, to the owner and to them. I got a phone call from their general - I think he's like a general superintendent over it, and he worked well with us. He got on the phone and he said, 'You need to take that off.' I said, 'We need to get paid.' He said, 'If you don't take that stop notice off, I will make sure you never get paid.' He said, 'That \$60,000.00 that you were trying to get, I'll make sure it takes us 4 or 5 years to get it to you and we won't do any more work with you.' I've relayed this story, without naming names, in a DBE meeting. But that is classic and it's not unheard of. That is not like a one-off. That is something that happens all the time. That's against the law. I went out and negotiated a contract with another gentleman that my husband had been doing business with him for a long time, but we also were getting screwed out of money by like this big company. So, I said, 'We're tightening up everything.' I went out to talk to him, because he wouldn't sign the contract. So, I went to his office. He said, 'I'm not signing this contract. I have never had to sign a contract with you.' I said, 'I'm sorry. We've had some issues in the past with other contractors.' He says, 'Everyone in the industry understands what you've had your problems with, but I'm not that person. So, if you want me to sign this contract, you can go shove it.'" [#18]
- The Hispanic and Native American male owner of a DBE-, 8(a)-, SB-, and MBE-certified construction company stated, "a subcontract is a very powerful thing and they have lots of rights in those contracts. And the unfortunate part is they will actually not issue you your work - you will - even though you were named, if you don't agree with what's on the subcontract - because most of them make mention of it in their advertisement when they send it to you, that their contract is available for you so that you can see it ahead of time. And I've seen them use it in a Caltrans substitution hearing that Caltrans allowed that to be

a condition that was allowable for cancelling somebody's subcontract. And then you'd have to go through the substitution - they would then go through the substitution hearing. I've also seen it where on our quote on bid day it says 'Bonds are excluded.' And I had a contractor - because they put in their advertisement - again, it says, 'We may require bonds for certain subcontractors' or some language similar to that. And since - you get to the job and they issue the subcontract and they want your bond, you go 'Oh, I can't supply it. I told you I couldn't supply it in my quote.' And they say, 'Well, we thought you meant cost. We thought you meant bond cost. And we're going to pay for the bond.' And you say, 'No, it doesn't say bond cost. It says bond is excluded.' And I have also had that be a reason for Caltrans to allow a contractor to cancel your contract. And in my mind that's categorically wrong. I mean, it's abusive." [#24]

- The Black American male owner of an uncertified MBE construction firm stated, "I can't tell you when I had a subcontract. I was given a verbal employment contract for a company between late 2019 and early 2020. And then - but in terms of the relationship I couldn't get the owners to sit with me and sort of define what the relationship was in writing, I wanted a more firm rules and responsibilities contract between them and me. And I wasn't able to get a straight answer from them so I got turned off from them and pulled away from it and started doing my own thing We couldn't come to an agreement. There was no contract and he was just going on and on and on about a contract, so I pulled out of it and started doing my own thing and then the pandemic hit." [#37]
- The Hispanic American male owner of an uncertified MBE construction firm stated, "Some companies they pay you hourly. They'll pay you - ok. So when I get dispatched somewhere they will say ok, I'm getting paid per ton or hourly, one or the other. So what these companies do is they at the end of the day if you get done quickly with work then they'll pay you hourly. They'll switch it up on you. And they know that I need the work since I'm a little I only have one truck. Everybody knows everybody in the dump trucking [industry] over here. Everybody knows each other. So like they know that I'm a new guy. We try to talk to them and they're like no, that's what it is. You're a new guy. Take the hit. Sometimes they'll be like ok. Get here at 7:00 in the morning and then that's when your time is supposed to start. When they tell you to get there, that's when you get there. But they call like 20 - 30 trucks. Right? And then they load the trucks up. They load the trucks up but then your truck don't get loaded till like 9:00. So they switch it up and say ok, well, you got loaded at 9:00 so that's when your clock started instead of 7:00 when you got there." [#50]
- A comment from an MBE Hispanic American-owned professional services company stated, "I worked on 2 projects with but we had issues with them and since that they have blocked us from getting jobs because they don't like [working] with a large national firm." [#AV181]
- A comment from an MBE Asian Pacific American-owned professional services company stated, "There are some firms that do pay to play. We really hold our integrity as a top priority so we may lose out opportunities because we do not get political. We focus on the best way to do our work and help our clients." [#AV166]
- A comment from an MBE Hispanic American-owned construction company stated, "C MBE Hispanic American 8167 Marketplace Comments: There is a lot of new trucking companies and they lower the price and they can't perform and leave customers stranded." [AV28167]

- A comment from an MBE Armenian-own construction company stated, “The big companies are pushing out the small businesses by their unethical practices. Big businesses select their favorite drivers first. I am independent so I am at their mercy. I'm trying to get certified as a minority business owner. Because I am [one].” [#AV28539]
- The male representative of an uncertified DBE and MBE firm stated, "On any construction or demolition site, the trucking and hauling of material, whether it be into a construction site or out of a demolition site, tends to be the most expensive portion of it. Due to the fact that this is the case. Most contractors have to bid accordingly to make sure that they cover this expense. However, there is nothing to guarantee any job security for whatever truck gets hired onto that project. So if there's an instance where you have a truck on a job that gets damaged by an excavator loading it, or that has questions about payment that they haven't gotten paid, whatever it may be. Anytime a red flag is raised, guess what? You're automatically off that job.” [#PT12]
- The male representative of an uncertified DBE and MBE firm stated, “Because there are more than enough people in need of work, and there is nothing in place that says that if you're going to contract a truck to be on this project something has to have happened or some sort of investigation on why are we taking this job off, or truck off the job?” [#PT12]
- The male representative of an uncertified DBE and MBE firm stated, “And so the easiest way to go about this, honestly, would be to separate the trucking from the bid of a contractor for a job. It's to be able to work directly. No contractor contracts trucks directly, they all go through a broker.” [#PT12]
- The male representative of an uncertified DBE and MBE firm stated, “And the broker takes a percentage of what you make, which ultimately affects what the truck is making. If a contractor bids a job saying that the trucking for him is going to cost them, we'll call it \$100, and then the broker takes 10% of that, there is nothing to the truck[ers] that states that this is what the contractor bid it at and what you should be getting paid at. So for all we know we can be getting paid \$79 an hour.” [#PT12]
- The male representative of an uncertified DBE and MBE firm stated, “Where it's honestly, given the expenses, sometimes it just doesn't make sense, but it's better for people to work than not work at all. You still got to put food on the table. But at the end of the day, honestly, I think that Caltrans should look at separating trucking from projects, or making it an extension of it where people can go ahead and bid for the trucks, or be able to contract directly, just because that's such a big issue. You never know how many hands are in the cookie jar.” [#PT12]
- The male representative of an uncertified DBE and MBE firm stated, “I'll put it to you like this, just an example, real quick, I was on a job where the contractor doing the job, ended up being the broker for the job, which I don't see how that's feasible, because now you're saying that a truck has to pay you to give him work for a job that you're doing. So now I have to pay money to get the job.” [#PT12]

8. Unfavorable work environment for minorities or women. Eight business owners and managers commented about their experiences working in unfavorable environments [#1, #11, #12, #13, #14, #26, #38, #52]. For example:

- The non-Hispanic white female owner of a WBE-, DBE-, UDBE-, and SB-certified professional services firm stated, "I've had it happen to me, not with Caltrans, but with another agency. And I slapped him down with words. I just said, 'Oh no, you don't.' Because he told me... This guy told me one time, he goes, 'We don't allow women on a construction site.' I go, 'Oh, I guess I have to shut you down until you allow me to come back on.' Because what I did for a living was a requirement for the project to have, it's conditions of approval. So you just have to know how to play poker, and you shouldn't have to, it should be all out in the open and everybody is even, but it's not that way." [#1]
- The non-Hispanic white male representative of a Native American-owned MBE-, SB-, and Micro-BE certified professional services firm stated, "Obviously, I haven't experienced that, but I've seen it" [#11]
- The Hispanic American female owner of an MBE-, WBE-, and SB-certified professional services firm stated, "Something I can bring up is for example... Again, when I was working for a company years ago, and I was breastfeeding, there was no place for to pump while I was at work. And because I took public transportation, sometimes I literally had to do it in a bathroom stall, you know what I mean? Whereas I feel like now 15, 16 years later they have a room, you can go into a private office and take your 15 minutes or whatever you need to do that. But again, when I was a young mom, 16, 17 years ago, I felt like having to do that was seen by my employer as an inconvenience, it would be like, Oh, you have to go do that? How long is it going to take? Or why can't you do that at home? It's like, My boobs hurt and literally leaking. So again, like if someone doesn't have kids or a partner that is doing that, then they don't understand the physical necessity for a mother to have to go pump her breasts so that she can get the milk out. I remember that being like super uncomfortable and there were times where I would drive and I would go do it in my car, but it's like, really? You know what I mean?" [#12]
- The Hispanic American male owner of an uncertified MBE construction firm stated, "Well, this has happened to my business partner and myself. We've gotten pretty nasty remarks, bad attitudes, primarily, when they see a minority enter in their facility. And I don't know. Maybe it might be a region that's primarily Caucasian. I mean, obviously, I'm not a woman, but I've seen facilities that do not have a women's restroom readily available. They have a Porta Potty, but they don't have something that a lady can use. Or they'll keep us at a location for extended hours and not allow us to enter their facilities, based on COVID this, COVID that, and we can't use the restrooms." [#13]
- The Subcontinent Asian American male owner of an uncertified MBE construction firm stated, "You know, between the worker[s], they always joke around, but I always sit down and talk to them because I came from minority myself. I came to this country when I was seven years old from overseas. So I will not let this happen to our business." [#14]
- The Middle Eastern American male owner of a construction company stated, "My experience was with race. And it was not to me but to my team, my workers in my presence. So I have seen comments being given to the team that are under my supervision. For being Hispanics for example, for being less educated. That I have seen. And I've taken appropriate action with the upper management of the entity, of the client. And appropriate measures were taken. That I've seen. So does it exist? Yes, it does exist. I personally probably look at the cup half full all the time so I never took it personally if I heard a comment directly to me

or not. I always took it positively. But it does exist in the industry. Gender discrimination and race discrimination” [#26]

- The Black American female co-owner of a DBE- and DVBE-certified and uncertified MBE construction company stated, "Yeah, I definitely think there is. Like I said, especially with the change of the world, and we just have to be mindful of that. I think everybody has, like, their policy, but they don't follow it in the field." [#38]
- The Asian Pacific American male owner of an uncertified MBE construction firm stated, "I'll be honest, we hang out with truckers. You'll hear it on the CB radio. Someone's talking bad about somebody else. But it's just a group of people that you hang out with... they're truck drivers." [#52]

9. 'Good ol' boy network' or other closed networks. There were a number of comments about the existence of a 'good ol' boy' network or other closed networks. Twenty-eight firms shared their thoughts [#1, #5, #7, #8, #9, #11, #12, #18, #19, #20, #21, #22, #24, #37, #38, #40, #41, #44, #46, #54, #55, #59, #61, #AV, #FG2, #FG3]. For example:

- The non-Hispanic white female owner of a WBE-, DBE-, UDBE-, and SB-certified professional services firm stated, "In our industry, as with Caltrans, it's an old white man's kind of job. they only pick their friends because that's who they know. Now things have been changing through the years, thank goodness, but it's still a good old boy network. So, when they see a woman, it's not the same respect as one of their cronies. And I know that with minorities, because I've seen it, but I haven't ever had it happen." [#1]
- The Black American male co-owner of a WBE-, MBE-, and DVBE-certified construction company stated, "One of them is, for example, we try to get government contracts and I am of the opinion as a lot of my peers is that many of those contracts are already given before an outsider such as myself even has a chance. In other words, a lot of those deals are made on the golf course. There's a lot of money changing hands. We know we don't have proof, but nobody's stupid. We know it. When you walk into a place, you see a bit, you see people who know each other. And that's where the job is going. And when you check on it, the job does do. No sour grapes. It's one of those things. One of the last ones we went to look at was for a training center. And when we pulled up, it was nice. And let me say this, the people there-it was not ethnically diverse. If you we're looking for Black and brown people. We weren't there. We just weren't there. I don't know if that's by design or whatever, but when you walk in... And I'm as liberal as a Kennedy, but I'll say this. When you walk into a place and you see all white guys in there who they all know each other, and the person who signs the contracts is practically taking the guy out to dinner... You know what I mean? And then when you spend the time and effort, we spent almost 2,000 dollars putting the bid together. And we had the Disabled Veteran advantage. We had all the advantages that you need, and they still gave it to somebody. They gave it to the person who, the commanding officer let it slip. It was going to go to him anyway. I don't try to look at things from a color of skin standpoint. I always look in the mirror and go, 'What could I have done to make it better?' So when you do everything that you know you can do and your bid is not just competitive, it's actually better, you can only assume, well, he gave it to his friend. And usually, those people on the golf course, it ain't us. But I'm not complaining. I'm just saying it's a fact. It's not us. I met a contractor last week who is white guy, who has his office in Compton,

California. Compton isn't a Haven for white people. It's black and brown. But he is scooping up all these government contracts for Compton Unified School District like it's nothing. I just don't think it's fair for people who don't look like me or us, or whatever, to improve a neighborhood that they really don't care about, if that makes any sense. We see the same old people getting all the work all the time. We walk into situation that is in every situation where it's a seven-figure deal, where you see the same old people. They just happen to be white. They know each other, they know each other's families, which in and of itself, isn't a bad thing. And they're shaking hands with the people who signed the contracts. And you go through the motions, you go through the steps that it takes for you in trying to get this contract. And you see it's the same people getting the contracts." [#5]

- The Black American male owner of an MBE-certified professional services firm stated, "Good old boy club. Again, it's an intellectual thing that you can't take a picture of and see it, but you know it's happening. No one said anything so blatant that you could say, hey, it's because of this, but you know. You know the undertone. You know the unwritten, unspoken, word that happens. It's just there and you know it, but you can't call it out, because if someone denied it, you have no way of proving it." [#7]
- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "I wear a suit every day to try and get in with them. I wish I was joking." [#8]
- The Asian Pacific American owner of a DBE-, MBE-, and SB-certified professional services firm stated, "Not towards any race or anything, it's more of the big firm taking care of each other, meaning you put me as your sub, I put you as your sub. And at the end of the day, all the big firms still win contract where the small firm and medium firm, they don't get a chance. Basically, that's how I'd say they hook up each other, so that's kind of like the good old boy system. But not for individuals, but as a firm." [#9]
- The non-Hispanic white male representative of a Native American-owned MBE-, SB-, and Micro-BE certified professional services firm stated, "That's probably the most prevalent thing of all the things you've mentioned so far And the good old boy network that I'm familiar with, it's not discriminatory against an individual. It's just, you're either part of it or you're not. There are women that exist in the good old boy network and there are minorities that exist in the good old boy network in my industry." [#11]
- The Hispanic American female owner of an MBE-, WBE-, and SB-certified professional services firm stated, "Something that I've seen, although I don't necessarily feel that that's excluded me in any way, but it's something that I'm highly aware of, and I know that in certain situations like firms will put out a bid for something, but they already know who they're going to hire, and they're rehiring the same ones and they have personal relationships. So, it can become challenging for someone that is qualified, but that's coming out not from that direct circle to try to break into it, so I definitely see that as being a real thing." [#12]
- The non-Hispanic white female owner of a DBE-, SWBE-, and CBE-certified professional services firm stated, "[One of the trade organizations] has been so good to me. I stopped being one of their first women presidents of that whole organization. I'd been on the board for the last seven years and kind of worked my way up there, but I was the first woman there. I was the first woman, and it was probably more because of COVID than anything, but

it's kind of telling. I was the first person, as a president, that did not get introduced to any of these unions by their labor people. I can tell you that I know that other gentlemen who had less experience and had less going on and less hands on had lunch with other unions. It's a different ballgame. If I call a contractor - I mean I've called field people at different companies and I've had them tell me to F off because they just don't want to work with me. So, when it comes to being a woman, you can't tell my nationality, but you definitely can tell that my voice is a woman. If you're old-school, you just - the men treat me differently. They treat me like I'm a 12-year-old child when I talk to a lot of them. There's nothing else to say. That's why I sit there, and I listen to the disparity and it's not good for any minority, but being a woman in this business is probably the biggest disadvantage because they just don't want - these men, most of these men, do not want a woman involved. I mean my project manager, I have a project manager, she's a woman. I have a couple women on the crew that come and go because there's not a lot of them out there. But I try to hire women whenever I can just because I feel like it's important for this industry." [#18]

- The Black American male owner of a DBE- and SB-certified and uncertified MBE professional services firm stated, "You know, but I can tell you that in the professional service area all they have - they will look around and most of the time they select their buddies or big companies, big companies that will hide them in case something happens. That's the discrimination there. They select big companies, and they select people that look like them. I've been in for interviews on projects where they didn't know that we were a Black firm, and the word would go around and about 20 people would come out just to see what a Black firm could do." [#19]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "There's always gonna be, I think, a good old boy network, but I don't think it's powerful or as big as what it ever used to be. And there's so much opportunity." [#20]
- The Hispanic American male owner of a DBE-certified and uncertified MBE construction company stated, "The same DBE company getting all the work, because - And I know that because I at one point used to work for the company. And so, when you have trips to Vegas and you take all the guys out, and you throw a big Christmas party with free TVs and free this and free that, you start to build the good ol' boy network, y'know?" [#21]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "I've been the beneficiary, I'd have to say, too, sometimes with that I'd say." [#22]
- The Hispanic and Native American male owner of a DBE-, 8(a)-, SB-, and MBE-certified construction company stated, "You don't know when you're excluded from it. I've got to believe it exists, and I couldn't tell you why. I do know - again, from my observation in certain companies - their hierarchy and help does appear grossly that way where, again, I get along with lots of people doing lots of things because I go from administrator-owner guy with the insurance company and the bank and the bonding company to I'm in the field and I'm talking to my working guys, and I talk to the other guy's working guys. And I notice that their clique of people on the other side, the prime contractors' categories, there's certain cliques that are just not very diverse in color. And so - to put it in some other way. And then you start looking out from there and you go 'Yeah, it looks like that's a pattern.' Again, I don't have any proof of that. It's just my observation, the fact that I'm 60 years old and I've seen a lot of stuff. And I'd be surprised if it wasn't happening." [#24]

- The Black American male owner of an uncertified MBE construction firm stated, "Definitely there is a kind of a clubbishness out there between architects and engineers and contractors but I'm not sure if it's race-based or just familiarity-based." [#37]
- The Black American female co-owner of a DBE- and DVBE-certified and uncertified MBE construction company stated, "I do believe that construction, when we look at who the prime contractors are, who are the big players, they're primarily Caucasian companies. I would say definitely 90 percent, and then the others who are not don't get to play in the big boy roles, so I'll just put it that way. They don't - they still don't get the big jobs. We have to get out of the mindset that construction is a boy's network or is that and that. Like, it's just changing. Like it - we're in Los Angeles. I mean, we're like a melting pot of everybody, so, it's just unfortunate. We're definitely outside the network. I mean, we belong to some associations with the construction field, and we've gone to the meeting, and we're like, you know, a fly in buttermilk, honestly. And we - it's just not - it's just not there. And then there is, you know, a minority association, but they don't get the fanfare and the support, you know? So, it's interesting to go to the two different so-called worlds of construction associations and see the difference." [#38]
- The non-Hispanic white male co-owner of an SBA-certified micro- and WBE professional services firm stated, "Where I have seen it, and it is true, is women in engineering. In the last 15 years or so, I've had two women come to work in the office. They were incredible. They were great. The young lady who was here helping me out three, four - almost four years ago - five years ago, gosh. She went on to become a PhD candidate in engineering down in New Zealand. I learned - I can't tell you how much I learned from her. She was so great. In each case, the both of them, they both had issues trying to figure out where to go. 'Who's going to hire me?' There I was, willing to help. They had issues with getting - breaking through the male dominated engineering community. They did share that there was issues with them finding placement. I can't believe that they did because they were just so talented. So, that is an issue. I know that when I've been on job sites, it's palpable. When the young lady who was working here, I would take her out on the job sites and making sure that she got exposure. She really had to - because I would make sure that she handled the interface, the talking, answering the questions. It was really good for her. At the same time, too, was interesting to observe that the workers had issues in being able to express what they wanted to say as I sat back behind her and let her deal with it. So, yeah, there are issues with gender in engineering." [#40]
- The Black American male owner of an SB- and MBE-certified professional services firm stated, "I used to carry a chip on my shoulder about racism and fortunately, about 1995, I woke up and realized that what I thought was racism, in many cases, wasn't racism, but just nepotism and the desire for people to hire people, the friends that they knew, and personal relationships. It could have been both. But it wasn't the corporate policy. And what I realized - corporate policy - often times, they establish these great policies at the corporate level, but it never makes it down to the lower and middle management and so, things change at that level. And I remember one year, I was taking - I sat for the Professional Engineers Exam and, as I was leaving, I saw one of the supervisors who was one of the people that told me that, when I was working with him, that I couldn't apply for the supervisory position because I didn't have my license - my engineering license. And it turned out that he didn't have his license at that time either." [#41]

- The non-Hispanic white male owner of an SB-, DVBE- and Micro-BE-certified construction firm stated, "I think human nature. Contractors like to do business with - and I've heard this from the contracting side as well - they like to do business with companies they know, companies that have performed well for them in the past, and they're less likely to give an opportunity for a company they've not worked with before. So, it's not any one thing. I think it's just human nature. You go with what's worked for you in the past. So, I have trouble faulting people for that. The firms that have - you know, that want - you know, that - the firms that get their feet in the door are firms that are minority, women, and things like that, because that's the requirements of the state. So once those folks establish themselves with - and perform well for a prime, it's really hard for others to get in. Like if you get a woman/minority firm that goes to work for a prime and they just consistently perform, they mark three boxes off for the prime. They mark small business, sometimes micro small business, women and minority boxes. And if they're doing their work and they're performing and they're filling open positions, they're likely to get the callback." [#44]
- The Middle Eastern American male president of an WBE-certified professional services firm stated, "That used to be the case years ago. I remember, when I was first out of college, I could see it. They had the good old boy network. But that was like, maybe 40 years go. Not anymore. To get contracts from national firms. There are a few national firms that do mostly bigger project. They're still in the private sector, but let's say they develop a shopping center, or they build 2-to-300-unit apartment buildings. Usually, these national firms - they deal exclusively with a few other national firms that happen to be engineers or architects. They do not deal with small companies. That's the toughest thing I've done - is to be able to work with them and convince them to give us a chance. Once they see you're a small company, they prefer not to work with us. They prefer to work with subcontractors like us, but they're bigger firms - much bigger firms. They have 50 to 100 employees. Large companies. I understood what the system is like. They have a few bigger companies. So, if they want to do design work, they go to them. If they want to do concrete work or they want to do plumbing, everything - they only deal with a handful of larger companies. They're all private companies, but they're large. They are large. They have branches all over United States and they work together. So, everything stays within this network. Even in Southern California. Caltrans' jobs, if you look around, you see most of the work goes to one or two big contracting companies that do large projects. And I know when they want design work, they go to these national companies. They don't come to me. They go through national companies that they know, and they work with them before." [#46]
- The Asian Pacific American male owner of a DBE-certified construction firm stated, "Caltrans is designed for big companies, for people who know the ins and outs, not designed for people who are new, for new businesses. For new companies, it's not open for new companies to enter. New companies are discriminated against, it's an old boy network." [#54]
- The Hispanic American male owner of a DBE-certified construction firm stated, "Good ol' boy network is definitely a thing. They tend to reuse the same people over and over again, so people trying to get into the transit service provider business and transit agencies, it's really difficult if you don't already know somebody." [#55]

- The Hispanic American female co-owner of a WBE-, MBE-, Micro-, and SB-certified professional services company stated, "You have to be in the good old network. And I'm not in that network." [#61]
- A comment from a non-Hispanic white WBE construction firm stated, "I think if you know people who know people you get jobs because they are more established companies. I think at one point a lot of public projects we had a lot of no we noticed business started picking up when we shifted to private sector." [#AV37]
- A comment from a WBE and MBE Black American-owned construction company stated, "Obtaining work with private sector is easy 'by word of mouth'. Working with public is based on who you know & usually done on the golf course. It should be based on numbers & what you know." [#AV182]
- A comment from a majority-owned professional services firm stated, "We believe that our capabilities have not been recognized. It seems that companies that have some connections with agencies get most of the work, and we are not really getting a fair share of the business in the industry, as far as engineering, with public agencies and government agencies. We really think that we need to be recognized and given the opportunity to get more public works projects." [#AV22]
- The non-Hispanic white female representative of a construction business advocacy association stated, "In construction, yes, because construction is still a good old boy network. I mean, there's so much business done behind closed doors, that I think it's really hard for women, minorities, if you're not in that network, it can be really hard to get work. I mean, it's interesting, I've been in the business for over 30 years, and I thought it would have changed by now. I thought there would have been enough women in the business that we would create our own good old girls' network or something like that. But it really hasn't happened. And it makes it hard to get work. You need to find out about the type of work that you can do, or somebody needs to be able to carve out something that gives you... you have the ability to do that work. And that doesn't happen unless you're kind of networking and have the ability to work with people. So, in my opinion, yes, it's hard to break into this industry. I think the public sector is easier because it really is a hard bid, low bid number that you're throwing out there. The private industry is very negotiable. I mean, most contracts are negotiated, everybody has the old Rolodex work which we don't use anymore because nobody has a Rolodex anymore. But it's like the contacts, it's the people you know, that gets you the work in the private industry." [#FG2]
- The non-Hispanic white female representative of a construction business advocacy association stated, "Literally, I was laughing at a major contractor who came in, was talking to my foreman, and then talked to me and literally everybody in the room saw that I terrified him. I literally did. And the thing is, the man does not know how to talk to women, he's uncomfortable talking to women, and I'm smart enough politically to use the guys that I have working for me to speak for me with these guys who have feminine anxiety. But the issue is it's there and you've got to see it and you've got to deal with it. And the other thing is the concept for us is we're not part of what it is. And you go to Beaverdilly, for example, the AGC party. There are maybe 1,400 men. There are 28 women. And of those 28 women, 20 of them are bonding agents, are salespeople, and other eight are female contractors, who simply by sheer numbers, there's nobody who looks like me. And while I don't have any

problem pitching in, I would go from room to room with male contractors. They would leave a room I walked into. Really great guys who I would have dinner with later that night, and were gracious with their wives and wonderful to me, but in a business setting did not want me standing there because it made things awkward for the way they were going to talk, as if I haven't heard a four letter word before. So, the thing is, it really hasn't changed a lot, and in rural America you might as well be back 50 years ago, because it hasn't changed." [#FG2]

- The Hispanic American female CEO of a professional services business development organization stated, "The access to those that make those decisions. I typically don't hang out at the boys' club or at the golf course and have that opportunity that maybe others would. And the same, I think, understanding just how it works. I mean, you go to the schools, the colleges, and you look at the engineering schools. You look at those that are coming up. They're not people of color. They're not women. They don't look like our community. They don't look like California really is. I mean, it starts from the very beginning, and how do we make those changes?" [#FG3]
- The Hispanic American female representative of a professional services business development organization stated, "It's just that reminder that a lot of times, when you come from a different background like this, that you've already started without having access. We think of someone maybe going to college and someone already had alum there that took them under their wings and shows them the ropes. And it's the same in business, right? Someone's in that similar field, and their parent did business together. And it kind of just starts there. You're already behind that eight-ball. And so, it's always kind of catch-up for it. If you don't even know there's a room you're supposed to be in, where they're making decisions, that apply to you, then, you're just working really hard. And you might do well, but you could do better if you knew there was this room you could be in. But you don't even know, so it's not even an invitation, but you don't even know that that exists. And so it all comes down to those two words, access and opportunity and where do we start applying it and how do we start making sure that happens. In spite of all of that, you're trying to get people into that room where the decisions are getting made. Once you're there, as I tell people, just bring your own chair. Don't worry about it. You just push it in there. But we just got to get people in there." [#FG3]

10. Resistance to use of MBE/WBE/DBEs by government, prime contractors, or

subcontractors. Fifteen interviewees shared their experience with the government, prime or subcontractors showing resistance to using a certified firm [#1, #8, #9, #11, #18, #22, #24, #38, #59, #AV, #FG4]. For example:

- The non-Hispanic white female owner of a WBE-, DBE-, UDBE-, and SB-certified professional services firm stated, "They mumble and complain that they have to use them, but I think they realize... And I know they realized that if they don't, they're not going to get the contract. So they do mumble and I've heard them mumble, but it is what it is. It's just the matter that it would be nice to think of us that we can do the exact same work a larger firm, a larger male owned firm can do. It's just that, we'll save you money and they don't care. They just want their friends." [#1]

- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "I think there's a level of trust that they can actually do the work the way the government is set up, that the projects are set up for large firms and these MBE, DBE, all these stuff is kind of a pain to them to try and figure out how they can align within and how they can re-manage it. And it's much easier for them to manage with a larger firm. So I'd imagine that there's some resistance I think just inherently from the additional amount of work needed to manage WBEs and MBEs that they feel is a distraction from the actual technical work at hand. And so I can imagine that the agency that is seen is an engineer at public agency, they'd be more likely to want to hire a larger firm with the expertise because they got better engineering and less admin work than hire a smaller local MBE/WBE firm that's growing. Not necessarily because they're MBE/WBE but maybe because they're growing and they meet that criteria. Because it's more work for somebody who's remained in this engineering and doing admin stuff." [#8]
- The Asian Pacific American owner of a DBE-, MBE-, and SB-certified professional services firm stated, "Sometimes I don't like to use that word discrimination, but I would say in general there could be favoritism, but I wouldn't say discrimination. the minority sometimes they don't get the opportunity because of favoritism for example, let's say you're working for a company whereas the minority may not get that job promotion because of favoritism, meaning somebody would say, Hey, this person is doing a better job than the minority person, because of their networking or bonding better, whatever the case may be. So I wouldn't say discrimination, but I would say favoritism sometimes. there's favoritism in terms of maybe two people are on equal playing fields, but one person is favored, maybe because they're seen more or they talk more, but necessarily on the job attributes." [#9]
- The non-Hispanic white male representative of a Native American-owned MBE-, SB-, and Micro-BE certified professional services firm stated, "No, it's the opposite. Everybody's always looking for one." [#11]
- The non-Hispanic white female owner of a DBE-, SWBE-, and CBE-certified professional services firm stated, "Being a woman is definitely, to me, a disadvantage meaning - it comes down to price, but the way you get treated afterwards or even getting thought of at time of bid, I believe there is somewhat of a disadvantage. One of the reasons we kept my husband as the field operations people is because you get more honey with bees than you do with vinegar, right, as they say. Having a man out in front helped keep things just going along smoothly. Instead of fighting it and trying to change the world and affecting my bottom line, I just decided if you can't beat them, join them. Let me put people in there that need to be put in there that are just going to get things done instead of trying to fight the system." [#18]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "Well, any other - well, I think people in general - there's a general perception among white males that women probably aren't qualified. They don't belong. They've been culturally trained that and they have to overcome that by training and consideration. I try not to do that but I'm sure I've been guilty of it subconsciously. And I think it works, like I said, the other way that now some of the white males probably they say, 'Well, we don't want to hire them because they've had too much advantage,' too. You know, it probably goes that way too, I'd imagine." [#22]

- The Hispanic and Native American male owner of a DBE-, 8(a)-, SB-, and MBE-certified construction company stated, "do I think people purposely go 'That guy is Asian and so I'm not going to do business with him?' No. Or Hispanic or a woman or whatever. But I do think that you could be any of those, and if you're smaller you may be on the 'Watch out for that guy list.' And it doesn't take very many things to crop up unanticipated that might cause you to get on the 'Never mind, let's just skip that guy.' I've had experience in the past where we got named - we were named for doing work and did a better-than-average job but were plagued by - are you familiar with a stop notice? So, it's easy to file one. You don't have to have any reason to file one. You don't have to have any proof to file one. You don't have to even be right. And the best part about it is there's no penalty. So, what's happened is lots of people out there, DBEs and non-DBEs alike - in fact, most of the DBEs that I'm aware of - have weaponized the whole process of stop notices to include filing them only because they refuse to acknowledge that there is an adjustment in the price based on they didn't do their job correctly or they didn't provide the correct service or there was a penalty that was absorbed by the person on the - the contractor on the job and it needed to be reflected on their price. So, what's happened with the stop notice thing is now everybody is using it as a resource. So - as a resource to compel others to pay them because prime contractors don't like to deal with it. So, if you're a DBE or a small business and you're on a job and you have a stop notice filed because you had issues with somebody because their price is not the one they quoted or they overcharged or they underperformed, or a whole variety of reasonable standard things that somebody would take a deduction in pay, including a prime would apply it if it was their situation - if you get a stop notice filed and you're a DBE, chances are you just went on the list of 'Oh, let's avoid that guy next time.' And you could - it could be happening for a completely legitimate reason and completely valid, but it doesn't matter. It's just what it looks like. Nobody will ask for the details. Nobody thinks about details. They just put you on the - now, this is my opinion - they will put you on the list of 'Don't make contact with that guy again. Let's try to avoid that if we can.' And I've seen it happen. And it has happened. So, I think there's things like that that are out there that cause people to - cause non-DBEs to maybe look at a DBE company or a small business in a certain light that isn't a representative light but it's the one that they use nonetheless. And it definitely impacts opportunities." [#24]
- The Black American female co-owner of a DBE- and DVBE-certified and uncertified MBE construction company stated, "Now, have I had everything positive? No. But, you know, when I'm sending people to the job, to give them opportunity, and they can actually do the work, you know, I've had complaints, like, not legitimate complaints. And so, that is unfortunate. I do know that I cannot send two African Americans to a job of a Caucasian company. I just can't, and I've had issues with that. I've had issues with my females who are lesbian who look more masculine. I've had issues with female I have that's transgender. So, those are things that, you know, the whispers and the so-called complaints. It's unfortunate. It's really judgmental, and it happens, and I wish it wasn't like that, but that's the reality. And so, we have to be cautious of who we send on jobs. sometimes when you know a particular client that you're dealing with, that you just have to be really strategic about who you send, because you know that they'll be, you know, that they'll think stereotypically about your employee, or mistreat your employee, and that you mentioned that, as far as, like, discrimination against women, that sometimes your - some of your - some of your

employees would overhear Definitely overhear, and it's unfortunate. It's just really unfortunate. We just live - we live in a different time, and we have a variety of people who are more open with who they are, and we have to just say, okay, that's it. Like, can they do - my husband's whole thing is, like, can they drive and can they pick up a cone and put it down? Okay. You know, and that's all that should matter. It's really all that should matter.” [#38]

- The Asian Pacific American female owner of a SB-, DBE-, and WBE-certified construction company stated, "I don't think the buyer or the contracting officer will take that non-payment or slow payment, no. It's not their money so they won't do that. But if they are choosing somebody from performing a job, maybe they were not comfortable to choose a female. Everything is improving because now a lot of buyers they are color themselves. The Black buyer, Hispanic buyer, Mexican buyer, woman buyer. So, it's less going to that direction. So, in the old time, maybe a Caucasian buyer... if you only have two choice you want someone that you are comfortable and you have the faith from the outside. So a Caucasian man when they present themselves, or a Hispanic man present themselves. The tone of the presentation is different.” [#59]
- A comment from an MBE Subcontinent Asian American-owned professional services company stated, "We are a small, minority owned business and experience problems with agencies including the Department of Parks. Experienced discrimination.” [#AV299]
- A comment from a WBE and MBE Hispanic American-owned construction company stated, "Obtaining public projects by city or state or Caltrans, the system is now not geared to help minorities doing capacities, no access to critical information, exclusion, very difficult to participate, we don't get to play ball with you guys, we pick up crumbs.” [#AV28120]
- A comment from a WBE and MBE Black American-owned construction company stated, "I am a Black American in a primarily white area where a lot of people don't look like me. And for whatever reason, we do not get the awards because they go to people they are more comfortable with. The genre where we work is largely civic such as law enforcement.” [#AV28203]
- A comment from an MBE Asian Pacific American-owned construction company stated, "As a minority company its hard to compete and win a bid.” [#AV28414]
- A comment from an MBE Hispanic American-owned professional services company stated, "Covid19 has hurt our business we are slow at coming back. Racial issues, we have been passed over by whites.” [#AV28471]
- The Black American female representative of a minority business chamber of commerce stated, "I think it's systemic, because we're not getting work, and it doesn't make sense. I mean, that's the systemic part of it. Nobody's getting the work, and we know that the work is out here. I'm a few hundred feet from I-5, and I see all the work that's being done out here, what Caltrans is doing. And I don't see anybody out there that looks like us. And I can't believe that that's not part of this whole systemic racism, that's part of the culture at Caltrans.” [#FG4]

11. MBE/WBE/DBE fronts or fraud. Twelve business owners and managers shared their experience with MBE/WBE/DBE fronts or frauds [#5, #7, #10, #11, #12, #18, #20, #22, #59, #61, #AV, #PT9]. For example:

- The Black American male co-owner of a WBE-, MBE-, and DVBE-certified construction company stated, "They have companies out there who put a minority in a position of power. I can't name any off the top of my head, but I've seen it and they put them in a position of power just so they can say, hey, look, we've got one. I think it happens a lot. We tend to call those people for lack of better phrase, where any of the reasons, we call them tokens. You get a token, disabled, deaf, you get a token. Minority open woman and your business is set." [#5]
- The Black American male owner of an MBE-certified professional services firm stated, "I have seen that tremendously in the service-disabled-veteran area and in the woman-owned. Well, yeah, I've seen it all the time, where folks will claim one thing and because it's a check in the box, but they're not. I know a company right now today that's existing as a service-disabled-veteran company, and no one in that company's ever been in the military. And no one's ever called them on it, and they've been in business for a lot of years, and they get work from the government, state and local as a service-disabled-veteran company and never been called on it." [#7]
- The non-Hispanic white male owner of a SB- and ELBE-certified professional services firm stated, "Well, they create these requirements, so people try to figure out a way around them and build shell companies or stuff like that. I mean, that's what happens when you start having special rules for special people. People like me would say, well, why can't I participate? Well, you're not one of those special people. When times are tough, they're going to try to figure out how to get that job." [#10]
- The non-Hispanic white male representative of a Native American-owned MBE-, SB-, and Micro-BE certified professional services firm stated, "I won't say it's rare and I won't say it's prevalent. The good thing about the Caltrans certification is it's a deep dive and it doesn't exist as much in the Caltrans certification, that's a pretty clean ship. But when you get into the lesser certifications or self-certifications, it's kind of Wild West. I think that there's a lot of integrity in the Caltrans certification." [#11]
- The Hispanic American female owner of an MBE-, WBE-, and SB-certified professional services firm stated, "I have, but nothing that I've reported or nothing that I'm sure about, there's so many... Like there's a few companies where the face, and everything is a man, and even with one company that I'm aware of right now, they say they're a woman owned, but I've yet to see the women that are running the company. I'm not sure how easy it is to trick people, but I feel like ultimately, they'll get caught." [#12]
- The non-Hispanic white female owner of a DBE-, SWBE-, and CBE-certified professional services firm stated, "I've heard of it. There's a couple companies that I know, for a fact - well, I don't know for a fact. I don't have proof. But the industry talks a lot that they are manipulating the program, yes." [#18]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "I know a friend, or people, that have their wives become the self - on paper they're the 51

percent owner and now they're a woman-owned business. And that seems unethical because I could do that with my wife but that really wouldn't be - that seems silly. You'd be working a loophole. I don't try to do that." [#22]

- The Asian Pacific American female owner of a SB-, DBE-, and WBE-certified construction company stated, "I know people pretend they are minorities, pretend they are woman. I don't think most of people are honest. So don't use one mistake to try to hunt all the thousands of small businesses. People do lie. People do lie. But why, because he's lying that get me suffer from this? I know, people lie to the government. They are the owner of the business. Especially a woman, any color, Caucasian, Black, Hispanic because, they really not knowing they don't hold the license. They may be a caller. Like most of the men say, oh my wife is the boss. But the men is the licensed thing. In construction, you have to be holding a license. Now the younger lady, younger woman, they have like, when I... 30 years ago. They don't have much female owned construction companies and the like." [#59]
- The Hispanic American female co-owner of a WBE-, MBE-, Micro-, and SB-certified professional services company stated, "There's an agency that allowed for an organization to win a contract without self-performing, and I always questioned that because they basically are a shell company, but they would get awarded like 40-million-dollar contracts and you're like, well, where are your people? Oh, I sub everything out. Well, that definitely isn't really your company." [#61]
- A comment from a WBE and MBE Black American-owned construction firm stated, "Many big non-minority firms use their wives or a token minority person as owners to get certification and that unfairly gives them advantage over smaller minority-owned firms with minority workers." [#AV90]
- The male owner of an LBE-certified construction company stated, "I think another challenge is that, when these disparity studies are done is that there's a survey of a lot of DBE firms, and I have friends at MTV firms that don't really have DBE firms, but they would show up in a disparity study, but really they are doing that as a side hustle And I think that's what often happens is that there's these folks that are well connected within the industry that aren't financially needy, but they go and create a business that now has an asset inside track to be a preferred contractor, to be a preferred vendor or what have you. It's not all there's certainly, that's not always the case, but that's certainly an element there of that, which is I think not the intent of the program, but in reality, it depends." [#PT9]

12. False reporting of MBE/WBE/DBE participation. Thirty-four business owners and managers shared their experiences as subcontractors with the "Good Faith Efforts" programs or experiences in which primes falsely reported certified subcontractor participation. Good Faith Efforts programs give prime contractors the option to demonstrate that they have made a diligent and honest effort to meet contract goals [#1, #5, #8, #15, #16, #17, #24, #29, #32, #34, #38, #39, #43, #51, #55, #AV, #FG4, #PT1, #PT10, #PT12, #PT2, #PT5, #PT9, #WT5]. For example:

- The non-Hispanic white female owner of a WBE-, DBE-, UDDBE-, and SB-certified professional services firm stated, "The idea of the small business or set aside or something that was kind of equivalent to the old affirmative action parts, which is why I have so many

certifications. They just want to say that they have those. Instead of calling a good faith effort, we call it a good fake effort because it is. Because there's no checks and balances to make the prime do what they say they're going to do. We just did a project for Caltrans through a prime contractor in which they used our certifications, which they told me... Well, first of all, they used our certification, they had us on board and then they didn't use our services very much. They didn't use what we were supposed to have had. So, when I talked to the owner of the company, he said, 'Well, we just needed your services.' I mean, 'Your certifications.' And I said that, 'You can't use them if we're not on there.' He goes, 'No, I'm going to use them.' So what I'm basically saying is that it's a scam. All of this is a scam. Nobody is actually doing their job. Like we got, like one tenth of the contract that we were supposed to have had... Certain agencies want small businesses to be involved. And what happens is, they will reach out to me in an email and say, 'We would like for you to send us your qualifications, to see if you would be good with our team on bidding this RFP.' So, they actually reach out to me because of the agency's request that, but they don't really care. I mean, there's one that I have stopped completely responding to for the last 10 years. Even though I get their information, it's just it's their good fake effort. So that, what it does is that they just want to say, yeah, they reached out to a certain amount of small businesses. They don't care if they actually get somebody or not. And then what they'll tell the agency is, 'Oh yeah, yeah. We reached out and nobody could do it.' Or, 'We couldn't find anybody.' And I've been literally in meetings on a water job that I heard, for a water recycling plant, that I was there, and they said, 'We can't find any small businesses.' And I stood up and said, 'I'm one. I'm one, you obviously didn't check because I've done probably over a hundred water projects.' And some of those people were in the room with me that I have worked with. And then they go, 'Oh yeah, we remember now.' So, there's a weird dichotomy that goes on with the agencies. And that they're, like I said, there's no checks and balances. They say, 'Yeah, we need small businesses.' And then somebody will put them on a team. And then after that there's no, 'Hey, are you using them? Are you doing what your contract says you to do?' I've seen projects completely close out that all of a sudden they say, say to the prime, 'Hey, you didn't use your small business.' That shouldn't have been a last-ditch effort. That shouldn't have been something that said, 'Oh, I guess you didn't use somebody.' They need to have the checks and balances as the project is being done. And it's probably a staffing issue. It could be just that they don't have enough people. I don't know. I had a project last year, that's the one I said that the owner of the firm said to me, 'Well, we only need you for your certifications.' He stopped using me because he didn't... And he told me I could not, I could not quit the project because then they will lose that requirement. I thought about it, and I thought, well, maybe I'll be working with them before, so I have to think, I mean again, so if that's the case, I don't want to damage the relationship. So, we really have a hard issue that we have to walk a fine line, small businesses, have to walk a fine line above the idea that, 'Yeah, we know they need us, but we don't want to piss them off either.' There's only so many companies that can hire you, because it's the same people over and over and over again." [#1]

- The Black American male co-owner of a WBE-, MBE-, and DVBE-certified construction company stated, "For example, if you have a DVBE, disabled veterans qualification, it gives you an advantage. But what a lot of these companies do, because we get calls all the time, 'Hey, look, we don't have a DVBE, but if you agree to be a subcontractor with us, we'll have

that DVBE, and we'll get the job.' Invariably, they offer you a job, something to bid on, that's the equivalent of pushing a broom I think that happens all the time because some of these larger companies will send out mass emails with every DVBE in a state listed on it, for some project. And even if you have an interest, you get the notifications two days before your bid is due. I get those emails all the time. Bottom line is, if anybody in my business will tell you, these people don't care, they want to do what they can to keep the government off their butt. They want to say, 'Look, we have a woman here. Look, We have a Hispanic here. We have a Black person here or more you want from us. We're not racist. We're not this. We're not trying to keep people from opportunities.' But once again, what do you do? You keep fighting that fight, or do you look for opportunities in other places?" [#5]

- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "A large firm, such as a national firm or multinational firm will use us as a sub-consultant, thinking that we would get work out of it. And then they actually don't use this for any work, and actually steal our designs and our ideas. And so, it'd be very difficult to work with larger firms in this area. And so that's kind of stunted our growth. if we go align with those larger firms, we are used as a minority or DBE sub, and there is no way of ensuring that we actually get the hours that we're scoped to do. At least I do not know. If they say that, 'Oh, we are going to say that this company is being hired, and we were trying to meet a 20 percent DBE goal.' And then they go to the project and let's say, they scope us out of the project and they do the work in-house. We never got that money, and we never got that 20 percent that we were promised. In fact, we were just cheated because they use our resume and our equals and our connections to get the work, but they never gave us the work. And there's nobody that we can refer to saying that 'Hey, we actually, the minority consultant on the job. We should've gotten work out of that.' But we don't, we don't have anybody to talk to about that. So, it's been very frustrating to be part of the DBE and minority business program. And as he hasn't helped us out much at all, to be honest with you We get on the contract with us having a certain scope item and then the prime is working with the client the whole time on the project, and then we're waiting for our scope tasks to come up, and then when it gets close to that scope, to that task, the prime has already run over budget on their tasks and they work with the public agency to renegotiate the schedule and the scope and they scope us out of it, and that's happened way too many times, and then they just argue. They just say, 'Oh look, our budgets went over and we have to re-strategize and so we weren't able to give you guys that work.' And we were like, what about this DBE requirement or this percentage that we have, or we signed this sub agreement, but then the sub agreement is based on the client and they've already re-negotiated with the city on doing that, and then I look at a city like, what's the point of your DBE requirement if you're not going to hold it wholly, and then they're looking at us being like, oh no, but the project kind of went awry because of budgets, and then I'm looking at the primary like, why did you let the project go awry? Your job as a project manager to hold us wholly in the original contract and not to put a city in a position where they have to scope us out of it, but it's just their strategy, and so I first thought it was a mistake the first time it happened, and then it happened three times, I was like, oh no, this is a strategy of all these private companies. And the city is just like, yeah, we don't have the money and what else do you want us to do, and then I'm like, well, it's [the prime's] fault as why they ran on a budget and spent too much time on these other tasks instead of ensuring that, and it's

frustrating too because the community also is told that they're going to get our scope items and they don't. So, the community is also going to community meetings, and so on the first job, I didn't know what to do to. The second time that it happened, I told the city and the consultant that I'm very upset and we need our name off of the job because as a professional, I don't want my name to be on a job that we didn't do any work on. And so, I've had to go tell San Jose and other agencies, they're like, Hey, take us off of this because I don't want them... They're going to use this as a resume or they want us to say, like, look, we did this collaboration, but they didn't do that and so I don't want to be associated with that project, and they'd look at me like, why don't you want to be associated? It's free marketing for you. I was like, no, I have my professional ethics of knowing what I worked on, and we didn't touch that. So, I don't care. I don't want my name on the job just for free." [#8]

- The Black American female representative of a minority chamber of commerce stated, "I think it was 2019 for the Caltrans work group, for the African-American work group in particular, we were asked to do a survey to identify how many Black DBE contractors in the Central Valley were actually qualified to do work on the Caltrans contracts that were available in that year. And so, they provided us with a list of all of the DBE certified businesses and asked us to reach out to them and see who responded. So they gave us a list for all of the DBEs, and they're in Caltrans' district six. And we identified 11 firms that were in our service area, and we made every effort to contact them really wanting to identify both qualified and capable entities. I called the other eight remaining firms to find information about their experience with the DBE solicitation and contracting. And all of the firms that they had been contacting daily for DBE contracting opportunities, but none of those opportunities turned into contracts, not one of them. There is no space provided on most of the procurement forms for them to self-identify or to list their DBE number, and that they're relying on the primes to do that part for them. And then if they don't have an established relationship with primes, they're not going to list them, even if they have contacted them, even if they said that they were going to work with them. So, they're having to take the good faith word of the prime contractor and our CEO calls it a good fake effort instead of a good faith effort, because that's really how it ends up happening. They call, they say that they're doing this work, but it never turns into anything. And he said that not being able to list their DBE number and the additional licensing that's required by Caltrans is an impediment to securing contracts directly with Caltrans." [#15]
- The Black American male representative of a DBE-, WBE-, MBE-, SB-, and Micro-PW-certified small business development association stated, "I know Caltrans had this mandatory DBE - mandatory small business - but they also had a thing they called 'good faith effort' that they were trying to get them to fully eliminate. 'Cause I used to get - I used to get requests from jobs - no way in the world I could do anything about it, but I would get the request because I have a DBE certification. And therefore, what'll happen is they'll send me a request for - to bid on a job, and I look at it and I say, 'It's not something I can do anything with.' And most of the time, the job is getting ready - the bid has to be in in less than a week. But, because they send it to me, they can say to Caltrans or wherever the job was at, 'We put these requests out to all these DBEs and nobody responded.' Just because they said that they did an outreach - and they did an outreach - they really were not honestly trying to bring somebody in. They were trying to fulfill an obligation that you put out there." [#16]

- The Hispanic American female owner of a WBE-, MBE-, SCMSDC-, and DBE-certified goods and services firm stated, "A lot of our clients go ahead and elevate that amount to a higher amount, and then they feel it's their money, and they're not giving it to that small subcontractor to be able to do the work. They'll hold onto it. But that was something they committed - they were already doing to do. But if the sub does not go ahead and get it done, then once the contract is finished, if it doesn't get used, then they lost out on that opportunity. So, I think there needs to be measures in place that they put so the prime stops playing with the purse that's not theirs. A hundred percent, this is the biggest problem that we have right now. A lot of the primes take advantage, put that amount saying that's what they're going to give, and in the process, they are not doing it. And the only way there will be some is if the small business goes and says something. But guess what? After they do that, what do they do? They create tension and they put themselves in jeopardy of the contract as a whole. With that agency or that organization that they're working with. And number two, they put themselves in a situation that they're adding stress to their own contract. And that's the game that a lot of these primes play a lot with. It's happened to me. It's happened to a lot of people before. In 2020 it happened to me." [#17]
- The Hispanic and Native American male owner of a DBE-, 8(a)-, SB-, and MBE-certified construction company stated, "So, you know what's on there, right? The 800 phone calls and the 800 advertisements, all of those, that's - we're - so, we get to be checked on the box. Yeah. Do they really want us to? Not really. I've called plenty of them back and they go 'Yeah, you know, send us your quote if you're really interested in bidding.' And the problem is, for instance, if we do the same work [as] they do we go 'Well, are you guys going to self-perform the concrete whatever?' And they go, 'Yeah, we always do our own number. But if you're lower than us, then we'll definitely consider that.' And that means - that's code for 'You have to be lower than our cost. And you're never going to be lower than our cost. But - we know we have to tell you that we're going to break that out, but we're probably not going to break that out.' And still that's the answer you get, because they've got to survive too. Right? If they give me the work and I can't get low enough in the number, then they're not going to get a job. And if they can't get a job then their program starts to suffer. So, I mean, I get why. And it's not their problem to make my life better. But at least don't say it. Don't put it in the little - don't put it in your advertisement, and when you call me you're expecting me to call back but you really don't. And you - I mean, the people - have you heard the recordings that we get? I mean, they come from - they're farmed out from some place and about half the time they forget who they're calling for. They'll say, 'Hey, I'm calling from Ghilotti - oh, no, I'm - De Silva Gates. And, uh, we wanted to know if you wanted to bid on this job.' And it's just a - it's a formality because they've got to fill in the blank and they have to check that box. I get it." [#24]
- The non-Hispanic white female co-owner of a majority-owned construction company stated, "They name us on their contract and the bid is awarded and they do not use our company, that that's a big no-no. That's happened, and, yes, we've been shocked. I don't follow-up on every bid to find out, you know - 'cause it's just impossible, and then, I don't know, I just believe that just - it just wasn't meant to be, I guess." [#29]
- The non-Hispanic white male co-owner of an MBE-, SB-, and DBE-certified professional services firm stated, "I feel like sometimes, though, we are used - our qualifications are used to get a job or help a firm get a job where the owner actually doesn't have any minimum

requirements, and we end up not getting any work out of it. And that is - that's kind of hard to swallow, because, you know, I don't have a marketing person. So, as a Chief Operating Officer, I'm, you know, also the, you know, running projects, and I'm having to stop what I'm doing, provide proposal materials for work we're never going to get. So, that has been challenging, where different owners will say they want commitments from small businesses or small local or disadvantaged business, but then they don't follow up with any requirements. That's been really kind of a rub." [#34]

- The Black American female co-owner of a DBE- and DVBE-certified and uncertified MBE construction company stated, "The prime will put - they'll let - you know, Caltrans know, oh, you know, we're using this sub for \$50,000. They get their credit to say they use a disabled veteran, so they get whatever percentage points they need, but they never check to see if that was paid to us. I've had contractors list us on a contract and never use us, never use us. There's a penalty - there should be a penalty if you don't meet it, and just saying, oh, I did a good faith effort, that's just, like, BS. I get those calls all day long. These people go out here, oh, I'm calling and see if you're bidding on this contract. What's your name? They do that all day long, and that's just when the contractors say, oh, I tried to find somebody. So, even that is bogus as well. I can look - I can pull Caltrans tabs from tomorrow when they come out, and you'll have five contractors on there to bid the job, and some of them, they didn't even put a percentage in there for anything. It happens all the time I get calls every week, are you bidding this contract. We send you 100 quotes over years, and you've never used us? I find that odd." [#38]
- The non-Hispanic white male representative of a DBE-certified and uncertified WBE construction firm stated, "Like I said, I worked with that one contractor that they get you all signed up and then they don't give you the work, and that's pretty frustrating. When we bid on some projects we really wanted to get, and we bid with the contractors that got the contract, but then didn't receive the work. And then maybe they had a different contractor that bid with them, too, also, you know? So sometimes we get to know those things so we can either do a better job at bidding, or even know that it's legitimate that they have another DBE." [#43]
- The Hispanic American male owner of a DBE-, SB-, and DVBE-certified and uncertified MBE professional services firm stated, "Not directly with me, but I did see happening quite frequently is companies that are in a professional field, like myself, that were the - theoretically need to hire some subs that would provide the services such as I would provide, professional-type services. In the past, I've seen them not basically giving that percentage and instead using the overall job and then going more towards the construction end to hire more towards the construction end versus the professional end. I did see that. Instead of having a project target, if there is a target for design and then a target for construction that would overall give the same results, that perhaps would help out a little bit more on the professional side." [#51]
- The Hispanic American male owner of a DBE-certified construction firm stated, "No agencies are putting out an RFP looking for employee evaluations. They put it in their contracts when they put an RFP on the street for service providers. But they're not actually looking for somebody to do it at a higher level, so I have to work with whoever the providers are. Well, the problem is, you know, none of the providers have incentive to ... so

they'll use my company as a DBE to get points in their bid process. But there's no follow-through and they're not required - there's no requirement for them to actually hire me. So, they use - they get the five points for having a certain number of DBEs or a certain percentage of DBEs, but if they never use those, they're not penalized for that. Okay so I've had conversations with other service providers. And so, when they're going out for - when they're going after work, they need, say, 10 or 20 percent DBE. So, they'll contact me and they'll be like, 'Hey, we're going after - we want to provide the service in Sacramento.' Okay. 'So, we need a certain number of DBEs. Are you willing to work with us?' and I'll say sure. They get my DBE identification information and number. If they win the contract, then I usually never hear back from them. Because typically it'll be on the buses, so I'll know they won the contract, but then they never contact - when I come and contact them about starting service, they're like, 'Oh, we'll take care of that later,' and then I'll never hear back from them. The agencies don't provide liquidated damages if they don't hit their marks for DBEs or they don't hit their marks for employee evaluations. So, it's basically a loophole in the system that allows them to get a list of DBEs. It's like uniform people, right, so they find DBE companies that provide employee uniforms, but they don't necessarily have to use them if there's not an incentive for them to do that. Like with [one service provider] when I was in Merced, they said they have a DBE for as a uniform provider. And then once they got the contract, they went out and got a national contract with whoever they used nationally, so the DBE is just left ... and they're a multinational company. They have contracts all over the world. When they come to California, a lot of agencies give points for if you have 10 percent DBE usage. And so, they'll throw out all the lists of DBEs that they've contacted and get those extra points in the evaluation. But if they win the contract, they're not necessarily held to using all of the DBEs, so it's basically a shell game. 'Yeah, we have all these. Oh, we're not going to use any of those.' I think the issue - for me, what I would do if I was the agency, if I'm contracting out my work, is that I would then want to see every month that these DBEs are being - that they're invoicing for work that's being done and just hold them accountable to the contract. It's in the contract that there needs to be liquidated damages. So, if you're supposed to do 40 employee evaluations and you don't - and you say you have a DBE for that or you're supposed to use a DBE for your uniforms and you wind up using a national chain, then I think there should be liquidated damages every month for that because you touted them. You used them to get the points to help win the contract. Then they should be part of the fruits of that successful contract." [#55]

- A comment from a WBE and MBE Black American-owned construction firm stated, "We have all the certifications--woman owned and minority owned---and people reach out to us but we are never told we have the won the bid and if we have won, they use their people and not our people to do the work on job." [#AV90]
- A comment from an MBE Subcontinent Asian American-owned professional services firm stated, "We've followed suit with a lot of these acronyms and abbreviations, but we've found that a lot of prime consultants use these to get the job but they don't give us work and there are no checks and balances to make sure we get the billing. We find out after getting the job that the prime contractors want to do the work internally rather than following through with us." [#AV38]
- A comment from a WBE MBE Black American-owned professional services firm stated, "We do experience barriers, and I feel it's really stacked against small minority businesses. I

think especially when it comes to government funded projects where you get incentives for hiring Black or using Black subs, but there's no enforcement. We're on a number of teams, but we continue to not get any work out of it. They always find reason to not give me work. The only reason we join these teams is so to show that we can win stuff." [#AV147]

- A comment from an MBE Subcontinent Asian American-owned professional services firm stated, "California has a DBE/MBE program which is great but there's not much accountability if private consultants don't follow through with their commitments. This has happened on a few jobs where the prime contracts use us as a disadvantaged/minority business to win the job and get the amount of hours and projects. But when the project is being executed there is nobody to turn to if they do not actually give us the work. This is frustrating because we were told we would get the work then end up losing money through this process with the prime consultants." [#AV264]
- A comment from a WBE MBE Black American-owned professional services firm stated, "We have been in the industry for over 20 years. We are the only people of color left and we're still struggling to get work. We have many people coming to train with us and we can't keep them because there is not enough work for them so it's like we are a training ground only. I have responded to RFPs and it was just logistics because the person that gets the job was already chosen." [#AV292]
- A comment from a majority-owned professional services firm stated, "There's a lot of contracts that come out that have a goal for small businesses and a lot of companies will get prices to say they've made an effort. But, there's no accountability to make sure they actually award it to us." [#AV8393]
- A comment from an MBE Black American-owned construction company stated, "My biggest argument with Caltrans is operating in DBE good faith program. There is no penalty to the prime contractor to substitute us with other trucking firms. The prime contractor listed us in their bid because it was the most appealing." [#AV8558]
- A comment from an MBE Black American-owned professional services firm stated, "It is difficult for us to start business, done the Caltrans and 'worktrans', some disabled alliances, never had luck, I was in the high speed rail line, most contractors never called back" [#AV926]
- A comment from a non-Hispanic white WBE construction firm stated, "Even though the state and the DOT ask for them to use the woman owned or disadvantaged businesses they dance around it and do it themselves because they don't want to spend the money. I've been doing my part and what's happening is they do the good faith, effort but they don't use me unless it's mandatory." [#AV928]
- The Black American male representative of a minority business advocacy organization stated, "One, you got to improve the process. You got to improve the system and the communication behind it. You allow the primes to say, 'Hey, there's not enough or there isn't any well-qualified minority firms out there.' Well, that's BS. They reach out via fax, or they go around the system, knowing that most of these firms don't have a back office or can't afford a back office. They're actually out doing the work. So, they get around it by saying, hey, just reach out to them. Well, who checks their fax machine nowadays? I couldn't tell you how many times where transportation projects, firms are reaching out, saying, 'We

need to fulfill a DBE, SBE quota or goal', and I receive it by fax and not a phone call or email or even some type of a community or SBE, DBE outreach. So, then they can take that data back and say, hey, look, we've reached out to all these firms, and no one really replied. Well, in this day and age, I don't think anyone's going to reply via fax. To me, that's been an issue and a problem I've seen, that I vocalized and voiced, throughout the years. Another thing is they get away with the small trades, or portions of a project, or a scope, that they know no one's going to benefit from or profit from. It's not of significant value to the scope. So yeah, bring me some gravel and lay it down. Your profits, who knows? 2 percent, but if you want to get your company some real revenue, some real experience, then somehow, some way, that's not available. Being a civil engineer, I could tell you a million opportunities from expanding or building a road or a train, but some of the opportunities that come across in those outreaches aren't of value. They're pennies. You can't expect a DBE program or a business to exceed or excel and even give them the opportunity to graduate. That's why most of us are in these programs for years, because the money that's being distributed, it doesn't do anything for us. A 5,000-dollar contract means nothing. A 20,000-dollar contract means nothing, 100,000-dollars. You have to get into the meat of it and provide a significant opportunity for these firms and hold the primes accountable." [#FG4]

- The Black American female representative of a minority business chamber of commerce stated, "In regards to the faxes... I get them at the office all the time, and I call the number on them, to tell them, you're perpetrating a fax law here, because the faxes are coming to an address that we haven't been at for 15 years. We moved 15 years ago, and I'm still getting faxes at that address. And when I call to talk to whoever's signature is on the ask, I get a voicemail. And I never, ever get a return call. And so I started sending the fax back to them with a note on it, saying, don't play with us. Don't use us. If you're not serious about it, leave us alone. But the faxes still keep coming, and I know what they're doing with it. Everybody knows what's going on. Caltrans could do a better job with assuring that the primes ... And we talked about this briefly too is that the primes are being held accountable to the small businesses and smaller contractors, the subcontractors in ensuring that they're getting work and not just taking their word for it, not just that good fake effort, that fax that's being sent out. There needs to be more accountability." [#FG4]
- The female owner of a WBE-, DBE-, UDBE-, and SB-certified professional services firm stated, "As subs, Caltrans does not have an adequate check and balance to find out if the subs are actually getting paid, they're doing their work. [For example] we had a [subcontract for a local] Fire. We were pulled off use. They used our DBE, but they pulled us off to have another environmental firm out there because they were friends." [#PT1]
- A respondent from a virtual public meeting stated, "There is the issue of primes taking DBEs-disadvantaged businesses, having them on their team, but hardly using them." [#PT1]
- A respondent from a virtual public meeting stated, "It's several contractors that we've worked with, and they gotten the bids and we work, and periodically, but it's nothing consistent and then they have their favorites and stuff like that. And we just, but they utilize us to get these contracts, but then we just, they don't get the work. And then once we do, they hound us about getting all this paperwork and stuff like that. There's a lot expected of us, but then we just, we're still out here scrambling around looking for work for our trucks

when they used us to get the bid. So yeah, it has, it's been, I know two brokers or people got contracts for sure that's done that in the last couple of years." [#PT10]

- The female owner of a WBE-, DBE-, and MBE-certified construction firm stated, "When the primes are calling and asking if we're going to participate, if I ask any questions, the person has no answers. They don't relay that information to others in the organization that might be able to help me to see if even there's a way to participate. So, I've asked, 'how are you willing to carve out this particular scope that I may be able to participate', and I don't get any responses back from that. So, I think that these primes are required to make a good faith effort, but I think that they're satisfied just making the good faith effort and it's really not mandatory." [#PT10]
- The Hispanic American male owner of a DBE-certified construction firm stated, "If a DBE is selected, but no services [performed,] can we ask if can we claim our percentage from this project? I am a DBE, I have been on many contracts, but if you see my utilization for an entire year is, is less than half the one what I supposed to be. There's no nothing, the carrot and stick for the prime." [#PT12]
- A respondent from a virtual public meeting stated, "I rather use the disparity study as a participant should be, as based on utilization, instead of the commitment. That's when are banging the door for Caltrans and look at programs where many years. Still, they are not utilizing that firm. That's the reason some of those DBE firms, like us are not getting enough participation, because they say, 'Yeah, we committed you, but you're not getting it.' Example, I have 11 contracts in Caltrans right now, but I'm only [used] only on four contracts. So, for paper it shows that [my firm] has 11 contracts, but maybe utilized only on four contracts." [#PT12]
- The Hispanic American female owner of a WBE-, MBE-, SCMSDC-, and DBE-certified goods and services firm stated, "Many times there are situations when you're dealing with someone (a prime) who out reaches out to you and says, 'Hey, I'd like to be able to...are you interested in doing work with us?' There's a bid and you'll say yes, and they'll send you all the information or they'll say, 'Go ahead and bid on it'. So you think you're excited about the whole situation that you have a prime that is interested in doing work with you. You go ahead and bid on the stuff and they won't coach you through it, and possibly it may be one, you may be not doing the numbers right because you're not understanding prevailing wage, if you're a small business or two, they go ahead and take your numbers and later they submit it and then they don't call you back saying that they were awarded or they use you and you're not really sure about how the channel works because you really don't want to be blackballed. Or they've been awarded more funds in the contract or in the future, but they don't trickle down the percent that is allotted to you. So, what I'm saying is, I think there needs to be not only accountability, someone actually watching and reviewing that area. And I know there has been, I seen it, but there needs to be additional because some of the primes are not really being wholehearted in good faith when they're actually trying to work with the small businesses. I think some of these small businesses are being exploited, and that's just a shame because it's been proven that a lot of small businesses are the ones that are the backbone of our economy, and they're the ones that are providing jobs in our communities. So, I just thought that, that's an area that you probably would like to look into and address, and see how there could be other avenues that they can hold the prime

accountable and watch over their areas. I do know that there are tracking systems, software that work on that, but I think there needs to be somewhat more coaching on that. I do know that there's areas like with Metro, what they've done is given you, once you get the award, they actually tell you, this is how much you should be earning. And, I think that's the way to go, that everything's put out on the table for us. And I'm not saying, 'Oh, we can't do our work,' but put out on the table about what amount are we supposed to really be getting. And in addition, if we need a sign on of these contracts, that the primes are very honest, that they sign off with the amount of the dollar that is there, that we're saying we're going to be able to do the business with. We're not seeing that. So, these are areas that we still need to have focus on. Being in business for 25 years and going through the trenches, it's been a hard, hard climb to be able to navigate a lot of that stuff. There needs to be some form of accountability. When they say that there's a percentage there, and it's at good faith that you should do it, but it's not required, that's when the whole thing drops for all the small businesses. You put it on the contract or the RFP, but yet you're not requiring them to do it. So, what incentive are they going to do? They're reaching out. And then, they'll say that 'They attempted to find a small business, but nobody did it.' That's what's been happening and I see that a lot. They'll steer you around to say, 'Oh, we're interested in working with you.' And all of a sudden, they'll say, 'We decided not to bid.' Or 'We decided to go with another organization.' There needs to be something else, so how to get that small business to be able to submit whatever they're going to take part in. And, that the prime is held accountable instead of them taking all the information in advance, and then going back to the small business and saying, 'I'm sorry, you didn't need it, we found someone else.'"

[#PT2]

- The female representative of a business development organization stated, "These primes are looking for companies with minority certifications, and they find them, and they use them in the proposal, but then they don't use them for the project. So that's the other thing, whether it's a woman owned business, a minority business, a DBE, those types of things, and they don't use them." [#PT2]
- The female owner of a DBE- and WBE-certified professional services firm stated, "There's also no protection around business proprietary data. They get smalls to bid and use their info, but don't give the smalls the business." [#PT2]
- The female owner of a professional services firm stated, "What I find interesting at this point is a lot of prime contractors will send out a request for you to bid maybe two or three days prior to the bid being due. And then what they do is they call or they email you, can you come down on your price? So, I don't even consider them any longer. They call me, are you going to bid? And I'm like, I'm not giving you a piece of paper for good faith effort. Not doing it. What's in it for me. I'm not going to help you check the box." [#PT5]
- The female owner of a DBE- and WBE-certified construction firm stated, "Many times, [my firm] will receive a solicitation from a contractor bidding work on a Caltrans project asking [us] to bid the labor compliance portion for the company. About 50% of the time these requests come in with a requested turnaround time of 24 hours or less. I do not consider this a good faith effort, but rather just an exercise in futility. I have never been contacted by Caltrans to see if the prime contractors claim for outreach really reached me in time for me to get a price to the prime contractor. This is also something that other WCOE members

have experienced and continue to experience. In at least 2 instances in the last 5 years, I supplied a price to the prime, the prime listed [my com[any] as their DBE contractor and [we were] never contacted to do the work. This is a flagrant violation of the spirit and letter of the regulations relating to DBE outreach. The projects were done before I found out I was the listed DBE and never got a contract or the work. This is also something that has happened to other WCOE members in California. “ [#WT5]

13. Other forms of discrimination against minorities or women. Sixteen interviewees discussed various factors that affect entrance and advancement in the industry [#11, #12, #19, #22, #36, #39, #41, #46, #61, #AV, #FG3]. For example:

- The non-Hispanic white male representative of a Native American-owned MBE-, SB-, and Micro-BE certified professional services firm stated, "Not race, but I do see, like I said earlier, I've witnessed gender. And there's women in the good old boy network, but personally I think there should be more. It's not as prevalent as it was when I was around in the '80s. It was very different in the '80s than it is today, but I think that there has been a palatable bias against women businesses in our industry specifically." [#11]
- The Hispanic American female owner of an MBE-, WBE-, and SB-certified professional services firm stated, "I think it's just invisible or it's not really talked about, but a woman that has a partner that shares in the responsibilities, I don't want to say they have it easier, but there's more you're responsible for three kids, for instance, with no outside help. There's just less time and more commitment to things outside of work hours so it just can be challenging. And again, if you're working and there's only one income, then funds are also limited for afterschool care, for childcare, things like that. So it just makes it a little bit more complicated to just be available 100 percent at the time, I feel my husband was when I was married, it's like if he had to travel for out of town, there was no question about who would take care of the kids and take them to school. Whereas if I've had an opportunity, I'm always the one that's having to make those arrangements... I'm only speaking for myself, but I feel that that's the case for a lot of women, like if all of a sudden got a job in New York, I couldn't just pack my bag and leave. I would be responsible for making sure that all my responsibilities are handled while I'm not present, and I don't think that that's ever something that men have to consider, again, from my personal experience." [#12]
- The Black American male owner of a DBE- and SB-certified and uncertified MBE professional services firm stated, "I was certified maybe in the '90s and the latter part of the '90s - this was prior to Proposition 209, and then after Proposition 209 the restrictions got us down below - we lost our certification maybe around '94, '95. It [was] 25 years ago. And so after Proposition 209 we then became certified again. Because after Prop 209, you know, that was a license to discriminate, Proposition 209 was. Well, the biggest impact has been Proposition 209, which still relates. And at this time the stereotype that African-American firms cannot do the work or are not around, whatever, it's because they were destroyed. And this disparity study is too important and I think it is faulty, because it deals on the availability. And Proposition 209 immediately wiped out within three years 80-percent of all the Black contractors in California. And it came out of the University of California over there and immediately wiped them out. So that doesn't mean that there are a number of Black contractors and professionals who can go do the work; it's just the fact that Caltrans

has license to discriminate. And if people don't have to on the professional service side and on the other side. So the effects of Proposition of 209 is still in full force, still in full force for African-American firms, which includes mine. So I have to work a lot harder to get projects than other ethnic groups, because the discrimination is still there for African-American. I don't understand that. Not a whole lot of people understand it, but it is systemic, and that's why you had the Black Lives Matter." [#19]

- The non-Hispanic white male owner of a majority-owned professional services firm stated, "Oh, I'm sure there is. To say there's not you'd be a fool, I think. I'm fully aware. There's all kinds of discrimination. I don't know, it's underlying, it's hidden. That's why this Black Lives Matter and all this stuff started bubbling to the top. To say that there's not you'd be a fool, I'd say." [#22]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "[I] think one of the problems with the engineering field is that there aren't very many women who involve themselves in the engineering field. And then also for some reason there's not a lot of minority personnel that participate in it. And I'm a member of the California American Council of Engineering Companies. And they're aware of this situation too. We have about 80 percent of all the representatives at the board meetings that are men, and very few minority engineers, Black, Hispanic, Asian - not that many. And I don't know - I know they've been aware of it and tried to examine it but I'm just not sure if there's been any conclusions." [#36]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "One of our owners, like I mentioned early on, one of our owners is Hispanic. [and] fluent in Spanish and that has afforded us a chance to connect with some clients that don't speak English as a first language. And they're able to connect with him, and communicate with him, and that's been a good source for some jobs. But the overall industry of engineering is not quite diverse." [#39]
- The Black American male owner of an SB- and MBE-certified professional services firm stated, "That's part of the real effects of institutional racism,... and what's funny is that, you know, many of the organizations that I've sought work with are considered public utilities, but many of those public utilities are actually privately owned companies. And so, even though they're supposed to be working for the community - and they're also the public agencies - they're really not. And even something like the electricity. It's free. It's in the air. It's in everything, you know? But we still have to pay for it" [#41]
- The Middle Eastern American male president of an WBE-certified professional services firm stated, "[In] my field, everything is based on what you know. So, people basically go by words of mouth. So, then, when I go to a - they ask me to go and provide the proposal for a project, they just ask me what I have done before. And then, when I mention what projects, they sometimes ask for references, and I provide them with the references. I've never had any problems." [#46]
- The Hispanic American female co-owner of a WBE-, MBE-, Micro-, and SB-certified professional services company stated, "I think it's such a funny question because when you think about a woman and they are childbearing, they obviously have another job in life, right? Part of being a woman. And I think being a woman-owned business, if you don't have

the support at home, it is really difficult for women to be owners of a company, because there's someone in their... They're the ones raising their children at home. So, it's a funny question, like what obstacles are there? Like a really big obstacle. My kids are older and I and I live close to my parents, so I had support, my husband helped raise my kids. So we were the typical, I guess, 21st century family where you have the husband and the mother, the man and the woman, both raising the kids and both working. I think not every household is like that. That became more apparent to me during COVID when kids had to learn from home. And there are some women engineers that I was working with, and they're working 24/7, because they're homeschooling and plus they're keeping their full time job. I have no idea how they're doing that. It's crazy, but I think inherently, I could see it being difficult to be a woman-owned business owner." [#61]

- A comment from an MBE Black American-owned construction company stated, "There are still racial barriers." [#AV74]
- A comment from an MBE Hispanic American-owned construction company stated, "I feel discriminated against. I worked with Cal Trans for a few years then it stopped in 2018. I have no idea why." [#AV28112]
- A comment from a WBE and MBE Hispanic American-owned professional services company stated, "There are many challenges for working moms such as access to childcare flexibility with current employers which can all prove to have its own challenges for any corporate executive " [#AV28117]
- The Black American male president of a professional services business development organization stated, "At the end of the day, this is all about relationships. Business is about relationships. And again, remember my lens, business-to-business, not necessarily on the consumer side, but I think it's true for the consumer side, as well. You do business with people you know and that you trust. And because of economics and the historical disparities in this state and in the entire country, people are segregated, and it's very difficult for someone from an underserved community to gain access to decision makers at the Department of Transportation or at major contractors and to develop the relationships, so that they can develop the trust, in order to be trusted enough to go on a job with them." [#FG3]
- The Black American male president of a professional services business development organization stated, "One of the barriers is just getting to know people. And it's no different than people that have not had those historical barriers, but they just kind of avoid the parts of our state where the underserved communities. They don't go down that, right? They don't patronize those businesses. So yes, there's definitely different." [#FG3]
- The Black American male president of a professional services business development organization stated, "There's lots and lots of very successful people of color, men and women, who are successful entrepreneurs, but some of the requirements that I think are put in place are overly burdensome, from people who are coming from underserved communities. And that's either the communities of color or even women who aren't people of color, who've had hard times getting access to capital and then there's the social norms, the pressures, that have kept women, for many years, out of the construction industry. And so having programs that require, again, provide access to women and minorities, to the

leadership and the decision makers, those are the biggest barriers is that not having access to develop those relationships.” [#FG3]

J. Insights Regarding Business Assistance Programs

Business owners and managers were asked about their views of potential race- and gender-conscious or neutral measures that might help all small businesses obtain work. Interviewees discussed various types of potential measures and, in many cases, made recommendations for specific programs and program topics.

1. Awareness of programs;
2. Technical assistance and support services;
3. On-the-job training programs;
4. Mentor/protégé relationships;
5. Joint venture relationships;
6. Financing assistance;
7. Bonding assistance;
8. Assistance in obtaining business insurance;
9. Assistance in using emerging technology, registering with public agencies, and electronic bidding;
10. Other small business start-up assistance;
11. Information on public agency contracting procedures and bidding opportunities;
12. Directories of potential prime contractors, subcontractors, and plan-holders;
13. Pre-bid conferences;
14. Other agency outreach;
15. Streamlining/simplification of bidding procedures;
16. Unbundling contracts;
17. Price or evaluation preferences for small businesses;
18. Small business set-asides;
19. Mandatory subcontracting minimums;
20. Small business subcontracting goals; and
21. Formal complaint/grievance procedures;

1. Awareness of programs. Thirty-one business owners discussed various programs and race- and gender-neutral programs they have experienced. Multiple business owners were unaware of any available programs for small business assistance [#1, #6, #7, #9, #14, #15, #16, #17, #18, #19, #34, #37, #38, #41, #57, #59, #60, #61, #AV, #FG1, #FG2, #FG3, #FG4, #PT1, #PT12, #PT2, #PT3, #PT8]. For example:

- The non-Hispanic white female owner of a WBE-, DBE-, UDBE-, and SB-certified professional services firm stated, "The agency of the SBDC that's out there. And I know that they try, and that is a program, but the thing is they don't... That's the group I said that when I came in to see if they can help me with my business, they were the ones that said I should be teaching them. And then also that it depends on where they're located because their location, some of them have more experience than others. So, I do appreciate that for small businesses. They can't do anything for me, but I'm sure they can for some new businesses that just want to navigate how to work with a lead agency." [#1]
- The non-Hispanic white male representative of a majority-owned construction firm stated, "I think that Caltrans puts on a lot of those programs and puts those meetings on, and they've been very well attended. I think Metro does as well. I think LAX as well. So, I think they've all done a good job of putting those opportunities out there." [#6]
- The Black American male owner of an MBE-certified professional services firm stated, "I think the federal government's 8a program is very helpful. I think the set-asides are very helpful. Again, I don't know how the Hub Zone for the set-asides is helpful. As far as state and local, all I know of is the disabled veterans, and I'm not sure how helpful that's been, because again I've not been able to obtain work. It's out there and I know that there's supposed to be a 3 percent mandate where companies have to use a service-disabled veteran, and I know of a team that is supposedly for a service-disabled veteran, it is. And again, the government doesn't pay for that. I'm not sure state and local pays for it, because there's ways of getting around awarding contracts to a service-disabled veteran. They reclassify it or reword it or something that takes it out of that arena. Therefore, they don't have to follow the rules. So I mean, I've seen it all." [#7]
- The Asian Pacific American owner of a DBE-, MBE-, and SB-certified professional services firm stated, "Ever since I started my own business, one thing is to be able to work with them again you would apply to be on the bench, on the SANDAG bench, so that in the event that somebody needs help on a particular item, they could pick you off the bench because you were kind of pre-qualified already. So, they pick you off the bench and put you on the project. For example, somebody that I used to work for had a project and they picked me off the bench as a QAQC for a project, so that kind of worked out. So that's a mechanism to be able to get the SANDAG work, because we don't currently have a contract with them versus all the other big firms, they do." [#9]
- The Subcontinent Asian American male owner of an uncertified MBE construction firm stated, "There's a community organization; it's a religious community, which is we go there and offer, or we help a lot. We also offer opportunity for people who wants to come from overseas or whatever they want and need some help, or they need to get their hand to the job, we recommend to go take some classes, some courses, like all this stuff. So, we do that kind of thing in our community." [#14]
- The Black American female representative of a minority chamber of commerce stated, "One of the projects that we [have heard of is] DRIVE, it's a ten-year investment plan based in the Central Valley, Developing the Region's Inclusive and Vibrant Economy, with a purpose of making sure that investments in the community are felt across all communities, disadvantaged and disinvested communities are prioritized. One of the programs that the [local] Black Chamber is leading, is betting big on women in small businesses owned people

of color, and one of the tools that we will be implementing is a bonding pilot. We will be able to close that gap and provide collateral to actually help our small businesses meet those bonding requirements. We did one two years ago with State Center Community College District or D3 program, Discover, Develop, Deliver, that worked on doing that pre-certification for contractors to do public works projects. And we think that that's a great model for working with Caltrans and other public agencies, discovering the contractors that are out there and helping them identify the opportunities that exist, develop, making sure that they're prepared their certification and paperwork is in order, and then deliver. Having them bid those contracts and actually be awarded. One of the signature things that we did in that program was a breakdown of the actual bid process. So, we had the purchasing manager from the college district actually go through the bid and break down each section and talk through how they would apply and do the paperwork, answer questions that they had, go through and do the site visit and site walk, all of the things that would help familiarize them with the bid process, they had access to in that Academy. Going back to State Center Community College District and their CUPCCA, C-U-P-C-C-A, it's a certification that's required for doing contracting work with the community colleges. And the process that they have and the paperwork, even though it's still all paper, they have a really great turnaround time and assistance that's available for folks who are filling it out. And so, I think they, so far, are one of the best in class that we've seen, and one that's available at no cost to our small businesses." [#15]

- The Black American male representative of a DBE-, WBE-, MBE-, SB-, and Micro-PW-certified small business development association stated, "One of the things that is part of the Women's Business Center is there are consultants that have expertise in different areas and so, they do have the ability - if they run into a person that needs media assistance, there's a consultant that they can refer 'em to get the help. And that's just a matter - because it's free. It always surprises me when I ask somebody that's struggling to get a business off the ground, had they talked with the Women's Business or SBDCs and they haven't. It's a free service to you. Why would you not take advantage of it? It's called PTAC - P-T-A-C. It's Procurement Technical Assistance Center. They operate similar as an SBDC, but they specialize in helping small business get contracts. So, when you engage them, you come in with a contract that you've already identified but you need help on acquiring it. And they'll help you with it. I mean, existing programs are programs such as the mentor/protégé programs and the teaming - allowing teams to be formed to present a bigger capacity. There are some emerging alternative funding sources that are starting to look pretty promising." [#16]
- The Hispanic American female owner of a WBE-, MBE-, SCMSDC-, and DBE-certified goods and services firm stated, "There are programs that help out. There's organizations I mentioned to you, which was SCMSDC, the Southern California Minority Suppliers Development Council, that helps out launching different programs and things to educate small businesses, small minority businesses. The same thing with WBENC, the Women's Business Enterprise Council, that does it for women as well. There's also another organization that I've very active with, which is the National Latina Women's Business Organization of Inland Empire, and what they do is they do coaching, they do training, they do courses, things like that that help out small businesses." [#17]

- The non-Hispanic white female owner of a DBE-, SWBE-, and CBE-certified professional services firm stated, "The Southern California Contractors Association was so good to me They gave me opportunity to be able to sit on different committees and they gave me access to programs through Caltrans that I didn't even know existed." [#18]
- The Black American male owner of a DBE- and SB-certified and uncertified MBE professional services firm stated, "We get with the University of California, UTSF, and we get with them and they become a partner. We have a five-percent goal with the SFMTA, the San Francisco Metro College and Transportation, that's - Authority. The other ones where we have a ten-percent goal is on the Bart Headquarters." [#19]
- The non-Hispanic white male co-owner of an MBE-, SB-, and DBE-certified professional services firm stated, "City of San Diego is one of the small businesses that we've - they have a small business program that we've worked really successfully with." [#34]
- The Black American male owner of an uncertified MBE construction firm stated, "TGSV at the [airport] in Miami when I was working for them they - he would come in the office and remind us, 'Hey guys, sunshine government and we are making an effort to reach out -' and we had 90 percent participation. I felt really, really blessed to be in that airport scenario because everything I had studied to get my contractor's license we were using those principles and applying them, and the scenario was we had a contract to administer construction projects in a way that ensured small business community enterprises participated and I think we did an excellent job at doing that and making sure that our outreach got into the community and that we supported the subs to do their work, to get the jobs done. I thought that was an excellent program. I felt they did a good job in outreach, they did a good job in supporting the sub - because remember, you're taking a small business and giving them a high-profile, Miami-International Airport contract and we're making sure they're supported in a way that they will be successful, and I felt that we did a very good job at that. What was I thought what was the oil and the glue of that whole thing was just straight - just being straightforward, say things as they are, just representing everything honestly, factually and being on top of things in a timely manner. That is what made that program work so well is that my boss was, 'Hey, we're here for this purpose. This is what we're doing, and we're going to do the best that we can.' And we - all of us in that office showed up and we gave it our best to make sure that we were legitimate, honest and transparent. And I think that was it right there, that we were building projects in the report and we were doing it without shenanigans. Yes, we did increase but - yeah, we did increase access so that there was the published bids and we put it - it was as an [ad in the] newspaper. Of course, you're working for Dade County so we had a lot of resources available for us to advertise the projects and then it was going on for some time so they had become known in the community. So, the bid rooms were always full; we always advertised, and had a lot of participation in the process. We also fronted the cost of preparing the plan. And of course, when they came to participate they would have to leave a check for - towards the cost of the plans and they would get it back if they didn't win the bid or return the plans or something like that, I think. It's called the MCC program, MCC --Miami Construction Contract, the Miami-Dade Airport MCC program." [#37]
- The Black American female co-owner of a DBE- and DVBE-certified and uncertified MBE construction company stated, "L.A. Metro has a great model for standing by the subs, Metro

has a great program. It's a monthly report that comes electronically where the prime contractor has to identify the subcontracts that they paid where the prime contractors have to enter the subcontractors they utilized for that month, and when they paid them, check number, and amount. And that information then comes to me as a subcontractor to verify. And also indicate on that verification - they let me know that we paid the sub on May the 1st. Did they pay you within seven days, because that is California law? And I say yes or no. So, it's every month like clockwork, and if they didn't pay me, this contractor will say zero, because we probably did not - or maybe we didn't receive a payment on that particular one. Maybe we didn't have invoicing. And so, it's just a great tool, I think, to document and hold the primes accountable." [#38]

- The Black American male owner of an SB- and MBE-certified professional services firm stated, "The National Society of Professional Engineers, the American Association of Black Engineers, the Association of Energy Engineers, the Institute of Electrical and Electronic Engineers the International Association of Electrical Inspectors. I used to go to a lot of meetings with the various agencies and organizations that I was telling you about - especially Association of Energy Engineers. The local Association of Engineers with Energy Engineers group for Los Angeles, and we had our meetings at the gas company and so, we were constantly having meetings and networking with each other and talking about the opportunities that were available and I know quite a few of them. And a lot of the electrical engineering firms are actively involved with the Los Angeles Industry Application Society of the IEEE that I was active with for a number of years before I moved. And I'm still active with the Power Engineering Society and the Industrial Activities Society, and the International Association of Electrical Inspectors. It's a conglomeration of businesses, architects, electrical engineers, and electrical suppliers of equipment, okay? So, I come in contact with a number of different organizations that are actively engaged in doing work for many of the agencies that you're speaking of, including Caltrans and Metropolitan Water District and so many others - the Department of Water and Power and so many of the other agencies - Southern California Edison and the state agencies." [#41]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "I've worked with a PTAC, they'll basically just send you notices of bids that's about all they've done for me. Well, maybe not true. Maybe PTAC-I've tried to re-energize my contacts with PTAC, and they are responding. So, they came back to be pretty knowledgeable. But I think the problem is the system. They say, we'll be aware of this system, well you can bid on these things, you can do that." [#57]
- The Asian Pacific American female owner of a SB-, DBE-, and WBE-certified construction company stated, "When I find out government have this minority woman program, I start learning because I got rejected by my own kind of people. Right? The Asian people think, oh, this is not a woman's job in security, in construction. So, when I start learning about these minority woman certification... I go to so many classes, so many trainings. Thank God many are free. But I joined an association that Women in Construction, Chinese contractor, Asian business. I even joined Latino business, a Black business. I joined different business just to learn. I took the class, How to Talk to a Stranger, because I'm not as outgoing as I should be. Metro has this monthly program call How to Do Business with Metro. They will bring in their buyer/contracting people and they will bring their prime contractor to encourage them to do business with small business. I know these buyers, they have a hard time

themselves because they are afraid to hire someone they don't know so they keep going back to the same small business group, or minority, or anything." [#59]

- The Black American female owner of an uncertified WBE and MBE professional services firm stated, "A program that was birthed out of hearing all, we don't have enough workers. What I didn't know is that Governor Newsome was on my heels to pass the pre-apprenticeship AB-235 where he wants 500,000 pre-apprentice and an apprenticeship programs by 2024. I had no idea... What I did do along the way I incentivize them at the end, I gave them \$250 when they graduated. I also gave them a certificate, but along the way, I was giving them little stipends to keep them interested and letting them know that ahead of other people that would come in and speak to them and say, this is a game changer. The program that we put together, me and the college, it was so intriguing for the individuals because no one wants to, everyone is not designed for college. When you understand that concept first, then you know that those that are not looking off in the college. But if you can give me a 16-week trade that I can see it and I know that it requires me to have a ninth grade reading level, that it will help me move to the next level and become very successful and help me take care of my family, I'm with it." [#60]
- The Hispanic American female co-owner of a WBE-, MBE-, Micro-, and SB-certified professional services company stated, "I think that the small business development center is it is an incredible resource for any business owner, small business owner. They're free, and they will help you in whatever capacity you need. I think that the other, let me see, programs that have been helpful for DBE and certified firms or when the agency actually requires that DBEs or certified firms be part of the award and not just a good faith effort. Like the SANDAG program is like that. They require that the spend hits a certain percentage for DBE firms, and SBEs too. So, when there's a program that is not just a good faith effort, but it's a requirement, that always bodes well. The city of San Diego has the same program for SLBE's. They built it in to their award system, the point system, when they give points on proposals." [#61]
- A comment from a WBE and MBE Hispanic American-owned construction company stated, "Back in 2000 there wasn't enough resources in the Central Coast for starting your own business. Thank goodness to the VA they helped us out a lot." [#AV8515]
- The Hispanic American female representative of an MBE- and DBE-certified construction company stated, "Construction [Contractor's] Corner is helpful. [The local] PTAC helped her navigate it. It is also good for networking, etc. If you know how to use it. There should be more resources on how to use the Contractor's Corner." [#FG1]
- The Black American male representative of a professional services business advocacy association stated, "Our focus is financial literacy in small businesses. We want to make sure small businesses have the opportunity during this pandemic, to get the resources they need and to grow during the pandemic. SBA does a good job of filtering information and being upfront with everybody about what's what and what's not. They're very transparent. I'm not giving any bad light on Caltrans. There's things everybody needs to get done, just do better, right? But if there is a model that we I think could look at to see how the flow of things are, the SBA, and the SBDCs around the state do one heck of a job as far as being upfront with everybody." [#FG2]

- The Asian Pacific American male representative of a minority business advocacy association stated, “I think once you get the contract, there are other issues. For example, you need to provide a payroll, certified payroll, that kind of stuff, which they need in order to get paid. There are number, a field of firms that really specialize doing that. I think one of them in the San Francisco Bay Area is run by African American woman, and she helps out with the DBE contractor, to take care of the certified payroll among other things.” [#FG2]
- The Hispanic American female representative of a professional services business development organization stated, “The chambers came together, an alliance, the Sacramento Black Chamber, and we’re talking with the Asian Chamber, and we’re talking with the Hispanic Chamber. And they came together, because their contracts weren’t really coming down to the businesses here. They came together to really say, hey, we need to look at this program and what you’re doing. And what I like about it ... And it’s not perfect, but they’ve done a lot to really make sure that things get down to small business, right? So, one of them is that they developed the SEED program. It’s a really simple process for people to apply. And once you’re in the SEED program, you’re automatically going to get some extra points when you apply for a program there. And they’re very committed. It also helps is they said they’re a community owned asset, right? Because we have really high SMUD bills. In doing that, they’re like, our goal, every year, is to hit this percentage of local small businesses. And I’ve had some businesses who have really gotten some good contracts, from 20,000 to 100,000, from a printer, up to construction, really doing something where they can meet the primes and work with it. But it’s very, very hands-on, to the point where people start to think, oh, it’s saturated, because they’re always like, how to work with SMUD workshops, what does that look like.” [#FG3]
- A respondent from a minority chamber of commerce focus group stated, “I do want to mention that we have a really, really good relationship with our utility company, who has done a tremendous job as assuring that their procurement opportunities, they have a goal for us. And they exceed it every year, the 25 percent of what they buy comes from small businesses in our region. And they report to me every month, where those contracts went, how many of my numbers got those contracts. I even see the ones that are non-members. And we meet on a quarterly basis, to talk about it. We talk about new projects that are coming up. They’ve done an incredible job. They’ve been very committed to this, since Prop 209 passed, back in the late 90s, and actually, was one of the communities that took the issue up to the California Supreme Court, to try to get it overturned. So, their commitment is there. We have asked, oftentimes, for some of the others, to build the programs similar, because it’s been successful, all these years. And nobody has. But we still have to knock on those other doors and make sure, particularly, if they’re getting federal funding. We will go knock on the doors and say, you got to show us something. But there is a successful program up in Sacramento.” [#FG4]
- A respondent from a virtual public meeting stated, “PTAC is a procurement technical assistance center, and they are free of charge, and their goal is once you have identified a contract, public works contract, whether it be local, state or federal, public works contract, their goal is to help you acquire that contract. And there are several PTAC’s throughout California, if you call them, you sign up as a client and they will assist you.” [#PT1]

- A respondent from a virtual public meeting stated, "What I'm doing right now is working with the PTAC committee." [#PT1]
- The Black American male owner of a professional services firm stated, "You got to work with LA PTAC. You have to work with your chambers to get all the education SBDC [and] SBA." [#PT12]
- The female representative of a business development organization stated, "The solicitation and the RFPs, and how do you bid or how do you respond? Again, the Monterey Bay PTAC helps with that and it's a free service. And they can help you look at the RFP and then submit a response. The procurement counselors there are very good at doing that. The PTAC also has a Bid Match program where they take the small business, and they have all these different databases of all these different projects and they match you to the project." [#PT2]
- The non-Hispanic white male owner of an SB-certified construction firm stated, "I just started working on the DBE certification and how long can I expect for the process to take after I submit the package. PTAC is helping me understand the process and requirements." [#PT2]
- A respondent from a virtual public meeting stated, "PTAC is amazing!! i have gotten great info." [#PT3]
- The Black American male owner of an MBE-certified professional services firm stated, "Have you guys looked at Riverside Black, or the Black Riverside Chamber of Commerce and different organizations like that, or for instance, like NESBE, National Society of Black Engineers or SWE, Society of Women Engineers, whatever the case may be, because I think you will find a pool that you're looking for." [#PT8]

2. Technical assistance and support services. Six business owners and managers thought technical assistance and support services are helpful for small and disadvantaged businesses [#8, #9, #13, #15, #21, #36]. Comments included:

- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "We have to do some reorganization ourselves internally to keep up with this, but also just understanding how Caltrans expects us to work with them, understanding if there's special... So, understanding how to fill out some of those forms regarding prevailing wage or more when... I think that would be beneficial." [#8]
- The Asian Pacific American owner of a DBE-, MBE-, and SB-certified professional services firm stated, "I guess for me, a little more like show and tell, and since we're maybe more small business helping each other. Let's say if I've learned something, maybe I can share my experience with another smaller firm, so they don't have to kind of go through the same issue that we went through. And I would want somebody to teach me how to overcome obstacle in terms of accounting or whatever the case may be. So, it's more of sharing resources I guess, if there's such a thing." [#9]
- The Hispanic American male owner of an uncertified MBE construction firm stated, "I do want to get certified in how to do my own bookkeeping and be more proficient in using

QuickBooks or doing some more of the corporate tax stuff, but we have somebody that does that for us. That would be something that'd be very helpful but mainly [I need] time." [#13]

- The Black American female representative of a minority chamber of commerce stated, "Identifying open contracts and the bids, because there's so many different online portals, there's different places where they post it. We have served as an aggregate and being able to collect those, keep them and distribute them to our members so they know what opportunities are available. So that's one of the biggest plays that we've helped our small businesses. It's just letting them know what's out there and what's available, and then when they identify an opportunity that they want to pursue, we'll provide them with that one-on-one technical assistance, help them prepare the bid and do bid review prior to submission. And so, we've seen that on bids that we've been able to help them review prior to submission, we've seen higher rates of positive response, meaning that they were deemed responsive and that either they were awarded or they weren't awarded and given a justification for why they weren't awarded." [#15]
- The Hispanic American male owner of a DBE-certified and uncertified MBE construction company stated, "So I do a lot of kinda self-learning, and when it comes to new - for example a new procedure. The LCP tracker is something that's newer to me that just the last month I learned. And I was here at night one day, trying to submit my certified payrolls, and man, it was driving me crazy 'cause I couldn't figure it out. And I had to reach out to a friend of mine who has a business as well, and I said, 'Hey, do you know how to do this?' He said like, 'Let me see if I can get my secretary to help you out.' So, then I got her on a Zoom call, and within ten minutes she had me up and running. She figured out some quick mistakes that I had made. But a lot of stuff I do is kinda self-learned, 'cause a lot of times when I'm in the office, it's late at night when I'm trying to do paperwork and everything else." [#21]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "It can be a challenge. Sometimes people get frustrated with the whole process. And a lotta times it has to do with whether they're familiar with how computers work with these new programs that're out. And a little bit of that is our fault because we're not keeping up with ways to make it simpler. Well, mainly just keeping track of payroll that has to be done for certain jobs. That has to be done a certain way and that's real frustrating for some people; to actually keep track of the different types of pay that has to be done. And I've researched it a little bit and there is some programs that help do that. 'Cause some people get frustrated by all of the paperwork that has to be done for those kinds of things." [#36]

3. On-the-job training programs. Fourteen business owners and managers thought on-the-job training programs are helpful for small and disadvantaged businesses. Support varied across industries [#2, #3, #5, #6, #9, #11, #13, #19, #41, #42, #48, #61, #62, #FG3]. For example:

- The non-Hispanic white male co-owner of a majority-owned construction company stated, "So the apprenticeship program, that's state mandate. You have to have so many apprentices per craft and you have to have them out there and teach them and all that. So it provides some benefit, but you can't develop a company and be successful on apprentices or on the job training. The competitive nature of our industry is so high and the production and the unit costs that it takes to be competitive. You can't afford to have too many of those

on your crews and even worse though, the risk of them getting hurt because they're not as aware." [#2]

- The non-Hispanic white male co-owner of an SB-certified professional services firm stated, "That's knowledge. We, typically in our line of work, we have to hire apprentice because again, we're a union contractor. So it's always good to have these guys trained and basically we're training them to work the way that we work, that our crew has been established and working in conjunction with the fore-mans and the superintendents and just making sure that they have the knowledge of the type of work that we do. We belong to the United Contractors, they have a great program in training, foreman training, superintendent training. They have a lot of programs and that's really been helpful. The union training, not so much. They've got a way to go with their program. I think that maybe it's their outreach program to high school kids, college kids and trying to recruit to get individuals, male and female to jump into our industry. That's probably one of the main problems, I think." [#3]
- The Black American male co-owner of a WBE-, MBE-, and DVBE-certified construction company stated, "We had a program where we were taking at-risk youth, because they used to, in the high schools, teach trades, but we would take an at-risk youth during the summer, and put them to work. Some of them have never picked up a hammer in their life, because all these kids now just want to be hip-hop stars and YouTube stars. But we throw them in there, and they never been so dirty in their lives. So we'll take on anybody, because to us, attitude is more important than ability. From the proper attitude, that's all you need. We'll teach you what you need to know. And we don't know everything ourselves." [#5]
- The non-Hispanic white male representative of a majority-owned construction firm stated, "I mean, there's some that are done at, I believe it's at LA Trade College through Local Jobs. Local Jobs, I believe is the name of the program. And that's been a pretty good program, because we're a union we do hire a lot of people out of the union, so they do the training for us. So we don't have a lot of experience with other programs other than what the unions offer and the other one I mentioned." [#6]
- The Asian Pacific American owner of a DBE-, MBE-, and SB-certified professional services firm stated, "Yeah, definitely. I would say maybe a little bit more mentoring, internship type of deal where I think the small firm would have to kind of invest in growing their staff instead of trying to hire from the outside or steal from other firms, because I think it's probably better to grow your own staff in a way." [#9]
- The non-Hispanic white male representative of a Native American-owned MBE-, SB-, and Micro-BE certified professional services firm stated, "Yeah. They're helpful, but they're only available to the signatory firms. And the signatory firms in California, for instance or in the nation, only represent 7 percent of all the businesses. And so, 7 percent of the businesses have access to apprentices, 93 percent do not. Well, if the California Apprenticeship Council, called the CAC, would allow apprenticeship programs to start because the unions oppose it. So even though they don't want to help, let's say a firm like mine, but they being the union by giving apprentices to us, they're a barrier to starting our own apprenticeship program. They'll protest it and I have letters showing them doing such. They only have 7 percent, but they don't want anybody else to do it." [#11]

- The Hispanic American male owner of an uncertified MBE construction firm stated, "Because if I have the lower insurance rates, I would gladly take somebody fresh out of trucking school, show them the ropes, train them, work with them, be in the truck with them until they feel comfortable and be a successful driver. And only the big, big companies really do that... out here you're larger trucking is way up there, Swift, CR England. They're able to do that, because they have such high volume, but a small company like myself wouldn't be able to do that. It wouldn't be cost-effective. Probably a more simplified drivers' manual. That same organization, the Federal Motor Carriers, they have a very thick, 1200 page safety manual, easier to read." [#13]
- The Black American male owner of a DBE- and SB-certified and uncertified MBE professional services firm stated, "We're trying to do is we're trying to do interns to expand those contractors, because we've been wiped out. So we've been trying to do internship, get some Black businesses back on the road." [#19]
- The Black American male owner of an SB- and MBE-certified professional services firm stated, "And so, I've been working with them and talking with them as a member of the Small Business Advisory Council trying to help them understand that if they can carve out projects under \$100,000.00-\$250,000.00 or even \$100,000.00 - because there are a lot of small projects that are done for - and the LAUSD is a good example. Caltrans is, too. You guys have facilities all over California and a lot of the work that's done isn't necessarily a major project. It could be replacement of an air conditioning system or replacement of - an upgrade of a service. And, in fact, the life of electrical equipment is generally about 25 or 30 years. And with all of the changes in the California Energy Code and the reduction of energy that's taking place, a lot of the services could probably be reduced or re-assessed for the actual usage. And some of that equipment, I'm sure, is more than 25 years old in some of those buildings that you have, and they could be replaced. And I'd be more than happy to help with something like that. In fact, one of the programs that I thought might be a good way to get young engineers familiar with building construction and design was to go in and actually help to redo the as-built drawings and to help develop as-built drawings. Because so many of our facilities were done and the drawings either lost or discarded and nobody really knows how they're operating, how they're connected, and how those systems are managed, you know? And so - and that was one of the programs I suggested for the Los Angeles - actually, for a program with the Cal State LA that I was working with them on some ideas for a training. And the idea was that if we could just go in and make sure the as-built record drawings of facilities were intact, it could create a lot of work and put a lot of students - get a lot of students involved in the fundamental." [#41]
- The non-Hispanic white male co-owner of an SB-, DBE-, and HUBZone certified construction firm stated, "[It's good] to find somebody that wants to work or learn a trade, you know, training somebody on the job and offering training for them is great, but it also slows down the job. 'Cause you're not just working and doing what you're doing to get the job done; you're teaching somebody and watching what they're doing and fixing their mistakes." [#42]
- The Hispanic American male representative of a construction union stated, "Another thing that union members when you're doing public work you have to - the companies have to have apprentices in there. And the apprentices have to be registered with the state. They

have to use apprentices and the apprentices have to be registered with the state. Well, they have to follow some regulations. They have to work with the BAS140, BAS142. So they have to follow those. sometimes they don't want to but they've got to follow the government rules, the state rules. I receive letters sometimes like represent apprentice and then we have a part in there to say put the apprentice and they put zero. So it's like it's not request. And I call them and I say so you requesting apprentice and they put zero. And they'll say, well, we don't need it. I say yes, you need it." [#48]

- The Hispanic American female co-owner of a WBE-, MBE-, Micro-, and SB-certified professional services company stated, "So as a consulting firm, we typically don't hire people with zero experience, because we are small firm, and it's not like a large firm that has on-the-job training. So, as a consulting firm, and I don't think the on-the-job training is actually feasible for us. We try to hire people that could help with the work right away. There's a position that we did hire someone with no experience in planning, but that was a referral from, it was during a recession, not the recession, but COVID, but she had shown promise because she was a personal reference. We knew someone that knew her and had trained her and said, She's pretty trainable. But typically, we don't hire people with zero experience." [#61]
- The non-Hispanic white male owner of a majority-owned construction company stated, "I think it would. I think that would be a big help, on-the-job training." [#62]
- The Hispanic American female representative of a professional services business development organization stated, "Those jobs that come in, how do we make sure it goes to our youth that are here, so that when they're good paying jobs, how does that work out? And then, how do we retrain people for jobs of the future, right, so that people have that opportunity?" [#FG3]

4. Mentor/protégé relationships. Twenty-five business owners and managers thought mentor/protégé relationships are helpful for small and disadvantaged businesses or participate in unofficial mentoring relationships with other firms [#1, #5, #6, #7, #10, #16, #20, #23, #34, #35, #37, #38, #41, #46, #50, #53, #61, #FG1, #FG3, #PT10, #PT11, #PT12, #PT3, #PT9, #WT2]. For example:

- The non-Hispanic white female owner of a WBE-, DBE-, UDBE-, and SB-certified professional services firm stated, "I mentor small businesses and I actually have them come into, the owners, come into my office, sit down on a computer and I help them with getting their certifications. So, I show them the how to avoid the pitfalls. But most agencies are, like I said, a huge... Everything's a huge process, and they don't tell you how to do it. They don't help you. There's agencies out there like SBDC, and I went to them once and they said, 'Well, you could teach us.' And so, what I do is just for free, I help small businesses gain their certifications, gain how to work with each agency, what the differences are in each agency and how to thrive. They even have a mentorship program for the prime contractors to work with the subs, that's bologna. None of them do. And I don't care who says... Everything I've ever heard was that no. No, that they just say, 'Oh, you can do this on your own.' I do mentoring free, but what they should do is set up a part for this. And I got to tell you, the ones I've seen that have done mentoring, are not good. In fact, I will write in the chat rooms saying like, 'This is not working. And this is why that you're not understanding what the

small businesses are going through.' And every time somebody will say, 'We didn't even think about that.' And so, it's their lack of experience and they're consistent trying to be a mentor for 20 years, but not understanding really what's happening today, not what happened 20 years ago. It's a big difference. And that's it, is that the problems that people had 20 years ago are not the same as they are now. And not only because there's new laws, but the agencies have changed. And so, these people that are trying to help mentorship are really not doing a good job." [#1]

- The Black American male co-owner of a WBE-, MBE-, and DVBE-certified construction company stated, "Oh, absolutely. If someone who's been through it before, and knows all the ins and outs, and has the proper connections, yes." [#5]
- The non-Hispanic white male representative of a majority-owned construction firm stated, "I think they should implement a mentor-protégé program where they do pair up general contractors with small or minority businesses to help them get started and help show them how to do business. And I think if they can incentivize that through the bidding process, that would be really well received." [#6]
- The Black American male owner of an MBE-certified professional services firm stated, "I've had two formalized mentor/protégées. Both were unsuccessful. Actually, I had three and all three were unsuccessful. I've heard of successful ones. I think if you get the right companies together, maybe, but based on my experience, they've been somewhat useless. All the mentors speak to the choir. They agree to be a mentor, then that needs to be spelled out clear what the objectives are in mentoring, and then the protégée needs to have a clear understanding of expectations from the mentor. I think that's where there's a lot of fuzzy gray areas. For an example, as a protégée, I expected a mentor to help me understand how to put my financials together. Well, the mentor felt that sharing that information with me is proprietary and, therefore, didn't share it. So how am I supposed to learn about getting my financials together, if I'm not taught how to do it, as a new startup company? And then, I had a mentor that wanted me to go out and find the work, and then bring it back to them so they could reap the benefits, and I get the small portion of the opportunity. So again, it was all about them, not about me. I was the one that had nothing." [#7]
- The non-Hispanic white male owner of a SB- and ELBE-certified professional services firm stated, "The people [working for Caltrans] aren't mentored, they're educated. They have a piece of paper. And then five years later, they're writing specifications... I had one county guy come up to me one time and start to, he was actually reading the book to me about how I was supposed to pave something. And I told him, I said, hey, do me a favor. Don't try to read a book to the guy that helped write it. And he had been, a rich man trained him. Anyway, if you catch the drift there. And I said, as a matter of fact, I've retired here. So, you no longer have permission to speak to me. You have something to say, put it writing. I'll respond in time. It worked. I had to do that twice in my career. So, yeah. The people aren't mentored, they're not brought up under somebody else's stead showing them, teaching them, learning from the experience. They're thrown into positions of power way too early in life. And they don't have the experience necessary in order to be able to get it done properly without looking for some place to catch the contractor doing something wrong." [#10]

- The Black American male representative of a DBE-, WBE-, MBE-, SB-, and Micro-PW-certified small business development association stated, "I'm aware of several. I can't say that I've seen them really being implemented on any kind of a wide scale. I don't personally know any - I know a Hispanic lady that had a trucking company that got into a mentor/protégé. I don't know any Black organization or Black small businesses that I'm working with that are into any kind of a mentor/protégée relationship. And I know they're there, because I know Caltrans has a good one and SBA has a good one, but I don't know anybody that's taken advantage of 'em." [#16]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "Mentor/protégé programs have had certain amounts of success when they were done properly. It's not so much the ingredient, it's the participant. What they gotta understand is, just 'cause you're in the mentor/protégé program doesn't mean you're gonna get a job working with that protégé or that member. And so, people sign up for the program and think it's gonna guarantee 'em a contract, and it doesn't." [#20]
- The Subcontinent Asian American male owner of a Micro- and SB-certified and uncertified MBE construction firm stated, "I've contacted Caltrans regarding their Calmentor Program. I've been in contact with Karen, who is actually the coordinator for the program, and she's trying to find a way to put me into the program. And like I mentioned, that's primarily because of the specific work that I do, and then it will be a lot more helpful if there is a company out there who does the same exact thing. Then they are able to mentor me how I can do the work that I am doing even better and so on. But I have been in touch with her. They prequalified me, meaning the panel approved that I can be a part of the mentor program. So, now it's just the time that it takes to find the right company to mentor me. So, I've given some suggestions and she is contacting those companies and she will get back to me hopefully in a few weeks or in a few months. So, that's one approach that I came across that I am taking. But the other one, I would say, is trying to find a mentor myself with the companies that I work and trying to find somebody who has been in the market for a very long time. But the challenge has been for me when I worked with contractors most of my friends and colleagues that I know are usually contractors, and they haven't seen the full engineering side of things because that's where they seek out help. That's where they contact me for the work. In my industry, or in the specific civil engineering design business, I would say most of the people I know are also my competitors, so - which makes it a challenge to find someone who can also mentor me. And this particular engineering can be done throughout California, so it doesn't really matter even if I know a former boss who has 35, 40 years of experience but lives in San Diego, and he or she might still hesitate to mentor me even though I'm in Northern California just because this business can be done throughout California. And it's just a question of how much they trust me that I'm not going to pick up their business and so on. So, that has been the challenge for me, to find somebody who is willing to trust me and put their time and efforts, so they feel like they are helping out a startup company." [#23]
- The non-Hispanic white male co-owner of an MBE-, SB-, and DBE-certified professional services firm stated, "I've seen a lot of other firms have success with the mentorship program. We actually haven't done that. We've approached a couple firms about doing it, but really, there's a lot of, like, there's a lot of private information that we have that we don't feel comfortable about doing it at this point. I think there were some relationships we

reached out to on the mentor program and a lot of that was, like, how do you get into some of these large San Dag projects and programs and, you know, I think they would be great to get into, and I see our business going that way.” [#34]

- The non-Hispanic white male representative of a majority-owned construction firm stated, "Mentorship would be huge. Like I say, especially - being able to deal with money part of it is bigtime. I do a lotta training of our new engineers. And we do help out with smaller subs too that're just getting started that we've known for a while - known the people that own it. We give them - a lotta times I'll give 'em a chance on a job here and there. 'Cause then they won't be able to - too big, they won't even be able to get the bonding; too big, they might not be able to execute. If they win too many jobs, they won't be able to do 'em 'cause they don't have enough manpower to do 'em successfully. That's part of the whole mentorship: you need someone to kinda say, 'Hey, slow down. You don't have enough people to do this work.'" [#35]
- The Black American male owner of an uncertified MBE construction firm stated, "Yes, I think that's a fantastic idea. I haven't seen anything of it, but I think that's a fantastic to pair smaller companies together. I thought about that, but I didn't know where to begin to search to find something like that." [#37]
- The Black American female co-owner of a DBE- and DVBE-certified and uncertified MBE construction company stated, "Trial and error, and I have some great contractors who kind of guided. They'd say, oh, this is wrong, this is wrong. You know, Caltrans just doesn't have anything that I've seen to help you fill out paperwork." [#38]
- The Black American male owner of an SB- and MBE-certified professional services firm stated, "I've been teaching for now since 2006. So, that's, what, 14 years, and I really enjoy that because it keeps me - I only teach one class a semester so, it gives me a chance to keep abreast of the changes in technology as well as keep up with chemistry and physics and some of the other basic math. And so, it's been fun. And then, all the while, trying to build a business. And I mentor a lot of young engineers." [#41]
- The Middle Eastern American male president of an WBE-certified professional services firm stated, "Originally, years ago, yeah, that was a problem. But, there was an old boy network, and they wouldn't give a chance, an opportunity to everybody. But that was one of my motivations that I went on my own and started my own company. And pretty much, I had to teach myself everything. And because of that, since then, I've been more than willing to give a chance to anybody. So, anybody who I meet, and they were looking for projects for a job, I would give 'em a job and I would give 'em a chance. I would train him myself and make sure they understood everything. And it's been a very rewarding experience for me as well and I do have a few guys that they were trained by me and then, they started their own corporations. And we're good friends and I'm very happy about it. I feel good about it." [#46]
- The Hispanic American male owner of an uncertified MBE construction firm stated, "When I quit my old job and I wanted to go into the dump trucking industry I started working with this company. And I was driving this truck and then I had told them that I wanted to start my own business and stuff to get my own dump truck. And then I just asked them. I said, 'Hey. Can you sell me one of yours?' and they're like, 'Yeah. Make me an offer.' And I made

them an offer and so I'm paying payments on a truck right now from them. They always - they provided [advice to] watch out for people that they won't pay you. If it's too good to be true. Don't work for any company that's not a big name. They took me around the truck to do, examine the truck and make sure it's running right. And insurance, they had me go through - I went through their insurance broker. They gave me a number on tires, how to get tires like cheaper tires and what else." [#50]

- The Asian Pacific American male owner of an MBE-, DBE-, and SB-certified construction firm stated, "I am part of the Caltrans Protégé Program, since last year. They called me. I don't know how they found me. But where the wheels really started to turn was two years ago, when I went online, and I was just really desperate to grow the business, volume-wise and dollar-wise. But just as an overall business, and I really had a vision of where I wanted to be, how big I want it to be, and I just knew that residential wasn't where it was gonna happen. The people I communicate with are larger prime contractors who kinda I use as like mentors. So, these are guys that run \$20 million business - Much larger than I am, but they've been really helpful to take me under their wing and kinda guide me. I think ultimately it just comes down to the individual who participates, and how much they want out of it." [#53]
- The Hispanic American female co-owner of a WBE-, MBE-, Micro-, and SB-certified professional services company stated, "We participated in the Caltrans mentor program three times, over the course of nine years. And I'm currently in one now with a cap mentor protégé program, and we typically has a business advisor and business mentor that we've been working with since 2019. Very positive. The mentor is kind of like the big brother in the industry. So, they help you out in whatever you need in your business. And it's at no cost. So, it's really nice. It's just our time." [#61]
- A respondent from a trade group focus group stated, "District 4 Mentorship Program has great momentum - more programs and websites like this statewide will really help identify primes who are participating in mentor/protégé programs so DBEs can reach out to primes or other DBEs for support." [#FG1]
- The Black American male president of a professional services business development organization stated, "When I think about the mentor protégé programs, I mean you hear about them, but how are they structured? If I own a restaurant, right, we should have mentors at the state, who run the commissaries or the cafeterias or whatnot, partnership, mentoring those businesses. Here's how you can deliver items. You have your retail front, but here's how you can also deliver things and buy them, so that they start to diversify their business. So, they need to opportunity to actually do the work. So mentoring is critical, but they have to be hands-on mentoring. I would recommend to Caltrans is to really get together with their primes and come up with some sort of mentor protégé program, where they actually get to do the work, and they get paid for the work that they do. But they get to participate, because until they get to participate, you're always going to have that, well, you don't have the experience, right? You don't have the experience to participate. And I think that's the best thing that Caltrans can put into place is some sort of mentor protégé program, that requires participation from local minority and women owned businesses." [#FG3]

- The female owner of a WBE-, DBE-, and MBE-certified professional services firm stated, "There's no issues with mentoring in private work, where there are issues with mentoring in a government work. When mentoring occurs in government work, there's always that fine line that Caltrans or local agencies will say, 'Oh, they are now the prime contractors performing your work.' Well, I need assistance. That's what helps me be successful. So, the thin line here is allowing the contractor to provide some assistance and not immediately identify that assistance as an appearance of performing my work." [#PT10]
- The female representative of a DBE-certified professional services firm meeting stated, "I am participating Cal mentor program. I just started this year. So, I'm one of the members." [#PT11]
- The Black American male owner of a professional services firm stated, "Caltrans has not adopted a mentoring coaching program. And that's why you see the low percentage of Black [business owners] get contract because it takes a strategy. It takes marketing. It takes a history of partnering with prime. Not partnering with Caltrans. And that's what I'm trying to say. You got to be able to partner with prime. Because you're with the prime, as a risk issue, they can't afford to have a risk and they really isn't trying to save a pulsating. So, they don't want to actually deal with stuff that can't provide. We have to make sure that the sort of understand you have to be a reliable service provider with at least experience. And that's what's hard for the minority, is for the prime to let them into the opportunity. So, I'm trying to help them understand it. You have to do teaming and joint ventures. That has to be part of their actual business development plan. That's why I bring up the telephone because mentoring and coaching is part of any organizations in terms of developing their staff. Well, guess what? That applies to your prime and yourself." [#PT12]
- The male co-owner of an MBE-, LSBE-, CBE-, and SB-certified construction firm stated, "Why doesn't Caltrans requires primes to mentor new construction companies as part of the bid award?" [#PT3]
- The male owner of an LBE-certified construction company stated, "People don't get that feedback that was requested, it's typically not provided to any firm by the DBE or otherwise. And it's really the amount of... If a DBE firm is able to provide bids that conform with non-DBE bids, then that is what will make them competitive. If that makes sense. Both in terms of scope, DBE scope, often times the challenge with DBE firms. So, they say, 'What do you want us to do?' Like, well you're a law school contractor finally lets we'll work in court, all that. And there has to be a lot of hand holdings sometimes, which doesn't, there's no time allowed for that. And so that has to happen through a mentorship process, which has happened, so those are good. think that would make some time, some sense or just getting away from the goals altogether and making it more of like a mentorship instead of trying to modify, incentivize folks to get that work by just providing options for people that need access to mentorship or to do funding bonding or, what have you. If you intended improve the disparity between business owners is to, instead of mandating that certain people get work, but just to help those that need help get work that is right. By providing opportunities and training and coaching and what have you, but not so much like you have to fund so much of it to a certain entity because I think the funding doesn't go the way it's supposed to go." [#PT9]

- The male co-owner of an MBE-, LSBE-, CBE-, and SB-certified construction company stated, "I have attended several seminars by several public entities and one of the common denominators is the need for quality contractors. Especially disadvantaged ones like WBE, DVBE, MBE, etc. On the contractor's side, primes seem to have difficulties finding enough quality subs and argue they do not have time to mentor anyone. Subs can't get enough training or opportunities. To me it looks like a vicious cycle. Therefore, I believe that a mentorship program requirement as part of the bid award will eventually result in better equipped contractors and a bigger pool for Caltrans to choose from. Basically, there will be bigger competition from highly trained companies. For this, of course, the mentees would have to meet some minimum criteria that the current contractor developing programs can help them meet. On the mentor side, maybe this would be a requirement only for large contracts. On the public entity side, it would cost a premium for the mandate." [#WT2]

5. Joint venture relationships. Eighteen business owners and managers discussed joint ventures. Many businesses thought joint venture relationships are helpful for small and disadvantaged businesses or had successful experiences with joint ventures, while others noted the complications that may arise [#1, #6, #7, #8, #9, #12, #14, #16, #20, #22, #27, #41, #51, #59, #61, #AV, #PT12, #PT8]. For example:

- The non-Hispanic white female owner of a WBE-, DBE-, UDBE-, and SB-certified professional services firm stated, "No, because that's another conglomerate you've just made. And I, actually I haven't been part of a joint venture, but I've been on projects that had a joint venture. And it just says a lot of incompetent people trying to do what they can, and they don't understand what joint venture actually is. I find them lumbering because there are too many... Several companies that have their own ways of doing things and nobody's efficient." [#1]
- The non-Hispanic white male representative of a majority-owned construction firm stated, "They can be. They can also be a problem depending on who you partner with. If you have two contractors that are working together and they're not able to see eye-to-eye or they don't get the information straightened out prior to bid time or agreements, then there can be issues between the JV partners which makes it harder to build the job successfully." [#6]
- The Black American male owner of an MBE-certified professional services firm stated, "I absolutely love joint ventures. I think joint ventures is the smartest business practice that ever has been invented, and I don't understand why, for the life of me, a lot of the established businesses don't realize to go with a joint venture. I absolutely think the joint venture is absolutely the way to go. I love joint ventures. Out of the 15, three have been very successful. The other 12 were unsuccessful. Let me break it down. Three were very successful. Two were horrible, because the owners of the business were horrible business owners, and they were just people that should not even be breathing. Once we got the joint venture, the other 10 went to sleep and did absolutely nothing to promote the joint venture. They just said, let's get it together, and they did absolutely nothing. But if we did a joint venture that has worked, everybody performs, because it's like a team. But if it's putting together a joint venture to pursue work, I mean, I've had three great experiences, two remarkably hollow experiences and 10 experiences where we did it. And once it was done, I

still think joint ventures are a good way to go. These ones that I'm talking about for teams has not properly utilized our exercise, but they certainly have potential." [#7]

- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "It's not super common. Typically, it's done as a joint venture and it's a requirement, joint venture, by in the procurement process. It's typically a DBE requirement or stuff, or they will say that they would prefer the prime consultant has all the expertise within for themselves, and boom, that cuts out everybody. When they make that sentence, it says like, we would prioritize primes that can do the expertise all in house or something along those lines, and immediately cuts us out of it because that's not how small businesses work." [#8]
- The Asian Pacific American owner of a DBE-, MBE-, and SB-certified professional services firm stated, "I think since we're kind of like the little fish, I think if the bigger firm would be able to kind of bring us along so we can kind of tag along where they give the small business a chance to work with them. Then I think it'll make all the small business around San Diego a little bit stronger, because a lot of the AECOMs of the world, they have all the qualifications. It was really easy for them to get a government contract, but if they can bring along a smaller firm, then it makes the whole industry a little bit stronger as a whole. We want to have that opportunity, but I don't think it goes down that low, because usually the big firm works with a medium firms, and we're really low on the totem pole." [#9]
- The Subcontinent Asian American male owner of an uncertified MBE construction firm stated, "If the contract is too large and we asked the customer if we can venture with another company, if you have a timeframe. For instance, if the customer says, I want to get the job done in six months, and we calculate the job and we think it's not going to finish in six months. So, we says, listen, what about we venture with another company to finish it before six months? Otherwise, that job might not finish on six months because of the size of the work. So that's sometime, like I say, if it's a big one, large contract, then we ask the customer if we can get another company involved. But if it's small, they have no time limit, then we have a no issue." [#14]
- The Black American male representative of a DBE-, WBE-, MBE-, SB-, and Micro-PW-certified small business development association stated, "The concept of teaming together and putting yourself in a position to get a bigger contract. From that perspective, I do believe that there was some effort from those companies or those industries to help out. Even that, it's still a gap. Saying you can team is one thing; actually creating a team, putting all the paperwork and all this stuff together to get on a job - that's a whole different ballgame." [#16]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "I tried to bid on one of those really big contracts, in fact a couple of them. I tried to call other consultants, like myself, and say, 'Hey, would you like to be the archeologist?' and 'Would you like to be the fisheries specialist?' and 'Would you like to be the plant biologist?' and some of them said, 'Yes,' and others said, 'No, somebody else has already called us.' There was a company going about calling them, and it was for this region up where I live - I don't know if they got the contract - and then some people knew much more about it. There was another company getting in and I didn't know all of the history. So, I looked a little bit naïve, I think, to them over the phone. And that was the other thing: I had to do it over the phone. I can't meet them face to face, which would be a lot easier. And even if there wasn't

COVID you have to drive over, or have a meeting conference where you kind of hang out with them and they say, 'Hey, you are witty and you are handsome, and I think I would like to work with you,' versus - companies are generally, if once you call them and start talking about that they're wondering, 'Well, how big of a slice of my pie do you want?' That's going on in the back of their minds. You have to overcome that barrier." [#22]

- The Middle Eastern American female representative of a majority-owned professional services firm stated, "A lot of times we partner with bigger firms." [#27]
- The Black American male owner of an SB- and MBE-certified professional services firm stated, "[I work with] the Consultants Network and Committee, which is a group of engineers that has chosen to be a consultant. So, we work with each other, and I've got a number of other engineers that I work with, and whenever I have a project that I can't handle, I team up with them and we do the work together and then, we separate. So, I have access to a large group of engineers, with the hope that, at some point in time, I'd be recognized and be able to land a sizable project and collaborate with the team and actually start hiring some younger engineers to support the projects in the future effort. But it just hasn't happened yet. I'm still optimistic. I'm still working towards it the Consultants Network that I'm involved with, we're constantly reviewing the SBIRG - the Small Business Innovative Research Grant and things of that nature to determine whether or not there's something that we might be able to team up on and therefore, create a business and an opportunity that one of our engineers is already working on that we can support a grant or have a grant written so that the work can be jointly done by a team. And there are several other engineers that have their own businesses, and they go after the larger projects, and, as I said, we team up as needed or as necessary or if desired." [#41]
- The Hispanic American male owner of a DBE-, SB-, and DVBE-certified and uncertified MBE professional services firm stated, "For me, it's a lot harder to go after a big project. I have to jump through hoops to show that, even though I'm a very small company, that I would have the potential to meet whatever they need in terms of bonding or financing or anything else, because usually I bring partners into the deal." [#51]
- The Asian Pacific American female owner of a SB-, DBE-, and WBE-certified construction company stated, "If people, if the contract originally meet 10 items and the bidder only do five, they have to find the other person that do the five to join together to bid the 10. You cannot have one company do it all and then we had to go find someone that do the other part that we become joint venture. So if needed that way, the original contract should be other than more specific detail, just focus on one section and then have that particular section professional be the job, not put two, three professional requirements together and expect a small company to bid out two, three professional skill. But the joint venture costs money because the agreement from the lawyer, from everything, they are adding the cost and losing the profit. Teaming with somebody not a good thing. Because cost stress, cost time, cost expense on coordinating." [#59]
- The Hispanic American female co-owner of a WBE-, MBE-, Micro-, and SB-certified professional services company stated, "Joint ventures, I think it would work if two companies provided the same type of service, because the joint venture obligates the other firm, whether they do work or not, until the work is completed by that joint venture. So, I think you have to be careful who you team with to do a joint venture." [#61]

- A comment from a majority-owned professional services firm stated, "We work primarily as a subcontractor. It is hard to compete with DBEs so we partner with companies that are DBEs." [#AV8335]
- A comment from a majority-owned professional services firm stated, "Expanded teaming relationships has been a challenge because of existing firms instead of new opportunities. There needs to be more opportunity with mid size firms." [#AV8440]
- The male owner of an ACDBE- and DBE-certified goods and services company stated, "I think things were better when there were actually subtenants where a prime would get a whole terminal or a space, and then they charge rent, and then a DBE could come in, and then they essentially run and operate their own store, and they just have to meet the rent requirements. But that wasn't as lucrative for the primes, and the primes convinced the rule-makers at the department of transportation, FAA, that joint ventures are acceptable and that the joint venture partners would have ownership and control, and we really don't because we have minority shares. We're at the table. We're at the meeting. We approved budgets that are foregone conclusions that we have no knowledge of how it was come up with the expenses. We receive the budget maybe a few days before the vote. Even if we vote against it, it's the majority. If the majority has the majority of percentage of the votes, your vote really doesn't matter. You just raise your hand or alienate the prime by saying, no, I don't approve, and then it still goes through, and then they look at you skeptical, and then there's another 100 people in line ready to take your place because they don't care, and they'd rather have the crumbs than nothing. And when I was on the outside, I said, 'These JV partnerships, that's a way to entry into this business if you don't have all this money to start.' And it's true, it is a way it'll put some money in your pocket, but it's truly a way to be exploited because you really, you just, like I said, 'The subtenant you have to have a little more money, a little more experience, but that way you really control your own destiny.' These JV partnerships, it's just very good with the expenses, but the profit, it's no way possible you can really participate in that." [#PT12]
- The Black American male owner of a professional services firm stated, "Because you're with the prime, as a risk issue, they can't afford to have a risk. So, they don't want to actually deal with stuff that can't provide. So, we have to make sure that the sort of understand you have to be a reliable service provider with at least experience. And that's what's hard for the minority, is for the prime to let them into the opportunity. So, I'm trying to help them understand it. You have to do teaming and joint ventures." [#PT12]
- The Black American male representative of an uncertified MBE professional services firm stated, "If you take small businesses from each of the sectors that we have and create a different frame for them to [operate] under, when you can do workshops where people are interested in partnering with other firms, so they can go after bigger contracts and that if the contract is in their purview. The only way we're going to get ... that's going to be more African-American involvement is if we are partnered with other firms and other small businesses that can help us make that number bigger." [#PT8]

6. Financing assistance. Fifteen business owners and managers thought financing assistance can be helpful for small and disadvantaged businesses [#2, #4, #5, #13, #16, #17, #18, #35, #37, #61, #FG3, #FG4, #PT10, #PT5]. For example:

- The non-Hispanic white male co-owner of a majority-owned construction company stated, "Small businesses I think are somewhat able to work with the small business administration and some other things that could provide some remedies, but how do you help with that? You have to have sound advisors and you have to have access to people that are going to help you understand and conform with the requirements, whether that's CPAs, lawyers, industry, advocates, or associations are helpful and sound advisors, plus a lot of industry people that have knowledge in the industry as resources as well. So, yeah, that's a key component." [#2]
- The Hispanic American male owner of an uncertified MBE construction company stated, "The government to help them out with the loan with the very low interest. They could keep going on the paid taxes and provide jobs." [#4]
- The Black American male co-owner of a WBE-, MBE-, and DVBE-certified construction company stated, "I understand how financing and credit and all that stuff works. But I know there's a lot of tricks of the trade, and I would say more information on the process, what you need to do to make it work, what you need to do to get financing, what you really need to do. And more representation in that area from people of color. You don't run into a lot sometimes. If you're sitting across from someone who looks like you, not that they're supposed to cut you slack based upon that, but they have a better idea of your struggle, and they're more likely to steer you in the right direction, instead of just telling you no and sending you on your way." [#5]
- The Hispanic American male owner of an uncertified MBE construction firm stated, "I think the lenders should be a little less stringent with their requirements, take a person's personal credit history, as opposed to being a brand-new company. They're not established, so obviously, it's a risk for them to loan to a brand-new company, but they can always take a person's personal credit score, as a big factor, as well. And I don't think they did that with mine." [#13]
- The Black American male representative of a DBE-, WBE-, MBE-, SB-, and Micro-PW-certified small business development association stated, "One of the things that I definitely noticed over the years of working with and helping - and I do work mostly with minority businesses and problem 85 percent with Black-owned businesses - and I can tell you - one of the biggest challenges is access to funding. And it wasn't a matter of finding the funding - the funding is there. There's a lot of - banks always talking about working with small businesses, then there's problem at least 8 to 10 alternative small business lenders, but they all have one thing in common that I found is a barrier, and that is the requirement for the business and/or mostly the individual to have a certain credit score. And even when they said they didn't look at credit scores, they did look at credit scores. So, it was always a challenge for a person in business to go in and, no matter how good their business idea was, if their credit scores were not at a decent level, they were not given the loans. There's alternative - I'm starting to now run into organizations or companies that say that they have alternative funding that is truly alternative funding. When they stop to take the time to look at the individual, look at the business, understand the business concept - and I understand they're dealing with money and the credit score is always in the back of their mind, but I'm starting to at least see them give more weight to the person, the business savvy-ness of the person, and the business idea and concept. When they do that, we can get more businesses

that are credible funded and start having more success. I'm just not - when you put too much weight on a credit score, we'll never get anywhere." [#16]

- The Hispanic American female owner of a WBE-, MBE-, SCMSDC-, and DBE-certified goods and services firm stated, "One recommendation is to hold the primes accountable, that they pay them on a certain time frame. I know there's a seven-day that they're supposed to pay, but a lot of them ignore that. Start auditing them, making sure they're doing it. Is the money going out there? And a small business should get paid, shouldn't have to wait 30, 60 days. If the organization is making us wait because we're a small business, we should be able to get paid quicker. And many times, what could be speeded up is that - I know we're the sub, and yet making sure that the sub gets paid on the - if they're on the contract and it's not being generated by the prime. The commitment that the prime has put on the contract should be - we shouldn't have to be negotiating that in the future. That's a commitment and that's what they said they were going to pay. Honor it and make sure it gets paid on a monthly basis if they provided the service. But if they had a loan those little small things could help because then we're not waiting for it. I don't think we need to wait, especially when it comes to labor. I mean, for me, I have to pull - put out all - I have to pay out our - for labor, and that's about 70 to 80 percent of what our billing is. And I'm having to pay this out before I even get paid. I know that there's some organizations that have the DBE criteria, that if you're a DBE you can get paid sooner, and I think that still needs to be in place. That helps out with the cash flow for many of these small organizations that are struggling. But there are things that we could do within the scope in order to support small businesses that are there that will make - wouldn't be that much of a large issue or a change in regulation." [#17]
- The non-Hispanic white female owner of a DBE-, SWBE-, and CBE-certified professional services firm stated, "I don't know what the capabilities are, but I think that Caltrans needs to take responsibility and not put the onus on a general contractor. Here's an example. Let's say that there's a general contractor willing to help the people get their capacities. But let's say that I don't have a great relationship with that person, with that entity. That's a disadvantage for me. Right? When you give power to a general contractor like that, that gives less power to a subcontractor. Most general contractors do not look at subcontractors as a partnership. They look at it as a means to an end. They're looking at these contractors, these subcontractors, small contractors as something they have to deal with, not something they want to partner with. They're only looking for the relationship to last with that project. They're not thinking about five years down the line or even the next project they might want to bid. We are trying to change that. I think some general contractors see a value that a lot of them do not. So, if you give them too much power, we already feel as if we are sometimes strong-armed by a general contractor. If you give them too much power, that is just causing even more problems for a small business." [#18]
- The non-Hispanic white male representative of a majority-owned construction firm stated, "That's a tough one. The only way you can help 'em is giving them someone that knows what they're doing if they don't. Someone that's been in the industry for a while that can guide them. I don't know how many of 'em will start with a CFO or anything like that. But you also need someone like that in your company to actually be pretty successful. 'Cause they may not know the construction side, but they know the money side. I mean, usually if they're getting into this work they're gonna learn the work and you're gonna hire people that ultimately can be able to do the work. And you're gonna learn yourself. Like I said, as

far as construction goes, when it comes to the work, you can be as good as you want or as bad as you want. It's just how much effort you put in. But as far as the money goes, you may not understand taxes and how to buy equipment and when to buy equipment and that kinda stuff. As far as becoming a bigger company, that's what makes bigger companies become bigger companies: being able to handle their money." [#35]

- The Black American male owner of an uncertified MBE construction firm stated, "When we were working at Miami-Dade we took some really small companies and supported them through the process. Maybe not financial support, but it was financial support in that we supported them in giving them a stamp of legitimacy when they went to ask for an operating capital outside of our program. If a small company was awarded a contract and they needed operating capital then somewhere along the line the financier would be reaching out to our office, so that if I was being useful in that kind of stuff and then we would support them on that front. You were verifying that what the person was applying for was actually what his money - that yes, this person did have a contract with us, and this person has a contract for X amount of money and that's what they're doing over here. That's what we could have told their financiers." [#37]
- The Hispanic American female co-owner of a WBE-, MBE-, Micro-, and SB-certified professional services company stated, "If people knew about the SBDC, or PTAC offices, they're free to small businesses, they're very knowledgeable about that kind of stuff. So, I need just a setting where small businesses know about that free resource." [#61]
- The Black American male president of a professional services business development organization stated, "Lots and lots of grants for technical assistance, technical assistance, technical assistance, which is great and important. However, you have to survive for that to matter. And I agree that most of the grants that have been coming out, the cash grabs, are insignificant. They're not the kind of grants that are going to be able to help people stay in business. So first and foremost, I think the factor's going to be the willingness of our public entities ... In this case, we're talking about the Department of Transportation ... to have a committed focus and to be deliberate about granting additional access to entrepreneurs of color, to the opportunities that they have, right? There's lots of funnel of money that's flowing down to the states and the counties. And we need to make sure that people who are hardest of hit, the people of color, and the businesses that employ them, which are businesses that are owned by women and minorities, have access to get to these people. As far as access to capital, I think that the underwriting standards ... I am not ... Well, I'm not going to go there. I read every day about all these grants that are being making to these different financial organizations, whether it's CFI's, FinTech's or whatever. But the underwriting standards have not been changed. So, there's still very little money that's making its way, in the way of credit, for minority owned businesses. And to take it a step further, not only was it hard to begin with, but 2020 was a disaster for everyone. So, the period of time where the bank looks back looks even worse now. I mean, if they look at 2019, some financial institutions are saying, hey, well, we're not going to look at 2020. We're going to look at '19 and '18, '17, but I think there still needs to be a change in the underwriting criteria that can protect how credit-worthy an entity is, because mind you, it's only so much that you can do with a grant. It's really the credit that will give them meaningful kind of dollar amounts that will allow businesses to survive long-term, to give them opportunity." [#FG3]

- The Black American male president of a professional services business development organization stated, "We put money in the stock market. We're the taxpayers. We put money in local banking institutions, and with all the money that Caltrans put into the banking institutions, and there need to be some accountability for those institutions to partner with Black-owned businesses. And I can say Black-owned, because the government doesn't do anything for Black folk only. And when Black folk benefit, everybody else benefits. I'm understanding what I'm saying, so I'm not talking about discrimination. I'm talking about policy and the way that things actually roll out. Leveraging the capital that they put in the financial institutions, for assistance, with Black-owned businesses. And I mean, if you're putting billions in, certainly you got billions worth of power to say to bank ABC, we want to see more participation and some relaxation in your consumer credits for small businesses or minority businesses. So that is something, and that is power that they have. And so, I think that the government, that you're contracting with, needs to exercise its muscle power, with the folks that they spread the money around with, to assist the sustainability of Black-owned businesses in the state of California. And government and the financial institutions and the financial community have a broader commitment to supporting bonds and insurance, beyond the bonding. That, in itself, is important, and they could be the bonder of last resort, because unless somebody defaults, they're not having to pay out anyway." [#FG4]
- The Black American male representative of a minority business advocacy organization stated, "I really, really love the idea, leveraging these large primes for financial support. We've even had federal funded projects, a contract in hand, went to the bank, and still came out empty-handed. But personally, I know others that has walked in the bank and don't have half of what we have and walk out with money. So, there's definitely some type of systemic racism that needs to be addressed, when it comes to backing us financially." [#FG4]
- The female owner of a WBE-, DBE-, and MBE-certified professional services firm stated, "You have a Caltrans job and you can't get any assistance from Caltrans to help you put the packet together. It goes back to the first person that says, where are the resources? There's no resources available from Caltrans to help you get a loan for their own project that you're working on. And I know in the past, Caltrans has provided this assistance, but it has to be from an organization or a company who actually has hands-on experience with developing businesses." [#PT10]
- The Hispanic and Native American male owner of a DBE-, 8(a)-, SB-, and MBE-certified construction company stated, "A revolving loan would be good. There are too many guys that are scared to pull the trigger to make a decision on paying a firm." [#PT5]

7. Bonding assistance. Ten business owners and managers thought bonding assistance can be helpful for small and disadvantaged businesses [#5, #16, #19, #24, #59, #FG2, #FG3, #FG4, #PT11, #PT12]. For example:

- The Black American male co-owner of a WBE-, MBE-, and DVBE-certified construction company stated, "Removing the bid bond would certainly help. Because I get it, the bid bond is to prove that you are financially stable to take this job, if you get this job. But it seems to be a little bit unfair, because a lot of the smaller companies don't have the heavy Dun &

Bradstreet rating, don't have the ratings that you need, to get any of those bonds, so maybe removing some of the requirements. But then again, if I was on the other side, I might say, Everything is fine." [#5]

- The Black American male representative of a DBE-, WBE-, MBE-, SB-, and Micro-PW-certified small business development association stated, "Bonding organizations are out there. I've recently been on several webinars that talk about bonding requirements, and there seems to be a, I think, a reasonable effort to try to provide access to bonding indication and access to actual bonding. So, I think bonding is something that - the answer to that problem's out there. It's just a matter of making the businesses aware that it's there and connecting them so that they can work together." [#16]
- The Black American male owner of a DBE- and SB-certified and uncertified MBE professional services firm stated, "So I just last meeting - I believe in the last meeting I brought Turner Construction, the largest building contractor in the United States of America, and we had established a goal for the Bart Headquarters building for 10-percent African-American participation. So we find out - and this is very important, Nadine, very important, that the prime contractor has to bond and insure the entire project. You need to note that. It is not necessary for the subcontractor to bond and insurance as dutification. All that's doing is just putting money in the pockets of the insurance companies and the bonding companies. It's not necessary. And I further found out that Caltrans, maybe unlike some of the owners, does not require the subcontractor to be bonded and insured. So I just sent a note to the director to say that Caltrans needs to lean on these big prime contractors that are making all of their subs bring in bonded and insurance, because it's not needed. They have insurance for that. And all of that is in the contract. So therefore, all that does is that raises the whole amount of the bid. You see what I'm saying? In other words, if all of the subcontractors have to go out and get bonded and insurance they're going to put that in their bid over and above what the prime contractor does. So it just raises the price. So that's what I'm trying to convince. But that's a major barrier. There are so many not only Black contractors, but minority and women who can't meet a bid because they can't get the bonded and insurance. That's a major barrier. My thing is they don't have to. Anything under \$1 million, that's my recommendation - under \$1 million you shouldn't have to require that, you know. That's just a burden on another contractor that's trying to make a dollar." [#19]
- The Hispanic and Native American male owner of a DBE-, 8(a)-, SB-, and MBE-certified construction company stated, "I think there has to be somebody somewhere who has a list and I think under separate oversight - a division [or] something that can do the analysis and know that going in this is going to be a riskier proposition. And most small companies, DBEs, non-minority companies, whatever, small ones, they know they're going to pay more for getting the same thing that a larger, more successful, more capitalized entity is going to get. So, there's got to be somewhere, some way - and I don't know if it's just a minority faction sort of thing other than - or it could be a small business sort of thing, but somewhere there has to be an acknowledgement that this is going to be a higher risk category. And it has to be - as much as I hate to say it, because I'm not a big proponent of being just supported every time I turn around by government this and government that because even they get all screwed up, but it seems like in the private sector people don't want to be blamed for being discriminatory. And in the interest of not being in that category they'll just

as soon pass on something that's even remotely - has the potential for going that direction. I think sometimes that's a big part of it. You'll never hear it from anybody's mouth and they're never going to say it out loud but I think that's the case. In my mind, it looks like - kind of the way I was raised - I mean, I know this is way simplistic, but there has to be a dad involved. There has to be a - in my house it was my dad. He was definitely in charge. And everybody that was there, whether they liked it or not, did what he said we needed to do. And maybe the word 'dad' is a bad description, but there needs to be one authority that has the right to analyze these things based on the premise and the model that what you're going to be evaluating is always going to be less than perfect. Because if they were perfect or they had all the other tools they needed, they would be over there, not over here. And I just don't see any facets of government or the private sector that has the commitment - for whatever reason - I mean, I don't know why - that they'll actually step into that arena and apply that. But I think it would be a humongous help. I hate to even suggest that because...I'm a big believer in not having the government involved in everything. However, I don't see where you get an authority that has to be listened to in their decision-making unless you're government, a government agency. I don't see where else anybody can get that kind of authority to make something stick. But then I also know that there's so much government red tape in many situations, that going down that road can almost be worse. But I don't know. I mean, that's the best answer I've got, I guess. I don't think there's a really good answer, unfortunately." [#24]

- The Asian Pacific American female owner of a SB-, DBE-, and WBE-certified construction company stated, "I think on the big package, maybe area show that, because the big package, if we know this area, show overhead, because everyone, the buyer, they only focus on how much is the labor, how much is the material? But nobody look[s] at what's your overhead [is], what's the insurance expense? So, if they have the extra three items, the bonding in the insurance and the insurance is auto and liability and then Workers' Comp, and then the income tax, right? having the bonding requirements and the insurance requirements sort of built into the cost, so you can see the true cost" [#59]
- The Asian Pacific American male representative of a minority business advocacy association stated, "There's some discussion recently [about] having the prime contractor waive the bonding requirement for the subcontractor, and particularly small business, SBE, DBE. The SA BART, BA Rapid Transit project in Oakland that's building the headquarters and the prime contractor has agreed to waive all the bonding requirement for the subcontractors. So, I think that would probably be one of the way that Caltrans can specify their prime contractor waive the bonding requirement for all the DBEs, and they bring on BART, so on and so forth, right?" [#FG2]
- The non-Hispanic white female representative of a construction business advocacy association stated, "It reminds me of when my children are getting their driver's license, especially, if they're going to get their driver's license, but their insurance is going to cost more, because they don't have the experience. And I'm going to have to drive with them. I'm going to have to invest my time, but then, they become the drivers, and then, I don't have to drive anymore. I'm the prime. They're more of hired on. And maybe if a prime is going to receive that contract, maybe they have to add them on their insurance or their bonding. I don't know how that part works, but somehow, for them to receive that contract, maybe they have to pay the additional cost of that insurance, because like interest on a loan, if you

don't have credit, your interest is higher than somebody who does have credit. Their interest is lower." [#FG3]

- The Black American male representative of a minority business chamber of commerce stated, "provide the bonds or be the bonding company of record, as Mr. Terry said earlier, so that contractors can participate or even have more pressure on the prime contractors, to carry the bonds and allow folks to pay them incremental payments, to cover the cost of the bond, as the project is going forward." [#FG4]
- A respondent from a virtual public meeting stated, "I also would like to see Caltrans come up realistically about bonding because I have bonding. Let's say that if I'm a DBE and I can bond say up to \$5 million, well, I would like to see it come out where I could bond a 10 or \$15 million job. You're not going to use \$15 million when you first got on the job. And I think that's a good way to start leveling the playing field." [#PT11]
- The male representative of a DBE-certified firm stated, "So, like this bullet train, we were extended on getting the bonding, and the prime said, 'Listen, to make it work, we'll break it up in three packages. And this way, when that package is done, then you're free up for more bonding.' But to tie up all that bonding in three years..." [#PT12]

8. Assistance in obtaining business insurance. Two business owners and managers thought assistance in obtaining business insurance can be helpful for small and disadvantaged businesses [#37, #55]. For example:

- The Black American male owner of an uncertified MBE construction firm stated, "General liability insurance is not difficult; it's the worker's comp that's difficult. The worker's comp is expensive. So, what you have to do is you have to get the state fund program and you put it as low as you can so we can get started. So now you have worker's comp, you can compete. You can put your name out there so if somebody goes and checks your license on the contract, the state license board and they look at your license they can say, okay, this guy has worker's comp, he shows up with two guys, he has worker's comp, it's okay. If you want to present yourself legitimately and go out to people's homes or not you have to have those insurances in place in order to even present yourself. Sometimes people don't care, and they do it anyways, but you have to have those in place, so you need that statement, you need that stuff. If you don't have it, you have to keep working to get it." [#37]
- The Hispanic American male owner of a DBE-certified construction firm stated, "You're left up to basically contacting your own insurance company that you have so like \$1,000,000.00 of liability insurance, you know, you're getting it from Allstate. You're getting it from State Farm. There's not really a discount. It's whatever the insurance companies decide to offer that, and that can be a problem for especially startups. Yeah, it would be nicer if there was like an umbrella policy, right, so maybe DOT offers liability insurance for the first three or four months of a contract, and then it switches over to a regular private insurance. But with private insurance, you're at the mercy of the private insurance company." [#55]

9. Assistance in using emerging technology, registering with public agencies, and electronic bidding. Twenty-six business owners and managers thought assistance in using emerging technology such as online bidding or online registration with a public agency can be helpful for small and disadvantaged businesses [#1, #2, #4, #10, #14, #16, #17, #18, #20, #22,

#29, #30, #32, #38, #42, #43, #44, #46, #53, #59, #61, #8, #FG1, #FG3, #PT12, #PT3]. For example:

- The non-Hispanic white female owner of a WBE-, DBE-, UDDBE-, and SB-certified professional services firm stated, "I understand for the people who actually are their own primes, that that is helpful. It is not helpful for me because I have to have some sort of prime to do that. It very rarely works for me and I do not like doing it online because I literally do not trust that any agency is going to protect your data... [because] there's breaches everywhere.... unless they can control your data and have great security... it's scary for a little, small business." [#1]
- The non-Hispanic white male co-owner of a majority-owned construction company stated, "You can go with technology and talk about how quickly and rapidly technology has played a role in construction. In the last two or three years, how much we've had to adapt to technology just to compete. Electronic bid submittals for Caltrans and other agencies is a new area for companies in the last three or four years." [#2]
- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "That's been good and bad. It has been nice to have the registrations and if I set up a fee or email, but also every city, it goes with different companies and agencies goes with different companies and there's competing companies like Biddingo, Permacure, ProcureNow, Bids, [and] CIP, there's a lot of these different companies, and so we're going and registering for all these different companies and they're in different formats and require submitting in different ways, and so it's nice to have it electronically and feed, but it adds some new challenges to us. I think just understanding each of these systems. I'm going after a job right now where I have to, through their electronic system, I have to enter in all of the rates into their electronic system and another client, I prepare a rate sheet and just preparing, just they're all different formats, different systems, different types of projects, and I think that just is the nature of the business, but having it online has helped to keep it into a system, but it just, there's many different forms of online now when it used to just be PDFs." [#8]
- The Hispanic American male owner of an uncertified MBE construction company stated, "I'm not that smart on computers. Second, I never really see anything to make me go over there. So before you do something, it's something that have to be attracting you. It's something you have to know, you're going to benefit by doing that. Like if you don't see any because you don't know, you not even get there." [#4]
- The non-Hispanic white male owner of a SB- and ELBE-certified professional services firm stated, "I consider online bidding platforms a joke. Well, because even though the work you do is very similar every day, every job conditions is different in the world of asphalt. So if you don't understand how to build the cost of doing something, then using a bidding platform, which throws in average numbers could take you a few bucks or break it. If you throw in it an average number for putting asphalt down, but you forgot to add the fact it's rough rock, hot mix asphalt, not standard asphalt, the haul is 65 miles, not six and a half miles, the traffic is absolutely horrendous or it's in the mountains or you have traumatic conditions... All of these things destroy bidding platforms. So bidding platforms don't help

you bid jobs unless you do exactly the same thing in the same locale on an everyday basis...." [#10]

- The Subcontinent Asian American male owner of an uncertified MBE construction firm stated, "It was difficult sometimes because... some new job comes that we never experienced it before. These are something like the new technology type. Like I say, that's why we're getting training to learn more and more. Every day in this field, every day you get trained is not enough. Tomorrow something else come in the market. You need to know how that system work[s], or how to install it. If we're not busy, we just always send a crew to training. Every day that we [don't] have much work, we call my crew and say, 'Okay, let's relax, watch some video. Let's learn more. Let's learn whatever, what's coming, what works.' These are our priorit[ies]. We need to be on top of our game. If Caltrans has the knowledge, if they have that person to experience or to pass that knowledge to others, we're willing to send our crew to learn. It's not an issue. Of course, like I say, every company goes through the difficulty when there's a new system comes in place. They need to know. If the company will provide that to learn, we are here to learn. We are here to go far enough as far as we can go to learn that system. So if the Caltrans offers that, if they want to build something, we have no knowledge on that. [and]... Caltrans is offering a training, of course, we'll send our crew to train and finish it or go ahead and do the job. Why not?" [#14]
- The Black American male representative of a DBE-, WBE-, MBE-, SB-, and Micro-PW-certified small business development association stated, "That is just an educational thing. Again, it's another one of those things that are out there, but you have to - some of these organizations hold webinars and things to educate [them]. A lot of our workers don't know about it, but I know it's out there." [#16]
- The Hispanic American female owner of a WBE-, MBE-, SCMSDC-, and DBE-certified goods and services firm stated, "I think it's a struggle when every agency has their own different way or process, which is a pain. If it was more uniform, it would be easier because now you're not doing a bunch of different processes or setups when you're bidding on things. It should be more uniform so the bidding process is much more simplified and easier to do." [#17]
- The non-Hispanic white female owner of a DBE-, SWBE-, and CBE-certified professional services firm stated, "We utilize it and it works good. I think it's probably really an advantage, actually." [#18]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "Well, I think that's a challenge for the whole industry, and it comes down to what I talked about - Caltrans offering more training so people learn how to do work within Caltrans." [#20]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "Now... [that] they have these computer systems... I haven't gotten any work on them yet, I'll just say that, and I've been doing it for like a year now." [#22]
- The non-Hispanic white female co-owner of a majority-owned construction company stated, "implementing it onto a computer system is a little bit easier, but each county, too, has their own [system]. So, you have to find out, like, if we're sub, I found out, 'What's your reporting department?' so I have to find it, make sure that we're logged in now as a sub. If

you're not logged in as a sub, then, you... [have] to go back and log in as [one].... Sometimes it's hard... If you could just name the job that you were on, maybe the system, if they could just all categorize it as what it is... instead of having it be named by the general, as a sub, to implement your payroll. It's been a little bit of a barrier, yes, it has been ...We used to carry in the bid, you know what I mean? You do all your paperwork, you fill out all your bids, you have your bond, everything's in a sealed envelope, you'd walk it in, and it was kind of exciting. You're sitting around the table and they open up the bids, you know what I mean, and you're thinking, 'Oh, is it gonna be me?' you know, our company. And now, just like the one we just did for Sonoma State, for instance, it was [on] Zoom, which is kind of cool, too, but it's Zoom. But at the same time, we don't know if the requirements were met that they asked for by the other competing contractors. So then, all you can do is ask a question, you know, in their little question thing, which I did, and they just said, 'We're going to look at that later.' And not to say that that's not, you know, on the up and up, but in years past, you'd be able to see it right then and there, you know what I mean? It was just, it was open, and so you could see for yourself, you were, like, 'Okay, check, check, check, check.' And that's a learning process, too, for contractors, say, you know, you miss something, well, then, you learn the next time, you know, to have that done." [#29]

- The non-Hispanic white male co-owner of a majority-owned professional services firm stated, "Well, the biggest challenge over all these years is just keeping up with all the changes that have happened. Y[ou] know, when I started out engineering in the 1970s, Caltrans - Then, specifications were a small booklet, and now they're three booklets or whatever, and all the changes that keep coming on. And the biggest change for me is keeping up with the technology. Two years ago, we didn't know anything about Zoom, and now we're having Zoom meetings all the time. And I didn't even do email until the early '90s. When we started out, that wasn't there. And mail - now hardly any mail comes, and everything's sent out as PDFs or whatever. So, for us, that's the biggest challenge to keep up with. And maybe it's just a sign of our times, that we're getting older. Y[ou] know, it's been a while, and we didn't grow up with all the - When we were in college or whatever, we didn't have all the training or all that for computer systems and stuff." [#30]
- The non-Hispanic white female owner of a DBE- and SB-certified and uncertified WBE professional services firm stated, "So I am registered online . With a ton of agencies. I get a lot of emails like saying what they have out for proposals. I have gotten some work that way, but a lot of those emails I just delete if I'm busy with work. Or if it's a city that I like to work in I might like try to get on a team with somebody for that project. If I'm not busy with work then I'll ask people can I be on your team." [#32]
- The Black American female co-owner of a DBE- and DVBE-certified and uncertified MBE construction company stated, "Caltrans is still paper... I have about three contracts that they're using the electronic system for [and] I don't know why they won't just fully go with it, but, you know, I don't know." [#38]
- The non-Hispanic white male co-owner of an SB-, DBE-, and HUBZone certified construction firm stated, "One of the things is that they used to - back in the day when we first started this all the advertisements used to be free, you know, and publicly available, whereas now - and of course you had to still look at them and go to procurement. But half of California you have to pay for e-bids or a Planet Bids, or one of these bidding. And they're not huge - I

mean they're not hugely expensive, but if you want - so like us, where we travel for work, a lot of these are areas; they're divided up in areas. So if I want to do work in Southern California I've got to pay for Southern California. And then if I wanted to work in Northern [California], I had to pay separately for Northern California to get access on projects to bid, and so on and so forth. So I could spend thousands of dollars just to see, whereas it used to be when they had ...public notices. I remember when they were in the newspaper and you had to look at the newspaper for them. But technology is good because you get to access those online, but the access can be a little bit difficult because if I'm using one platform and I'm wondering why I'm not seeing any work in Bakersfield, well, Bakersfield is on a completely different platform than like a few cities over, like Fresno or Santa Maria. So that I would say is a little bit difficult, because I can't purchase every one, and I'm not going to have enough work or know where I'm going to be competitive all the time for this type of project. So I have to pick and choose." [#42]

- The non-Hispanic white male representative of a DBE-certified and uncertified WBE construction firm stated, "Yeah, we kind of don't do very much of that. We're a little bit more old-fashioned, so we'll show up with a little packet or something, or send in a little packet. But uploading stuff to some of those bid things, it's just - it's so hard, because they just - nobody knows who you are. You don't know anybody. I do the same thing, like I said, on my doughnut shop, and all that. I just have people send their applications to my email, and then I hire them purely off of what's on the paper. It's almost like going in blind. I really like to see people and get a feel for people and know who they are when I hire them. You know what I mean?" [#43]
- The non-Hispanic white male owner of an SB-, DVBE- and Micro-BE-certified construction firm stated, "You know, I don't think it's as easy as it could be. There's so many different kinds of proposal notification systems, and it's hard to know if you're reaching the right audience. So I don't know if it's just because we haven't figured it out yet, but there's several different things that - several different services that we use. But I think it's not there yet. I think it's an emerging technology, and it's promising, but I don't think we're quite there yet." [#44]
- The Middle Eastern American male president of an WBE-certified professional services firm stated, "I haven't experienced that. I don't know. I guess if somebody would contact us and let us know how to get on and start engaging in that, then I would know more." [#46]
- The Asian Pacific American male owner of an MBE-, DBE-, and SB-certified construction firm stated, "two years ago, we discovered Bluebeam, which is a software we use to take off plans. That does turn things around, big-time, yeah. I mean, it's not like the old days, where I had to get a plan, and then sit there and measure it, use a ruler to measure stuff. You can't do that anymore with the volume of, the complications of, the complexities of some of the plans we get now. You need software to help you do that. So we invested in software to do that. So it's been fantastic." [#53]
- The Asian Pacific American female owner of a SB-, DBE-, and WBE-certified construction company stated, "We just need more learning, training." [#59]
- The Hispanic American female co-owner of a WBE-, MBE-, Micro-, and SB-certified professional services company stated, "Those are actually really good when you can submit

online, it prevents having to print everything and run down to the office and submit it by five. You don't have to go through traffic. So, because of COVID, a lot of the submittals went online, and it's actually been really nice." [#61]

- The non-Hispanic white male co-owner of a majority-owned construction company stated, "Why is Caltrans dictating what work codes people can sign up for? Suggestion: make harsher penalties/fines to keep people honest, but then allow people to sign up for whatever [work codes] they want." [#FG1]
- The non-Hispanic white male owner of a majority-owned construction company stated, "Primes must list [the subs'] NAICS codes to get 'credit' for DBE participation and meet goal. Might be that DBEs need more education on NAICS codes." [#FG1]
- The female owner of a WBE-certified construction company stated, "DBEs need more support on electronic bidding." [#FG1]
- The female owner of a WBE-certified construction company stated, "[DBEs need more support with] item codes in addition to NAICS codes." [#FG1]
- The Hispanic American female representative of a professional services business stated, "We found a lot of businesses actually, just like the distance learning for kids, don't necessarily have the same access to broadband, to be able to do the work that they needed. So we had a lot of businesses that didn't even have an email address, when you went to the owner. So you can imagine the number of times, including us, are sending email blasts, apply for this, do this, in English and Spanish, and realizing that's not enough, because they're not able to apply." [#FG3]
- A female representative of a local agency stated, "I was on a workshop and I had a question on how does the Caltrans corner work? And so I think small agencies, we're learning how to use those resources and personally, I don't really understand [the] Caltrans corner right now. I think that now that we're online, actually, that the webinars are fantastic. The last one that I was on, which mentioned the corner, that one of the best webinars that I've been on through the whole pandemic, they explained what the DBE expectation was, the facilitators talked about some of the forms. It was just very, very good. So I think that Caltrans is doing a good job." [#PT12]
- A respondent from a virtual public meeting stated, "I'm on Cal eProcure, and no one is really teaching us how to navigate around that. But, I saw on a workshop, [they]list of dates that you attach to this and thank you for that. That's coming up. So in order for me to be bid, like the bids are also coming up, so I'm like, 'I can't do my background research like he said, if I don't know how to get access to the information.' I'm like, 'This is crazy.'" [#PT3]

10. Other small business start-up assistance. Business owners and managers shared thoughts on other small business start-up assistance programs. Twenty-one owners agreed that start-up assistance is helpful [#7, #12, #13, #15, #16, #26, #44, #53, #59, #61, #AV, #FG1, #FG2, #FG4, #PT1, #PT12]. For example:

- The Black American male owner of an MBE-certified professional services firm stated, "I think that [start up assistance] would be wonderful. I think that every small business need any advantage they could get to help, because remember, let me just equate this to a 16-

year-old kid getting his driver's license, getting out on the interstate for the very first time. No one cares if the kid just got his driver's license. They care about him getting on the freeway, driving at the speed and not impeding traffic. Well, the same rule applies in business. When you start a brand-new company, the people that's been in business for a lot of years don't care that you just started. They just want you to get out there and perform, do everything of their lowered expectation. And obviously, in a business, you don't know. So, you're out there trying to figure this out. I just mentioned about I go up to a big company, just talking about how to set up my finances so I'll know how to bid and what's expected and what I want to be audited on, the things of that nature. Well, it was through trial and error and bad reports that I learned, oh, you don't do things this way. Oh, you don't do things that way. It's such a competitive environment. Companies don't want you to give you the upper hand, or they want to give you the hand up that's needed for a small business. That's why it supports that every, what is it, five years and a business fails. Wonder why, because if you can't get it off the ground in five years, you get tired and give up. For us that have been fortunate and blessed to be able to get past that, okay, great. We give ourselves a little small golf clap, but the competitiveness, you just learn to be more competitive, and you learn how to drive on the freeway, so to speak." [#7]

- The Hispanic American female owner of an MBE-, WBE-, and SB-certified professional services firm stated, "I guess the simple response would be education or... right? I have a mission-based business, but because I didn't study business, my focus isn't on the profits purely as much on doing the work and spreading the mission." [#12]
- The Hispanic American male owner of an uncertified MBE construction firm stated, "A person that wants to be brand new in this industry has very little access to assistance. You just take the plunge. You just go into business. That's pretty much it. Maybe more small business assistance, when it comes to specifically trucking, as opposed to just a general, a small business association loan officer that may or may not know about trucking but maybe something more industry specific, just to trucking." [#13]
- The Black American female representative of a minority chamber of commerce stated, "[There is a] lack of knowledge. One other big one, there's so many different service providers in the state of California that provide small business services, but they're not always the right size or culturally competent. For Black businesses in particular and women owned businesses, one of the biggest challenges in California is going to the right service provider to get the right help they need. Academies. So, getting folks prepared, whether that's a two week, three week, four week, six week intensive, getting you prepared for doing work with a public agency program." [#15]
- The Black American male representative of a DBE-, WBE-, MBE-, SB-, and Micro-PW-certified small business development association stated, "One of the things that I did recognize is the need for individuals going to business to have a better understanding of what it takes to run a business. And one of the challenges I had is I had people coming in and they had about four or five business ideas and it doesn't matter - even if they have four or five good business ideas - to understand that it's a challenge to start one business and run it and be successful. The idea of being able to start two or three was not realistic. There's a lot of classes out now. The Women's Business Center have a class called Start, Run, Grow, and it really is about helping people understand... from the idea of starting a

business, from concept and getting it ready. That is beneficial, because I always try to discourage a person from starting a business just to make money, because if you don't have a passion for what you're doing, there's a good chance you won't be successful, because you're gonna always run into some challenges. And if you're simply in it for the money, those challenges are gonna make you quit. And I've seen that happen a lot of times. The idea of, you know, when you go after funding, developing a business plan - most of the businesses that I'm working with - one of the biggest concerns I had is when I talked to a lender and their response to a person that's already been to the bank is, 'Okay. You need your business plan. You need to come back.' But they never really understood the in-depth requirement to write a business plan. Even individuals when they come in, I tell them, 'You know, okay, you're in business. Do you have a business plan?' And the number of people would say, 'Okay. What's a business plan?' And it always kind of caught me off guard when a person is in business running a business and they don't know what a business plan is." [#16]

- The Middle Eastern American male owner of a construction company stated, "Oh these [start up assistance programs] are, absolutely. These are fantastic. These are great. And I think these kind of programs, I strongly believe these kind of programs are good for everyone, even those that have been doing it for years. There's always going to be policy that came out to get familiar with. There's always that new method or new technology or new product or something to get to learn from these programs. So definitely these are very helpful resources for contractors." [#26]
- The non-Hispanic white male owner of an SB-, DVBE- and Micro-BE-certified construction firm stated, "I think there's a niche market out there to teach small firms how to prepare proposals. That would be a great help to small professional firms." [#44]
- The Asian Pacific American male owner of an MBE-, DBE-, and SB-certified construction firm stated, "So that's when I filled an application with a hundred-year-old construction company, a multi-billion-dollar construction firm, and I became part of their - They accepted my application, and I became part of their one-year partner - it's called a strategic partnership program. And that's what really opened up my eyes, learning from accounting to commercial construction, and really got me excited about the future of my business in moving forward into commercial construction. And then from there, it just kind of like snowballed. Then I became a graduate of the Los Angeles Small Business Academy that's run by the Department of Water & Power. And that introduced me into the world of public works, and then, now I'm with Caltrans. So, I think education has been my biggest asset in term of driving my motivation, driving my business and the vision that I have." [#53]
- The Asian Pacific American female owner of a SB-, DBE-, and WBE-certified construction company stated, "A lot of people, if they are selling furniture and they see a job selling paint and they say, Oh, I want a job. So, they don't know anything about painting. All they know about furniture... and they didn't know the labor in assembling furniture and the labor in the painting are different, and if they are not trained, if they're small people, they will be in trouble. the owner operator has to know finance. Has to know job description. I think maybe we need to come up a questionnaire. Whoever want to start their business, it's like a dating form, right? You want to say certain people, do you go church, what kind of church? Do you like food, what kind of food? Do you like music, what kind of music? So, like a

survey. They must, they should have a survey, not just, oh, I wish to own my business. So, a lot of electricians, they work for big electrical contractor and they know they have a dream. They want to have their own company and they didn't know the companies carry all the insurance expenses. So, once they start their own, even they have the skill, they have the knowledge of the job, but do they know operation? Do they know financing? Do they know estimating? Do they know? So an owner, if doesn't have three, four, five that or three, four, five skill, that it will be a risk. I'm very cold when people say they want to start their business. When people say they want to start their business, I will give them a sharp question and some people think I'm discouraging. And I do agree because if they only have a dream to be an owner, they think the owner, up to an hour, we'll go party, have a drink. They do not know those owners continue learning, working overtime to something. So, I myself tell my employee, I had work 40 to 60 percent planning and we only have 40 percent to perform." [#59]

- A comment from a majority-owned professional services firm stated, "The bureaucracy for a startup is horrendous. It seems to be hurdles to get access to start work. We sat in a workshop for the company, SCORE. They had a presentation within a government official. The documentation is just very extensive" [#AV8200]
- The female representative of a majority-owned construction company stated, "[Caltrans needs to] educate firms [who want to] become DBEs on how to complete qualifications so from the beginning the information [regarding what] they are qualified/interested in are correct. Training for DBEs seeking to win a Minor B project - winning this first project helps them secure more Caltrans work. DBE Bootcamps and the upcoming DBE Summit have been working really well!" [#FG1]
- The Black American male representative of a professional services business advocacy association stated, "I would say education [is what's needed most], and I say that in the sense of we've seen at the chamber that the businesses that are striving right now during this pandemic are the ones that are willing to accept and adapt, right, because they know how, because they see new education of how businesses work." [#FG2]
- The non-Hispanic white female representative of a construction business advocacy association stated, "One of the things I've been tasked with is addressing payment issues with Caltrans, and part of that is getting contractors educated, getting them educated how to read a contract, how to make sure the contract is favorable to them, as far as the terms for payments and things like that, because most of our businesses are subcontractors, not prime contractors. And that's a really important aspect of staying in business." [#FG2]
- The Asian Pacific American male representative of a minority business advocacy association stated, "Education. I think the tie-in with that is really we need some handholding for the emerging firm or the firms that's trying to get Caltrans contract on it. Because not only there are issues in how to bid a job and how to respond to the SOQ, but there are other things that need to be recognized. For example, the contract and requirements and the insurance. And also, one thing from a contractor standpoint, so you need somebody to be able to help, because once the contract going to procure, you cannot call Caltrans regarding that particular contract. So, you have to have a supported service, to help what I call the emerging firm, the firms that has hardly has done much work for Caltrans... Caltrans for years has been trying to [let a] interchangeable supportive service

contract. But in the last five years, they have failed to do that, and they failed to bring the firms that knowledgeable how to take care of that. Right now, at this particular moment, there is no supportive contract under being handled by Caltrans right now. So, they are falling behind, so I think that should be one of the key thing to bring in new firms then.”
[#FG2]

- The Black American female representative of a minority business organization stated, "I feel that, especially minority businesses, they are barely hanging on in the first place because of the foundation and not understanding or not really feeling like they can comply with all of the requirements. We spend a lot of our time trying to assist our small and minority businesses, with understanding the rules and getting them through that point and without the lack of funding and just knowledge that ... just a base of directory of these small businesses have been created, so that they can all be on the same page and that the footage is equal, because it's not equal for minority businesses." [#FG4]
- The Black American male representative of a minority business advocacy organization stated, "It boils down to the resources and communications that is allotted to some of the small companies and businesses. My company, alone, is a small business, that is located and represented in the Los Angeles metropolitan area and had Metro not been given the funds from the federal government and also allowing small businesses to apply for the PPP loans, we probably would have been in the same situation. But a lot of firms don't position themselves, the foundation of their firms, they don't position themselves to be prepared, because they're not educated on that. And I think it starts from the core and making sure that we educate and provide the necessary resources in the beginning, which will then equal to being able to survive." [#FG4]
- The Black American male representative of a DBE-, WBE-, MBE-, SB-, and Micro-PW-certified small business development association stated, "One of the challenges for helping, and again, I'm particularly interested in helping Black-owned businesses, one of the challenges is being able to offer the detailed level assistance to go [out there]. You need your financials further than you need a business plan. In my experience, I have to go work one-on-one or I work with these businesses to make sure that they do what they want. And it goes beyond just getting DBE certified. I have several businesses that have gotten DBE certified, and that's where it stopped. So, I'm just wondering about that supportive service program, if it's going to be reimplemented in District 6 and how can I maybe be of some assistance to make sure that happens? It needs to go beyond just, here's your business plan, here's your financials and here's your DBE certification. It needs to go that next step of, how do you win contracts?" [#PT1]
- A respondent from a virtual public meeting stated, "What I've seen is that there's a little bit of gap on providing services or support to those contractors that are just new businesses, like a startup. Or businesses that are less than two years, with just one person or two people at most. It just seems like that's the barrier on a contractor that is bigger, like three people or more, or more years. It's easier to be there as a consultant for prime, but if you're just starting, it does seem like there is really little opportunity to do business with them." [#PT1]
- A respondent from a virtual public meeting stated, "How would a startup company thrive in this market? What are the tools available out there, Caltrans or otherwise-any other public

agencies too. What are the tools available? Because I feel for a startup company unless you have prior knowledge, or you have partners with prime contractors or other big companies...for an individual to solely start and get into Caltrans projects it seems like a very...at least it feels a lot more challenging. All I'm asking, to metaphorically put it, is the path to the door. If someone can point me out, I'm not even asking for a ride here. So, it's just like, hey where can I find the door? Will someone point me out? That's really what I'm facing." [#PT1]

- The male representative of an uncertified DBE and MBE firm stated, "Being a new contractor, I wanted to see who I can speak with that could walk me through the process as far as bonding for these projects, who I could reach out to in order to secure the bonding. But be able to not only bid on it but walk me through a process of what to expect on a new job, since I'd be a new contractor coming on with Caltrans. I'm a visual learner and a hands-on learner. So, being able to shadow somebody, from finding a bid, being able to submit the bid and procure the necessary resources, to being able to do day one on the ground. I don't mind giving up my workday or work month too if need be, if an opportunity for Caltrans to have something like that, where I'd be able to shadow a major prime." [#PT12]

11. Information on public agency contracting procedures and bidding

opportunities. Fifteen business owners and managers provided their thoughts on information from public agencies contracting procedures and bidding opportunities, noting its accessibility online. Others were unaware of how to access that information, and thought the information is helpful for small and disadvantaged businesses [#8, #16, #38, #56, #61, #AV, #FG3, #PT10, #PT3, #WT]. For example:

- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "Sometimes we have to figure all that stuff out. I think just more information is good information." [#8]
- The Black American male representative of a DBE-, WBE-, MBE-, SB-, and Micro-PW-certified small business development association stated, "It's called PTAC - P-T-A-C. It's Procurement Technical Assistance Center. They operate similar as an SBDC, but they specialize in helping small business get contracts. So, when you engage them, you come in with a contract that you've already identified but you need help on acquiring it. And they'll help you with it." [#16]
- The Black American female co-owner of a DBE- and DVBE-certified and uncertified MBE construction company stated, "Tutorials would be helpful by Caltrans to make it easier for people to do the paperwork right the first time. I mean, who wants to do a lot of re-work? I don't." [#38]
- The Black American female owner of a DBE-certified and uncertified WBE and MBE construction firm stated, "Once you learn how to get your equipment and get your company up and running and all of that, how does nobody teaches us how to bid? And then when you meet them face-to-face, that's the last thing that they talk about. You're not forcing them to be transparent enough to the fullest extent of the law. They keep these little loopholes; they keep gliding through these doors. I'm like, 'Just how you've been getting away with it for long.'" [#56]

- The Hispanic American female co-owner of a WBE-, MBE-, Micro-, and SB-certified professional services company stated, "I think for small businesses to submit as a prime, if there was... Well, I know the SBDC. If there was some kind of class or instruction on how to submit a proposal for the agency, that would be helpful to the small businesses. So, let's say they wanted to submit the first time for Caltrans, Caltrans has their own formatting, so to have like a workshop on how to submit to Caltrans for new businesses, that would be helpful. So new businesses don't feel intimidated to submit a proposal to Caltrans, because they've already gone through the workshops." [#61]
- A comment from a majority-owned construction company stated, "How to navigate the website, and having resources in place on the state side to provide, easy format for the bid, very hard to navigate..." [#AV8215]
- A comment from an MBE Hispanic American-owned construction company stated, "There is a lack of information on how to do proposals and access to systems. Lack of work we found available. Find it hard to compete with big guys. Need resources." [#AV8289]
- A comment majority-owned construction company stated, "It's a barrier not knowing where to find bidding information or find active bidding information." [#AV8298]
- A comment from a WBE and MBE Hispanic American-owned professional services firm stated, "There aren't very many examples on how to write a proposal or bid for Caltrans jobs. There also are no classes on how to do this." [#AV8483]
- A comment from a WBE and MBE Hispanic American-owned construction company stated, "We have difficulties with assistance in bidding and finding contracts." [#AV943]
- The Black American male president of a professional services business development organization stated, "They need the opportunity to be able to connect and get in front of decision makers and to make sure that they are getting the opportunity to participate in the RFPs, and even the smaller bits, that the state can make, without doing RFPs, like that under 250." [#FG3]
- The Hispanic American female representative of a professional services business development organization stated, "We have another one that we work with, and I appreciate them, because it's our transportation and things, but they have all these contracts. And I've been in this role as CEO now about six years. And so, every year, I'm all, 'Can you show us an example of a business that has actually gotten a contract with you and why they were successful and what does that look like, because yours is really cumbersome.' After all this time, I still don't know quite how to tell someone how to apply and what to do and what to say. And they don't have anyone. There's never an example. And so, if there isn't even anyone to show, then it makes it really hard to get people to apply." [#FG3]
- The female owner of a WBE-, DBE-, and MBE-certified professional services firm stated, "The barriers to success is obviously like everyone's explaining there's no assistance from Caltrans, our local agencies as a small business, as a DBE on how to maneuver through the paperwork, to not only bid as a prime but also to bid as the subcontractors or sub consultant. So that is lacking from the government side and makes it very challenging for me to succeed in growing my business." [#PT10]

- The non-Hispanic white male owner of an SB-certified construction firm stated, "Is there a place where the new/ startup firms can get familiarized with the Caltrans bidding process and other pertinent paperwork that consultants need to be familiar with, to work with Caltrans?" [#PT3]
- Written testimony submitted to BBC stated, "Overall Caltrans DBE/SB/MBE procurement methods need to be more transparent, inclusive and accessible the Special Provisions that Caltrans puts out for our industry for various projects bidding our vague and Caltrans isn't willing to answer questions prior to bid time." [#WT]

12. Directories of potential prime contractors, subcontractors, and plan-holders.

Thirty-two business owners and managers thought a hard copy or electronic directories of potential primes, subcontractors, and plan-holders would be helpful for small and disadvantaged businesses. Many firms knew how to access that information through the Caltrans' websites, while others did not know how to access that information [#2, #5, #9, #12, #15, #16, #17, #20, #21, #26, #27, #35, #42, #45, #54, #55, #56, #61, #AV2, #FG1, #PT1, #PT12, #PT2, #PT3, #PT4]. For example:

- The non-Hispanic white male co-owner of a majority-owned construction company stated, "One of the features that actually was really important, and I don't think it's utilized to its full opportunity today, but actually came about because of our efforts in trying to help create a better system was a feature called 'opt in'. The opt in feature was pretty novel. It was with Caltrans and as a DBE contractor I could go into the Caltrans database, see what jobs or bidding, see if it had worked that I wanted to try to bid on and then push a button for that particular job that said, I'm opting in as an available commercially useful function company to provide a bid, please contact me. And then if I was Ghilotti Brothers, a general contractor and I'm bidding that job in Marin, I would get a list sent to me of all these DBE contractors that say, I'm interested. Now, if you were a DBE contractor and maybe you didn't know how to get on the Caltrans website, or you didn't know how to opt in and stuff like that, do we still need to be able to try to reach out to you? Yes. But that really didn't gain the traction that I think it should have to really bridge that gap of I'm interested. You're interested, let's work together. I mean, I think that's really what it's designed to do." [#2]
- The Black American male co-owner of a WBE-, MBE-, and DVBE-certified construction company stated, "You call other contractors who may be on the list of contractors bidding for a job, in hopes of, one of them will partner up with you and take you on as a partner, in the hopes of, you have something that they need. Our disabled veteran status is very attractive to a lot of companies for state projects, because there's a five or 10 percent advantage that they give to people who have the disabled veterans status. You're rolling the dice looking for someone who has what you don't have." [#5]
- The Asian Pacific American owner of a DBE-, MBE-, and SB-certified professional services firm stated, "It's a matter of I guess having more opportunity to be on the prime's team, I guess. I mean they do have those open houses where you'll get a chance to meet the prime, but I guess more of that wouldn't hurt I guess." [#9]
- The Hispanic American female owner of an MBE-, WBE-, and SB-certified professional services firm stated, "It's not a barrier. Again, it just requires time, I feel at this point with

my business, I grew up by myself and got it to a great point, but I feel like I can no longer continue to grow without help.” [#12]

- The Black American female representative of a minority chamber of commerce stated, "The process for DBEs to be identified by prime contractors, this current system is set up in a way where primes have all of the power from being able to select, and we think that having a marketplace that subs can also see primes and can submit their letters, their capability statements to those primes and to open up those channels of conversation and relationship so that they can build and be in better position instead of just getting a random phone call saying, hey, do you do this work? Are you a DBE? Okay, I'll call you back. We want to see more relationship building and a better effort to actually build those relationships between the primes and the subcontractors, so that contracts can actually be awarded." [#15]
- The Black American male representative of a DBE-, WBE-, MBE-, SB-, and Micro-PW-certified small business development association stated, "That's another one of those things where you have a small company - they don't have the personnel, you know? And I think all that is kind of a full-time job itself keeping up with everything that's going on. While you're doing a contract, you have somebody out there that have the time to start - be searching for another contract." [#16]
- The Hispanic American female owner of a WBE-, MBE-, SCMSDC-, and DBE-certified goods and services firm stated, "I think that could be worked. It could be improved. It's an area that could really focus on concentration to help more small businesses be a part of it, partake in it." [#17]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "I've been at, it's called 'meet the generals,' where you go out and meet the general contractors that do all that. And again, it was getting people to show up. Yeah, I've been to many of 'em where there's nobody there. Or it's the same exact people, and they've already got work. I've been to the events, and nobody shows up. I know Caltrans has really put an effort up to meet the generals, but there won't be a lot of people that'll show up to those events, 'cause I've gone to 'em." [#20]
- The Hispanic American male owner of a DBE-certified and uncertified MBE construction company stated, "I think it takes time to build that rapport with somebody, either through projects that you've done, or rentals that you've done, where they start to recognize the company name and they'll solicit you for a bid. Or different things, I mean, like going out to their office, sending them information, just trying to be in contact with them. But it's difficult, because sometimes what we see and hear about is situations where those relationships with some of the other minority DBE companies are fostered by trips, by nice gifts, et cetera. We've put ourselves out there on the Caltrans website before, listing ourselves as available for contracts to be bid under. On the Caltrans website, there's a section - there's a bidding plan holder section, and then there's a certain amount of - it says, 'Prime contractors looking for help.' So if I look at the list of prime contractors looking for help - Let's just say a particular project, maybe there's five contractors looking for help. Okay, I can send in my bid, but do I know that they received it, or that it's being evaluated or anything? There's no way - There's no way for me to confirm that. Because there's been times where I'll send it to their generic estimating@xyz.com, and then I've had some of the estimators sometimes that know us a little bit more say, 'Hey, have you sent? We haven't

received your bid. Can you send it to us?' I'm like, 'Oh, I sent it to your estimating@xyz.com, but here you go. Here's the bid.' And then sometimes companies that we don't send a bid to, because they're not in that list that says that they're looking for assistance, are the ones who bid on the job and who run the job as the prime. And so, we didn't even have an opportunity 'cause we didn't send them our bid, not knowing that they were gonna bid on it. On the Caltrans website, again, they have the link that says, 'These are the prime contractors looking for help,' but sometimes it's not even those prime contractors that are in the bid. Sometimes it's other contractors that bid on a project, and since you didn't know that they needed help, you didn't send them anything. You didn't send them the bid. And so that, I think, could be improved on Caltrans' side a little bit." [#21]

- The Middle Eastern American male owner of a construction company stated, "It can be. It can be if it's a very specific trade. Like we did a foundation for a high rise one time. And the type of foundation there was only one company in all of southern California that did this kind of work. So how do you research this? There was not enough information about competition or about people talking about the product of this company. So, it can be. For the majority, I would say probably like 80 percent of the subcontractors when or suppliers or vendors. 80 percent of them have been around long enough that they can be searched, and they can be evaluated including subcontractors as well. But sometimes you fall with a certain particular quota that you don't have enough resources to research that firm." [#26]
- The Middle Eastern American female representative of a majority-owned professional services firm stated, "I guess it's kind of tough. But most agencies have a list of certified of DBE, MBEs and once the RFPs are out, they usually have that available for people that want to partner with them. So that's one way of doing it. I mean it's not perfect. And usually, I think these DBE firms they again they have their own list of companies that they partner with and it's just word of mouth. And this company recommending this DBE to the other firm and so forth. So, I'm not sure how else would they be able to market themselves really." [#27]
- The non-Hispanic white male representative of a majority-owned construction firm stated, "Not [a problem] in Caltrans. They have a website you go to that tells you - if you look at a job and who's bidding it, and they'll tell you every single prime, and usually the contact e-mail for it." [#35]
- The non-Hispanic white male co-owner of an SB-, DBE-, and HUBZone certified construction firm stated, "I guess I don't have access to that information, 'cause I don't know how to do that. Finding subcontractors, I mean I can call around and look on peoples' websites and go to the next guy, but to have it all accessible or the knowledge that, hey, this is the best place or way to find this or find partners or do a joint venture, I don't really know about that." [#42]
- The non-Hispanic white male representative of an SB-certified professional services firm stated, "I would assume it's probably, one, the longevity of the firm, because I can completely understand a new firm starting up that might not necessarily have connections to a lot of different groups. But, I think that's actually becoming easier and easier with the access to the Internet and LinkedIn and all of the various tools that are out there to find DBEs throughout any area." [#45]

- The Hispanic American male owner of a DBE-certified construction firm stated, "What I don't have, I don't have the up-and-comers, right. I have basically - I know the Big Four. But there's smaller companies that are trying to get involved in providing transit services that I don't have access to because I don't know who they are." [#55]
- The Black American female owner of a DBE-certified and uncertified WBE and MBE construction firm stated, "I called this number to the lady in Sacramento. And she showed me how to get back on the website, what to click on and what to click on next. To find them. The actual prime contractors who's got the contract and what is supposed to be contract." [#56]
- The Hispanic American female co-owner of a WBE-, MBE-, Micro-, and SB-certified professional services company stated, "Knowing who your competitors are, so that's what you're talking about is knowing who's competing? I sometimes I don't know how to get that information. And when you compete for something, you want to know who your competitors are to assess whether it's a good idea to go after the project or not. It would make it better. We'd be able to make a better decision if that were available to the public. If we knew who our competitors were." [#61]
- A comment from a WBE and MBE Hispanic American-owned professional services firm stated, "Companies outside of California come into town and they bid really cheap and they get the contract. Opportunities to be connected with primes is an issue--I attend outreach programs to be connected with primes and then nothing happens." [#AV8384]
- A comment from an MBE Hispanic American-owned construction company stated, "One of the biggest issues would be project bonding and getting access to the projects themselves, the main contractors have their own team. It has been difficult to crack into." [#AV8449]
- A comment from a majority-owned professional services firm stated, "We work for larger companies but have not found a partner company." [#AV8576]
- A comment from a non-Hispanic white WBE professional services firm stated, "Our biggest challenge has been to get connected with prime contractors for agencies projects; our company's services are a small component so we need team with prime contractors and that has been difficult for us. Networking is also a challenge." [#AV892]
- A comment from a non-Hispanic white WBE construction company stated, "Finding subcontractors to work with us is a challenge." [#AV899]
- The female owner of a WBE-certified construction company stated, "The same advertising area on Contractor's Corner can show which primes are interested and subs can reach out then. Sometimes primes don't want to opt-in because they don't want competitors to know they're bidding." [#FG1]
- The non-Hispanic white male owner of a majority-owned construction company stated, "Opt-in currently exists on advertising section in Contractor's Corner but it isn't commonly used. Update and market the 'Opt-in' program. Build out Caltrans 'Contractor's Corner' website. The Opt-in Program is a best kept secret in the Caltrans program - when a DBE opts in as a sub and the prime opts in, the likelihood of getting the bid from the DBE is much higher. For the DBE - you also get the email contact for the prime's estimator. DBEs can search and determine whether there are multiple bidders in their work code. By marketing

and building out this existing resource, you could improve the marketplace. Idea: develop an incentive - if a DBE and prime 'opt-in' simplify the Good Faith requirement letter process to incentivize participation - this could help overcome the barrier where some DBEs may not 'Opt-in' because it reveals they are bidding to their competition. Develop a more user-friendly portal (i.e., Montana DOT webpage)." [#FG1]

- A respondent from a virtual public meeting stated, "What I've found, so far, it's really-a little challenging to navigate. For example, here is the perfect example, where because I do professional services-you know I don't provide a product. I see situations where the RFP is published, and my expectation is I'll start out by being a sub. But with the vast number of people...are larger contractors who submit an interest. I am then told if I would like to be a sub. I have to sometimes contact a hundred different people who maybe have just attended a meeting, it doesn't mean that they are necessarily even going to submit a contract. It's really, really complicated right? If I am working on my own, let's say a hundred contractors attend a meeting to express some level of interest. I have absolutely no understanding as to if they will submit the bid. I have to go through a whole list and contact each and every person to determine if I would like to potentially partner with you. It's very challenging. I don't know how to work around that in a more efficient way. At the end of the day, I think it's very important to develop partnerships, but if you're new to the line of business or the industry... it will take me a very long time to gain some level of footing. I don't know how small businesses learn how to maneuver through that system. So, I think that in and of itself is a challenge to a small business." [#PT1]
- The male representative of a professional services firm stated, "So, on the construction side, they have a website where you can go find which primes are chasing the project, and who's the point of contact. So, I have an opportunity to reach out and discuss what services we offer. On the A&E side, they don't have that same feature. So, I have no clue where to start and who to talk to for the prime consultants. For example, on the construction side, I'm looking at the list of products. I'm following. There's a tab that says, 'prime contractors looking for help.' You click on that, and it has a list of which primes, what are they looking for? Here's a phone number, here's a point of contact, the phone number and an email. Right? So, my admin person would go call that person and says, 'Hey, we'd like to set up a meeting with you. We've emailed you expression of interest or our scope letter. When can we talk?'" [#PT12]
- The CEO of a WBE- and MBE-certified goods and services firm stated, "Have a Prime Contractors Day so you can be a supplier to the prime contractor. Caltrans, I don't know who their primes are. So usually, the primes don't tell me...they don't tell who are the primes. You know they always say go through Caltrans." [#PT2]
- A respondent from a virtual public meeting stated, "My issue is finding primes- the availability of primes. When you don't have a plan-holder, let's say for an on-call generalist, for district four, there's no plan-holder. There is no way to determine who the potential primes are so I can do marketing outreach I have posted ads as subcontractors looking for primes. It has been a rare-unicorn-rainbow situation in which I find prime looking for sub. One time I found a prime looking for a sub and I did do the outreach and they declined to even consider our application because we are headquartered in southern California, and this was for a district in northern California. Of which we are desperate to participate in, the

reconstruction-you know the fires and stuff. We want to be a part of northern California's rebuild." [#PT3]

- The Black American female owner of a DBE-certified and uncertified WBE and MBE construction firm stated, "How can we get a list of the primes old contracts who've worked with trucking subcontractors?" [#PT3]
- A respondent from a virtual public meeting stated, "As a new company looking to build strong relationships, how do i get to them?" [#PT3]
- The non-Hispanic white male owner of an SB-certified construction firm stated, "I don't have past performance and want to team with another company, how do I find these companies? Do I talk to companies that I know of or are there any other avenues?" [#PT4]

13. Pre-bid conferences. Ten business owners and managers thought pre-bid conferences where subs and primes meet could be helpful for small and disadvantaged businesses to network and develop relationships with project managers and primes. However, most noted that by the pre-bid meeting, most teams are already formed [#5, #8, #17, #38, #59, #61, #FG1, #PT12, #PT2, #PT8]. For example:

- The Black American male co-owner of a WBE-, MBE-, and DVBE-certified construction company stated, "I don't know that good comes of it. We've been to these mixers and stuff. A friend of mine puts on this event, well, he was before COVID called, LA's Largest Mixer, where everybody, all these businesses get together, and the general public comes in, and you hand out cards, shake hands, you meet people. But nothing has really ever come out of that, nothing to my knowledge." [#5]
- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "Caltrans has a, let's say there's a new job coming up, like a big interchange job, like a huge mega interchanged job. They will do a pre-proposal meeting like that, or they'll have a meeting, it says, meet the primes, and then there'll be three or four prime companies that'll be going after the job, and they'll say they're a prime. There's a bunch of stuff. They're trying to get a piece of that work. At that time, Caltrans will do a couple of trainings about how to become a DBE, how to be registered and other stuff like that, but the main purpose of that meeting is for us to go rub shoulders with those larger private firms to see if we can get in on their job. The problem with that whole exchange is that those larger firms, they go to that meeting already with their team in mind. And so, when we meet with them, they're just like, yeah, you're cool and all, but we are going to go with people that we've already used, and so it's a good point, but it's mainly, it's not really meaningful. So, me and a lot of other local CEOs, we stopped going to those things because it just was like... And even the larger firms, even sometimes, even they know that one of the big firms is going to get it. They're just there to show face, and so they'd be like, yeah, AECOM's going to get it so I'm not really going to put too much effort because AECOM did the previous study so they're probably going to get this one. And then they'll throw in the proposal just for the sake of throwing in the proposal, but they know they're not going to get it, but I'm sure you can imagine, they have the resource to just throw in a proposal. For me, for us, if we were to throw out a proposal, that takes up a majority of our week, and so even simple things like formatting and colors and binding, it just takes so much time." [#8]

- The Hispanic American female owner of a WBE-, MBE-, SCMSDC-, and DBE-certified goods and services firm stated, "My goal is to make sure that I'm doing it the right way the first time, that I'm not having to go back, I'm not having to adjust anything, I'm not having to change things, and lastly I'm not losing any money. So, if the bidding process is done in a way that the information is given to me and I bid on it, I end up getting the award as even a sub of any sort - and I'm talking about subcontracting because - more so because small business. I get the award, and then later I go back, and now I start the work. My whole thing is that I want to make sure I'm doing it the right way. And number two, I want to make sure that the client is doing it the right way as well. So, in respect to that, if you put me on the contract, you say, 'This is the amount that we're going to - you're going to be awarded this amount,' spell it all out. And one of the things, the benefits that I feel that - it really works when you have an initial meeting, that you have the primes and the subs in there, and the dollar amount is right on paper saying, 'This is how much you're going to - you committed' and there's a thing of execution already in place that everybody knows: the job, the scope, and this is what it's going to be. That way there's no questions in the future and there's no gray area that you're not getting the full awarded amount that needs to be given. And sometimes, because that is not executed things fall through the ropes that some of the primes kind of take advantage of the little, small business. And I've seen it. It's happened to me. And I think just by these little, small things like meeting to execute at the end once the award has been there, giving the information to the sub as well, is very important." [#17]
- The Black American female co-owner of a DBE- and DVBE-certified and uncertified MBE construction company stated, "We attend some of the pre-job meetings, and, again, a lot of it is just bidding and getting your name out there and seeing kind of what the rates, the going rates are, so that you're kind of within the realm with what's the norm, and just building relationships." [#38]
- The Hispanic American female co-owner of a WBE-, MBE-, Micro-, and SB-certified professional services company stated, "I think pre-bid meetings are good." [#61]
- A respondent from a trade group focus group stated, "Networking at Zoom pre-bid [meetings] is good. Have the participants complete a brief survey form (which includes contact information) prior to the Caltrans-hosted mandatory pre-bid meetings, so we know what type of work they are available and interested to do on the project." [#FG1]
- The male representative of an uncertified DBE and MBE firm stated, "I think one of the biggest things that I feel we're dealing with is the disconnect of not being able to have that face-to-face contact and not being able to have somebody to go back and reference and more to get yourself known, shake hands, and see how to go ahead and approach people rather than just try to send an email and possibly just get a runaround or not really get the appropriate answer. I think if Caltrans could go ahead and put something on along those lines, to be able to have more interpersonal interaction with the people of their district, where we can come in and ask questions, it would be huge." [#PT12]
- The CEO of a WBE- and MBE-certified goods and services firm stated, "Attending a networking event or meeting people or sending emails, I can tell you that they don't work." [#PT2]

- The Black American male owner of an MBE-certified professional services firm stated, "I think it was last year or maybe it was 2019 into 2019. There was a big effort. It was called Meet the Primes. You meet with the big railway companies. When I thought was some positive interviews, they said they'd get back to you, and they don't. So, my assumption is that they always go to the larger firms, right? Yes, people may look at us and say we're small and maybe scoff at us, but ask for some example work to show that we have quality work. So, we don't even get those opportunities, which is unfortunate." [#PT8]

14. Other agency outreach. Eight business owners and managers thought other agency outreach could be helpful for small and disadvantaged businesses. Many shared their experiences with Caltrans' outreach efforts [#7, #10, #11, #12, #34, #36, #AV2, #FG4]. For example:

- The Black American male owner of an MBE-certified professional services firm stated, "I've seen it in the federal government. I've seen it in state, and I've seen it local. They'll have these industry days, or they'll have these matchmaking events. The organizations send the least interested person to do the event. So when you, the small business, go to these events in hopes of presenting yourself and learning work, the person that you're talking to, number one, doesn't even want to be there. They'll take your information, throw it in the trash and never get back to you, and you spent a lot of money to go to this thing. They charge you to go to these events. You go to these events, and you walk away with nothing. So it becomes some sort of a glad-hand check in the box for organizations, but it really doesn't amount to anything. So I find them very useless." [#7]
- The non-Hispanic white male owner of a SB- and ELBE-certified professional services firm stated, "So what's the purpose? In other words, what I'm saying is, I think they're a waste of time." [#10]
- The non-Hispanic white male representative of a Native American-owned MBE-, SB-, and Micro-BE certified professional services firm stated, "I think so. I attended the summit that started this and based on the questions, I think it was very helpful." [#11]
- The Hispanic American female owner of an MBE-, WBE-, and SB-certified professional services firm stated, "I just felt like it was too general, [and] I didn't really know how to use it for the specific work that I was seeking." [#12]
- The non-Hispanic white male co-owner of an MBE-, SB-, and DBE-certified professional services firm stated, "I think that the outreach that San Dag does and that a lot of the local municipalities do for, you know, meet the buyers, I feel like we did all that stuff when we started, and I feel like that was really invaluable, not only to be meeting some of the big players and big players, but also meeting some of the other small municipalities, which we were able to kind of leverage early on, too. I would recommend, you know, including some of those smaller agencies and those outreach events, even if you have to kind of sponsor them for a booth, or, you know, not ask for money. I feel like that would be a very, a powerful gain. I know, obviously, post-Covid world." [#34]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "if I was talking to Caltrans, if they really wanted to make inroads with the smaller businesses: to try to - not to try to bend over backwards for us but just make people feel

more welcome. I mean, there's a lot of older people - and I'm not exactly a youngster - that are just dead set on not working with the state. They either have had bad experiences or they don't think it's worthwhile to make money. And so you have that - kind of the sour attitude that exists. And I've never really completely understood it. ___ have had enough work to really make - with Caltrans or anything like that to make a complete determination. So I'm sure smaller businesses would welcome the opportunity to bid for work with Caltrans if the opportunity existed." [#36]

- A comment from a majority-owned construction company stated, "I've gone to as many Caltrans small business outreaches and bootcamps as I can and met with many district managers and procurement staff with few results. I had 2 of my products certified by CALTRANS Material Engineering Dept and received approval for us." [#AV2]
- The Black American female representative of a minority business organization stated, "a lot of it is communication, not getting the information, not sharing with the Black chambers or the NAACPs and getting that information out into the community, with the small businesses, women, Black, Hispanic, whatever. It just doesn't happen that way. And I think that Caltrans could do a better job in the communication piece." [#FG4]
- The Black American female representative of a minority business organization stated, "Because there is a lack of diversity on that council, the word's not getting out. So when I ride through our community, I get real frustrated, when I don't see Black people or people of color, working on those jobs. And being a person who's had that experience, to have had the opportunity to oversee a program such as that, I know we can do better. And I know, because you don't have the right people at the table are forcing it, to say, Let's include everybody at the table. Everybody can get a piece of the pie, and just provide the opportunity. But the opportunity isn't being provided, and that's where the racism comes in." [#FG4]

15. Streamlining/simplification of bidding procedures. Five business owners and managers thought streamlining/simplification of bidding procedures would be helpful for small and disadvantaged businesses [#51, #59, #61, #AV]. For example:

- The Hispanic American male owner of a DBE-, SB-, and DVBE-certified and uncertified MBE professional services firm stated, "Typically, I've seen agencies that have very streamlined, easy to build contracts, and I've seen some others that have been extremely complex, like the federal government, unnecessarily complex." [#51]
- The Asian Pacific American female owner of a SB-, DBE-, and WBE-certified construction company stated, "They just need to use basic second grade language. Sometimes they cut and paste using some fancy language that that didn't even them know themselves. A lot of people that doesn't read their own document. They just cut and paste. So instead of 30 pages, you can just go with three to five page, why 30 page?" [#59]
- The Hispanic American female co-owner of a WBE-, MBE-, Micro-, and SB-certified professional services company stated, "Small businesses have limited overhead resources. And when we're working on projects that are billable, that's how we make money, but we realize that we have to put in... You have to go after projects in order to win a project, so you have to put in the time to put the proposal together. Some of the public agencies have

onerous requirements for subs. The prime passes it down to the sub, or the agency may say that all subs, not just the prime, have to submit all of these forms. Sometimes that is very time consuming for a small business. So, if it were easier for small businesses to be on a team and fill out the forms that are truly necessary, then I believe that would be helpful.” [#61]

- A comment a majority-owned professional services firm stated, "The RFP process can be time consuming and could be streamlined and made more uniform." [#AV103]
- A comment a majority-owned professional services firm stated, "Need a more streamlined system for RFPs and RFQs." [#AV331]

16. Unbundling contracts. Nineteen business owners and managers shared mixed thoughts on breaking up large contracts into smaller pieces. Many thought that it could be helpful for small and disadvantaged businesses, while others noted that it may increase the complexity of project management for Caltrans [#6, #8, #15, #16, #17, #20, #22, #25, #41, #54, #59, #61, #AV, #FG2, #FG3, #PT12, #PT2, #PT1]. For example:

- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "I think if Caltrans were to have more smaller projects and more work that needs to be[done] hiring local businesses [than] that are from the Caltrans district... I think that would help support a lot of smaller businesses because a lot of times the Caltrans jobs are just too large, so they have to be managed from some of these more national firms, and there's no benefit to the national firms to actually hire us, other than getting some recognition in the initial stage. If they do a big planning study and they were to scope out projects, maybe scope it out into a lot of smaller projects instead of larger contracts that keep us keep firms out. Cities can give contracts that are less than \$20,000. They can give them directly to a firm, but that's still a very small number for a lot of these types of jobs. I think there's some things that are done by large firms that don't need to be done by large firms like traffic control. Temporary traffic control, cones and barriers can be done, I think by a lot of small firms. A lot of striping jobs I think can be scoped to do for small firms to help them grow and establish, and I think maybe putting more barriers on the larger firms. They would like to do everything in house. As much [as] that saves everybody money, doing in-house, I think you put restrictions on them doing in house because it basically, it sets up every project to only encourage those types of firms. You say we would like the expertise to be from local firms to do this or we would like each, I don't know, each discipline to be done by a firm whose expertise is that discipline, and that would encourage a lot more local firms. On a job, you'd have an environmental consultant, a traffic engineering consultant, a civil engineering consultant, a planning outreach equity consultant, and maybe somebody else there opposed to just having AECOM who just does it all. It's so big that it only allows for certain types of firms. And the only firms that it allows for that are firms that are not California based. You know what I mean? It's just two big, these projects, and I get it, from the public sector side they want less to manage. It's easy to just have a small management team for a mega interchange project, right, and then have one consultant that they manage, but it does not do much to help us as a small business, if that large consultant does not have any regulatory requirements or checks and balances to make sure they're actually hiring small companies, right? So if that's not there, then it's really hard for us to compete." [#8]

- The Black American female representative of a minority chamber of commerce stated, "There's a huge mismatch between what work is available and the contractors that are able to do that work in the Central Valley. Most of the contracts that have come out in the last three years from Caltrans have been way too big for any of our contractors to bid on as the prime, and the pieces that they should be able to bid on as a subcontractors, they are not being unbundled or created in a way where they could go after those contracts." [#15]
- The Black American male representative of a DBE-, WBE-, MBE-, SB-, and Micro-PW-certified small business development association stated, "Well, that's a good idea, but again, that's one I can see from the other side, because I had small businesses that really, the most they can handle in a contract was maybe \$50,000.00 or \$100,000.00. I talked to individuals in Caltrans, and they were like, 'We can't take a \$5 million-\$10 million job and break it down to a \$5,000.00 or \$10,000.00 contract. It's just not realistic.'" [#16]
- The Hispanic American female owner of a WBE-, MBE-, SCMSDC-, and DBE-certified goods and services firm stated, "They bundle things up instead of separating out to make it easier on them. For example, I've seen some contracts - and I'm just going to use the contracts that I've seen - if it says 'Pesticide and cleaning' and they bundle it up. The specialty in clearing is totally different than pesticide. Bundling up contracts, what does that mean? Does that allow the person to go out there and get a subcontractor? If that's fine, and you're acknowledging that you can get a subcontractor, then I can't complain about that. But when you don't allow them to get subcontractors and you want them to have the whole bundle, then not every small business can be able to provide that service without getting a subcontractor." [#17]
- The non-Hispanic white male representative of a majority-owned professional services firm stated, "Yes. I'd fall back just again to have smaller jobs. I mean, some of these jobs are mega-projects that our big guys can't even handle. They have to joint venture." [#20]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "So if you would allow, and they're starting to move towards this, small purchases for somebody like me, and I think they can do this under \$2,500 now in the state, they can make a purchase. But they don't even do one a year, I think. It has to be only one - at least at the Forest Service [they] can do that. But they would say, 'Well, this guy is actually pretty good at reviewing this thing we're reading and editing it, and making sure that I would do that, you know, for \$2,500. I'd love to do something like that. And they'd say, 'We know you're an expert and we're not going to give you all these rules to make sure you do the job right because we don't trust you. We do trust you, and that we know you're going to give us a good product. You've done it before.' I think they should have more discretion bidding small expert-type projects like - I don't know, I don't think - their whole system isn't set up that way." [#22]
- The non-Hispanic white male owner of a majority-owned SB-certified construction firm stated, "I would say the thing that - if I could rephrase that a little bit, the thing I'm most frustrated with is we get a lot of large projects say in our area that suck up a lot of the funding, and they could have split those up some way or not sucked all the budget out of our area into these huge projects where they're not putting out enough small jobs for the smaller contractors. Because, I mean, you take \$50 million and spread it out over 20 jobs, that puts a lot of smaller contractors to work. You take \$50 million and stick it in one big

job, well, those size jobs, it's limited to these larger contractors Make sure that - let's just say there's \$100 million for District Two Caltrans, which is the area we mostly work in. Instead of putting out a project or two that takes up 80 percent of that, 90 percent of that funding, make sure they put out a lot more smaller projects so there's a lot more contractors going to work. Because, a lot of times, in big jobs, they even bring contractors from out of the area because there's one or two contractors big enough in our area to bid that job, and then a half a dozen big contractors that are big enough to bid that job, they come from out of the area, and we can't bid it. We're not big enough. Then there goes the majority of the funding for our district into this job. Sometimes it can't be helped, I understand, because the jobs are just that big. That's not my point. My point is do one big job. If you've got two of them, don't do two of them in the same season. Do one and then spread it out over - so there's a bigger percentage of that budget going to smaller jobs. I'm sure this is applicable to all the other districts for Caltrans in California, because we all live in - every district has a quantity of local contractors that would much rather work closer to home than have to travel ten hours from home to find a job. it would be nice if there was an abundance of those smaller jobs, because it takes a while for all of us to get busy to where - you might bid six or ten jobs before you get one.” [#25]

- The Black American male owner of an SB- and MBE-certified professional services firm stated, "And so, I've been working with them and talking with them as a member of the Small Business Advisory Council trying to help them understand that if they can carve out projects under \$100,000.00-\$250,000.00 or even \$100,000.00 - because there are a lot of small projects that are done for - and the LAUSD is a good example. Caltrans is, too. You guys have facilities all over California and a lot of the work that's done isn't necessarily a major project. It could be replacement of an air conditioning system or replacement of - an upgrade of a service. And, in fact, the life of electrical equipment is generally about 25 or 30 years. And with all of the changes in the California Energy Code and the reduction of energy that's taking place, a lot of the services could probably be reduced or re-assessed for the actual usage. And some of that equipment, I'm sure, is more than 25 years old in some of those buildings that you have, and they could be replaced. And I'd be more than happy to help with something like that. In fact, one of the programs that I thought might be a good way to get young engineers familiar with building construction and design was to go in and actually help to redo the as-built drawings and to help develop as-built drawings. Because so many of our facilities were done and the drawings [are] either lost or discarded and nobody really knows how they're operating, how they're connected, and how those systems are managed, you know? And so - and that was one of the programs I suggested for the Los Angeles - actually, for a program with the Cal State LA that I was working with them on some ideas for a training. And the idea was that if we could just go in and make sure the as-built record drawings of facilities were intact, it could create a lot of work and put a lot of students - get a lot of students involved in the fundamental[s]. That would be great for the small - and for the engineering, you know? For the contractors, it's a little bit different unless there's a problem with bonding, but for the engineering firms, the bonding is not a problem with these projects. In most cases, for somebody like LAUSD and Southern California Edison and so many of the others - San Diego and the cities - some of those projects - most of those projects or many of those projects are still daunting when it comes

to the cost and expense of them. It's difficult for a one-man shop to really do the work." [#41]

- The Asian Pacific American male owner of a DBE-certified construction firm stated, "Caltrans can help small business by giving smaller jobs in the office, or maintenance station[s], doesn't have to be a big job." [#54]
- The Asian Pacific American female owner of a SB-, DBE-, and WBE-certified construction company stated, "If public agencies have small job[s]... give the small companies experience and give them [opportunities] to practice and go." [#59]
- The Hispanic American female co-owner of a WBE-, MBE-, Micro-, and SB-certified professional services company stated, ". I think it is a good idea to have smaller scopes of work. That gives the opportunity to the small businesses to compete." [#61]
- A comment from an MBE Hispanic American-owned construction company stated, "When they ask for an electrical contract sometimes the job is too big and they need to break it down to other contractors." [#AV152]
- A comment from a Majority-owned construction company stated, "The only barrier we have is limited to the amount of work that is put out by Caltrans and other agencies. Obviously the more work that is put out, the easier it is for companies to grow or expand or new ones to start." [#AV253]
- The Asian Pacific American male representative of a minority business advocacy association stated, "I think for Caltrans they really need to what I call unbundling the contracts. The contracts [have] been getting bigger and bigger. And their argument is, 'Well, we don't have stop to manage these projects.' But on the other hand, there is... well, of course, Caltrans, when they work large contract, they don't need to manage so many people. But on the other hand, they're paying for it, because the prime contractor...would have to bring in people to manage these huge contracts. As a result of their looking for larger and larger contracts. Some of the smaller firms has been really only getting subcontract opportunities. They never be able to grow if the trend is going forward, getting bigger, bigger contracts there." [#FG2]
- The Hispanic American female representative of a professional services business development organization stated, "Have you thought about un-bundling these things, right? So again, so are there smaller ones? Is there a marketing part of it? Because we all have businesses that can do that work and are successful at it and good at it. So how can you do this, to make this more attainable, because every year, quite frankly, I'm just as tired as them, of sitting across the table going, What do we do in our DBEs? Why isn't it working? Why don't your members want to do this? I'm like, It's not that they don't want to. It's just very cumbersome. There's a lot here, and they've never seen anyone successful, and you have yet to show me someone that has gone through this and been able to work it through." [#FG3]
- The Hispanic American male owner of a DBE-certified construction firm stated, "There's projects that they could break up the package. A lot of these projects, it's one item, like the guard rail or fence job or whatever. And they have these packages so big that the small guy can't bond them." [#PT12]

- The Hispanic American male owner of a DBE-certified construction firm stated, "There's no reason that Caltrans can't break up that project so that they do get more small business participation that are bonded and finance the project, right? But they come up with these seven million, 12 million, and there's no way that we're going to be able to bond projects that size." [#PT12]
- The female owner of a DBE- and WBE-certified professional services firm stated, "Caltrans could restructure their solicitations so they are smaller chunks of work." [#PT2]
- A respondent from a virtual public meeting stated, "I have, you know, submitted proposals with sub-contractors and it does seem like- it's just that difficulty of it doesn't even matter if you have a minority business, it's just difficult to get in as a one-person business. Just because they are looking for, perhaps maybe, more stability or businesses that have proven record as a company and not as a professional experience. I think you know, of course I understand the primes, that they want to have some kind of security for their contract. And it's probably hard to trust somebody that doesn't have a lot of experience or record as a company, but they can start with really small contracts. It can even be contracts that are 15k or they can just allow, you know small contractors, to get that at least some experience with some tasks and start getting some kind of reputation and experience, so they can start slowly growing. But just giving that opportunity of really small contracts. Again, just minimal amounts of the work so they can start getting the trust of different startups." [#PT1]

17. Price or evaluation preferences for small businesses. Five business owners and managers thought price or evaluation preferences for small and local businesses are helpful [#9, #14, #24, #35, #FG2]. For example:

- The Asian Pacific American owner of a DBE-, MBE-, and SB-certified professional services firm stated, "They currently kind of have that right now. For example, if a small business primes a project, they get awarded a certain amount of extra point beyond your typical 100-point range scale evaluation. But the thing is, a lot of the contracts, as a prime you need to do a certain amount of a percentage of the contract. So, if a project is too big, the small firm might not be able to qualify to even go after it as a prime." [#9]
- The Subcontinent Asian American male owner of an uncertified MBE construction firm stated, "It's good. It's very good. Because like I say, we have competitor and we'd been in the small and we get extra point. Why not? Caltrans has that. After we do couple of jobs, and they says, well, this company, regardless of when we call them to do something, they never say no, and we want to keep this company for those smaller or big or in the far future events. So, the point is very important for us. If we get points from the Caltrans, it's a part of the point." [#14]
- The Hispanic and Native American male owner of a DBE-, 8(a)-, SB-, and MBE-certified construction company stated, "Small business preferences seem to be helpful." [#24]
- The non-Hispanic white male representative of a majority-owned construction firm stated, "They do that but it's so minimal that usually it doesn't even affect a low bid. I think I've only seen it affect a low bid one time." [#35]

- The non-Hispanic white female representative of a construction business advocacy association stated, "I want to point out when I was bidding as the prime contractor, and I was bidding as a woman-owned business, I didn't count as a woman-owned businesses. I mean, I was then treated like a regular contractor, and I had to provide the subcontractors, I had to have the participation of the subcontractors that were DBE. So even if they unbundle the contracts, there's not going to be any advantage for a DBE. There's not going to be any sort of requirement that they fulfill by taking a prime contract. I mean, I agree, I think the contracts should be smaller, if possible. You no longer... like I don't count as a woman-owned business when I do a prime contract. It would be beneficial to have like self-performance count towards your DBE goal for those smaller prime contracts. I'm just saying in construction, there is no benefit to being the DBE prime. There's no brownie points for doing that. So I think maybe that should change a little bit too, so that you're at least... And I know in the Department of General Services, there is actually a percentage credit that they give you so that your bid can be a certain percentage higher than a regular general contractor, and then you would still be considered the low bid. But I forgot how that worked. I would have to go look at the DGS and the way they structure their contracts, and that's for small businesses." [#FG2]

18. Small business set-asides. Nineteen business owners and managers thought small business set-asides are helpful for small and disadvantaged businesses [#5, #7, #9, #10, #11, #19, #22, #27, #42, #44, #59, #61, #AV, #FG3, #FG4, #PT12, #PT3, #WT3]. For example:

- The Black American male co-owner of a WBE-, MBE-, and DVBE-certified construction company stated, "I would say there should be, maybe a mandatory minimum of contracts, that go specifically to small businesses. Then once you're in, perhaps whatever financial assistance you need in getting this done or obtaining the bond, maybe the government can, or whatever, a city agency can partner with you, to help you get that bond. Or maybe even the government agency for a small or minority -owned business could even carry that bond for you. Maybe if they could remove some of those thresholds, or at least be willing to carry that aspect themselves, if you have proven that you're a minority-owned business, you're only making X amount of dollars this year, and it would benefit society as a whole, if we gave someone a break who truly needed it. So yeah, maybe the government could partner up with the contractor, and do these jobs together. But I think there needs to be a minimum of contracts that go exclusively to small, minority-owned businesses. And right now, they're still going to the big guys. The job that we bid on, was almost 2 million dollars. To be honest with you, if we would have received it, I don't know how it was going to get some of the requirements done, but I would have, because I'm resourceful like that, then... I think that would be great [to have small business set asides]! Certified small business, they're doing great. But it should be contracts. If something like that would happen, it should be contracts that are proportionate to the ones that the big boys are getting. Something that could... A contract that could potentially be business changing, life changing. But it would be nice to have some... Only small contractors are bidding on." [#5]
- The Black American male owner of an MBE-certified professional services firm stated, "That is wonderful. That's another way of getting small businesses started. That's one of the ways that I got started was through that 8a program. Had it not been for that, I doubt I would've ever gotten anywhere." [#7]

- The Asian Pacific American owner of a DBE-, MBE-, and SB-certified professional services firm stated, "I think it's a great idea. I think it's open to a small business, have a small amount of contract and all the liability and insurance that the small business can obtain, then that's going to definitely help out small business to grow. I think the best thing they can do if they're trying to help small businesses, [is] set aside smaller contracts, chop up the bigger projects to a little bit more smaller projects so that everybody gets a chance to work on it. So, if they do that, then they're definitely going to help the small business directly. Because if the big prime can't bid on it, then it's going to leave it to the smaller firms to bid on it. That's the immediate help to the small business." [#9]
- The non-Hispanic white male owner of a SB- and ELBE-certified professional services firm stated, "I could see the set asides for a small business. I was small so I got some help there. But small businesses competing with large businesses was basically there isn't any competition. [One of the large] asphalt [firms] in town could bid the same job and put it in place for what it cost me to buy it and haul it to the job. Why is that? Well, if they don't sell the asphalt through themselves for the same price they sell to me for." [#10]
- The non-Hispanic white male representative of a Native American-owned MBE-, SB-, and Micro-BE certified professional services firm stated, "Really the way to do it is similar to how the venture business enterprise works by having small business set asides and DBE set aside. I do think that helps those small firms, for example, we're a small business, but if I had to do a set aside to a micro business and still maintain my work quality, I would be forced to mentor that business." [#11]
- The Black American male owner of a DBE- and SB-certified and uncertified MBE professional services firm stated, "I'm trying to get Caltrans to do what they call a bench contract. Bench contract says that you prequalify all of the firms in the state, because it's public funds. It's your dollar and my dollar. And you prequalify and the big firms, they get to bid on projects let's say from \$5 million and larger, but they can't bid on the small contracts from let's say \$500,000.00 to \$5 million. So then you put other firms - you can only qualify in one area. And the startup firms will go from zero to \$500,000.00. And that way all the firms get a chance, they're on the list, when a firm wins a project, he goes to the bottom of the list." [#19]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "I think those are nice, yeah. But again, I would almost, again, say that's kind of being like quota driven, and I'm not a huge fan of quotas just for quotas' sake. If they think the small businesses are competitive and can do the job just as well, then they should do it. But I don't think they should just simply say because the small businesses have a lobby group bugging them about it, you see what I'm saying? Is that a political decision or is that an economic decision?" [#22]
- The Middle Eastern American female representative of a majority-owned professional services firm stated, "We haven't had any challenges with teaming up with primes like that [in a joint venture]. I mean we teamed up with a company again last year. And they knew we have to have 35 - 40 percent of the work because we were doing most of the work. They were just priming it because it was SBE set aside prime." [#27]

- The non-Hispanic white male co-owner of an SB-, DBE-, and HUBZone certified construction firm stated, "The only thing I'd say is there's a lot of competition in the world that we're able to get certifications in. So that's the only tough thing. You know, some of these other certifications and they'll go to a job site and there will be a job walk and there will be one or two other people, where you go to a job walk as a small business enterprise and/or disadvantage and there will be 20 companies on the job walk. So, I think you're not in a category where you - I mean granted you do get a set-aside, but you have a much bigger pool, bigger fish, bigger pond sort of thing." [#42]
- The non-Hispanic white male owner of an SB-, DVBE- and Micro-BE-certified construction firm stated, "Having small business set asides is great, if it's just small business set aside. I really don't support, except for small business and disabled veterans' business percentages, because veterans come in all shapes, sizes, genders, transgenders, all kinds of minority or non-minority people. The one thing they have in common is they've served the country. So, I don't have - yeah, I don't have a problem with those kind of set asides. And as a matter of fact, I think it helps and promotes small business and small business growth." [#44]
- The Asian Pacific American female owner of a SB-, DBE-, and WBE-certified construction company stated, "If they can separate. Using like, this job is under 50,000. Or this job is over 20,000. So, if they have that final among, because the buyer know how much they have in their budget and they know how much they can spend, that they don't need to open totally. So, the big companies, they will not do a 5,000-dollar job, but the small company will not do a 50,000-dollar job. So, if this job among is like a 5,000, you can say between three to eight. Because if you do five, people will come in with 4,900 or 4,500 Contract opportunity. If you show people the carrot, reachable carrot, not far away carrot then the participation will come." [#59]
- The Hispanic American female co-owner of a WBE-, MBE-, Micro-, and SB-certified professional services company stated, "It's also helpful when there's like a set aside program where the prime is a small business and we're competing with other small businesses. When small business has to compete against the large firms, it's very difficult to win and it's discouraging for the prime to submit because you're competing against these larger firms that may be incumbents, they may have a lot of experience putting proposals together, you may have a whole team of marketing people to put the proposal together. And it's hard for the small businesses to compete with that. As soon as they can set aside competition with small businesses for certain projects that are smaller projects, I think that that would be a good opportunity for small business." [#61]
- A comment from a majority-owned construction firm stated, "Government needs to give a chance to small contractors like me and they don't. Need to consider specialized contractors like me." [#AV78]
- A comment from a WBE and MBE Black American-owned construction firm stated, "It would be nice if they set aside jobs for small businesses only to bid on so we are not constantly competing with the big firms that have lots of money and resources." [#AV90]
- The Black American male president of a professional services business development organization stated, "We do think that no one likes to hear the words, set asides, but again, for those communities that are hardest hit, that there should definitely be a focus on making

sure that Latino-, Black-, Asian-owned businesses, Native American-owned businesses, are getting the opportunity to compete for those contracts. We talk about set-asides or whatever they want to call them, quotas, or whatever. But I want to make sure that what our businesses are asking for, it's really about opportunity. So, we're not telling people that they have to set aside business for unqualified inferior businesses. That is not what the set-aside is about. The set-aside is that we know, for a fact, there are qualified businesses out there, to do the work. The set-aside means you have to let them participate, right? And I think that's very important, when we talk about those kinds of concepts, is it's not about setting something aside for someone who's not qualified to do the work and is inherently going to add a risk. It's about letting people participate who are qualified but have had historical barriers put in their way." [#FG3]

- The Black American male representative of a minority business chamber of commerce stated, "Caltrans had a person that was their compliance administrator, and I can't think of her name, at the moment. She's been retired for a good while. But she, in fact, made sure that the participation of minority businesses was engaged and the small business sector, still, if I remember, covers up to 500-million-dollars, as a small company. Well, we cannot compete with a large corporation like that, and if you're going to say small business, then that needs to be reclassified to small minority owned businesses or some title along those lines, that opens up the... It gives opportunities and not put minority owned business in competition with the major contractors of the world, that have been around forever, and they get all of the contracts. And all you got to do is go up and down the state of California, and you can see who the folk are who get the contracts, because they're the same people all the time, because they can afford to play. And they've been kept in the game, while we have been kept out of the game, so even holding them accountable. I mean, you get sued for all kinds of stuff, so get sued for helping Black-owned businesses." [#FG4]
- A respondent from a virtual public meeting stated, "Are there small professional or engineering projects for us as a prime on smaller projects?" [#PT12]
- The non-Hispanic white female representative of a majority-owned construction firm stated, "The federal government has contracts that are 'set-aside' for small businesses or DVBE businesses. Would Caltrans ever put out a set-aside contract to ensure minority and small businesses get the work?" [#PT3]
- The female owner of a WBE-, DBE-, and SB-certified professional services firm stated, "Hope that there are more SBE Prime, WBE Prime and meaningful RFP or Bench opportunities in future but without that opportunity for us to compete there will probably be fewer and fewer businesses like ours in the future." [#WT3]

19. Mandatory subcontracting minimums. Nineteen business owners and managers shared their thoughts on mandatory subcontracting minimums. Many perceived mandatory subcontracting minimums as helpful for small and disadvantaged businesses, while others noted that industry and contract specific requirements may be necessary [#2, #3, #5, #7, #9, #10, #14, #16, #17, #22, #26, #27, #33, #34, #35, #38, #42, #PT2, #PT3]. For example:

- The non-Hispanic white male co-owner of a majority-owned construction company stated, "I think it's helpful to a degree, but it can also, if not managed appropriately can have some

unintended consequences. We talked about the program, not having enough contractors in DBE program, which means they're getting calls and if they are able to turn in proposals, they may be turning in proposals that maybe they're over committing. And then once they're not performing, then they may be hit and hit with liquidated damages and other things." [#2]

- The non-Hispanic white male co-owner of an SB-certified professional services firm stated, "I mean, if we're a concrete contractor and we're bidding on a project that's all concrete and they're telling us I've got to have 25 percent subs on it. Well, we perform all this work. So, it makes it difficult for us to go. Why am I subbing all this when I can do it myself?" [#3]
- The Black American male co-owner of a WBE-, MBE-, and DVBE-certified construction company stated, "As a sub? Yeah, that's good. Because some small businesses aren't ready for the big time... For the state California requirements that you have to have a certain percentage of your subs have that DVBE status. It would help, but there has to be transparency for any sort of limitations to be put on anything because people are so creative. They'll find ways to fulfill a requirement. And it may not be totally on the level, but they've fulfilled the requirements, so they get the large contract and everybody thinks everybody's happy." [#5]
- The Black American male owner of an MBE-certified professional services firm stated, "I think that would be most excellent. I think that should be mandatory, and that's a way to force the primes to look at startups or small businesses or assisting a new startup. I think that would be a wonderful idea." [#7]
- The Asian Pacific American owner of a DBE-, MBE-, and SB-certified professional services firm stated, "I think if they really want to try to help the small business, I think they should insist the larger firm to give out some of the smaller work to the smaller firm, things that they could do, just to give them a chance to kind of grow. I think that's achievable, smaller contract, smaller scope of work. So that would be my two cents, try to force the prime to divvy up the work a little bit better." [#9]
- The non-Hispanic white male owner of a SB- and ELBE-certified professional services firm stated, "I went through the times where we had to subcontract out a certain percentage of your work to a minority or women business enterprise. If you have a job where you go to overlay a road for three miles and you have asphalt and you have trucking and you have preceding. Where's the room for the minority? And who was the minority that do anything? There wasn't any. There's a program for veterans. I mean, we've had programs for everybody, but white folk, and I happen to be one of those white folks. I actually had a fellow in Texas who I was bidding to paving for a pipeline job. He asked me, so what kind of old boy are you? I said, I'm just your old, white Anglo-Saxon Protestant, your basic WASP. And he said, well, you're no damn good for nothing and are you? I said, I can get the work done. He said, Yeah, but I need minority participation. Without minority participation, my bid doesn't count. Without having a certain amount of veterans or a certain percentage of woman business. And I went through all of those programs. And so, it made it extremely difficult because I just had to be born white. I wasn't born anything else. And it wasn't preference. If you're Hispanic, you could be a preference. But if you're a Portuguese, you couldn't. I know because I had a Portuguese trucker. He said, well, why does Hispanics get to have preference that the Portuguese don't? These are also programs manufactured by

the folks downtown, under some requirement, probably put on by the children in the round house, which I got so affectionately because our legislators. To help people out, we can't pull up some folks by stepping on others. So, there's been an extreme amount of difficulties of trying to stay in business through the eighties and the nineties and the early two thousands. Fictional businesses were started up, it did nothing. They pass the paperwork around the circles to meet these requirements. It's not like you had a job where it had 10 or 15 different trades on it, where you can go get another trade to do something for you. There ain't asphalt, all the asphalt came from the big guys. There is no liberal guys with asphalt plants. So, you buy it from the big buys. It always came down to truckers. That was all the thing he knows...was trucking. To make these requirements on these types of jobs was ludicrous. I don't know where the mandates came from, but they came, and they interfered with efficient, competent contractors tremendously. I was one of them. Went through all that time period." [#10]

- The Subcontinent Asian American male owner of an uncertified MBE construction firm stated, "Personally, I would like to get contract from whatever companies directly. We don't subcontract to others because I don't want to, as a subcontract, do a lousy job and I get blamed for it. Whether it is a small job or a big job, I like our company do it themselves. We never subcontract our job to others and because of lack of the job security wise, and I don't want to lose my reputation." [#14]
- The Black American male representative of a DBE-, WBE-, MBE-, SB-, and Micro-PW-certified small business development association stated, "Well, that's a good idea. I mean, the only concern I have for that is that most of the major - I'm not gonna say, 'most' - several of the major contractors have already identified the subcontractors that they want to use." [#16]
- The Hispanic American female owner of a WBE-, MBE-, SCMSDC-, and DBE-certified goods and services firm stated, "Once there's a criteria saying that this is how much they're going to give to that small business that there needs to be some form of accountability, that it's checked that they are giving that amount to the small business. A lot of our clients go ahead and elevate that amount to a higher amount, and then they feel it's their money, and they're not giving it to that small subcontractor to be able to do the work. They'll hold onto it. But that was something they committed - they were already doing to do. But if the sub does not go ahead and get it done, then once the contract is finished, if it doesn't get used, then they lost out on that opportunity. So, I think there needs to be measures in place that they put so the prime stops playing with the purse that's not theirs." [#17]
- The non-Hispanic white male owner of a majority-owned professional services firm stated, "That's being prescriptive again. I would let the contract officers us their professional judgment more. They should be able to size up the people and should interview them; that's what they should do. That's just what you would do. You wouldn't make them fill out a form if you're going to hire a nanny to watch your kids and you're really worried about safety. You would interview the nanny, and you'd look at her in the eyes and you'd talk to her, get a feel for her, and you've probably want to call her references. You wouldn't have her fill out this big contractual application form and somehow try to make a computerized objective decision based on a nanny that way, would you?" [#22]

- The Middle Eastern American male owner of a construction company stated, "They have been useful. They have been useful." [#26]
- The Middle Eastern American female representative of a majority-owned professional services firm stated, "Let's just say like LA Metro for example if they have a project that it's going to be 30 percent DBE, I mean it's all obviously depending on federal funding and things like that. But if it's a \$500,000.00 you sometimes question yourself. 30 percent, that's about \$150,000.00 for work. And a lot of times it's very difficult to find that kind of the firms that can actually do work. So, we sometimes think about it a little bit. Does it make sense for us to go after it? Because as a prime you like to have at least 45, about 45 percent. And if you have to bring other subconsultant and other non-DBE consulting it becomes an issue whether we want to go after it or not." [#27]
- The non-Hispanic male owner of a majority-owned SB-certified construction firm stated, "Sometimes it's hard because they want a certain percentage of small business - they want a certain percentage of a DBE participation in projects. Sometimes, that can be difficult. There's only so many limited DBE enterprises out there and they do want a percentage of that one some of these jobs. And some of these DBE companies are scattered all over California. So, we could have to get someone from way up North or down South to come on up to do a job locally, being that the DBEs are so slim and rare." [#33]
- The non-Hispanic white male co-owner of an MBE-, SB-, and DBE-certified professional services firm stated, "I'm absolutely in favor of the mandatory percentages." [#34]
- The non-Hispanic white male representative of a majority-owned construction firm stated, "California has this weird thing where a supplier can be a DBE. But there's a lot of in-between suppliers they call 'em. Where all they do is basically call someone that we used to call as a supplier and they buy the material from them, mark it up, and then sell it to us. And I know other states like Texas and a few others don't allow that kinda DBE participation. But California does. So, there's quite a few of those. Don't get me wrong: we have a good relationship with those companies. But I don't know how much they actually bring to the table All they're doing is buying from a company that we normally buy to if there is no DBE participation." [#35]
- The Black American female co-owner of a DBE- and DVBE-certified and uncertified MBE construction company stated, "They self-perform, and, I mean, I don't understand that. Like, if - and I'm not doing a bad job. It's not even that they say, oh, you're doing a sucky job; you have to go. It's like, oh, well, you met your contract, you know? And it's just unfortunate. I mean, you've called people out to Union Hall to do work. They got out of the work list and, you know, you use us for a month, and then this person's out of work again, because our - we have union labor, so it's not like they sit around, and we pay them if they're not working. So, it's really unfortunate that that is allowed to continuously be done and nobody - nobody looks at it. To me, like, if you put us for us traffic control, if you put a paver out there, if you put a sign person out there, why, if that service is needed for the duration of the project, are they allowed to change, why? If they had a three percent goal DBE goal on their contract, they would meet - they would, you know, work with you until they met that goal and then self-perform. Even if they had, you know, an additional incentive for them to keep us on for the duration of the project, that would be helpful as well to all parties. I mean, it would help them, it would help us, it would help the employee that we, you know, hire. I mean, if there

isn't incentive, that's fine, but I can tell you that the only reason - if they don't have goals, a lot of the small contactors wouldn't even be used, just would not be used. So, it's great that it's there, but it's also somewhat of a hinderance to where they only use you for that. You know, we're put in a box, and, you know, that's their choice, but, like, we have a lot of great contracts out there who can do great work, but they're not getting the opportunity to shine because they're only given three percent, and that can be, like, you know, \$20,000, and in contracting, that goes pretty quick." [#38]

- The non-Hispanic white male co-owner of an SB-, DBE-, and HUBZone certified construction firm stated, "Let's say that they have a requirement for a service to say hold - that are set aside on the project, but we don't have one that we work with, but somebody else does, it can be very difficult for us to get a bid from someone, especially if we don't already have a relationship with one. So, to have a subcontractor set-aside requirement is generally a - it can be an advantage if you have a bunch of set-aside subs that you already work with, but if you're trying to work in an area and your sub doesn't work there and somebody else has it, well, then it's a disadvantage to you." [#42]
- The female owner of a DBE- and WBE-certified professional services firm stated, "Caltrans could mirror the subcontracting plan requirement that the Feds require. Maybe require the primes to post their subcontract solicitations and require parameters for that competition process to ensure transparency and accountability." [#PT2]
- The non-Hispanic white female representative of a majority-owned construction firm stated, "Instead of having contracts with DBE goals, why not make the goals requirements?"[PT3]

20. Small business subcontracting goals. Twelve business owners and managers thought small business subcontracting goals are helpful for small and disadvantaged businesses [#22, #24, #25, #26, #44, #54, #55, #FG2, #FG3, #FG4, #FG5]. For example:

- The non-Hispanic white male owner of a majority-owned professional services firm stated, "I think that's kind of a waste of time again. I think you should be focusing on let's get - how can we get a relationship with really clever, good people to solve our problems. And I don't know that those are the - that's an odd way of going about it. I think you should let the people - they should change the culture of how they buy services. And I think to do that they should be allowed - they shouldn't have to take the lowest bid, and they should just say we just take - they take the best value. But of course I guess I'm being naïve here because I think what happens is they start hiring their brothers-in-laws." [#22]
- The Hispanic and Native American male owner of a DBE-, 8(a)-, SB-, and MBE-certified construction company stated, "So, this is one of the things that's wrong with the Caltrans thing, is keeping the popular DBEs popular and full of work and keeping the rest of them without any opportunities. It's that Caltrans will allow a bidder, a prime contractor, to name their subs at bid time. It requires it, right? It's required by state law. And so - however, you don't have to meet the goal at that point. You can meet the goal when you submit your paperwork the next day or the day after, whenever it's due - I think it's two days later. And at that point most prime contractors will 'Uh oh, we got the job. We're low.' And then they go to their non-DBE subcontractors and go 'Hey, do you guys want to get this job? If we're

going to get this job, we need to make this goal. So, you need to drum up some DBE participation as a second-tier sub.' Then all of a sudden, from what it looked like on bid day based on who got named as a primary subcontractor, all of a sudden there's a slew of the regular names that always get used for either traffic control or - and they name them under one of those prime contract subcontractor categories. And so, that allows them to actually meet the goal, and then they get the job. And so, they didn't necessarily have the job or name the DBEs at bid time, but they allow them to do it after. And in my opinion that process is being abused. And the other thing is that sometimes there's some things that - Caltrans went after the trucking business fairly hard, I feel like, about ten years ago, meaning trying to root out the things that were being used that were not necessarily - that couldn't meet the CUF1 requirement. And it seems like it kind of just gradually slid backwards and now - for instance, on a big huge asphalt job people will use the transporter of the oil for the asphalt as a huge component of meeting the DBE goal. Now, technically it applies. It's always second or third tier. And they're really transporting it. But they're giving them - they're letting them count the value of the actual oil product in the trailer that's being transported, which is not - it technically works. But I guess my point is what it's done is it allowed for them to continue to use - everybody knows - everybody knows if you've got a big asphalt job a huge part of the DBE goal is going to be met with the supplier or the transporter of the oil. And so, whoever gets the job goes to the DBE - or, goes to the asphalt guy and goes 'Hey, we need to separate out your trucking for your oil.' And so they do. And now, I don't - I guess somebody goes back and looks at it after to make sure that it made the - it does satisfy the CUF requirement. Yeah, the commercially useful function of some of these that are being used, what's happening is it requires the contractor to use less creativity in trying to bring in more DBE participation." [#24]

- The non-Hispanic white male owner of a majority-owned SB-certified construction firm stated, "Let me just answer that with what's a disadvantage for us, in particular. It has a lot to do with the specific market we're in and the specific size we are. So, we're not little, in our local market, but we're not the biggest contractor. The two biggest contractors in our area, they have their own hot-mixed asphalt. We do not, so we buy from them. But we bid against them. They can meet some of their minority goals by purchasing the oil from the oil suppliers through a DBE sub, which means when they get to the rest of the items on the project, whether it's traffic control, whatever it is, they don't have to worry about hiring minority subs because they've already met their goal with their buy on their oil on their asphalt. That is a serious disadvantage for us, because we're forced to use all the subs that we hear. That will push your price up because, of course, you could do some of those things cheaper if you do them in-house, but you're not afforded to do that because you've got to meet your goal. Well, they don't have to meet their goal the same way we've got to meet our goal by hiring the traffic sub and whatever it is. Putting out that work over here in other categories, whatever categories that they can perform themselves. So, they're more competitive and we have a disadvantage." [#25]
- The Middle Eastern American male owner of a construction company stated, "They have been useful. They have been useful." [#26]
- The non-Hispanic white male owner of an SB-, DVBE- and Micro-BE-certified construction firm stated, "Well, small businesses, until they get to the size where they can compete, you

know, it's imperative that - and they have small business set aside - not set asides. Excuse me. They have small business percentages in contracts.” [#44]

- The Asian Pacific American male owner of a DBE-certified construction firm stated, "Prime does not have incentive to work with a small business. Because its expensive.” [#54]
- The Hispanic American male owner of a DBE-certified construction firm stated, "Yeah, I think that there should be an incentive for them to use as many DBEs as possible. So while I understand business and companies don't want to necessarily have to have another expense stream, I think it would be great if there was a way for them to apply for grant money or have some sort of revenue stream with the state that says, 'Hey, look, we bid on this program. We were supposed to be a 5 percent. We're at 10 percent or we're at 20 percent,' and maybe give them a little extra for using small businesses so that we can keep people employed and keep the economy running. I don't think that that's, you know, with all the money that they potentially have at their disposal, I don't think that's a lot to ask.” [#55]
- The non-Hispanic white female representative of a construction business advocacy association stated, "I just really think Caltrans needs to make sure that all of our DBE small businesses, all of our business entities, are looked at for utilization on meeting goals. Suppliers have a little more difficulty in making sure we're meeting comp-by the State of California, and I don't think when we're talking to the major contractors for any of the DBE work, they are aware that they can use suppliers as easily as I can use anybody else. And if we're talking about SB money, they count 100 percent, unlike they do for the DBE issues. So those are the things that I think are most important. When we're talking about the client or the owner being Caltrans, they really need to force GCs to meet goal, to really make sure the GC who is going after their contract, it's important they meet their DBE or their SB goal. It's important that that is set by the owner in this case.” [#FG2]
- The Black American male president of a professional services business development organization stated, "So those big companies that are being hired, they need to be held accountable, that they also have active subcontracting plans and are being held accountable and are financially incentivized to meet those goals, by making sure that they do every job that they do, that a certain percentage of that job is going to a minority owned business, as well. To us, this is first and foremost, right? And then, once people are not worried about making payroll or keeping the lights on, then we can turn to what the meaningful technical support... Talking is great, but what it really comes down to is making sure that the primes must perform their contract with a diverse partner and that that agreement is structured in a way such that the prime is still 100 percent responsible for the delivery of the job, so they can't sandbag the smaller business, right? They have to be 100 percent responsible, but they also have to be 100 percent responsible for helping that subcontractor learn and grow and deliver the work, so that they have better experience long-term.” [#FG3]
- The Black American female representative of a minority business organization stated, "I know that people don't like to hear it, because they talk about there was a time when there were goals on a project, so when you knew that there was adversity, you would put those on program, not quotas, but goals, to ensure that there were quality participants and participation of small businesses included on those projects. But we're not doing that anymore. They want to call it quotas. Well, that's not quotas. It's a goal. It's a goal to include

diversity on a project, to ensure that everyone is getting included and getting an opportunity to work.” [#FG4]

- The non-Hispanic white male co-owner of a majority-owned construction firm group stated, "Efforts to quantify is not representative of what is ultimately happening when it comes to finding and utilizing DBE firms' Capacity seems inflated... [The] goal keeps going up but [we have the] 'same pool of DBE companies available to do the work'. List of contractors that perform a 'commercially useful function' hasn't changed in last 12-15 years, it's about 400 companies, but we find 2,000 that say they have capacity.” [#FG5]
- The Hispanic female representative of an MBE-certified, Hispanic American-owned construction firm stated, “Some DBEs sell very specialized things, but rules about using suppliers eliminates the DBEs from being able to compete... Some firms lose certification during projects and it's impossible to replace.” [#FG5]

21. Formal complaint/grievance procedures. Seventeen business owners and managers felt formal complaint and grievance procedures are helpful for small and disadvantaged businesses. Most firms stressed the need for confidentiality in these procedures [#1, #5, #7, #11, #17, #18, #19, #25, #38, #42, #43, #54, #55, #FG4, #PT2]. For example:

- The non-Hispanic white female owner of a WBE-, DBE-, UDBE-, and SB-certified professional services firm stated, "I would love that to work if it really did. I had a client in a large transportation firm that didn't pay me for a year and a half. So, the agency came to me and said, 'We want you to work on this project with us through this company because we need your services.' And I said to them was, 'Why would I work with you if you haven't paid me for my work before?' So, we had a grievance, and I went to their offices and what ended up happening is, the company that didn't pay me pretty much got off the hook, and I got let go because I complained, but the other company is still working for this major transportation company, or agency. So, what happens is, the little guy gets swallowed up. I know so many small companies that have just folded, give in, and just work for the big guys because it's not worth it. It's too hard to fight every day.” [#1]
- The Black American male co-owner of a WBE-, MBE-, and DVBE-certified construction company stated, "Especially with residential work, with any area, the contractors board is run by the Consumer Protection Agency. So anytime a phone call comes, they are more pro-consumer than they are pro-contractor, and many contractors say that the contractor's board out here should be done away with anyway.” [#5]
- The Black American male owner of an MBE-certified professional services firm stated, "The only recourse you have is doing a protest against something and when you deal with an organization whose scorecard is not sustaining a protest, well, they always side with the organization. Therefore, you don't have a chance in the devil's hole of winning. Mind you, I have won a protest, but guess what? The government authority had no authority. Everything they provide are recommendations. They recommend to the organization that, 'Hey, you did something wrong. You need to fix it.' Well, they fix it and they still don't award the contract. So, what was the purpose of the reprisal? Nothing was done. They went through the motions, but they still do what they want to do. So, was your mission effective? Absolutely not. Could that personally hurt you? It certainly can, because if you protest too

much and now you get blackballed in the industry. So now, you never get work. So, in fear of reprisal, most companies, not me, will just go and just fill out the next one and not waste your time, because it is a waste of time. There is no upside to protesting. Make the government an authority. Give them some teeth. Give them authority to make decisions and the organization has to conform to their decisions and not make them a recommendation body. Make them an authority body.” [#7]

- The non-Hispanic white male representative of a Native American-owned MBE-, SB-, and Micro-BE certified professional services firm stated, "No, there's really no process. There is no process. Again, I'll go back to the project labor agreements. There is an arbitration clause in there, but those arbitrators are actually selected by the trade unions. So, it is not an honest... I won't say it's dishonest. I don't want to use that word. There's no equity in it." [#11]
- The Hispanic American female owner of a WBE-, MBE-, SCMSDC-, and DBE-certified goods and services firm stated, "There's a reason for everything. There's always two different sides to everything, right? And if a formal complaint is going to come about, I think that there needs to be an organization [that] needs to put the focus at both - they need to prove their case and not take a side on one from the other. And by doing that it [will] actually help both organizations grow. I mean, the prime can't be saying things about the small businesses, the subcontractors are not doing everything they need to do on their end. So, I think it's a two-sided thing on that." [#17]
- The non-Hispanic white female owner of a DBE-, SWBE-, and CBE-certified professional services firm stated, "There's no way to redress when something goes off, when your relationship with your prime." [#18]
- The Black American male owner of a DBE- and SB-certified and uncertified MBE professional services firm stated, "We have had some disagreements in Caltrans did not have an appeals board. In other words, someone says, 'Well, you were supposed to do this and that.' We said, 'No, that's not in our contract. That's not what we were supposed to do.' And so, I don't think Caltrans has that. I mention it every so often" [#19]
- The non-Hispanic white male owner of a majority-owned SB-certified construction firm stated, "Yeah, well that will open up a can of worms. I've complained about - and I'm not a big complainer, so I don't want you to misunderstand me. But I've had a few things that were not right, a few years ago, that I complained about. I got pulled off a job... I think if I were one of the big contractors, that would never happen. But because I'm kind of a small/medium-sized contractor I'm more vulnerable." [#25]
- The Black American female co-owner of a DBE- and DVBE-certified and uncertified MBE construction company stated, "It definitely is, because some people have legitimate complaints that they're trying to resolve, and you just have [people that don't] want to hear you and they don't want to deal with it, and they think you'll just go away. You know, I have one [a firm] now I'm dealing with. I think he thought we would just go away. Unfortunately, we had to pull our lawyer. Like, it's just ridiculous, you know? We're dealing with work a year ago, and you're like, oh, you charged me two hours too much double time. How do you remember that? What are you talking about? You know. And, you know, small industry,

everybody talks, and, you know, you just have to stand up and say, 'We've done the work, you have to pay.'" [#38]

- The non-Hispanic white male co-owner of an SB-, DBE-, and HUBZone certified construction firm stated, "Sometimes you feel like they're not going to respond to your actual question, but they're just trying to come back with what they want you to do. And your question would be ignored. Even if you list sections of the contract they'll just say, 'Hey, this sounds like [nonsense] to me' and oftentimes it's brushed off as, 'No, it was obviously intended.' And that's the verbiage they always go to when they make a mistake, 'It's obviously the intention of this.' And it's like, 'Well, that's not what translated to us. I'm glad you understood what you meant, but we didn't.' and that's I think a thing that we get. What do you do after that? I don't know how to respond to that. But I'd say if we feel we have a legitimate question, a complaint about something that doesn't make sense, they always go back to, 'Well, it's clearly the intention of this' and that is like it's supposed to shut down the conversation, because I don't know where to go from there." [#42]
- The non-Hispanic white male representative of a DBE-certified and uncertified WBE construction firm stated, "Well I tried, and it just didn't get any traction. They were closing the project out they asked [me] to sign off on it, but I think some of those things, even in what I talked about, is learning process. When you get a little bit bigger, there are a lot of people put out on the line on these projects." [#43]
- The Hispanic American male owner of a DBE-certified construction firm stated, "Well, it can be because it's more of a personal relationship. There's no arbitration for the contract. [Besides taking it to court], there's nowhere I can't really air my grievances. And if they don't hear from me, they just don't return my call. I can't even call DOT and say, 'Hey, this is going on' and maybe they look into it or it's not really a Labor Relations Board thing, so they don't want to touch it. So, you're kind of left to your own devices when it comes to trying to deal with that kind of stuff. Like the ones that are past due, there's no mechanism for me to fine the company for being 30, 40, or 60 days late. All I can do is send an email, and if they decided to hear me [out] or not." [#55]
- The Black American male representative of a minority business advocacy organization stated, "But you have to be careful, and I say that because we've been in this program for 17 years. There was a period of time where my firm alone joined forces with other firms, to speak up about paid when paid. We wrote to assembly members. We wrote to state and local officials because some of our contracts went well beyond six months of not getting paid. We end[ed] up getting paid, a year later, for the one particular project. But the years after, because we did complain, I want to say we got [blacklisted]. So even though you get into these programs, you get opportunities, you still have to sit on the sideline and be quiet, don't really voice your opinion, because you're in the game. We're giving you a piece of the pie. It may not be to your liking. It may not be fair. But you're in the game, and once you do speak out about it, I have firsthand experience of being [blacklisted].... We didn't get on too many projects with too many primes, so I'll say that." [#FG4]
- A respondent from a virtual public meeting stated, "I work with a number of small businesses to help them draft solicitation responses especially on federal contracts. The issue that keeps coming up from those that work with primes especially in the construction

world is that primes don't abide by the rules and the only way to fix the issue, going to Caltrans for resolution, is a risk that the relationship with the prime will be tainted." [#PT2]

- A respondent from a virtual public meeting stated, "Risks include being blackballed, not getting recommendations for future sub or prime work." [#PT2]
- A respondent from a virtual public meeting stated, "Can Caltrans create a confidential prime rating system that Subs have to contribute to whenever they act as subs on Caltrans work? This would eliminate the risk of being the only sub to complain." [#PT2]
- A respondent from a virtual public meeting stated, "Of course the prime ratings have to drive part of the award process - so ranking poorly would affect the likelihood of the prime winning their next contract." [#PT2]

K. Insights Regarding Race- and Gender-based Measures

Business owners and representatives shared their experience with Caltrans' certification and small business programs and provided recommendations for making it more inclusive. For example:

1. Experience with Caltrans' programs;
2. Experience with the federal DBE program; and
3. Recommendations about race- and gender-based programs.

1. Experience with Caltrans' programs. Nineteen business owners and representatives shared their experiences with Caltrans' programs [#1, #2, #6, #8, #10, #15, #22, #25, #38, #60, #61, #AV, #FG1, #PT11, #PT10, #PT2, #PT4, #PT5, #WT5] For example:

- The non-Hispanic white female owner of a WBE-, DBE-, UDBE-, and SB-certified professional services firm stated, "If I already have my certification, I don't need to contact [Caltrans]. So they can't do anything for me, unless, well, I wouldn't trust what they're going to tell me anyway. And I know that there's a lot of good people that work at Caltrans. I know because some of my employees, my past employees work there, but I also know that they're stymied with what they can and cannot do because of the agency is just too 1950s." [#1]
- The non-Hispanic white male co-owner of a majority-owned construction company stated, "I've been involved in trying to improve things specifically for Caltrans as an industry leader for probably 12 or 15 years, I read the 700 page disparity study they did, I don't know, three disparity studies ago, I've been trying to be very active in helping improve our DBE program with Caltrans. And some of the challenges we've been sitting on mentoring boards that they've established and mentor-protégé, I had been involved with Abigail. I think her name is Edwards. And her efforts to help develop DBE contractors and get them set up. So, yes, the answer is that there is a lot that Caltrans can do and needs to do right now. That burden unfortunately, is really laid upon the contractor erroneously. And the reason I say that is because the demand that DBE firms to meet goals is an absolute priority if you want to do Caltrans work. It's moved from a goal to a mandate. In the last couple of years, they have basically said, you are not going to get a job unless you meet the goal. They've taken away the good faith effort and the good faith effort is an absolute joke anyways. And it's a

huge waste of time and resources, and is not even utilized by Caltrans as a resource to help improve the system. But if you didn't get a job on making the goal, then you probably didn't get the job. And so that burden of finding commercially useful functioning DBEs basically falls on the contractor. And the reason I say that is because there's not enough qualified DBE companies out there to do the volume of work that Caltrans is putting out to meet their goal. So one of two things happen is we go with the firms that we know are already providing that service and are established and doing well, which usually means that they're overloaded, stretched, and can't make their commitments. And in some instances over committed to the point where they ended up going out of business, or we try to take a chance on somebody that is new and the only person or people that end up taking the hit, if you will, if that doesn't work out is typically the general contractor. It's not Caltrans, right? So they don't perform, maybe they're financially taking a hit as far as the small business or DBE, but that's the chance you take when you go in business. But we get hit as a general contractor risk schedule delays, liquidated damages, their inability to pay suppliers, stopped notices against the job, unsafe environment where somebody gets hurt and we're on the general liability blanket. So all these things really fall on the contractor and we're out there basically having to do what really Caltrans should do, which is help these businesses, learn about what it is to do Caltrans work, how to run a sound financial business, how to stay afloat, how to take care of all these things that are required. it's the same 400 contractors that are in the DBE program for the last 10 years, it really hasn't materially increased. It's really, really challenging for us, me, particularly to understand how we think this DBE program is actually sustainable and providing benefit. Because in my mind, as I talked about the other day with Caltrans and that group, it's working on it. It needs to be completely overhauled. The system has not improved the metrics don't demonstrate that it's actually graduating companies. And ultimately isn't that the idea that it's based on success. You take disadvantaged companies, you're giving them opportunities, they grow, they develop, and now they're able to stand on their own two feet. It was interesting the other day on our conference call with Caltrans, Dave, I can't remember his last name, but he's the new head of office of civil rights or whatever that DBE program is for Caltrans. He basically said that he believes that the program used to stay in place because there's been a demonstration that when the DBE contractors mature and grow out of the program, that they fail. And I'm sitting here listening to this, saying, Oh my God, that's horrible. Because what that tells me is the program isn't supporting and developing where they can stand on their own two feet. My other concern is that the program doesn't develop them. That's great to get their foot in the door and maybe they have success initially, but are they really learning and developing and growing in a way where they can stand on their own two feet? I mean, back to the comments that Dave made about when they graduate out, going out of business, that's really shameful on all of us if that's happening. I mean, that's like being a parent and having your kid in your house until you're 21 and spending all this and energy with them and then, hey, all right go out and get yourself a job and live on your own. And then a month later he's homeless. It's like what was that all about? Why didn't that work? I mean... I'm really thinking that that's a really a telltale sign about the health of the program, if that's really out there to the degree that Dave thinks it is. Now all the other stuff that needs to happen as far as mentoring and supporting and developing and educating and training that should not be on a general contractor. I just don't believe that we signed up for

that when we agreed to start doing Caltrans work. It's Caltrans' program, they're mandated to do the work, they're mandated to get the utilization." [#2]

- The non-Hispanic white male representative of a majority-owned construction firm stated, "The biggest recommendation or comment would just be if they try to really lessen the compliance requirements from the firms that are trying to get their businesses started and they make an easier barrier to entry for them to get into the program. Right now it takes much too long and it's too stringent of a process for new DBEs and minority companies to enter the market." [#6]
- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "We tried to get part of the mentor protégé program, but we were not able to get with any firm that actually was in our industry. So the only firms that were open to having a protégé firm were firms that were electrical and firms that weren't related to our civil industry, and a lot of the civil engineering industries were mainly choosing more mid-size firms than firms of our size under their wings, and so I think we were just too small for that. I think it's a great program. I think it just needs to be expanded and maybe more smaller jobs and also just more support for us because it's such a new program and it's confusing. We applied for it, but then after we applied for it, going and trying to find the firm and getting them to also sign with us, and then that's a lot of, we're calling a lot of people and some of them are aware of it. Some of them are not aware of it. Some of them are interested, some of them are not interested, and so it's not as big of a deal to the larger firm as it is to us, and so we're chasing around trying to find somebody to buddy up with, but it's not a big priority to the larger firms, and so I think it's a good program. We weren't able to use it as much as we would've liked to. It's been a lot of work to get into it. Once we're into it, it's been a lot of work to try and get work out of it. And once we get to work, it's been hard to make sure that we actually get paid. Once we get down to contract, it's hard to make sure we actually get work out of it. And so we found it to be a lot much easier to just market ourselves as a prime and work as a prime." [#8]
- The non-Hispanic white male owner of a SB- and ELBE-certified professional services firm stated, "I quit going to the meetings. And I kept getting asked, Are you going to come to the meeting? No, I'm done. No. I work for money now. You want my education, my experience, my expertise, you're paying me. I don't do it for free anymore. I did it for free for 10 years for Caltrans, no charge. Spent my own money flying back and forth to Southern California every other meeting, we'd go meet in Southern California. I paid all my own bills, never charged a dime. I'm not going to do that anymore. There's good people in Caltrans. The good people appreciated it. But some of these good people didn't have a voice or at least if they used their voice they'd lose their job. That's the way it works in public agencies, public service." [#10]
- The Black American female representative of a minority chamber of commerce stated, "My initial reaction is it's mostly negative. And I can also say that has been contributed to by the staff turnover in district six when Morris Caudle retired in 2018, it sent the whole Valley reeling, because Morris was an institution in and of himself, and maintained a lot of those relationships and could close the gaps. The primes trusted him and when he had a subcontractor that was a DBE or was a Black-owned business, he recommended them and they would take his word for it. And losing someone who had those kind of relationships,

had a ripple effect. There was not as much confidence in our local office and there was also a period where information was not shared as freely. And so I think that's had a lasting impact on Caltrans work in the region for the last couple of years. But I think we're finally in a position now, Caltrans' recommitment to working with DBEs and working with small businesses owned by people of color and re-staffing that office has had a positive impact. “ [#15]

- The non-Hispanic white male owner of a majority-owned professional services firm stated, "In fact the [meeting] I went to in the state at the Caltrans, a guy - Wayne Gross was the guy who organized it. So I do remember him. I called him up a few times; he was really helpful. He tried to help me. But he wanted me to go these really, really odd things that didn't make sense to me. But I did them and they kind of helped. And I thought, 'Gosh, if this is the way everybody has to get ahead and get their -' I don't know what I was doing. I was creating this kind of - getting on this list. Like I said, I can't explain it to you. So it was a good intention - I can go into details - I know we don't have much time but he tried to have me copy these lists of things from another site. He said go there and just copy them into yours and then pick these things on this list, and then submit it, and then submit it with this weird - and there's no way that a person could have figured that out on their own. And he tried to write it up on a thing and it didn't make sense. Then I don't know if I completely completed everything, but I'm getting some notices from people will send me an email once and be, 'Do you what to bid on this' so it's partly working. People sat there and he could explain things differently than on websites. You can't do it all by a website. You have to [crosstalk] have face to face -- I would like to meet with him again, but it was kind of hard to call him up and he would explain things. But the information wasn't quite as good over the phone. So for face-to-face the seminars are pretty good." [#22]
- The non-Hispanic white male owner of a majority-owned SB-certified construction firm stated, "I've had to use that stop notice because somebody wasn't paying me, and they were a big contractor that just kind of paid when they felt like, I guess, and I exercised a stop notice. I was assisted by good relationships with Caltrans because I was working as a sub. I was very thankful for being assisted by telling me how and when. I got paid promptly, but it affected my relationship with the prime. They thought I was out of line and I was dang sure not out of line. I was just trying to get paid." [#25]
- The Black American female co-owner of a DBE- and DVBE-certified and uncertified MBE construction company stated, "I mean, there's no resolution, there's no outreach, there's nothing that I see. I mean, they have an Office of Small Business, but, okay, and what do they do? It's like, exactly what do they do? Like, what is their method for being involved with a small business and saying what their needs are? Again, I was on a small business council for Caltrans in one of the districts, and it was nothing. Like, it was just nothing, really fluff. And I'm like, there are real issues that we're dealing with. It wasn't about - I think they're focused on let me help you get a contract. We already know how to do that, you know? I have the contract; now I need to get paid for the work I've done. So, they're missing a piece. So, they're having the outreach. They just say, oh, we're helping small business connect with the primes, but they're not doing the last piece to make sure that prime pays the subcontractor. So, there is a disconnect there in completing that circle to make sure the money actually trickles down." [#38]

- The Black American female owner of an uncertified WBE and MBE professional services firm stated, "Caltrans said to me, they would deal with me, but they didn't want to deal with me. That's how they came at me. At first they wanted to deal with us and they said, 'Well we don't have any funds and this.' I said, 'Well, how are you expecting us to do this?' Then so we've been based off the end kind, and we can be bigger on Caltrans. Caltrans can really [be] big. But the funding and the investment has to be there. They have to be a willing participant and show up. They were not willing to show up then." [#60]
- The Hispanic American female co-owner of a WBE-, MBE-, Micro-, and SB-certified professional services company stated, "And I think it's been great that they track the spend of DBEs, DVBEs and SBEs. Because if you don't have the tracking of those numbers, you can't see how you can improve if people aren't actually tracking it. So that's really good. I think SANDAG also does the same, they track the percent spend for DBEs, and I believe City of San Diego does too. But I think that's really helpful because if small business know that not only is it a goal, or is it mandatory, but they're tracking it, and how the agency is doing and awarding it, meeting their goals, it incentivizes small businesses to continue working with those agencies because they're being accountable to the goals they're setting." [#61]
- A comment from an MBE Subcontinent Asian American-owned professional services company stated, "California has a lot of programs to start out helping small minority owned businesses, but they're not followed through." [#AV38]
- The non-Hispanic white male owner of a majority-owned construction company stated, "There should be a pilot study tracking results [of DBE utilization] after [the] goals interview. District 4's Calmentor program is good. [With regard to Caltrans'] DBSLs, some are used and some are not at all, and many firms don't know such a thing exists." [#FG1]
- The female owner of a WBE-, DBE-, and MBE-certified professional services firm stated, "I'm a consultant in the professional area in government and/or human resources. So my interest in Caltrans, [and] local agency work, is in government and consulting services and also assisting contractors and contract compliance as well as human resources needs. So anyway, my experiences with discrimination is, my line of work, is not a line item, excuse me, and bid documents. So it's very difficult to find work for that in that respect. And also, when I do get work as a result of a DBE goal, it's not listed by the contractor because Caltrans or local agencies won't recognize my work type to count towards the goal. So that's a challenge that Caltrans does not recognize. Again, if I'm not a line item on the contract, I'm not being counted towards the goal." [#PT10]
- The male representative of a DBE-certified construction firm stated, "We've had great success with the program. We find it to be the reason for a lot of our work, which we're very thankful for. Probably actually going to end up graduating out of the program here within the next five or six years, more than likely, whether we want to or not." [#PT11]
- A respondent from a virtual public meeting stated, "Think one thing, and I am speaking again from the small agency point of view, is that I would just emphasize that Caltrans and LA Metro, they are able to have expansive programs to try and reach DBEs. But the fact that a small agency that receives funding is required at the same level to reach DBEs, is very difficult. So, what I guess I'm getting at is that, in looking at the disparity study on how do DBEs get information. They're getting information a lot of times from these large agencies.

But there's also all these small agencies that have federal money and who have Caltrans money and they are again held to the same standard to have to get information out to DBEs. And that's where I think Caltrans needs to look at these other agencies and saying, okay these agencies are receiving Caltrans money. How do we help them get to the DBEs so we all reach our goal? Yes, I can put it on California Bids, I can put it on Planet Bids, but a free clearing house where DBEs can go to and say, oh this is a project that is requiring a DBE. So, what I've done is gone to LA metro, but again LA Metro doesn't have a permanent place for me to announce it, so I just announce the bids in the public comments. And it would be helpful if Caltrans, this is their requirement, if they really want to reach DBEs that they have a non-paid clearing house for them to look for bids. And the big thing for me, and this is the nugget, is that all cities that are required to have a DBE plan know that's where they can post their outreach. That's really the key, not so much the DBEs can find it, but cities that are required to meet that regulation to outreach, so they know they can post bids on a Caltrans calendar, public forum, something like that.” [#PT2]

- The female owner of a DBE- and WBE-certified construction firm stated, "The program is helpful to help close the gap and compete with Larger contractors.” [#PT4]
- A respondent from a virtual public meeting stated, "Is there a section in the study that identify different types of services who are DBE certified that are being underutilized because they do not participation requirement? For example, there is a lot of DBE participation requirements for the construction contract, but not too many for the design contract or construction management. Or it is a participation goal rather than requirement.” [#PT5]
- The female owner of a DBE- and WBE-certified construction firm stated, "I cannot over emphasize the importance of the DBE program. That program does not guarantee me one bit of work, but it should guarantee me the opportunity to bid work advertised by Caltrans. The DBE program at Caltrans has been successful in my securing at least two new clients in the last ten years. They have become regular clients for me both on and off Caltrans projects. That is what the DBE program should do; giving DBEs opportunities to bid with prime contractors they have not met or worked with before.” [#WT5]

2. Experience with federal DBE program. Five business owners and representatives shared their experiences with the federal DBE program [#1, #7, #11, #FG3, #PT1] For example:

- The non-Hispanic white female owner of a WBE-, DBE-, UDBE-, and SB-certified professional services firm stated, "The problem with federal [DBE]... [is] when you do a... a GSA ,it's a pay to play. You give them a certain amount of money, they put you on a list... [Then], you should be able to get a contract. If you don't get a contract within a certain period of time, you lose your money and you have to try and apply again. So what happens with that is they have their outside services that have classes for that. The first time I went to one of those, I couldn't believe what I was hearing. Half of the class walked out within the first half hour, because why would a small business pay for just the opportunity to work with a federal client?" [#1]
- The Black American male owner of an MBE-certified professional services firm stated, "I think it needs to be obvious that there is a program, and there needs to be some sort of way

of knowing that companies have a chance to win work. I'm not sure that's promulgated properly or that people are made aware, but I certainly am not aware of it or has it been brought to the forefront like, 'Hey, guys, let's go and look at state and local for these programs.' That has not been something that's been advertised in this work and something that made this work." [#7]

- The non-Hispanic white male representative of a Native American-owned MBE-, SB-, and Micro-BE certified professional services firm stated, "And most businesses that aren't a DBE, WBE ... don't even get that opportunity to be 18 percent allocation. So I wouldn't say it's an argument, but it would be an interesting study to see why those firms left or why they didn't exist after the affirmative action went away because affirmative action isn't meant to increase the cost of a contract by the percentage of affirmative business. It doesn't mean that you put 18% on top of every project and the fact they went away when affirmative action went away, it tells you the system wasn't working." [#11]
- The Black American male president of a professional services business development organization stated, "I do think Caltrans does a good job of that. I think the training around the DBE program, and I have come across a number of opportunities, where the DBE language, right, is in the contracts, that opportunities are being given." [#FG3]
- The Black American male president of a professional services business development organization stated, "My point is disadvantaged businesses, the threshold to be considered disadvantaged is so low, that before our businesses get any critical mass or significant size, they get kicked out. So if you do well and you start going, it's almost like you get kicked out, but you're still nowhere near at the level to be able to compete with the big boys. But the assistance gets cut off super early. So I think the outreach is good. The education is good. But I think there's some fundamental flaws, in terms of I think what the program is supposed to accomplish." [#FG3]
- A respondent from a virtual public meeting stated, "there are a list of documents I need to provide. But these are the very general names of the documents [and]... not a very specific one. Sometimes I have to go online to try to find out what other people are providing. How did other DBE certified companies get their thing, like what documents did they have to provide? For example, the meeting minutes, or how much money was put forward to start the business. Are we talking about everything? Like some of the personal things that I own, that I brought in to starting the business, do I also put a value to those? Like, show that this is how much I started or is it just about the money that I spilled out of my pocket to start the business. So, some of those seem to be a little bit of a grey area." [#PT1]

3. Recommendations about race- and gender-based programs. Interviewees provided other suggestions to Caltrans about how to improve its certification and small business programs [#1, #2, #5, #7, #8, #10, #15, #17, #18, #19, #26, #38, #40, #41, #AV, #FG1, #FG2, #FG3, #FG4, #FG5, #PT1, #PT10, #PT2, #PT8, #PT9, #WT6]. For example:

- The non-Hispanic white female owner of a WBE-, DBE-, UDBE-, and SB-certified professional services firm stated, "I want to give a suggestion of something that might help. And that is, large corporations, and I used to own a company with my ex-husband that was on the NASDAQ stock exchange. So, I understand large business too. And what we had, is we

had a tech group for that of different business owners could get together and share and find solutions to problems. We do not have that with small companies. We have minor ones that end up being, just buy my services type thing, but we don't have a real mentorship, or not mentorship, a more of an organization that can... You get together and even do virtual meetings once a month for an hour. And people can say, this is what is happening to me... Actually, most people know me. And I have made huge strides in some different agencies. Because of that, I get emails all the time saying, 'What did you do to fix this problem with this agency?' And I tell them, and like I say, I mentor people free, but the idea is we need some sort of a small business forum to be able, for others to say, 'Hey, it's not just me that's going through this.' I'll tell you, I have so many people that I mentor that they say, 'How do you know all this?' It's like, 'Well, all this stuff happened to me and I don't want it to happen to you.' I say in general, that when a lead agency, no matter who it is, when a lead agency actually puts into play, that they want people with small business certifications, no matter which one it is, that they need to make sure that they actually follow through and take care of those. Not just mentor them, but the idea of making sure they still exist, because what happens is they get lost by the side. And that's why I started mentoring small businesses, because they could not get anywhere with the lead agencies, and nobody cared, and they didn't call back. Or if they did call back, it would be a month later and the disaster's already happened. So that's why I was suggesting maybe a forum for small businesses. I've given talks to small businesses before in these kinds of forums. But I think something that if an agency adds some added value by saying, 'We're going to train you how to work with this agency, or to give you points of how to work with the agency.' And they do already have things set up as how to work with Caltrans. It's like, 'Yeah, no. You don't. You don't help. You just don't help.' So, what we need to do is make sure that, that the people aren't scared and that people know what Caltrans wants and wants to know how to be successful. Because my first client, that used to work for Caltrans, when I lost money with him, all he said was, 'Well, next time we'll try and see if we can make it up.' It's like, 'Why don't you just tell me how to play this game, how to be able to be successful in Caltrans contracts.' The mentorship is not as prevalent as they want to believe, because I hear this from every small business that works with Caltrans." [#1]

- The non-Hispanic white male co-owner of a majority-owned construction company stated, "I think there's like five or six elements to that that all have tremendous return on investment, but it really starts with, what are the metrics? What's the overarching vision for the program? What are we saying are our big, hairy, audacious goals for this program? Are we saying that we want to get 20 new firms? What's the number? If we got 400 right now that are doing business, 10 percent, that's 40. How close are we getting to 10 percent of new businesses a year? Maybe 1 percent. And then, what are we talking about the program? The program should be developed not so you just stay in there forever, and you get the luxury of being insulated from having to bid hard bid. You should grow and develop and become a real company and be able to get out on your own two feet. Maybe not in three years, but certainly in five, or whatever. How many are graduating, and what's our goal there? And then, out of those that are graduating, what's our goal for how many are still in business five years later? So, the vision, the goal setting, and then the metrics. What are those quarterly numbers telling us? Are we on track this year? Are we off track? Why? They've got to run the program like a business, like we would have to stay in business. Like a DBE would have

to. mean, they're expecting all this stuff from both of us, the general and the DBE, but in fairness, they're really not doing what they should be doing to create success and a positive outcome." [#2]

- The Black American male co-owner of a WBE-, MBE-, and DVBE-certified construction company stated, "Remove the bid bond requirement for small minority-owned businesses. Remove some of the financial requirements as one of the rules, if you will, one of the things that you need, in order to bid. Make things like worker's comp and different types of liability insurances, more affordable to smaller businesses. I would say there should be, maybe a mandatory minimum of contracts, that go specifically to small businesses. Then once you're in, perhaps whatever financial assistance you need in getting this done or obtaining the bond, maybe the government can, or whatever, a city agency can partner with you, to help you get that bond. Or maybe even the government agency for a small or minority -owned business could even carry that bond for you. Maybe if they could remove some of those thresholds, or at least be willing to carry that aspect themselves, if you have proven that you're a minority-owned business, you're only making X amount of dollars this year, and it would benefit society as a whole, if we gave someone a break who truly needed it. So yeah, maybe the government could partner up with the contractor, and do these jobs together. But I think there needs to be a minimum of contracts that go exclusively to small, minority-owned businesses. And right now, they're still going to the big guys. More information put out there. After COVID, maybe more face to face round table discussions, and I think there should be a mandatory minimum of contracts, maybe there already is, that are awarded, not given, but awarded to women small businesses, disadvantaged businesses. More decision-making people and more diverse decision-making group of people. Something that really reflects society, not just the old guard." [#5]
- The Black American male owner of an MBE-certified professional services firm stated, "I think we need to get away from all of those [race and gender conscious measures]. I think that creates all this other mess. I think people need to be held accountable for their actions, and I think that people need to be rewarded on merits, and I think people need to be treated fairly. The whole concept of all these programs, I think, keep racism and all that stuff alive in America. I think we need to get rid of all that mess and say, Hey, here's the qualifications. It doesn't matter what race you are. You meet the qualifications, and you get the work. I think the more we keep bringing this up and the more we keep talking about it, the more we're going to keep dealing with it. So, I think equality is equality. I think everybody should be treated fair across the board, and it shouldn't matter what your gender or what your race is or any of that stuff, again my humble opinion." [#7]
- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "I think maybe more accountability on larger firms to actually hire the small firms. Right now, it seems like there's a lot of things done in the initial stages, but they're not actually any falling through of that. I've been to many Caltrans meet and greets sessions, where we talked to other consultants where we get introduced by the project. But even after that point, there's no accountability that means to me that we actually get that work or nobody's checking up on that. But I'm not so sure I'm not from what Caltrans or the state can do to support us, I think just mapping more small business programs. We would like more training and expertise. I found the Caltrans small business program training is very useful when I went to them, but I found that they were very much controlled by some of the

larger firms even there, and so they had this small business program, but it was mainly there so we would go rub shoulders with the larger firms, and that was really, they weren't really ready for that. You know what I mean? I liked it in theory, but it didn't result in what we wanted it to result in." [#8]

- The non-Hispanic white male owner of a SB- and ELBE-certified professional services firm stated, "Those programs [race and gender conscious] are discriminatory. And I don't think it's right to be discriminatory. Period. When you set the discrimination based upon the size of the business, then you could be any color, or sex, or crossdresser, or whatever you want. It doesn't make any difference. So you haven't discriminated except against the big boys who have severe advantages. They don't have to replace all their equipment because they work in the state of California. They can swap out their Nevada equipment for California equipment. Like Granite construction company... never cost them a dime to meet the CARB requirements. Destroyed tens, if not hundreds of thousands of small businesses in the state of California, mainly with the trucking industry. All the independent truckers are gone nowadays. They're all gone, because they couldn't afford to go out and spend 100,000 dollars. They drove for a living. They just destroyed them with these requirements." [#10]
- The Black American female representative of a minority chamber of commerce stated, "Making sure that the supports available are robust and that they're the right size? All of our businesses, specifically when you're talking about minority and underserved communities, they have specialized needs that not all service providers can meet. And so having data that's accurate, that makes it easier for that work to happen, I think, is the number one. And then number two is those right size programs and supports. And then third is awareness and making sure that they're aware of the programs and the resources that are there available to them. Closed mouths don't get fed, and if you don't know that the help is there you can't access it. Caltrans does a good job on delineating which projects DBEs are qualified for because of that federal funding. But I think they also need to consider how DBE can be used on state funded projects only, and whether there's an ability to provide preference to primes that choose to use a DBE contractor even when DBE is not required. Because when it's not required, we still don't see contractors getting access to those opportunities. So that's a thought on how the process could be improved in the program as well. We did one two years ago with State Center Community College District or D3 program, Discover, Develop, Deliver, that worked on doing that pre-certification for contractors to do public works projects. And we think that that's a great model for working with Caltrans and other public agencies, discovering the contractors that are out there and helping them identify the opportunities that exist, develop, making sure that they're prepared their certification and paperwork is in order, and then deliver. Having them bid those contracts and actually be awarded. One of the signature things that we did in that program was a breakdown of the actual bid process. So, we had the purchasing manager from the college district actually go through the bid and break down each section and talk through how they would apply and do the paperwork, answer questions that they had, go through and do the site visit and site walk, all of the things that would help familiarize them with the bid process, they had access to in that Academy. And we think the Caltrans has the same opportunity and resources to do something similar, whether that's virtual or in-person. But we think that increasing the learning opportunities that are available is something that Caltrans could and should do, and it's something that they don't have to do

on their own, but that all public agencies should've been doing... You cannot improve on those things that you do not measure, so we always start with an assessment. We want to figure out where you are today, and then we also want to do some vision charting and figure out where you want to go next. So, making sure that the programs you're offering and the services you're offering are the right size and right fit for the small businesses where they are, but also where you want them to go. And we think that that's evergreen for technical assistance providers, but also for our public works agencies. They know what is required to be successful in our programs. Create an assessment tool that allows you to prepare everyone to be successful. I think that's number one given answer every time, but also access to culturally competent resources that meet people where they are, that speak in plain language and that don't confuse concepts and make them more difficult than they need to be. Working in these spaces, we use a lot of acronyms and do alphabet soup when we need to be very clear on what these things mean for our small businesses and help them understand so that they can grow, because you don't know what you don't know. And the same thing for our public agencies. Be open to asking questions, I think that's one thing that they don't do enough of, is asking questions, not only of the agencies that provide these technical assistance services, but ask the small businesses, Why don't you apply for our contracts? What do you feel has kept you from being successful in contracting? What resources could we provide? Be very intentional about the design of the programs that are being offered and tap on diverse stakeholders, don't continue to go back to the same folks. And something else that I've heard in a couple of my leadership classes in the last few weeks has pushed people into positive thinking. So, if you're asking them how they can improve upon something, make it very clear, we don't want to hear the things that we do bad. We want to hear what you want us to do well, and frame those in a way where you have community buy-in into the programs. Same thing for organizations like ourselves, but more important for our public agencies to have that same kind of structure." [#15]

- The Hispanic American female owner of a WBE-, MBE-, SCMSDC-, and DBE-certified goods and services firm stated, "I just think if you just concentrate on some of the things that are already in place to improve them, to get them better, to have people that are in it that are holding them accountable, to make sure that our primes are doing what they're saying they're going to do, it would make things much easier for everybody who's a part of it - the sub, the prime, and the organization that is actually providing the - spearheading the contract." [#17]
- The non-Hispanic white female owner of a DBE-, SWBE-, and CBE-certified professional services firm stated, "I've talked to several people at the civil rights, their new people and everything. I know that it's almost impossible. But they're asking contractors to help DBEs do this. It's not the contractor's ability to do that. They have their own problems. They're not going to be able to give them some of their bonding capacity. They're not going to be able to take on that responsibility. Their insurance companies will never allow that. Why would they allow that? So, it's going to have to come down to Caltrans helping these people do that. I mean they're going to have to spend the time and effort and they're going to have to get experts in the field working for Caltrans that work directly with these people. The general contractor already is asked to do so much. I don't think that it's feasible for them to do both. I don't think they can do it. I don't think they have the bandwidth to do it. I think that if you want equity, you have to provide the tools for these small businesses to be able

to succeed. I think one of the main tools in that arsenal is the support of Caltrans itself.”
[#18]

- The Black American male owner of a DBE- and SB-certified and uncertified MBE professional services firm stated, "As I mentioned to you, Bart Headquarters building we have a ten-percent goal for African-American alone, because the contractor said, 'Look, if you let my contract go then I'll set this up, because I'm a private company, I don't come under Prop 209.' That's the - yeah, private contractors can do that; they can set up any goal they want to, as long as they meet the basic goal of that agency. Now if the agency has a 15-percent or 17-percent goal and they want to set up another goal for women, then they can set it up. That's it. As long as they meet that basic goal. And that's what a whole lot of people don't know that. That's part of it." [#19]
- The Middle Eastern American male owner of a construction company stated, "I think it would be nice - and I don't know if it's feasible or doable or even realistic or not. But maybe it would be nice for the government entities to send maybe a little flyer that is coming from the government entity, not from a marketing company where it just gets looked at and discarded right away to see to all the contractors that are listening, [those] that have the classification for the government jobs. 'Hey. Have you ever thought of bidding on government jobs? If you're interested we're having a webinar to invite new faces to the public sector and see how to bid, how to get' - I think that will invite a lot more people, contractors that would be very qualified but just don't have, never have the know how to enter the public world to do that. That's just a little recommendation or suggestion there." [#26]
- The Black American female co-owner of a DBE- and DVBE-certified and uncertified MBE construction company stated, "As far as most beneficial, Caltrans gives more DVBE percentages, so that's how we win on that end, and Metro gives more DBE. So, it just depends on the agency. And I feel like if they both have the same programs, they should both put out equal amounts of percentages for all programs, because it's fair. Some people aren't both. I happen to be both, but if I wasn't, then I couldn't really work a lot of work for Metro, because they don't put a lot of DVBE jobs out there. So, and then by the same token, Caltrans doesn't put a lot of DBE jobs out there. They used to, probably about - probably it's been, like, over, like, when we first started, like 12 years ago, but then they started focusing more on DVBE. So, I'm not sure of the switch on they recognize the certification, but they're not, as far as I see, putting a lot of bids out that include those goals I mean, it's easy. I mean, definitely easy to do a tutorial, you know, just how to fill out this form, what we're looking for, because they just don't have it, and it's just - but they want a lot, but they don't help you understand it. And, you know, your prime contractor assumes you know. Oh, I need this document. You've never heard of that document before in your life, you know? You go on Caltrans' [website] and you find the document, but there's no sample. At least if you have it on there, have a sample of what's supposed to go on there and where you get the information to put it. I thought this would be the great time to give a voice, a legitimate voice, from someone who's been in the business, who's done the paperwork, who's dealt with multiple contractors, and I don't just deal with Caltrans. So, I do know that there's capability to do things better, and, you know, I'm glad I had that experience to know that there is capability to do things better. We really need the State of California to step up and do their part." [#38]

- The non-Hispanic white male co-owner of an SBA-certified micro- and WBE professional services firm stated, "The biggest part about wanting to participate with you today is to say that small micro businesses deserve support. They need to have some sort of mechanism that allows them to become real in these processes of working for a large agency like a Caltrans and make it effective so that you don't get killed in the process of trying to get your foot in the door." [#40]
- The Black American male owner of an SB- and MBE-certified professional services firm stated, "I was hoping it [the interview] could solve or address some of the issues that I've had and hope that Caltrans might take a closer look at how it's divvied out, especially for small engineering firms. They're doing - these guys are doing a great job for the contractors - the women contractors - and I'm seeing an awful lot of women businesses that have opened up their shop and gotten - and hired contractors that can go in and pour cement and do construction, you know?" [#41]
- A comment from a majority-owned professional services firm stated, "They need to focus more on small businesses helping us small people not major companies." [#AV938]
- A respondent from a trade group focus group stated, "Increase transparency around how Caltrans sets local DBE goals. Increase transparency around how the statewide 17.6% goal and the local project goals are set with a side-by-side comparison to the market capacity for DBEs. Define which Caltrans work codes and/or NAICS codes are being used to arrive at the increase in local goals to demonstrate how the goal is achievable. We can develop education programs on key tools like e-bidding, navigating Contractor's Corner, developing cost proposals, invoicing and ICRs, with participants from the DBE mentoring program." [#FG1]
- The Black American male representative of a professional services business advocacy association stated, "We're a resource center. So, we may not have any relation as far as contractors and things I mentioned, but we deal with them. We want to make sure we give them what they need. Maybe if Caltrans would kind of embrace more resource centers a little bit differently and make us at the forefront too so we can get all the information filtered down, that's another I think path that should be taken in the future as well." [#FG2]
- The non-Hispanic white female representative of a construction business advocacy association stated "I think from my frame of reference, the DOD, the DOE are phenomenally better to work with than the DOT, because they literally insist their contractors meet goals. They not only insist their contractors meet goals, but they also make the contracts ensure that they make goal, by adding additional personnel to aid the small business segment. So you have people helping you, calling you, saying... for example, with us, we sent 78 truckloads of steel from North Carolina to another part of the United States, and it was right during the pandemic and Black Lives Matter and one of the things that we ended up having to do was write insurance, thanks to the contractor, that if we were impacted by either health or social unrest, that we had a disclaimer within the insurance policy, we didn't pick up the delay. I don't think I would have ever thought about that, had I not been called by the contractor saying this was coming back through the agency. I think we need to think in terms of rather than simply saying to a contractor [that] you have to have a goal. You need to make sure, or you need to assist your small contractors in being successful, and that obviously is built into whatever becomes the contract itself. Rather than leaving a small contractor out there to hang. It does not help the GC, at any level, regardless of how big or

small they are, if they're small subs or suppliers or professional services fail. It just doesn't help anybody. I think we need, from an agency level, to start looking at ways to ensure success." [#FG2]

- The Asian Pacific American male representative of a minority business advocacy association stated "Right now, your recommendation has been setting a goal for the entire state. I want to see whether is possible for you to set goals for each of the district, because the DBE population has been entirely different. Let's say you're District 4, you would expect a very high, real large group of DBE, while you be going to District 1, 2, or 3, even 9, you rarely have too many DBEs in those districts." [#FG2]
- The Hispanic American female representative of a professional services business development organization stated, "When we come back in 2021, once they get through this last few weeks, I think we're going to find that if people see their businesses are still open, that they're going to start looking for the resources again. And that's exactly what's happened to this last quarter. And people came back and said, 'Hey, we're still open. Let's start figuring this out.' So again, we have the grassroots team went out there. It's a lot of, though, one-on-one. We found it's a lot of one-on-one. It's a lot of personal relationships. It's a lot of going out that way. All these organizations ... I'm going to speak for me, but I'm probably thinking I'm not wrong ... always reach out every year and they're like, Let's talk about how we can partner. What can we do? How can we make this work? And the point, by now, after all this time, I'm like, you know what? My time is just as valuable, but either you have something different to share, that's really going to make this work for our businesses, or let's just hold out on this, because I'm just feeding you information for a report that you're going to fill out, that isn't doing anything for anyone. So I really need things now to very intentional about what they want, the programs, to really feel like it's authentic that you're trying to get people this work." [#FG3]
- The Black American male president of a professional services business development organization stated, "I think it's access to capital, more specifically, credit and underwriting obstacles, bonding obstacles, in the construction world. It's meaningful technical support, meaning what businesses can they be in, and even if they do pivot, then all of this is underpinned by my number one thing is intentional, focused, access to opportunities for women and minority owned businesses and dare I use the words, set aside or carve-outs, to make sure that these businesses are getting a lot of the business under picking, continue to stay in business, continue to pay their employees and pay their payroll taxes, that the state needs so desperately, and that those major contractors with the state are also held accountable, that if they're going to take state jobs, then they have a responsibility, that a percentage of that job is done with a small and preferably diverse business partner. And I'm talking about minorities, women, veterans, and LGBT businesses, that need to be required to be included in Department of Transportation contracting opportunities." [#FG3]
- The Black American male representative of a minority business chamber of commerce stated, "Bonding and insurance and financial [support]. And timely payments. Leveraging the capital that they put in the financial institutions, for assistance, with Black-owned businesses. And I mean, if you're putting billions in, certainly you got billions worth of power to say to bank ABC, we want to see more participation and some relaxation in your consumer credits for small businesses or minority businesses. So that is something, and

that is power that they have. I think that the government, that you're contracting with, needs to exercise its muscle power, with the folks that they spread the money around with, to assist the sustainability of Black-owned businesses in the state of California. And government and the financial institutions and the financial community have a broader commitment to supporting bonds and insurance, beyond the bonding. That, in itself, is important, and they could be the bonder of last resort, because unless somebody defaults, they're not having to pay out anyway. I think they could play a greater role in interacting with the African American Chambers of Commerce, throughout the state of California, for inclusion of Black-owned businesses and the NAACP. And again, we have very similar roles, and we try to walk down the path together without walking on each other's feet. Sometimes, it gets to be a little difficult, but most of the time, we partner together, and our roles as advocates for our clientele group puts us in the same spot, a lot of times. But certainly, Caltrans should utilize the Black Chambers more so, and they should utilize the NAACP and in particular, when you're trying to get into the communities and working with Black-owned businesses and certainly, the Chambers and since COVID, have received some funds, not enough to try to assist and educate businesses and help them to stay in the game and maybe expand, so more funds should be put into the organizations to provide technical assistance at Caltrans, because they need it to." [#FG4]

- The non-Hispanic white male co-owner of a majority-owned construction firm stated, "If you're really intent on making change, go after the 2,000 people that say they're interested in doing Caltrans work. Follow up and figure out why they aren't doing the work. Provide resources." [#FG5]
- A respondent from a virtual public meeting stated, "I understand the primes that they want to have some kind of security for their contracts. It's probably hard to trust somebody that doesn't have a lot of experience or record of company, but they can start with really small contracts that they can be even contracts under \$15K, where they can just allow small contractors to get just at least some experience with some tasks and start getting some kind of reputation and experience so they can start slowly growing. Just giving that opportunity of really small contracts just minimum a month or two, so they can start getting the trust of different startups." [#PT1]
- The female representative of a business development organization stated, "I know that Caltrans had included LGBT-owned businesses for their small business outreach programs. And I wonder how that data is being collected for this disparity study? And, or if you've seen any progress since they've started to include LGBTBES? More of a general where we're at with the data collection on that effort." [#PT10]
- The female representative of a business development organization stated, "I think that maybe even having a statewide DBE mastermind group, if you will, best practices, what did you learn? Or, a peer-to-peer sharing, even to say, 'Okay, how did you do this contract?' You have the newbies coming up and then you have the more experienced subcontractors or the primes just because again, I've been in this space probably for the last five years. And again, you don't really know what's going on until you're actually in these networking events, and you understand the processes and how things work. It's not an overnight thing, because every contract is very different and unique. So, there's different aspects to the contracts. But, if you have different companies at different stages that are trying to enter, and you

have that little bit of that peer to peer and you learn from each other, I think that's great. Because more often than not, they're going through the same issues they went through when they started up. So, it's something like that, something that Caltrans could possibly navigate and say, 'Hey, listen, this is something that we could do.' Maybe that's just... And then, with COVID now via Zoom, where they can see people face-to-face and have that connection versus a dry email, or this is what I do, all that kind of stuff. And really get to know the small business owner and what it is that they're doing, versus something that just comes through an email, and then they don't have that connection or that relationship building. Because networking is about building relationships with these companies, whether you're a small company, or prime or subcontractor." [#PT2]

- The female owner of a DBE- and WBE-certified professional services firm stated, "I think Caltrans can set a system to pay subs directly and to provide referrals directly for subs." [#PT2chat]
- The Black American male representative of an uncertified MBE professional services firm stated, "If you take small businesses from each of the sectors that we have and create a different frame for them to [work] under, when you can do workshops where people are interested in partnering with other firms, so they can go after bigger contracts and that if the contract is in their purview." [#PT8]
- The Black American male owner of an MBE-, SB-, HUBZone, and DBE-certified construction firm stated, "At least two or three times a week we do receive good faith effort calls from prime contractors, some being Caltrans projects, but it's pretty much all over different municipalities and large bids that are out there. And to be real frank with you, the amount of time that we've gotten those, I have only gotten no more than two replies back when I just requested the result of bids that we've actually submitted quotes for that were solicited. So that we at least get an idea as to exactly how we've compared to other trades that are similar to ours so that we could tweak our numbers. If in fact we were either too high or too low, irresponsive or what have you. So ultimately the question is, is there anything that Caltrans can do to almost make it that the primes at least get back to the women and minority-owned firms that they solicit? If, in fact, we're taking the time to provide them with a quote, being that we're small and takes a lot of our time and sometimes the cost to get the plans, whether or not they can at least be kind enough to let us know exactly what it was that was done that prohibited us from getting the quote? Or what someone else did that thing that enabled them to get the quote?" [#PT9]
- The non-Hispanic white male owner of a DVBE- and SDVOSB-certified professional services firm stated, "The SDVOB/DVBE programs are not overseen by legal enforcement regulations? SDVOB/DVBE programs are not a part of the DBE categories. My predecessor, Rick Fowler, briefed me over two years ago that he, also, found the Caltrans Disparity-Study was not interested in assisting SDVOB/DVBE programs. Until the Disparity-Study, purpose/mission is modified to officially include SDVOB/DVBE programs, it is not productive for the DVBE Representative to take time and participate!" [#WT6]

L. Other Insights and Recommendations.

Other recommendations for Caltrans, or other public agencies in California to enhance the availability and participation of small businesses. Interviewees shared

other insights or recommendations [#2, #8, #9, #10, #11, #12, #15, #19, #22, #26, #45, #50, #AV2, #FG1, #FG3, #FG4, #PT1, #PT12, #PT7, #PT8]. For example:

- The non-Hispanic white male co-owner of a majority-owned construction company stated, "The disparity study used to say, do you want to do work for Caltrans? Yes. Check the box. What do you want to do that work for Caltrans? The whole state. Okay. Check the box. Then it puts all that information into a database, comes up with this numerator, let's say numerator denominator. I think the number's on the bottom. I think it comes out with this capacity for what, I believe, what could be done in the industry. If all those people, I don't know the exact methodology, but this is my layman's understanding of what the industry DBE community could do if they were allowed an opportunity. And then they look at how much has actually been done right now. And then they look at the two numbers and say, okay, well, geez, look at all these dollars that aren't being given to DBE programs, we got to raise the goals. And the problem is several things. First of all, they finally changed it. You can't just check the box for all California, because clearly if you're a small business DBE program and you're in San Diego and I'm calling you up saying, hey, I've got some type work to put in, in Northern California, are you really honestly going go out there and work? So that helped a little bit, they finally made that change because I was screaming about that. But have you ever done any Caltrans work? If you're saying yes, I'm interested, that's great. But should that really be used as a criterion for saying that they're being held back or they're not given opportunities, or we got to increase the numbers because if we call them up and say, Okay, you want a job? They're likely to say, no, I don't want to work for Caltrans. Well, why'd you check the box? Well, I don't know. I thought it would be a great opportunity, but you know, it's not really, for me, it's too much risk, whatever. I think that really needs to be flushed out. It really needs to be flushed out because it's artificially saying that all these people aren't being held back and that we've got to increase the program." [#2]
- The Subcontinent Asian American owner of an MBE-certified professional services firm stated, "I'm really happy that you're doing this. I really appreciate it. We've been kind of lost in the space trying to figure it out. And so it's really nice to hear and know that Caltrans and folks are thinking about how to assist folks like us. I think these next few years are going to be very critical as we do a lot more infrastructure spending to make sure that the spending goes to small, local firms and we are trying to follow that path. As a small local firm, we're really, really trying to be a small local minority-owned firm who prioritizes equity, who has better planning processes, who sets up ourselves to pay taxes in the county, we're trying to follow all those rules. But the rules are set up better for a larger firm to come into the Bay Area, renting office in like a WeWork and having one person there a few days a week. They'd meet the same criteria as we do. You know what I mean? And so we're trying to follow these rules, serving in the Bay Area, but there's ways that these larger firms raid into the rules and then they still manipulated them for their benefit and I think as long as we have folks like yourselves and others who keep thinking about that and trying of figure out what strategies these big firms are doing to combat them to level out the playing field, I think that's the best strategy that we could do. But it gives me a lot of encouragement knowing that you're doing this kind of survey." [#8]

- The Asian Pacific American owner of a DBE-, MBE-, and SB-certified professional services firm stated, "I guess with the soon to be, the federal infrastructure bill that's coming out, hopefully with the amount of money, the funding that all these local agencies are able to kind of develop a lot more projects, I hope this is the chance to give the small business an opportunity to work on it. If that doesn't work out, then I don't think there's any other stuff in the future will help small business. I think this is going to be the defining, the key moment right there is whether they're truly willing to help or not. So, I'm excited, but I'm also hoping that this thing's going to work out for everybody." [#9]
- The non-Hispanic white male owner of a SB- and ELBE-certified professional services firm stated, "Be a true partner not one in name only. That's what I would recommend for Caltrans. Figure out how to be a true partner. Caltrans needs to treat all contractors like they're small contractors. And it's all personal. You work, you start off by making it as easy as possible to bid the job. Make the job completely reasonable to bid." [#10]
- The non-Hispanic white male representative of a Native American-owned MBE-, SB-, and Micro-BE certified professional services firm stated, "So as part of the sales, the advocacy of the affirmative action plan in November, what happened was that they said we had, let's just make up another, a number of 100,000 minority businesses. They're women owned businesses, or however they quantified it that went out of business with affirmative action. Well, that tells you everything you need to know because it tells you that these firms were either not qualified, or something, because when the affirmative action goes away and the businesses go with it, it tells you that it's a checkbox in the contracting process because if you were a woman-owned business, for instance, and you had the quota affirmative action, 18 percent or whatever it was for five years, you should be competitive without that afterwards. And the fact that they use those numbers, I found it really interesting that they used all those numbers of businesses that dissolved because of affirmative action. It tells you that it didn't work correctly because the idea was that you get the work because you're qualified and you're good at it. And the affirmative action is to get your foot in the door, and then you build a business on it. Well, if they closed of affirmative action in '96 and all these businesses went away, it shows you that it was only a giveaway or a program because if you would have given any other business a five-year head start, or whatever it was, with a guaranteed whatever percentage of work, that patients should be breathing on their own because in '96 when this went away, the economy wasn't bad. So, how do you fix that? I don't know because the businesses shouldn't have went away if they were qualified when the affirmative action went away. So, what do you think about that? I mean, how do you fix that? Yeah. Now that we're talking about it, what I would like to do is rather than make a DBE 18 percent underneath the prime, they should have an additional prime for that DBE percentage. So, if you have 100 percent contract with, let's just make an even number like 20 percent DBE or minority business. If it's a million-dollar prime contract, then they should do an 800,000 dollars prime and then they should do a 200,000 dollars separate prime solicitation for the DBE because where the gaming comes in and where the issues are, are with the primes selecting the DBEs. They're never going to learn to do it themselves, unless they're in the driver's seat. So, if you wind down the submittal requirements, like you have a million-dollar prime, they're very sophisticated and they can submit, and they just add that 18 percent on. They're not vested in that DBE; they're just checking a box so that they can get hired. So, what the agency should do is say, 'we have a

20 percent DBE qualification, we're going to wind down the submittal requirements and we're going to issue a subprime, but not under, they're going to have their own contract.' That's really the way to get them to go. And that's the reason why I'm a prime and not a sub is I like to be in control of my own destiny, negotiate my own contracts, so on and so on. And so, I think the fix would be now that we're just sitting here would be to make those DBE requirements, separate contracts that DBEs can prime themselves because the DBE comes out of an 18 percent underneath the prime, no better to qualify as a prime in the next one. They basically live to be an 18 percent of their whole life. They're really limited to the amount of growth because those contracts kind of come and go and what they normally do in my industry, you do write down what you want because I'm thinking now, what they do is they get staff augmentation. And so, in a Caltrans situation, they'll grab a warm body from their DBE, and they'll just put them out on a job. Well, that does not make the management of the minority owned business any more sophisticated, they're basically selling hours or time for hours or hours for money. And so, they'll never be in a position to go for a prime where if you took that allocation set aside and you made that a separate prime contract with the idea that we're going to work with this DBE and raise their level of business experience... kind of teach a person to fish." [#11]

- The Hispanic American female owner of an MBE-, WBE-, and SB-certified professional services firm stated, "I think for me, it's just a question of finance. I'm really proud of the way my company has grown, one of my biggest clients and I have written their guidelines for all their cultural events in North America. So, when I think about like, Hey, I'm a one woman show and I'm getting really big contracts and work with really big firms. I also feel frustrated because again I'm at the point where if I want to get another company to do that work I need help. And so, until I get some specific funding, I don't have the means to pay someone to work for me 40 hours a week without having the work first. So, it's almost like the chicken and the egg, like which came first. If I had money, then I could hire somebody to help me, but because I don't, then I feel like I'm missing out on a lot of opportunities because I'm only taking on what I can do with the limited resources that I have. And I think that going through this interview process, and before this just made me realize that, before I was... I remember having a huge contract doing three really big events in one month and then thinking, well, like I have to pay these people. If I want them to work on the next event with me and my clients taking me three, four months to pay me, but I still have to pay my stuff, I can't wait three or four months to pay the people that were working for me. So, I would then take on odd jobs, like I work with the catering company, a freelanced food production, to make sure that my people were getting paid on time, but if I had funds, then that wouldn't be an issue. I keep taking jobs and jobs because I...the payroll, you know what I mean? I think it's one of those things again, where it's like, if I had more money than I would have more staff and I would have more opportunities. I don't know why I've been so hesitant to really focus on investments or... I guess the pace I was growing out was sustainable for me to still be able to oversee it all, but again, I feel like now I'm at the point where I just have to delegate a lot of these responsibilities, but again, I can't do that without the funds to pay people." [#12]
- The Black American female representative of a minority chamber of commerce stated, "Doing business in California is a challenge and a lot of people see it as a privilege, but it is not. It is something that is fought for. Most businesses that are starting in California, they're

lucky if they make it to two years old. If they make it to three, we want to throw them a big celebration. In particular for businesses owned by people of color, most of them are micro enterprises, which means they employ one to five people, themselves, possibly a family member, but when they do grow, they hire from their local community. And we know the small businesses are the engine of our local economies because those jobs they create usually stay local. They're helping create new jobs that wouldn't be there otherwise. So, the value that's placed on small business in California, we know how important they are to the overall economy, but regionally and on a local level, we don't value them enough. And so that undervaluing of our small businesses is a barrier, and it's a barrier in California, that when we talk about the golden state, you wouldn't think exists. So that value of small business, the resources that should be available on the local level, those things are barriers and challenges to doing business in California. It's that our small businesses are one of the last opportunities for Black communities and communities of color. I'm not a huge fan of the BIPOC acronym because I don't know who came up with it, but I think it's very intentional in calling out all of those communities so I will say this in that broad scope. That resources that are designed for Black people, that change the status of Black people, improve the lives of our indigenous brothers and sisters, because before Black people were challenged in this country, the land was stolen from the indigenous people. And so if we don't ever do right and create justice for those two communities, the prosperity that is developed will not be equally felt or shared. And that is what we've seen a resurgence of justice calls be really about, is making sure that we do right by those two communities. When we break down the BIPOC and we start with the Black and indigenous, POC and the rest of the communities of color will follow behind. All boats rise in high tide, right? We want to make sure that there's enough water that lifts those two communities first, and then everyone else will follow and get those benefits. And that starts with intentionally creating policies and programs that meet those needs. And because of prop 209, we cannot call out Black and indigenous communities by name, but we know the data and the metrics that exist that help us identify them without calling their name, and we need to use data in a way that allows us to do that work. So let's use the tools that we have available to make a difference that will be lasting, because generational wealth is something that Black and indigenous communities have been robbed of since... for the last 400 years. And we know that we're never going to close that gap if we don't try to close it with innovative strategies and intentional policy." [#15]

- The Black American male owner of a DBE- and SB-certified and uncertified MBE professional services firm stated, "So I was speaking to the availability, that is faulty. You can't discriminate - like if you had 100 contractors, Black contractors, and I've been here long enough to know that we were in parity at one time, prior to Prop 209. And then you only have 10, 15 left, you set your goal based on the 10, 15 left, not on the fact that you can reach. You know, a goal is where you go to reach to, not that you document that this is where you are and we're going to keep you there, where you are. You set a higher bar. So, if African Americans are only participating at one-percent you're supposed to set the goal to five-percent. But you can't go in and say, 'Okay, we only have available one-percent and that's what we're going to set our goal for.' That's nothing but documenting discrimination. So, I hope you're capturing what I'm saying. To me that's the documentation of existing discrimination. You're supposed to set the goal to five percent and let all the African-American firms rise up to meet that goal. And I've seen that. I've been around long enough,

and I'm so blessed to be around this long and so blessed that I'm living at a time that these are the changes for progress that must be made to set the goal higher than what you have in terms of availability. And Caltrans is setting the goal at availability. To me, and I want you to quote me, that's totally incorrect. Maybe I shouldn't say it so - well, it is terribly incorrect. To tell you the truth, the most successful thing that Caltrans could do is to bring back Affirmative Action or in some kind of way establish Affirmative Action for African American firms. Because at two percent that's a statement. I mean not two percent, one-percent. That's a distinct statement of discrimination, no matter how you put it. So Affirmative Action allows you to redress those kinds of disparity. And that is a disparity. Because I'm in the field and I can tell you, you set that goal at five percent, you're going to get five-percent. You'll get it. There's a stereotype that Black firms are not out there and they're not out there because you don't select them. And on the professional service side we can do that. Professional service side is objective to a point and then becomes real subjective to another point, particularly when the person doesn't look like the people who are on the selection board. So, I think that we have to in some kind of a way innovate Affirmative Action. But I think that there needs to be - if you shackled the Black firms, and at one time I would say all firms, but today we're doing 17-percent, but we're only doing one-percent African American, so that means that everybody else has risen, has increased. But high waters does not raise all boats. And African American contractors and professional people still sitting on the bottom. So that's an indication of discrimination. And that's what I hope the disparity study can highlight and we can do something about that. Because that's a clear case of discrimination." [#19]

- The non-Hispanic white male owner of a majority-owned professional services firm stated, "Caltrans I think is interested in the status quo. It becomes a money machine, to be honest, and they hire people, and they look for projects to build. And they say, 'We have these dollars; what can be build next?' and that seems like an odd way to spend taxpayers' money. I think a better way would be to say, 'Are we - what's the best way to provide transportation?' For example, they're not very interested in mass transit, I've noticed. They want to build more roads, and they want to pave everything. And here's the reason I asked my supervisor when he was there, I said, 'Why are we doing all these silly, biological surveys alongside a road that's been highly disturbed? We don't find any rare species there. There's a bunch of junk in the road and it's polluted by car traffic and tire weight. And her answer was, 'Well, here in the District 4 we have a lot of lawyers and environmental people driving back and forth on the highways. If they see us doing something they're going to start complaining. So, every time we have what's called a ground-disturbing activity we just do the normal surveys.' And it seemed to me, wow, what an odd way to approach the job. I mean they just do it because they've been harassed. Because they hadn't done it, so they just, 'Let's just do it all the time.' And it became - there was a really funny dynamic developed: the biologists were sort of looked at with distrust and disappointment by the engineers who wanted to get the project done. They looked at the biologists coming in - 'They're going to slow it down,' and in fact we did; we had to do these surveys that were kind of inane and not very useful. For example, a vegetation survey really should have been done like three flowering periods, when the flowers - the plants are only flowering. And that was really hard to do very quickly; sometimes it'd take years to get them done just because there's ground-disturbing activities, there's 99 percent chance of those flowers not being

there is pretty high probability. But yet, nevertheless they couldn't make an expert decision to do that. So, it became a procedural thing: 'We're going to do it. We're got this money. We're going to do this ground-disturbing activity. We're going to do the biological surveys.' And they scheduled - they just started scheduling it that far out. And we would go to meetings; sometimes there would be a project manager would have a meeting every two weeks and go to the meeting and they'd look around and there would be 20 different people at these meetings. And they might ask me something about how the biological permits are going. Because you had to get all the permits. 'Yeah, they're going fine.' And I thought it was largely a waste of time to have those meetings too. And if you added their salaries up it was probably like tens of thousands of dollars to host a meeting. And that could be, for me, a very large contract. There's an example of how money could be - well, I could probably basically tell you that this thing needs surveys, maybe would be a better thing to do. Why are they being driven like the cart is driving the horse - because of all their fear of doing something wrong. And it just - I don't know, I don't think California highways are necessarily any better than anybody else's highways. And in fact I talked to the engineers during lunchtime and they said, 'We need to spend more money on building highways.' I said, 'What are you talking about? These highways are great. We don't need to spend more. We need to spend money on mass transit.' Because we have such congestion. They didn't want to talk about that." [#22]

- The Middle Eastern American male owner of a construction company stated, "I am an immigrant from Egypt. My skin is not white. It's dark tan. People from this part of the world are not Black, are not white or Caucasian. Somewhere in between, I guess. So, this is the reality of what I am in terms of race and looks. But some applications don't have that line item." [#26]
- The non-Hispanic white male representative of an SB-certified professional services firm stated, "It's an important discussion that's out there that I commend you guys for reaching out and doing an interview associated with DBEs and finding out more information about us. I do feel that a lot of times the small businesses are kind of passed over because of the feeling that being small means that you may not have the capacity to get the work done. I've worked with a large firm, and I've worked with smaller firms, and every single one I know has been capable of doing the full work that would be required for any project, so I commend you guys for doing this survey, so thank you." [#45]
- The Hispanic American male owner of an uncertified MBE construction firm stated, "I think that working with Caltrans would give me the resources to learn how to do everything that people are not willing to, in my industry willing to teach me due to the fact that I take their jobs or the competition." [#50]
- A comment from a non-Hispanic white DVBE-owned construction company stated, "We are a disabled veteran owned business. Women and minority owned companies are considered [for the disparity study], why aren't disabled veteran businesses asked about as well?" [#AV81]
- A comment from a majority-owned construction firm stated, "Service-disabled veterans are often not given as much preference as woman-owned and minority-owned companies." [#AV8104]

- A respondent from a trade group focus group stated, "Launch a pilot Market Capacity Study (ideally co-sponsored by Caltrans, BBC, the Prime Contractors and DBEs) to analyze the marketplace capacity and DBE bid participation. You would take the Project Goal and measure the Work Codes who bid it and track the results. This could be done on a single project or a set of projects with the objective of determining the availability and participation of DBEs in key NAICS codes and Work Codes." [#FG1]
- The Black American male president of a professional services business development organization stated, "Our belief is that in order to bring about economic justice, that entrepreneurship is the key to intergenerational wealth and highly well-paid professional jobs... This is why people use words like systemic racism, right, is because when the bar is so high that it's like, how's anybody ever get in, and we understand that best price, best value, but if you want to get more people involved in state processes, then you're going to have to make allowances for people who may not have the experience or may not be able to meet the bonding and the insurance. And I'm a realist. I understand how the real-world works. I understand the risk and that there's money on the table here, that has to be mitigated. But I think that's the work that needs to be done on the state side is we know there's liability on jobs. We know these things are dangerous. So how do we frame this up so that we can allow more people to participate. That's where the work has to be done is on that side. And here's the thing that I think is tough. Everybody is always looking at, how do we solve this problem in a way that doesn't cost anybody anything? And I think that that's the fallacy. It's like, when we send our children to college, there's a cost. There's a cost. If we want more people in our state to have gainful employment and to be able to help pay for their healthcare, to be able to pay for their taxes, and participate in this economy, there's a cost. And that cost is going to have to come from somewhere, and that's usually where we get into trouble with things like Prop 209, Prop 16, is that the folks have benefited with all those historical in the way, even though they're now willing to say, okay, fine, let's remove the barriers. But now, you've got these communities that are in shambles, from decades and decades of economic disparity. And you can't just remove the barriers. Then, you have to invest. And where does that money come from, right? And invest doesn't necessarily mean cash outlay, but it could mean saying that somebody could do the business, but they're not able to get 5-million-dollars' worth or insurance or whatever, then somebody's going to have to pay for that, or somebody's going to have to take on that risk, and I say, leave it underneath the state or the prime, but those are the hard conversations that have to be had. You've got folks who have taken advantage of these situations for decades, and they have all that upper wealth. And now, it's like, well, sure, we're willing to stop discriminating. But it doesn't matter there's a stop to discriminating when you've devastated those communities, and they can't compete anyway because of the disparity and because the standards are created as if there was no disparity, right? It's like, as in the construction industry, well, this is just what's normal for John. This is the normal amount of insurance. This is the normal amount of bonding. This is the normal years of experience you would expect, right? And stop telling people to go to classes when there's no money on the other end, right? And this isn't new. I think people will watch this and say, oh, well, what's this guy talking about? These concepts aren't new. I'm not that smart. When a union picks a brand-new person, who's never done that job before, right, they put him through their apprentice programs and blah, blah, blah, blah. And they pay them to be on the job, even though they know, the

person might not be as fast, doesn't have the experience. But they know, on the other end of that, the long-term view is they get a dues paying member, right, that is going to help sustain long-term. So, for anybody who's watching this eventually, like, what are they talking about? It's like, we got to have the insurance and the bonding or whatever, but the long-term view is we're either going to continue to pay big dollars in this state to incarcerate people, focus on law enforcement, or we're going to start to put programs ... and people moving towards untaxed means of income, that are legal or we're going to put processes in place, that help integrate more people in, because long-term, that means more people paying taxes, more people covered with healthcare, more people taking care of themselves and being preventative. That's less expensive in the long-term, but we have to not be limit Wall Street, right, which is addicted to quarter over quarter results, year over year results. This is not a business. It's our community. We need to think in 20 and 30 year blocks of time, not in well, how'd we do this year? How many people took the classes this year? Don't tell me about how many people took the classes. Tell me about how many people you put to work. That's what we need to be focusing on is ... I'm not talking about from the NGOs. I'm talking about from the contracting awarding side of it, right? How many people are we putting to work, either directly or indirectly." [#FG3]

- The Hispanic American female representative of a professional services business development organization stated, "We've started here, saying, again, I call them diverse corridors. I'll hear, they call them the aging corridors. But what's that investment that's going to be there? By the way, I say that, because I think the people there have been there for so long, and there's businesses there for generations. And people should feel really proud of that. They've made it through recessions. They're making it through this pandemic. And when people refer to them as aging and disadvantaged, I see them, and I'm like, well, obviously, they're doing something right, because they're still in business. So maybe you should put some investment in there. Everyone can learn from them and see what that looks like. And so that's part of it too, making people feel really proud of what they've accomplished. It's just as important as anyone else. If you're in business, you're contributing to the economic engine of your local economy. And so that's what we want to make sure people feel empowered by. When you look at the state of California and our demographics, the reality is that it's going to be, as we've all said, a majority minority, so if investments aren't starting to be made, real, intentional investments everywhere, California is not going to flourish. We might be really good now, but we really need to start looking around and who your future workforce is, who your future business owners are, and live here right now. And everyone kind of talks about it all the time, out there, but this is where the investment's going to be made. If everyone wants to rise together, it really, really needs to start looking at it that way, so from contracts to workforce development to entrepreneurship, the whole gamut, this is what it looks like, right here on our screen. And so if you're not making investment here and doing that, people will go ... they'll go elsewhere. They'll make other plans. But for the people that are doing well, if nothing else, you won't continue to do well, if you don't make the investment. This is the most important piece that's needed is the people power." [#FG3]
- The Black American male representative of a minority business chamber of commerce stated, "The fact is, I'm sure that you all are doing this study right now, so that Caltrans can one, look at what they're doing or not doing but more importantly, to meet the

requirements that the courts initiated in Prop 209. And we have not been able to get the local jurisdictions, for the most part, to do the diversity and utilization studies, so that they can establish a goals program. And Prop 209 did not say that there could not be goals businesses. I was very much involved in it, and the utility corporations wouldn't be as active as they are, without former assemblywoman, who is not deceased, Gwen Moore, because she wrote them, wrote them, wrote them, wrote them, has caused them to be good partners with the minority business program. But Caltrans has not done the similar kind of thing.” [#FG4]

- The Black American male representative of a DBE-, WBE-, MBE-, SB-, and Micro-PW-certified small business development association stated, "My concern is over the years, and I've been doing this for about 25, 30 years, and over the years, different programs that's come and gone, I'm concerned about misunderstanding of the best way to assist Black-owned businesses to get into the industry and be successful. And part of my concern is, I've noticed in your 2016 disparity study, that all of the goals were less than you wanted, but in particular, the goal for Black businesses was way down. And part of my concern is that when they stopped doing race conscious programs, and they just did organizations of color or minority organizations, they stopped trying to have any programs particularly for Black-owned businesses. So, therefore, when companies will build off their obligations with other races, they just said, 'We've done it.' So, when I call and ask, 'Okay, have you done anything for Black businesses?' They said, 'We can't do race projects.' 'Well, have you fulfilled the goals?' 'Yeah, we fulfilled our goals last month.' You look at the project and there's no Black-owned businesses on the project, but they have fulfilled their goals. So, hopefully, part of the result of this study will help them understand they need to reconsider going back to race conscious programs. And even in that, one of the things I want to make sure that you look at is how they're implemented... One of the things I have concern is that, if you're doing outreach to the Black community and you implement a program to go through the Black media and give a webinar or a seminar and you go and do that, from some people's perspective, they've been successful. We say we're going to put this program and workshop on, we've done it, we were successful. They don't go back and look and see if the program is altered in any contracts or anything. It's just a matter of, we say we were going to do the program and we've done it. So, I'm advocating that you take another approach to how you address these disparities with the Black community and make sure that you not only show that you're aware of them, but you do something significant, some way to make sure the result is not just that you implement a program, but the result is that you've increased the number of Black businesses participating in your contract.” [#PT1]
- The Black American male owner of a professional services firm stated, "I just wanted to say is that you have to get involved to actually help the system. So, I'm doing exactly what they say, hey, you got to contribute.” [#PT12]
- The Black American male owner of a professional services firm stated, "When you do disparity study, you have to start at the top of the community. Of course, the churches and the chamber. You have to have an actual one-on-one with each of the chambers. It could be the women chamber, it could be the LGBT, it could be Black. The chambers are the voice of small businesses. So, when I look at your involvement in council, I look at who's in involve... You did not engage in the actual community. And that's through the chambers and the church groups, the community groups. If you go to each it could be the largest Catholic

church within like San Jose. You start with, you want to talk about the Black six when it gets into the biggest well-known Black church in Oakland and L.A. You got to start that way. You have to have a strategy. And if you're not that to do that, to be a poacher, they will not be receptive to your investigation. And it takes time to learn that." [#PT12]

- The Black American male owner of a DBE- and SB-certified and uncertified MBE professional services firm stated, "You say, 'Okay, we only have 20 percent available.' You only documenting that discrimination. That said, because the availability has to do with... And my mind concept is that you're supposed to set goals to increase the participation, not to document what it is in terms of availability. And so, I'm just saying that we can discuss this further. I won't to take up a lot of time, but I am totally against this availability concept. I think that has to do with outreach. It has to do with encouragement. I'll tell you a quick story. District four, we set up to talk to 20 Black contractors after proposition 209, 82 showed up. And so, as a matter of outreach, and it's a matter of setting a goal to get firms participating. So now we're just sitting here at 1 percent anticipation of African Americans and if you can change that, that's fine. I'd like to see it, but I don't want to take up any more time, but that's where I am. I think availability is a wrong way to go. We should be setting goals and you can have availability as much as you want to, but it all depends on how many people participating." [#PT7]
- The Black American male representative of an uncertified MBE professional services firm meeting stated, "I think sometimes we brush over and some people don't even know the real heinous history when it comes to African-American communities and businesses and the practices that took place in our communities. I don't know if you are noticing that, but in the 1920s and thirties our dollars circulated in our community up to 100 times. The closest dollar to us was the Jewish dollar and that dollar circulated up to 40 times in their community and that's because we weren't integrated into the mainframe. We had our own communities and so our dollar was circulated up to a year before it left and then the structures of this country led by our government literally destroyed our economies, literally crushed our communities. So even though it doesn't exist today, that's not what's happening today so I don't want people to think that I'm saying this is, it's just that the impact of that has to be weighed into these disparity studies and I don't know if you don't have people with historic content to go along with the study, I don't know if it will hit the mark the way it should or the way you guys are trying to because you're not trying to drudge up old history but you just need it from a contextual standpoint to really drive home the point on how we make it better, because I'm an American of African descent. I don't call myself African American. I'm an American of African descent. I'm a full blooded American. I created America; America is built on my back. I am an American and I think that we all should today in this world, I think we have to graduate from what color we are and graduate to what kind of character we're going to have, what kind of human being we're going to be and how we're going to help other human beings be human. I think this study can do a lot if it's done from a humanistic standpoint, not just the data gathering standpoint. I just wanted to say that, but I like what you guys are doing... Be honest. Say that it's not equitable. Say that you know that there's some departments and there's some people in each department that are practicing different biases. Let's start there. Let's start with just being honest and saying, 'You know what? We've got some issues because we can't make human beings any different than what they are.' People get to bring their biases, their prejudices, whatever it is. And not

just white folks, Black folk too, and Asians, everybody. So, let's start with that. Let's start with the fact that, you know what, we keep having these separate conversations, these private things, we were not honest enough, we've become so politically correct that we lie to each other. We just lied to each other in different places. See, I can't be honest with Caltrans with them here, so I got to lie and smile and be okay, and just wait for the session until I can say what I need to say. I don't even want to create that energy, which I want to be able to say, 'Yo, Caltrans, do you see it?' I want to hear Caltrans say, 'Not only do we see it, we want to do something about it.' Because if you ask small businesspeople, African-American in particular, they will tell you that they believe that Caltrans is complicit. That they've allowed it, that this exists because Caltrans wants it to exist. And if that's not true, Caltrans say that's not true. And then we got to say, as Black folk, 95% of our businesses that want to participate, aren't even ready. [The ones who do participate are] the 5%, only 5% of the African-American [who have] one employee or more. He's the 5% and he can't get a job. That's what says a lot about this system, that even the elite, even my top tier people can't get work. 5% of African-American businesses have one employee or more. And if they can't compete, the 95% don't stand a chance." [#PT8]

- The Black American female owner of an uncertified MBE professional services firm stated, "So prop-16 here was to reverse 209 so you could do procurement and educational access by taking into account minority-status. So, it failed. I think the messaging on it was wrong. I think what we should be making a point of, is that government is missing out on some really brilliant, capable people. We're not addressing the internal biases in organizations and who wants to wait another four decades for people to smarten up?." [#PT8]

APPENDIX E.

Availability Analysis Approach

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Availability Analysis Approach

BBC Research & Consulting (BBC) used a *custom census* approach to analyze the availability of California businesses for the transportation-related construction and professional services prime contracts and subcontracts the California Department of Transportation (Caltrans) and subrecipient local agencies award.¹ Federal courts—including the Ninth Circuit Court of Appeals—have approved BBC’s approach to measuring availability. In addition, federal regulations around minority- and woman-owned business programs recommend similar approaches to measuring availability. Appendix E expands on the information presented in Chapter 5 to further describe:

- A. Availability data;
- B. Representative businesses;
- C. Availability survey instrument;
- D. Survey execution; and
- E. Additional considerations.

A. Availability data

BBC partnered with Davis Research to conduct telephone and online surveys with thousands of business establishments throughout Caltrans’ *relevant geographic market area* (RGMA), which BBC identified as the state of California. Business establishments Davis Research surveyed were businesses with locations in the RGMA that BBC identified as doing work in fields closely related to the types of transportation-related contracts Caltrans and subrecipient local agencies awarded between January 1, 2015 and December 31, 2019 (i.e., *the study period*). BBC began the survey process by determining the work specializations, or *subindustries*, relevant to each prime contract and subcontract and identifying 8-digit Dun & Bradstreet (D&B) work specialization codes that best corresponded to those subindustries. The study team then collected information about local business establishments that D&B listed as having their primary lines of business within those work specializations.

As part of the survey effort, the study team attempted to contact 28,993 local business establishments that perform work relevant to Caltrans’ transportation-related contracting. The study team was able to successfully contact 5,181 of those business establishments, 3,755 of which completed availability surveys.

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

B. Representative Businesses

The objective of BBC's availability approach was not to collect information about each and every business operating in the RGMA. Instead, it was to collect information from a large, unbiased subset of local businesses that appropriately represents the entire relevant business population. That approach allowed BBC to estimate the availability of minority- and woman-owned businesses in an accurate, statistically-valid manner. In addition, BBC did not design the research effort so that the study team would contact every local business possibly performing transportation-related construction and professional services work. Instead, BBC determined the types of work most relevant to Caltrans contracting by reviewing prime contract and subcontract dollars that went to different types of businesses during the study period. Figure E-1 lists 8-digit work specialization codes within construction and professional services most related to the relevant contract dollars Caltrans and subrecipient local agencies awarded during the study period and that BBC included as part of the availability analysis. The study team grouped those specializations into distinct subindustries, which are presented as headings in Figure E-1.

C. Availability Survey Instrument

BBC created an availability survey instrument to collect information from relevant business establishments located in the RGMA. As an example, the survey instrument the study team used with construction establishments is presented at the end of Appendix E. BBC modified the construction survey instrument slightly for use with establishments working in professional services to reflect terms more commonly used in those industries.² (e.g., BBC substituted the words "prime contractor" and "subcontractor" with "prime consultant" and "subconsultant" when surveying construction design and other professional services establishments.)

1. Survey structure. The availability survey included 14 sections, and Davis Research attempted to cover all sections with each business establishment the firm successfully contacted.

a. Identification of purpose. The surveys began by identifying Caltrans as the survey sponsor and describing the purpose of the study. (e.g., "The California Department of Transportation is conducting a survey to develop a list of companies that have worked with or are interested in providing construction-related services to Caltrans and other local public agencies.")

b. Verification of correct business name. The surveyor verified he or she had reached the correct business. If the business was not correct, surveyors asked if the respondent knew how to contact the correct business. Davis Research then followed up with the correct business based on the new contact information (see areas "X" and "Y" of the availability survey instrument).

c. Verification of for-profit business status. The surveyor asked whether the organization was a for-profit business as opposed to a government or nonprofit organization (Question A2). Surveyors continued the survey with businesses that responded "yes" to that question.

² BBC also developed email versions of the survey instrument for business establishments that preferred to complete the survey in those formats.

Figure E-1.
Subindustries included in the availability analysis

Industry Code	Industry Description	Industry Code	Industry Description
Construction		Excavation, drilling, wrecking, and demolition (continued)	
Concrete work		17940000	Excavation work
17410100	Foundation and retaining wall construction	17990903	Shoring and underpinning work
17710000	Concrete work	16299902	Earthmoving contractor
17719901	Concrete pumping	Fencing, guardrails, barriers, and signs	
17719902	Concrete repair	16110100	Highway signs and guardrails
17919902	Concrete reinforcement, placing of	16110101	Guardrail construction, highways
17959901	Concrete breaking for streets and highways	16110102	Highway and street sign installation
Concrete, asphalt, sand, and gravel products		17999912	Fence construction
14420000	Construction sand and gravel	17999929	Sign installation and maintenance
29510000	Asphalt paving mixtures and blocks	Heavy construction	
29510201	Asphalt and asphaltic paving mixtures (not from refineries)	16110000	Highway and street construction
32730000	Ready-mixed concrete	16110200	Surfacing and paving
50320500	Concrete and cinder building products	16110202	Concrete construction: roads, highways, sidewalks, etc.
50329901	Aggregate	16110204	Highway and street paving contractor
Dam and marine construction		16110205	Resurfacing contractor
16290110	Marine construction	16119901	General contractor, highway and street construction
Electrical equipment and supplies		16119902	Highway and street maintenance
36480110	Street lighting fixtures	16220000	Bridge, tunnel, and elevated highway construction
36690206	Traffic signals, electric	16229901	Bridge construction
50630504	Signaling equipment, electrical	16229902	Highway construction, elevated
Electrical work		16229903	Tunnel construction
17310000	Electrical work	16229904	Viaduct construction
Excavation, drilling, wrecking, and demolition		17710302	Driveway contractor
16110203	Grading	Landscape services	
16290400	Land preparation construction	07829902	Highway lawn and garden maintenance services
16299904	Pile driving contractor	07829903	Landscape contractors
		17110302	Irrigation sprinkler system installation

Figure E-1.
Subindustries included in the availability analysis (continued)

Industry Code	Industry Description	Industry Code	Industry Description
Construction (Continued)			
Painting, striping, marking, and weatherproofing		Remediation and cleaning	
17210200	Commercial painting	87449904	Environmental remediation
17210300	Industrial painting		
17210302	Bridge painting	Traffic control and safety	
17210303	Pavement marking contractor	36690203	Pedestrian traffic control equipment
17990200	Coating, caulking, and weather, water, and fireproofing	50990304	Reflective road markers
17990201	Caulking (construction)	73599912	Work zone traffic equipment (flags, cones, barrels, etc.)
17990202	Coating of concrete structures with plastic	73899921	Flagging service (traffic control)
17990203	Coating of Metal structures at construction site		
17990207	Glazing of concrete surfaces	Trucking, hauling and storage	
Rebar and reinforcing steel		42120000	Local trucking, without storage
32720700	Concrete structural support and building material	42129905	Dump truck haulage
34410200	Fabricated structural Metal for bridges	Water, sewer, and utility lines	
34410201	Bridge sections, prefabricated, highway	16239906	Underground utilities contractor
34490101	Bars, concrete reinforcing: fabricated steel	16290105	Drainage system construction
50510209	Forms, concrete construction (steel)	16290108	Irrigation system construction
Professional Services			
Construction management		Surveying and mapmaking	
87419902	Construction management	87130000	Surveying services
Engineering		Testing and inspection	
87110400	Construction and civil engineering	73890200	Inspection and testing services
87110402	Civil engineering	87340301	Hazardous waste testing
Environmental services		87349909	Soil analysis
87489905	Environmental consultant	Transportation planning services	
89990702	Geophysical consultant	87420410	Transportation consultant
Other professional services		87480204	Traffic consultant
87330201	Archeological expeditions		

d. Confirmation of main lines of business. Businesses confirmed their main lines of business according to D&B (Question A3a). If D&B's work specialization codes were incorrect, businesses described their main lines of business (Questions A3b). Businesses were also asked to identify the other types of work they perform beyond their main lines of business (Question A3c). BBC coded information on main lines of business and additional types of work into appropriate 8-digit D&B work specialization codes.

e. Locations and affiliations. The surveyor asked business owners or managers if their businesses had other locations (Question A4). The study team also asked business owners or managers if their businesses were subsidiaries or affiliates of other businesses (Questions A5 and A6).

6. Past bids or work with government agencies and private sector organizations. The surveyor asked about bids and work on past contracts and procurements. Davis Research asked those questions in connection with prime contracts and subcontracts (Questions B1 and B2).

g. Interest in future work. The surveyor asked businesses about their interest in future work with Caltrans and other government agencies. Davis Research asked those questions in connection with both prime contracts and subcontracts (Questions B3 through B6).

h. Geographic area. The surveyor asked businesses where they perform work or serve customers in California (Questions C0a through C11b).

i. Year established. The surveyor asked businesses to identify the approximate year in which they were established (Question D1).

j. Largest contracts. The surveyor asked businesses about the value of the largest contracts on which they had bid or had been awarded during the past five years. (Questions D2 and D3).

k. Ownership. The surveyor asked whether businesses were at least 51 percent owned and controlled by minorities or women (Questions E1 and E2). If businesses indicated they were minority-owned, they were also asked about the race/ethnicity of the business's owner (Question E3). The study team confirmed that information through several other data sources, including:

- State of California Unified Certification Program certification and ownership lists;
- Caltrans vendor data; and
- Information from other available certification directories and business lists.

l. Business revenue. The surveyor asked questions about businesses' size in terms of their revenues. For businesses with multiple locations, the business revenue section of the survey also included questions about their revenues and number of employees across all locations (Questions F1 and F2).

m. Potential barriers in the marketplace. The surveyor asked an open-ended question concerning working with Caltrans and other local government agencies and general insights about conditions in the local marketplace (Question G1). In addition, the survey included a

question asking whether respondents would be willing to participate in a follow-up interview about conditions in the local marketplace (Question G2).

n. Contact information. The survey concluded with questions about the participant's name and position with the organization (Questions H1 and H2).

D. Survey Execution

Davis Research conducted all availability surveys in 2021. The firm made multiple attempts during different times of the day and on different days of the week to successfully reach each business establishment. The firm attempted to survey the owner, manager, or other officer of each business establishment who could provide accurate responses to survey questions.

1. Establishments the study team successfully contacted. Figure E-2 presents the disposition of the 28,993 business establishments the study team attempted to contact for availability surveys and how that number resulted in the 5,181 establishments the study team was able to successfully contact.

a. Non-working or wrong phone numbers. Some of the business listings BBC purchased from D&B and Davis Research attempted to contact were:

- Duplicate phone numbers (41 listings);
- Non-working phone numbers (4,007 listings); or
- Wrong numbers for the desired businesses (1,078 listings).

Some non-working phone numbers and wrong numbers resulted from businesses going out of business or changing their names and phone numbers between the time D&B listed them and the time the study team attempted to contact them.

b. Working phone numbers. As shown in Figure E-2, there were 23,867 business establishments with working phone numbers Davis Research attempted to contact. They were unsuccessful in contacting many of those businesses for various reasons:

- The firm could not reach anyone after multiple attempts at different times of the day and on different days of the week for 16,815 establishments.
- The firm could not reach a responsible staff member after multiple attempts at different times of the day on different days of the week for 1,657 establishments.
- The firm could not conduct the availability survey due to language barriers for 214 businesses.

Thus, Davis Research was able to successfully contact 5,181 business establishments.

Figure E-2.
Disposition of attempts to contact business establishments

Source:
BBC Research & Consulting availability analysis.

	Number of Establishments
Beginning list	28,993
Less duplicate phone numbers	41
Less non-working phone numbers	4,007
Less wrong number/business	1,078
Unique business listings with working phone numbers	23,867
Less no answer	16,815
Less could not reach responsible staff member	1,657
Less language barrier	214
Establishments successfully contacted	5,181

2. Establishments included in the availability database. Figure E-3 presents the disposition of the 5,181 business establishments Davis Research successfully contacted and how that number resulted in the businesses the study team included in the availability database and considered potentially available for Caltrans work.

Figure E-3.
Disposition of successfully contacted business establishments

Source:
BBC Research & Consulting availability analysis.

	Number of Establishments
Establishments successfully contacted	5,181
Less establishments not interested in discussing availability	1,207
Less unreturned fax/online surveys	219
Establishments that completed surveys	3,755
Less no relevant work	2,070
Less not a for-profit business	18
Less line of work outside of study scope	43
Less no interest in future work	160
Less multiple establishments	52
Establishments potentially available for organization work	1,412

a. Establishments not interested in discussing availability for Caltrans work. Of the 5,181 business establishments the study team successfully contacted, 1,207 establishments were not interested in discussing their availability for Caltrans work. In addition, BBC sent e-mail availability surveys upon request but did not receive completed surveys from 219 establishments. In total, 3,755 successfully contacted business establishments completed availability surveys.

b. Establishments available for Caltrans work. BBC deemed only a portion of the business establishments that completed availability surveys as available for the prime contracts and subcontracts Caltrans and subrecipient local agencies awarded during the study period. The study team excluded many of the business establishments that completed surveys from the availability database for various reasons:

- BBC excluded 2,070 establishments that indicated their businesses were not involved in relevant contracting work.

- BBC excluded 18 establishments that indicated they were not for-profit organizations.
- BBC excluded 43 establishments that indicated their businesses were involved in construction or professional services but reported that their main lines of business were outside of the study scope.
- BBC excluded 160 establishments that reported they were not interested in contracting opportunities with Caltrans or other government organizations.
- 52 establishments represented different locations of the same businesses. Prior to analyzing results, BBC combined responses from multiple locations of the same business into a single data record.

After those exclusions, BBC compiled a database of 1,412 businesses that were considered potentially available for Caltrans work.

c. Coding responses from multi-location businesses. Responses from different locations of the same business were combined into a single summary data record according to several rules:

- If any of the establishments reported bidding or working on a contract within a particular subindustry, BBC considered the business to have bid or worked on a contract in that subindustry.
- BBC combined the different roles of work (i.e., prime contractor or subcontractor) establishments of the same business reported into a single response corresponding to the appropriate subindustry. For example, if one establishment reported that it works as a prime contractor and another establishment reported that it works as a subcontractor, then BBC considered the business as available for both prime contracts and subcontracts within the relevant subindustry.
- BBC considered the largest contract any establishments of the same business reported having bid or worked on as the business's relative capacity (i.e., the largest contract for which the business could be considered available).
- BBC coded businesses as minority- or woman-owned if the majority of its establishments reported such status.

E. Additional Considerations

BBC made additional considerations related to its approach to measuring availability to ensure estimates of the availability of businesses for Caltrans work were accurate and appropriate.

1. Providing representative estimates of business availability. The purpose of the availability analysis was to provide precise and representative estimates of the percentage of Caltrans contracting dollars for which minority- and woman-owned businesses are ready, willing, and able to perform. The availability analysis did not provide a comprehensive listing of every business that could be available for Caltrans work and should not be used in that way.

2. Using a custom census approach to measuring availability. Federal guidance around measuring availability recommends dividing the number of minority- and woman-owned businesses in an organization's certification directory by the total number of businesses in the

marketplace (for example, as reported in United States Census data). As another option, organizations could use a list of prequalified businesses or a bidders list to estimate the availability of minority- and woman-owned businesses for its prime contracts and subcontracts. The primary reason why BBC rejected such approaches when measuring the availability of businesses for Caltrans work is that dividing a simple headcount of certified businesses by the total number of businesses does not account for business characteristics crucial to estimating availability accurately. The methodology BBC used in this study takes a *custom census* approach to measuring availability and adds several layers of refinement to a simple headcount approach. For example, the availability surveys the study team conducted provided data on qualifications, relative capacity, and interest in Caltrans work for each business, which allowed BBC to take a more detailed approach to measuring availability.

3. Selection of specific subindustries. Defining subindustries based on specific work specialization codes (e.g., D&B industry codes) is a standard step in analyzing businesses in an economic sector. Government and private sector economic data are typically organized according to such codes. As with any such research, there are limitations when choosing specific D&B work specialization codes to define sets of establishments to be surveyed. Specifically, some industry codes are imprecise and overlap with other business specialties. Some businesses span several types of work, even at a very detailed level of specificity. That overlap can make classifying businesses into single main lines of business difficult and imprecise. When the study team asked business owners and managers to identify their main lines of business, they often gave broad answers. For those and other reasons, BBC collapsed work specialization codes into broader subindustries to more accurately classify businesses in the availability database.

4. Response reliability. Business owners and managers were asked questions that may be difficult to answer, including questions about their revenues. For that reason, the study team collected corresponding D&B information for their establishments and asked respondents to confirm that information or provide more accurate estimates. Further, respondents were not typically asked to give absolute figures for difficult questions such as revenue and capacity. Rather, they were given ranges of dollar figures. BBC explored the reliability of survey responses in a number of ways.

a. Certification lists. BBC compared data from the availability surveys to information from other sources such as vendor information the study team collected from Caltrans. For example, certification databases include data on the race/ethnicity and gender of the owners of certified businesses.

b. Contract data. BBC examined Caltrans contract data to further explore the largest contracts and subcontracts awarded to businesses that participated in the availability surveys for the purposes of assessing capacity. BBC compared survey responses about the largest contracts businesses won during the past five years with actual contract data.

c. Caltrans review. Caltrans reviewed contract and vendor the study team collected and compiled as part of the study analyses and provided feedback regarding its accuracy.

DRAFT Availability Survey Instrument [Construction]

Hello. My name is [interviewer name] from Davis Research. We are calling on behalf of the California Department of Transportation. This is not a sales call. The California Department of Transportation is conducting a survey to develop a list of companies that have worked with or are interested in providing construction-related services to Caltrans and other local public agencies. The survey should take between 10 and 15 minutes to complete. Who can I speak with to get the information that we need from your firm?

[AFTER REACHING AN APPROPRIATELY SENIOR STAFF MEMBER, THE INTERVIEWER SHOULD RE-INTRODUCE THE PURPOSE OF THE SURVEY AND BEGIN WITH QUESTIONS]

[IF ASKED, THE INFORMATION DEVELOPED IN THESE INTERVIEWS WILL ADD TO EXISTING DATA ON COMPANIES WHO HAVE WORKED WITH OR ARE INTERESTED IN WORKING WITH CALTRANS]

X1. I have a few basic questions about your company and the type of work you do. Can you confirm that this is [firm name]?

1=RIGHT COMPANY – **SKIP TO A2**

2=NOT RIGHT COMPANY

99=REFUSE TO GIVE INFORMATION – **TERMINATE**

Y1. What is the name of this firm?

1=VERBATIM

Y2. Is [new firm name] associated with [old firm name] in anyway?

1=Yes, same owner doing business under a different name – **SKIP TO Y4**

2=Yes, can give information about named company

3=Company bought/sold/changed ownership

98=No, does not have information – **TERMINATE**

99=Refused to give information – **TERMINATE**

Y3. Can you give me the complete address or city for [new firm name]?

[NOTE TO INTERVIEWER - RECORD IN THE FOLLOWING FORMAT]:

. STREET ADDRESS

. CITY

. STATE

. ZIP

1=VERBATIM

Y4. Do you work for [firm name / new firm name]?

1=YES

2=NO – TERMINATE

A2. Let me confirm that [firm name/new firm name] is a for-profit business, as opposed to a non-profit organization, a foundation, or a government office. Is that correct?

1=Yes, a business

2=No, other – TERMINATE

A3a. Let me also confirm what kind of business this is. The information we have from Dun & Bradstreet indicates that your main line of business is [SIC Code description]. Is that correct?

[NOTE TO INTERVIEWER – IF ASKED, DUN & BRADSTREET OR D&B, IS A COMPANY THAT COMPILES INFORMATION ON BUSINESSES THROUGHOUT THE COUNTRY]

1=Yes – SKIP TO A3c

2=No

98=(DON'T KNOW)

99=(REFUSED)

A3b. What would you say is the main line of business at [firm name/new firm name]?

[NOTE TO INTERVIEWER – IF RESPONDENT INDICATES THAT FIRM'S MAIN LINE OF BUSINESS IS "GENERAL CONSTRUCTION" OR GENERAL CONTRACTOR, PROBE TO FIND OUT IF MAIN LINE OF BUSINESS IS CLOSER TO BUILDING CONSTRUCTION OR HIGHWAY AND ROAD CONSTRUCTION.]

1=VERBATIM

A3c. What other types of work, if any, does your business perform?

[ENTER VERBATIM RESPONSE]

1=VERBATIM

A4. 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)

A5. 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**

A6. What is the name of your parent company?

1=VERBATIM

98=(DON'T KNOW)

99=(REFUSED)

B1. Next, I have a few questions about your company's role in doing work or providing materials related to construction, maintenance, or design. During the past five years, has your company submitted a bid or received an award-for either the public or private sector-for any part of a contract as either a prime contractor or subcontractor?

[NOTE TO INTERVIEWER – THIS INCLUDES PUBLIC OR PRIVATE SECTOR WORK OR BIDS]

1=Yes

2=No – **SKIP TO B3**

98=(DON'T KNOW) – **SKIP TO B3**

99=(REFUSED) – **SKIP TO B3**

B2. Were those bids or awards to work as a prime contractor, a subcontractor, a trucker/hauler, a supplier, or any other roles?

[MULTIPUNCH]

- 1=Prime contractor
- 2=Subcontractor
- 3=Trucker/hauler
- 4=Supplier (or manufacturer)
- 5= Other - SPECIFY _____
- 98=(DON'T KNOW)
- 99=(REFUSED)

B3. Please think about future construction, maintenance, or design-related work as you answer the following few questions. Is your company *interested* in working with public agencies such as Caltrans, cities, counties, or other local agencies in California?

- 1=Yes
- 2=No – SKIP TO B5
- 98=(DON'T KNOW) – SKIP TO B5
- 99=(REFUSED) – SKIP TO B5

B4. Is your company *interested* in working with public agencies a prime contractor; a subcontractor/trucker/supplier; or both?

[MULTIPUNCH]

- 1=Prime contractor
- 2=Subcontractor
- 3=Trucker/hauler
- 4=Supplier (or manufacturer)
- 98= (DON'T KNOW)
- 99=(REFUSED)

B5. Is your company *interested* in working with Caltrans specifically in the future?

- 1=Yes – SKIP TO C0a
- 2=No
- 98=(DON'T KNOW) – SKIP TO C0a
- 99=(REFUSED) – SKIP TO C0a

B6. Please tell me why your company is not interested in future work with Caltrans?

[ENTER VERBATIM RESPONSE]

1=VERBATIM

Now I want to ask you about the geographic areas your company serves within California. Please think about the geographic areas in which your company has worked, submitted bids, or serves customers as you answer the following questions.

C0a. Is your company able to serve all regions of California or only certain regions of the state?

1=All of the state

2=Only parts of the state **SKIP to C1**

98=(DON'T KNOW)

99=(REFUSED)

C0b. Has your company ever tried to get work in the following regions of California, even if it wasn't successful in doing so?

[MULTIPUNCH]

1=The North Coast Region, extending from Mendocino through Eureka to the Oregon border

[NOTE TO INTERVIEWER: IF ASKED, THE NORTH COAST REGION IS CALTRANS DISTRICT 1 WHICH INCLUDES DEL NORTE, HUMBOLDT, LAKE, AND MENDOCINO COUNTIES]

2=The Shasta-Redding Area, extending from Red Bluff through Redding to the Oregon border

[NOTE TO INTERVIEWER: IF ASKED, THE SHASTA-REDDING AREA IS CALTRANS DISTRICT 2 WHICH INCLUDES LASSEN, MODOC, PLUMAS, SHASTA, SISKIYOU, TEHAMA, AND TRINITY COUNTIES]

3=The Sacramento-Tahoe Region, extending from Sacramento Valley to Lake Tahoe and up to Chico

[NOTE TO INTERVIEWER: IF ASKED, THE SACRAMENTO-TAHOE AREA IS CALTRANS DISTRICT 3 WHICH INCLUDES BUTTE, COLUSA, EL DORADO, GLENN, NEVADA, PLACER, SACRAMENTO, SIERRA, SUTTER, YOLO, AND YUBA COUNTIES]

4=The San Francisco Bay Area, extending from San Jose to Santa Rosa

[NOTE TO INTERVIEWER: IF ASKED, THE SAN FRANCISCO BAY AREA IS CALTRANS DISTRICT 4 WHICH INCLUDES ALAMEDA, CONTRA COSTA, SONOMA, MARIN, SAN FRANCISCO, SAN MATEO, SANTA CLARA, SOLANO, AND NAPA COUNTIES]

5=The Central Coast Region, extending from Santa Barbara to Salinas North Coast Region

[NOTE TO INTERVIEWER: IF ASKED, THE CENTRAL COAST REGION IS CALTRANS DISTRICT 5, WHICH INCLUDES MONTEREY, SAN BENITO, SAN LUIS OBISPO, SANTA BARBARA, AND SANTA CRUZ COUNTIES]

6=The Central Valley, extending from Bakersfield to Stockton

[NOTE TO INTERVIEWER: IF ASKED, THE CENTRAL VALLEY IS CALTRANS DISTRICTS 6 AND 10, WHICH INCLUDES ALPINE, AMADOR, CALAVERAS, FRESNO, KERN, KINGS, MADERA, MARIPOSA, MERCED, SAN JOAQUIN, STANISLAUS, TUOLUMNE, AND TULARE COUNTIES]

7=The Los Angeles Basin

[NOTE TO INTERVIEWER: IF ASKED, THE LOS ANGELES BASIN IS CALTRANS DISTRICTS 7 AND 12 WHICH INCLUDES LOS ANGELES, VENTURA, AND ORANGE COUNTIES]

8=The San Bernardino-Riverside Region, including San Bernardino and Riverside and extending east to Arizona

[NOTE TO INTERVIEWER: IF ASKED, THE SAN BERNARDINO-RIVERSIDE REGION IS CALTRANS DISTRICT 8 WHICH INCLUDES SAN BERNARDINO AND RIVERSIDE COUNTIES]

9=The Bishop Region, extending from Bishop to Mono Lake along the Nevada border

[NOTE TO INTERVIEWER: IF ASKED, THE BISHOP AREA IS CALTRANS DISTRICT 9 WHICH INCLUDES INYO AND MONO COUNTIES]

11=The San Diego Region, extending from San Diego and Oceanside east to the Arizona border

[NOTE TO INTERVIEWER: IF ASKED, THE SAN DIEGO REGION IS CALTRANS DISTRICT 11 WHICH INCLUDES SAN DIEGO AND IMPERIAL COUNTIES]

98=(DON'T KNOW)

99=(REFUSED)

[NOTE TO INTERVIEWER, IF YES TO ALL REGIONS SKIP TO D1]

C0c. For those regions where you have not tried to get work, what has kept your company from pursuing contracts?

1=VERBATIM (PROBE FOR COMPLETE THOUGHTS) **SKIP TO D1**

97=(NOTHING/NONE/NO COMMENTS) **SKIP TO D1**

98=(DON'T KNOW) **SKIP TO D1**

99=(REFUSED) **SKIP TO D1**

Now I'm going to read to you several regions of California. After I read each region, please tell me if your company is able to do work in that region and if your company has ever submitted bids, even if unsuccessful.

C1. The first region is the North Coast Region, extending from Mendocino through Eureka to the Oregon border. Is your company able to do work in this region, and have you ever submitted bids for work in this region, even if unsuccessful?

[NOTE TO INTERVIEWER: IF ASKED, THE NORTH COAST REGION IS CALTRANS DISTRICT 1 WHICH INCLUDES DEL NORTE, HUMBOLDT, LAKE, AND MENDOCINO COUNTIES]

1=Yes, able to work and have submitted bids

2=Yes, able to work but have NOT submitted bids

3= No, neither able to serve nor submitted bids

98=(DON'T KNOW)

99=(REFUSED)

C2. The next region is the Shasta-Redding Area, extending from Red Bluff through Redding to the Oregon border. Is your company able to do work in this region, and have you ever submitted bids for work in this region, even if unsuccessful?

[NOTE TO INTERVIEWER: IF ASKED, THE SHASTA-REDDING AREA IS CALTRANS DISTRICT 2 WHICH INCLUDES LASSEN, MODOC, PLUMAS, SHASTA, SISKIYOU, TEHAMA, AND TRINITY COUNTIES]

1=Yes, able to work and have submitted bids

2=Yes, able to work but have NOT submitted bids

3= No, neither able to serve nor submitted bids

98=(DON'T KNOW)

99=(REFUSED)

C3. The next region is the Sacramento-Tahoe Region, extending from Sacramento Valley to Lake Tahoe and up to Chico. Is your company able to do work in this region, and have you ever submitted bids for work in this region, even if unsuccessful?

[NOTE TO INTERVIEWER: IF ASKED, THE SACRAMENTO-TAHOE AREA IS CALTRANS DISTRICT 3 WHICH INCLUDES BUTTE, COLUSA, EL DORADO, GLENN, NEVADA, PLACER, SACRAMENTO, SIERRA, SUTTER, YOLO, AND YUBA COUNTIES]

1=Yes, able to work and have submitted bids

2=Yes, able to work but have NOT submitted bids

3= No, neither able to serve nor submitted bids

98=(DON'T KNOW)

99=(REFUSED)

C4. The next region is the San Francisco Bay Area, extending from San Jose to Santa Rosa. Is your company able to do work in this region, and have you ever submitted bids for work in this region, even if unsuccessful?

[NOTE TO INTERVIEWER: IF ASKED, THE SAN FRANCISCO BAY AREA IS CALTRANS DISTRICT 4 WHICH INCLUDES ALAMEDA, CONTRA COSTA, SONOMA, MARIN, SAN FRANCISCO, SAN MATEO, SANTA CLARA, SOLANO, AND NAPA COUNTIES]

1=Yes, able to work and have submitted bids

2=Yes, able to work but have NOT submitted bids

3= No, neither able to serve nor submitted bids

98=(DON'T KNOW)

99=(REFUSED)

C5. The next region is the Central Coast Region, extending from Santa Barbara to Salinas North Coast Region. Is your company able to do work in this region, and have you ever submitted bids for work in this region, even if unsuccessful?

[NOTE TO INTERVIEWER: IF ASKED, THE CENTRAL COAST REGION IS CALTRANS DISTRICT 5, WHICH INCLUDES MONTEREY, SAN BENITO, SAN LUIS OBISPO, SANTA BARBARA, AND SANTA CRUZ COUNTIES]

1=Yes, able to work and have submitted bids

2=Yes, able to work but have NOT submitted bids

3= No, neither able to serve nor submitted bids

98=(DON'T KNOW)

99=(REFUSED)

C6. The next region is the Central Valley, extending from Bakersfield to Stockton. Is your company able to do work in this region, and have you ever submitted bids for work in this region, even if unsuccessful?

[NOTE TO INTERVIEWER: IF ASKED, THE CENTRAL VALLEY IS CALTRANS DISTRICTS 6 AND 10, WHICH INCLUDES ALPINE, AMADOR, CALAVERAS, FRESNO, KERN, KINGS, MADERA, MARIPOSA, MERCED, SAN JOAQUIN, STANISLAUS, TUOLUMNE, AND TULARE COUNTIES]

1=Yes, able to work and have submitted bids

2=Yes, able to work but have NOT submitted bids

3= No, neither able to serve nor submitted bids

98=(DON'T KNOW)

99=(REFUSED)

C7. The next region is the Los Angeles Basin. Is your company able to do work in this region, and have you ever submitted bids for work in this region, even if unsuccessful?

[NOTE TO INTERVIEWER: IF ASKED, THE LOS ANGELES BASIN IS CALTRANS DISTRICTS 7 AND 12 WHICH INCLUDES LOS ANGELES, VENTURA, AND ORANGE COUNTIES]

1=Yes, able to work and have submitted bids

2=Yes, able to work but have NOT submitted bids

3= No, neither able to serve nor submitted bids

98=(DON'T KNOW)

99=(REFUSED)

C8. The next region is the San Bernardino-Riverside Region, including San Bernardino and Riverside and extending east to Arizona. Is your company able to do work in this region, and have you ever submitted bids for work in this region, even if unsuccessful?

[NOTE TO INTERVIEWER: IF ASKED, THE SAN BERNARDINO-RIVERSIDE REGION IS CALTRANS DISTRICT 8 WHICH INCLUDES SAN BERNARDINO AND RIVERSIDE COUNTIES]

1=Yes, able to work and have submitted bids

2=Yes, able to work but have NOT submitted bids

3= No, neither able to serve nor submitted bids

98=(DON'T KNOW)

99=(REFUSED)

C9. The next region is the Bishop Region, extending from Bishop to Mono Lake along the Nevada border. Is your company able to do work in this region, and have you ever submitted bids for work in this region, even if unsuccessful?

[NOTE TO INTERVIEWER: IF ASKED, THE BISHOP AREA IS CALTRANS DISTRICT 9 WHICH INCLUDES INYO AND MONO COUNTIES]

1=Yes, able to work and have submitted bids

2=Yes, able to work but have NOT submitted bids

3= No, neither able to serve nor submitted bids

98=(DON'T KNOW)

99=(REFUSED)

C10. The next region is the San Diego Region, extending from San Diego and Oceanside east to the Arizona border. Is your company able to do work in this region, and have you ever submitted bids for work in this region, even if unsuccessful?

[NOTE TO INTERVIEWER: IF ASKED, THE SAN DIEGO REGION IS CALTRANS DISTRICT 11 WHICH INCLUDES SAN DIEGO AND IMPERIAL COUNTIES]

1=Yes, able to work and have submitted bids

2=Yes, able to work but have NOT submitted bids

3= No, neither able to serve nor submitted bids

98=(DON'T KNOW)

99=(REFUSED)

[ASK FOR EACH 2 MENTIONED IN C1-C11]

C11a. Earlier you mentioned that you could do work in the <INSERT REGION NAME>, but have not submitted a bid for work in that region. What specifically has kept your company from pursuing work in <INSERT REGION NAME>?

1=VERBATIM (PROBE FOR COMPLETE THOUGHTS)

97=(NOTHING/NONE/NO COMMENTS)

98=(DON'T KNOW)

99=(REFUSED)

[IF MORE THAN ONE ANSWER OF "2" FOR QUESTIONS C1-11]

C11b. Now what about <INSERT REGION NAME>? What specifically has kept your company from pursuing work in <INSERT REGION NAME>?

[REPEAT AS NEEDED FOR REGIONS WHERE C1-11 WERE ANSWERED "2"]

D1. About what year was your firm established?

1=NUMERIC (1600-2021)

9998 = (DON'T KNOW)

9999 = (REFUSED)

D2. What was the largest prime contract that your company bid on or was awarded during the past five years in either the public sector or private sector? This includes contracts not yet complete.

[NOTE TO INTERVIEWER - READ CATEGORIES IF NECESSARY]

- | | |
|--|--|
| 1=\$100,000 or less | 9=More than \$20 million to \$50 million |
| 2=More than \$100,000 to \$250,000 | 10=More than \$50 million to \$100 million |
| 3=More than \$250,000 to \$500,000 | 11= More than \$100 million to \$200 million |
| 4=More than \$500,000 to \$1 million | 12=\$200 million or greater |
| 5=More than \$1 million to \$2 million | 97=(NONE) |
| 6=More than \$2 million to \$5 million | 98=(DON'T KNOW) |
| 7=More than \$5 million to \$10 million | 99=(REFUSED)/(NO PRIME BIDS) |
| 8=More than \$10 million to \$20 million | |

D3. What was the largest subcontract or supply contract that your company bid on or was awarded during the past five years in either the public sector or private sector? This includes contracts not yet complete.

[NOTE TO INTERVIEWER - READ CATEGORIES IF NECESSARY]

- | | |
|--|--|
| 1=\$100,000 or less | 9=More than \$20 million to \$50 million |
| 2=More than \$100,000 to \$250,000 | 10=More than \$50 million to \$100 million |
| 3=More than \$250,000 to \$500,000 | 11= More than \$100 million to \$200 million |
| 4=More than \$500,000 to \$1 million | 12=\$200 million or greater |
| 5=More than \$1 million to \$2 million | 97=(NONE) |
| 6=More than \$2 million to \$5 million | 98=(DON'T KNOW) |
| 7=More than \$5 million to \$10 million | 99=(REFUSED)/(NO SUB BIDS) |
| 8=More than \$10 million to \$20 million | |

E1. My next questions are about the ownership of the business. A business is defined as woman-owned if more than half—that is, 51 percent or more—of the ownership and control is by women. By this definition, is [*firm name / new firm name*] a woman-owned business?

- 1=Yes
- 2=No
- 98=(DON'T KNOW)
- 99=(REFUSED)

E2. A business is defined as minority-owned if more than half—that is, 51 percent or more—of the ownership and control is by Black American, Asian American, Hispanic American, or Native American individuals. By this definition, is [firm name/new firm name] a minority-owned business?

1=Yes

2=No – **SKIP TO F1**

98=(DON'T KNOW) – **SKIP TO F1**

99=(REFUSED) – **SKIP TO F1**

E3. Would you say that the minority group ownership of your company is mostly Black American, Asian-Pacific American, Subcontinent Asian American, Hispanic American, or Native American?

1=Black American

2=Asian Pacific American (persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia(Kampuchea),Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Commonwealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kiribati, Juvalu, Nauru, Federated States of Micronesia, or Hong Kong)

3=Hispanic American (persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race)

4=Native American (American Indians, Eskimos, Aleuts, or Native Hawaiians)

5=Subcontinent Asian American (persons whose Origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka)

6=(OTHER - SPECIFY) _____

98=(DON'T KNOW)

99=(REFUSED)

F1. Dun & Bradstreet lists the average annual gross revenue of your company to be [dollar amount]. Is that an accurate estimate for your company's average annual gross revenue, including all locations, over the last three years?

1=Yes – **SKIP TO F3**

2=No

98=(DON'T KNOW) – **SKIP TO F3**

99=(REFUSED) – **SKIP TO F3**

F2. What was the average annual gross revenue of your company, including all locations, over the last three years? Would you say . . .

[READ LIST]

1=Less than \$1 Million	8=\$12.1 Million - \$16.5 Million
2=\$1.1 Million - \$2.25 Million	9=\$16.6 Million - \$19.5 Million
3=\$2.3 Million - \$3.5 Million	10=\$19.6 Million - \$22 Million
4=\$3.6 Million - \$4.5 Million	11=\$22.1 Million - \$26.29 Million
5=\$4.6 Million - \$6 Million	12=\$26.3 Million or more
6=\$6.1 Million - \$8 Million	98= (DON'T KNOW)
7=\$8.1 Million - \$12 Million	99= (REFUSED)

G1. We're interested in whether your company has experienced barriers or difficulties in California associated with starting or expanding a business in your industry or with obtaining work. Do you have any thoughts to share on these topics?

- 1=VERBATIM (PROBE FOR COMPLETE THOUGHTS)
- 97=(NOTHING/NONE/NO COMMENTS)
- 98=(DON'T KNOW)
- 99=(REFUSED)

G2. Would you be willing to participate in a follow-up interview about any of those issues?

- 1=Yes
- 2=No
- 98=(DON'T KNOW)
- 99=(REFUSED)

H1. What is your name?

- 1=VERBATIM NAME

H2. What is your position at [firm name / new firm name]?

1=Receptionist

2=Owner

3=Manager

4=CFO

5=CEO

6=Assistant to Owner/CEO

7=Sales manager

8=Office manager

9=President

10=(OTHER - SPECIFY) _____

99=(REFUSED)

H3. And at what email address can you be reached?

1=VERBATIM

Thank you very much for your participation. If you have any questions or concerns, please contact Keith Herron from the California Department of Transportation at 916-324-8423.

APPENDIX F.

Disparity Analysis Results Tables

APPENDIX F.

Disparity Analysis Results Tables

As part of the disparity analysis, BBC Research & Consulting (BBC) compared the actual participation, or *utilization*, of minority- and woman-owned businesses in transportation-related prime contracts and subcontracts the California Department of Transportation (Caltrans) and subrecipient local agencies awarded between January 1, 2015 and December 31, 2019 (i.e., the study period) with the percentage of contract dollars those businesses might be expected to receive based on their *availability* for that work.¹ Appendix F presents detailed results from the disparity analysis for relevant business groups and various sets of contracts Caltrans and subrecipient local agencies awarded during the study period.

A. Format and Information

Each table in Appendix F presents disparity analysis results for a different set of contracts. For example, Figure F-2 presents disparity analysis results for all contracts and procurements BBC examined as part of the study considered together. A review of Figure F-2 introduces the calculations and format of all disparity analysis tables in Appendix F. As shown in Figure F-2, the tables present information about each relevant business group in separate rows:

- “All businesses” in row (1) pertains to information about all businesses regardless of the race/ethnicity and gender of their owners.
- Row (2) presents results for all minority- and woman-owned businesses considered together, regardless of whether they were certified as Disadvantaged Business Enterprises (DBEs).
- Row (3) presents results for all non-Hispanic white woman-owned businesses, regardless of whether they were certified as DBEs.
- Row (4) presents results for all minority-owned businesses, regardless of whether they were certified as DBEs.
- Rows (5) through (10) present results for businesses of each relevant racial/ethnic group, regardless of whether they were certified as DBEs.
- Rows (11) through (19) present utilization analysis results for businesses of each relevant racial/ethnic and gender group that were certified as DBEs.

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

- Column (a) presents the total number of prime contracts and subcontracts (i.e., *contract elements*) BBC analyzed as part of the contract set. As shown in row (1) of column (a) of Figure F-2, BBC analyzed 24,349 contract elements Caltrans and subrecipient local agencies

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

awarded during the study period. The values presented in column (a) represent the number of contract elements in which businesses of each group participated. For example, as shown in row (5) of column (a), Asian Pacific American-owned businesses participated in 1,405 prime contracts and subcontracts Caltrans and subrecipient local agencies awarded during the study period.

- Column (b) presents the dollars (in thousands) associated with the set of contract elements. As shown in row (1) of column (b) of Figure F-2, BBC examined approximately \$18.5 billion that were associated with the 24,349 contract elements Caltrans and subrecipient local agencies awarded during the study period. The value presented in column (b) for each individual business group represents the dollars businesses of that particular group received on the set of contract elements. For example, as shown in row (5) of column (b), Asian Pacific American-owned businesses received approximately \$336 million of the prime contract and subcontract dollars Caltrans and subrecipient local agencies awarded during the study period.
- Column (c) presents the dollars (in thousands) that were associated with the set of contract elements, after adjusting those dollars for the fact that BBC collected data on a sample of contracts subrecipient local agencies awarded through the Local Assistance Program. The study team weighted the data to be representative of the entire set of those contracts and adjusted dollars each relevant racial/ethnic and gender group received during the study period accordingly. Chapter 4 describes the sampling procedures BBC used.
- Column (d) presents the participation of each business group as a percentage of total dollars associated with the set of contract elements. BBC calculated each percentage in column (d) by dividing the dollars going to a particular group in column (c) by the total dollars associated with the set of contract elements shown in row (1) of column (c), and then expressing the result as a percentage. For example, for Asian Pacific American-owned businesses, the study team divided \$341 million by \$18.6 billion and multiplied by 100 for a result of 1.8 percent, as shown in row (5) of column (d).

2. Availability results. Column (e) of Figure F-2 presents the availability of each relevant group for all contract elements BBC analyzed as part of the contract set. Availability estimates, which are represented as percentages of the total contracting dollars associated with the set of contract elements, serve as benchmarks against which to compare the participation of specific groups for specific sets of contracts. For example, as shown in row (5) of column (e), the availability of Asian Pacific American-owned businesses for Caltrans work is 3.1 percent. That is, Asian Pacific American-owned businesses might be expected to receive 3.1 percent of relevant Caltrans contract and procurement dollars based on their availability for that work.

3. Differences between participation and availability. Column (f) of Figure F-2 presents the percentage point difference between participation and availability for each relevant racial/ethnic and gender group for Caltrans work. For example, as presented in row (5) of column (f) of Figure F-2, the participation of Asian Pacific American-owned businesses in relevant Caltrans contracts and procurements was less than their availability for that work by a 1.2 percentage points.

4. Disparity indices. BBC also calculated a disparity index, or ratio, for each relevant racial/ethnic and gender group. Column (g) of Figure F-2 presents the disparity index for each group. For example, as reported in row (5) of column (g), the disparity index for Asian Pacific American-owned businesses was 59.6, indicating that they actually received approximately \$0.60 for every dollar they might be expected to receive based on their availability for the relevant prime contracts and subcontracts Caltrans and subrecipient local agencies awarded during the study period. For disparity indices exceeding 200, BBC reported an index of “200+.” When there was no participation or availability for a particular group for a particular set of contracts, BBC reported a disparity index of “100,” indicating parity.

B. Index and Tables

Figure F-1 presents an index of the sets of contracts for which BBC analyzed disparity analysis results. In addition, the heading of each table in Appendix F provides a description of the subset of contracts BBC analyzed for that particular table.

Figure F-1.
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Table	Characteristics							Analysis of potential DBEs
	Agency	Time period	Contract area	Contract role	Contract size	Funding	Region	
F-2	Caltrans and Local Assistance	01/01/15 - 12/31/19	All industries	Prime contracts and subcontracts	N/A	All funding sources	N/A	No
F-3	Caltrans and Local Assistance	01/01/15 - 06/30/17	All industries	Prime contracts and subcontracts	N/A	All funding sources	N/A	No
F-4	Caltrans and Local Assistance	07/01/17 - 12/31/19	All industries	Prime contracts and subcontracts	N/A	All funding sources	N/A	No
F-5	Caltrans and Local Assistance	01/01/15 - 12/31/19	Construction	Prime contracts and subcontracts	N/A	All funding sources	N/A	No
F-6	Caltrans and Local Assistance	01/01/15 - 12/31/19	Professional services	Prime contracts and subcontracts	N/A	All funding sources	N/A	No
F-7	Caltrans and Local Assistance	01/01/15 - 12/31/19	All industries	Prime contracts	N/A	All funding sources	N/A	No
F-8	Caltrans and Local Assistance	01/01/15 - 12/31/19	All industries	Subcontracts	N/A	All funding sources	N/A	No
F-9	Caltrans and Local Assistance	01/01/15 - 12/31/19	All industries	Prime contracts	Small	All funding sources	N/A	No
F-10	Caltrans and Local Assistance	01/01/15 - 12/31/19	All industries	Prime contracts	Large	All funding sources	N/A	No
F-11	Caltrans and Local Assistance	01/01/15 - 12/31/19	All industries	Prime contracts and subcontracts	N/A	FHWA	N/A	No
F-12	Caltrans and Local Assistance	01/01/15 - 12/31/19	All industries	Prime contracts and subcontracts	N/A	State	N/A	No
F-13	Caltrans and Local Assistance	01/01/15 - 12/31/19	All industries	Prime contracts and subcontracts	N/A	All funding sources	Northern California	No
F-14	Caltrans and Local Assistance	01/01/15 - 12/31/19	All industries	Prime contracts and subcontracts	N/A	All funding sources	Bay Area	No
F-15	Caltrans and Local Assistance	01/01/15 - 12/31/19	All industries	Prime contracts and subcontracts	N/A	All funding sources	Central California	No
F-16	Caltrans and Local Assistance	01/01/15 - 12/31/19	All industries	Prime contracts and subcontracts	N/A	All funding sources	Southern California	No
F-17	Caltrans	01/01/15 - 12/31/19	All industries	Prime contracts and subcontracts	N/A	All funding sources	N/A	No
F-18	Local Assistance	01/01/15 - 12/31/19	All industries	Prime contracts and subcontracts	N/A	All funding sources	N/A	No
F-19	Caltrans and Local Assistance	01/01/15 - 12/31/19	All industries	Prime contracts and subcontracts	N/A	FHWA	N/A	Yes
F-20	Caltrans and Local Assistance	01/01/15 - 12/31/19	Construction	Prime contracts and subcontracts	N/A	FHWA	N/A	Yes
F-21	Caltrans and Local Assistance	01/01/15 - 12/31/19	Professional services	Prime contracts and subcontracts	N/A	FHWA	N/A	Yes

Figure F-2.

Agency: Caltrans and Local Assistance

Time period: 01/01/2015 - 12/31/2019

Contract area: All industries

Contract role: Prime contracts and subcontracts

Funding source: All funding sources

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	24,349	\$18,541,140	\$18,626,520				
(2) Minority and woman-owned businesses	10,591	\$3,416,081	\$3,440,401	18.5	26.8	-8.3	68.9
(3) Non-Hispanic white woman-owned	3,660	\$1,199,526	\$1,204,136	6.5	5.8	0.6	110.9
(4) Minority-owned	6,931	\$2,216,555	\$2,236,266	12.0	21.0	-9.0	57.3
(5) Asian Pacific American-owned	1,405	\$335,769	\$341,414	1.8	3.1	-1.2	59.6
(6) Black American-owned	626	\$125,807	\$128,731	0.7	1.4	-0.7	49.9
(7) Hispanic American-owned	3,711	\$1,393,284	\$1,403,943	7.5	13.8	-6.2	54.7
(8) Native American-owned	747	\$166,352	\$166,725	0.9	1.2	-0.3	73.4
(9) Subcontinent Asian American-owned	442	\$195,343	\$195,452	1.0	1.5	-0.5	69.6
(10) Unknown minority-owned	0	\$0					
(11) Minority-owned or woman-owned DBE	9,758	\$2,211,595	\$2,230,744	12.0			
(12) Non-Hispanic white woman-owned DBE	3,368	\$731,729	\$736,252	4.0			
(13) Minority-owned DBE	6,390	\$1,479,865	\$1,494,493	8.0			
(14) Asian Pacific American-owned DBE	1,338	\$275,066	\$280,701	1.5			
(15) Black American-owned DBE	614	\$122,060	\$124,981	0.7			
(16) Hispanic American-owned DBE	3,309	\$745,539	\$751,129	4.0			
(17) Native American-owned DBE	721	\$151,968	\$152,341	0.8			
(18) Subcontinent Asian American-owned DBE	408	\$185,232	\$185,341	1.0			
(19) Unknown minority-owned DBE	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses and unknown minority-owned DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the Agency awarded.

Figure F-3.

Agency: Caltrans and Local Assistance

Time period: 01/01/2015 - 06/30/2017

Contract area: All industries

Contract role: Prime contracts and subcontracts

Funding source: All funding sources

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	14,095	\$8,242,960	\$8,278,481				
(2) Minority and woman-owned businesses	6,106	\$1,457,998	\$1,467,579	17.7	27.3	-9.6	65.0
(3) Non-Hispanic white woman-owned	2,063	\$529,801	\$531,575	6.4	6.4	0.0	100.5
(4) Minority-owned	4,043	\$928,198	\$936,004	11.3	20.9	-9.6	54.1
(5) Asian Pacific American-owned	827	\$160,323	\$161,596	2.0	3.2	-1.3	60.9
(6) Black American-owned	398	\$81,152	\$81,446	1.0	1.6	-0.6	60.2
(7) Hispanic American-owned	2,089	\$534,651	\$540,839	6.5	13.3	-6.7	49.2
(8) Native American-owned	482	\$69,526	\$69,567	0.8	1.2	-0.4	68.6
(9) Subcontinent Asian American-owned	247	\$82,546	\$82,557	1.0	1.6	-0.6	64.2
(10) Unknown minority-owned	0	\$0					
(11) Minority-owned or woman-owned DBE	5,613	\$1,034,159	\$1,038,683	12.5			
(12) Non-Hispanic white woman-owned DBE	1,880	\$344,749	\$346,462	4.2			
(13) Minority-owned DBE	3,733	\$689,410	\$692,220	8.4			
(14) Asian Pacific American-owned DBE	784	\$132,245	\$133,508	1.6			
(15) Black American-owned DBE	391	\$79,703	\$79,997	1.0			
(16) Hispanic American-owned DBE	1,867	\$337,639	\$338,841	4.1			
(17) Native American-owned DBE	469	\$61,489	\$61,530	0.7			
(18) Subcontinent Asian American-owned DBE	222	\$78,334	\$78,345	0.9			
(19) Unknown minority-owned DBE	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses and unknown minority-owned DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the Agency awarded.

Figure F-4.

Agency: Caltrans and Local Assistance

Time period: 07/01/2017 - 12/31/2019

Contract area: All industries

Contract role: Prime contracts and subcontracts

Funding source: All funding sources

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	10,254	\$10,298,180	\$10,348,039				
(2) Minority and woman-owned businesses	4,485	\$1,958,083	\$1,972,822	19.1	26.4	-7.4	72.2
(3) Non-Hispanic white woman-owned	1,597	\$669,726	\$672,561	6.5	5.4	1.1	120.7
(4) Minority-owned	2,888	\$1,288,357	\$1,300,262	12.6	21.0	-8.5	59.8
(5) Asian Pacific American-owned	578	\$175,447	\$179,819	1.7	3.0	-1.2	58.4
(6) Black American-owned	228	\$44,655	\$47,285	0.5	1.2	-0.7	38.5
(7) Hispanic American-owned	1,622	\$858,633	\$863,105	8.3	14.2	-5.8	58.8
(8) Native American-owned	265	\$96,826	\$97,159	0.9	1.2	-0.3	77.2
(9) Subcontinent Asian American-owned	195	\$112,797	\$112,895	1.1	1.5	-0.4	74.2
(10) Unknown minority-owned	0	\$0					
(11) Minority-owned or woman-owned DBE	4,145	\$1,177,435	\$1,192,062	11.5			
(12) Non-Hispanic white woman-owned DBE	1,488	\$386,980	\$389,789	3.8			
(13) Minority-owned DBE	2,657	\$790,455	\$802,272	7.8			
(14) Asian Pacific American-owned DBE	554	\$142,821	\$147,193	1.4			
(15) Black American-owned DBE	223	\$42,357	\$44,984	0.4			
(16) Hispanic American-owned DBE	1,442	\$407,900	\$412,288	4.0			
(17) Native American-owned DBE	252	\$90,479	\$90,810	0.9			
(18) Subcontinent Asian American-owned DBE	186	\$106,898	\$106,996	1.0			
(19) Unknown minority-owned DBE	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses and unknown minority-owned DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the Agency awarded.

Figure F-5.

Agency: Caltrans and Local Assistance

Time period: 01/01/2015 - 12/31/2019

Contract area: Construction

Contract role: Prime contracts and subcontracts

Funding source: All funding sources

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	20,062	\$15,333,850	\$15,404,870				
(2) Minority and woman-owned businesses	8,603	\$2,963,747	\$2,986,907	19.4	26.5	-7.1	73.2
(3) Non-Hispanic white woman-owned	3,093	\$1,017,396	\$1,021,203	6.6	5.0	1.7	133.3
(4) Minority-owned	5,510	\$1,946,351	\$1,965,704	12.8	21.5	-8.8	59.3
(5) Asian Pacific American-owned	1,043	\$242,548	\$247,976	1.6	2.5	-0.9	64.8
(6) Black American-owned	388	\$114,705	\$117,615	0.8	1.2	-0.4	64.0
(7) Hispanic American-owned	3,179	\$1,345,059	\$1,355,701	8.8	15.4	-6.6	57.2
(8) Native American-owned	646	\$165,852	\$166,224	1.1	1.3	-0.2	81.5
(9) Subcontinent Asian American-owned	254	\$78,188	\$78,190	0.5	1.1	-0.6	44.9
(10) Unknown minority-owned	0	\$0					
(11) Minority-owned or woman-owned DBE	7,928	\$1,807,398	\$1,825,450	11.8			
(12) Non-Hispanic white woman-owned DBE	2,898	\$565,677	\$569,447	3.7			
(13) Minority-owned DBE	5,030	\$1,241,721	\$1,256,002	8.2			
(14) Asian Pacific American-owned DBE	1,010	\$203,662	\$209,089	1.4			
(15) Black American-owned DBE	376	\$110,957	\$113,864	0.7			
(16) Hispanic American-owned DBE	2,794	\$698,411	\$703,985	4.6			
(17) Native American-owned DBE	620	\$151,468	\$151,839	1.0			
(18) Subcontinent Asian American-owned DBE	230	\$77,223	\$77,225	0.5			
(19) Unknown minority-owned DBE	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses and unknown minority-owned DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the Agency awarded.

Figure F-6.

Agency: Caltrans and Local Assistance

Time period: 01/01/2015 - 12/31/2019

Contract area: Professional services

Contract role: Prime contracts and subcontracts

Funding source: All funding sources

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	4,287	\$3,207,290	\$3,221,650				
(2) Minority and woman-owned businesses	1,988	\$452,334	\$453,494	14.1	28.3	-14.2	49.7
(3) Non-Hispanic white woman-owned	567	\$182,130	\$182,932	5.7	9.9	-4.3	57.2
(4) Minority-owned	1,421	\$270,204	\$270,561	8.4	18.4	-10.0	45.7
(5) Asian Pacific American-owned	362	\$93,221	\$93,439	2.9	5.9	-3.0	49.0
(6) Black American-owned	238	\$11,102	\$11,117	0.3	2.3	-2.0	15.0
(7) Hispanic American-owned	532	\$48,226	\$48,242	1.5	6.1	-4.6	24.4
(8) Native American-owned	101	\$500	\$501	0.0	0.7	-0.7	2.2
(9) Subcontinent Asian American-owned	188	\$117,155	\$117,262	3.6	3.3	0.3	110.2
(10) Unknown minority-owned	0	\$0					
(11) Minority-owned or woman-owned DBE	1,830	\$404,196	\$405,295	12.6			
(12) Non-Hispanic white woman-owned DBE	470	\$166,052	\$166,804	5.2			
(13) Minority-owned DBE	1,360	\$238,144	\$238,490	7.4			
(14) Asian Pacific American-owned DBE	328	\$71,404	\$71,612	2.2			
(15) Black American-owned DBE	238	\$11,102	\$11,117	0.3			
(16) Hispanic American-owned DBE	515	\$47,129	\$47,144	1.5			
(17) Native American-owned DBE	101	\$500	\$501	0.0			
(18) Subcontinent Asian American-owned DBE	178	\$108,009	\$108,116	3.4			
(19) Unknown minority-owned DBE	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses and unknown minority-owned DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the Agency awarded.

Figure F-7.

Agency: Caltrans and Local Assistance

Time period: 01/01/2015 - 12/31/2019

Contract area: All industries

Contract role: Prime contracts

Funding source: All funding sources

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	5,499	\$14,087,789	\$14,154,245				
(2) Minority and woman-owned businesses	1,061	\$1,661,405	\$1,676,735	11.8	24.4	-12.6	48.5
(3) Non-Hispanic white woman-owned	244	\$585,504	\$586,228	4.1	4.7	-0.6	88.1
(4) Minority-owned	817	\$1,075,901	\$1,090,507	7.7	19.7	-12.0	39.0
(5) Asian Pacific American-owned	135	\$119,242	\$122,972	0.9	2.7	-1.9	31.8
(6) Black American-owned	28	\$9,983	\$12,356	0.1	0.9	-0.8	10.2
(7) Hispanic American-owned	446	\$722,469	\$730,855	5.2	13.5	-8.4	38.2
(8) Native American-owned	69	\$78,484	\$78,537	0.6	1.0	-0.5	53.1
(9) Subcontinent Asian American-owned	139	\$145,723	\$145,787	1.0	1.6	-0.5	65.5
(10) Unknown minority-owned	0	\$0					
(11) Minority-owned or woman-owned DBE	787	\$687,025	\$697,375	4.9			
(12) Non-Hispanic white woman-owned DBE	185	\$219,585	\$220,294	1.6			
(13) Minority-owned DBE	602	\$467,440	\$477,081	3.4			
(14) Asian Pacific American-owned DBE	101	\$80,047	\$83,766	0.6			
(15) Black American-owned DBE	17	\$6,475	\$8,846	0.1			
(16) Hispanic American-owned DBE	286	\$166,196	\$169,631	1.2			
(17) Native American-owned DBE	60	\$69,303	\$69,356	0.5			
(18) Subcontinent Asian American-owned DBE	138	\$145,419	\$145,483	1.0			
(19) Unknown minority-owned DBE	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses and unknown minority-owned DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the Agency awarded.

Figure F-8.

Agency: Caltrans and Local Assistance

Time period: 01/01/2015 - 12/31/2019

Contract area: All industries

Contract role: Subcontracts

Funding source: All funding sources

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	18,850	\$4,453,351	\$4,472,276				
(2) Minority and woman-owned businesses	9,530	\$1,754,676	\$1,763,666	39.4	34.3	5.2	115.1
(3) Non-Hispanic white woman-owned	3,416	\$614,022	\$617,908	13.8	9.4	4.4	147.0
(4) Minority-owned	6,114	\$1,140,654	\$1,145,758	25.6	24.9	0.8	103.0
(5) Asian Pacific American-owned	1,270	\$216,528	\$218,443	4.9	4.2	0.7	117.2
(6) Black American-owned	598	\$115,824	\$116,375	2.6	3.1	-0.4	85.3
(7) Hispanic American-owned	3,265	\$670,815	\$673,088	15.1	14.6	0.5	103.3
(8) Native American-owned	678	\$87,868	\$88,188	2.0	1.8	0.2	111.2
(9) Subcontinent Asian American-owned	303	\$49,620	\$49,665	1.1	1.3	-0.2	85.5
(10) Unknown minority-owned	0	\$0					
(11) Minority-owned or woman-owned DBE	8,971	\$1,524,570	\$1,533,369	34.3			
(12) Non-Hispanic white woman-owned DBE	3,183	\$512,144	\$515,958	11.5			
(13) Minority-owned DBE	5,788	\$1,012,426	\$1,017,411	22.7			
(14) Asian Pacific American-owned DBE	1,237	\$195,019	\$196,934	4.4			
(15) Black American-owned DBE	597	\$115,584	\$116,135	2.6			
(16) Hispanic American-owned DBE	3,023	\$579,343	\$581,498	13.0			
(17) Native American-owned DBE	661	\$82,665	\$82,985	1.9			
(18) Subcontinent Asian American-owned DBE	270	\$39,814	\$39,859	0.9			
(19) Unknown minority-owned DBE	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses and unknown minority-owned DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the Agency awarded.

Figure F-9.

Agency: Caltrans and Local Assistance

Time period: 01/01/2015 - 12/31/2019

Contract area: All industries

Contract role: Prime contracts

Funding source: All funding sources

Small contracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	3,611	\$1,774,069	\$1,804,205				
(2) Minority and woman-owned businesses	840	\$345,582	\$355,921	19.7	34.4	-14.7	57.4
(3) Non-Hispanic white woman-owned	184	\$68,093	\$68,737	3.8	8.5	-4.6	45.1
(4) Minority-owned	656	\$277,489	\$287,184	15.9	25.9	-10.0	61.4
(5) Asian Pacific American-owned	105	\$36,214	\$39,901	2.2	4.4	-2.2	50.4
(6) Black American-owned	26	\$9,350	\$11,718	0.6	1.7	-1.0	38.5
(7) Hispanic American-owned	359	\$154,426	\$157,966	8.8	15.3	-6.5	57.4
(8) Native American-owned	54	\$32,630	\$32,667	1.8	2.3	-0.5	78.2
(9) Subcontinent Asian American-owned	112	\$44,868	\$44,932	2.5	2.3	0.2	108.4
(10) Unknown minority-owned	0	\$0					
(11) Minority-owned or woman-owned DBE	666	\$262,143	\$272,366	15.1			
(12) Non-Hispanic white woman-owned DBE	151	\$57,565	\$58,206	3.2			
(13) Minority-owned DBE	515	\$204,577	\$214,161	11.9			
(14) Asian Pacific American-owned DBE	79	\$27,006	\$30,690	1.7			
(15) Black American-owned DBE	15	\$5,843	\$8,207	0.5			
(16) Hispanic American-owned DBE	262	\$97,843	\$101,278	5.6			
(17) Native American-owned DBE	47	\$29,016	\$29,053	1.6			
(18) Subcontinent Asian American-owned DBE	112	\$44,868	\$44,932	2.5			
(19) Unknown minority-owned DBE	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses and unknown minority-owned DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the Agency awarded.

Figure F-10.

Agency: Caltrans and Local Assistance

Time period: 01/01/2015 - 12/31/2019

Contract area: All industries

Contract role: Prime contracts

Funding source: All funding sources

Large contracts

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	1,888	\$12,313,719	\$12,350,040				
(2) Minority and woman-owned businesses	221	\$1,315,823	\$1,320,814	10.7	23.0	-12.3	46.5
(3) Non-Hispanic white woman-owned	60	\$517,411	\$517,490	4.2	4.2	0.0	100.8
(4) Minority-owned	161	\$798,412	\$803,323	6.5	18.8	-12.3	34.5
(5) Asian Pacific American-owned	30	\$83,028	\$83,071	0.7	2.5	-1.8	27.0
(6) Black American-owned	2	\$632	\$638	0.0	0.7	-0.7	0.7
(7) Hispanic American-owned	87	\$568,044	\$572,889	4.6	13.3	-8.6	34.9
(8) Native American-owned	15	\$45,854	\$45,870	0.4	0.9	-0.5	43.3
(9) Subcontinent Asian American-owned	27	\$100,855	\$100,855	0.8	1.5	-0.7	55.7
(10) Unknown minority-owned	0	\$0					
(11) Minority-owned or woman-owned DBE	121	\$424,882	\$425,009	3.4			
(12) Non-Hispanic white woman-owned DBE	34	\$162,020	\$162,088	1.3			
(13) Minority-owned DBE	87	\$262,862	\$262,921	2.1			
(14) Asian Pacific American-owned DBE	22	\$53,040	\$53,077	0.4			
(15) Black American-owned DBE	2	\$632	\$638	0.0			
(16) Hispanic American-owned DBE	24	\$68,353	\$68,353	0.6			
(17) Native American-owned DBE	13	\$40,286	\$40,303	0.3			
(18) Subcontinent Asian American-owned DBE	26	\$100,550	\$100,550	0.8			
(19) Unknown minority-owned DBE	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses and unknown minority-owned DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the Agency awarded.

Figure F-11.

Agency: Caltrans and Local Assistance

Time period: 01/01/2015 - 12/31/2019

Contract area: All industries

Contract role: Prime contracts and subcontracts

Funding source: Federal Highway Administration

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	19,193	\$14,999,642	\$15,038,087				
(2) Minority and woman-owned businesses	9,044	\$3,046,217	\$3,052,841	20.3	27.6	-7.3	73.5
(3) Non-Hispanic white woman-owned	3,034	\$1,072,296	\$1,074,019	7.1	5.9	1.3	121.2
(4) Minority-owned	6,010	\$1,973,921	\$1,978,822	13.2	21.7	-8.6	60.6
(5) Asian Pacific American-owned	1,253	\$280,984	\$282,737	1.9	3.2	-1.3	59.6
(6) Black American-owned	499	\$116,443	\$117,003	0.8	1.4	-0.7	54.2
(7) Hispanic American-owned	3,250	\$1,264,156	\$1,266,261	8.4	14.4	-6.0	58.3
(8) Native American-owned	651	\$144,483	\$144,856	1.0	1.2	-0.2	82.7
(9) Subcontinent Asian American-owned	357	\$167,855	\$167,964	1.1	1.5	-0.4	72.5
(10) Unknown minority-owned	0	\$0					
(11) Minority-owned or woman-owned DBE	8,359	\$1,928,214	\$1,934,513	12.9			
(12) Non-Hispanic white woman-owned DBE	2,789	\$625,460	\$627,096	4.2			
(13) Minority-owned DBE	5,570	\$1,302,754	\$1,307,417	8.7			
(14) Asian Pacific American-owned DBE	1,198	\$235,460	\$237,203	1.6			
(15) Black American-owned DBE	497	\$115,049	\$115,606	0.8			
(16) Hispanic American-owned DBE	2,915	\$658,192	\$660,074	4.4			
(17) Native American-owned DBE	633	\$133,436	\$133,809	0.9			
(18) Subcontinent Asian American-owned DBE	327	\$160,616	\$160,725	1.1			
(19) Unknown minority-owned DBE	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses and unknown minority-owned DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the Agency awarded.

Figure F-12.

Agency: Caltrans and Local Assistance

Time period: 01/01/2015 - 12/31/2019

Contract area: All industries

Contract role: Prime contracts and subcontracts

Funding source: State

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	5,156	\$3,541,498	\$3,588,433				
(2) Minority and woman-owned businesses	1,547	\$369,864	\$387,560	10.8	23.4	-12.6	46.2
(3) Non-Hispanic white woman-owned	626	\$127,230	\$130,116	3.6	5.6	-2.0	64.9
(4) Minority-owned	921	\$242,634	\$257,444	7.2	17.8	-10.6	40.3
(5) Asian Pacific American-owned	152	\$54,786	\$58,677	1.6	2.7	-1.1	59.7
(6) Black American-owned	127	\$9,364	\$11,728	0.3	1.2	-0.8	27.8
(7) Hispanic American-owned	461	\$129,128	\$137,682	3.8	11.1	-7.2	34.7
(8) Native American-owned	96	\$21,869	\$21,869	0.6	1.4	-0.8	42.2
(9) Subcontinent Asian American-owned	85	\$27,488	\$27,488	0.8	1.4	-0.6	55.9
(10) Unknown minority-owned	0	\$0					
(11) Minority-owned or woman-owned DBE	1,399	\$283,381	\$296,231	8.3			
(12) Non-Hispanic white woman-owned DBE	579	\$106,269	\$109,156	3.0			
(13) Minority-owned DBE	820	\$177,112	\$187,076	5.2			
(14) Asian Pacific American-owned DBE	140	\$39,606	\$43,498	1.2			
(15) Black American-owned DBE	117	\$7,011	\$9,375	0.3			
(16) Hispanic American-owned DBE	394	\$87,347	\$91,055	2.5			
(17) Native American-owned DBE	88	\$18,532	\$18,532	0.5			
(18) Subcontinent Asian American-owned DBE	81	\$24,616	\$24,616	0.7			
(19) Unknown minority-owned DBE	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses and unknown minority-owned DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the Agency awarded.

Figure F-13.

Agency: Caltrans and Local Assistance

Time period: 01/01/2015 - 12/31/2019

Contract area: All industries

Contract role: Prime contracts and subcontracts

Funding source: All funding sources

Northern California

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	6,191	\$3,593,204	\$3,617,509				
(2) Minority and woman-owned businesses	2,519	\$674,058	\$683,367	18.9	25.8	-6.9	73.3
(3) Non-Hispanic white woman-owned	1,056	\$251,200	\$253,412	7.0	6.0	1.0	115.9
(4) Minority-owned	1,463	\$422,858	\$429,955	11.9	19.7	-7.9	60.2
(5) Asian Pacific American-owned	242	\$37,058	\$37,282	1.0	4.2	-3.2	24.6
(6) Black American-owned	138	\$21,783	\$21,787	0.6	1.5	-0.9	39.2
(7) Hispanic American-owned	821	\$232,426	\$239,268	6.6	10.5	-3.8	63.2
(8) Native American-owned	210	\$66,480	\$66,495	1.8	1.6	0.2	114.5
(9) Subcontinent Asian American-owned	52	\$65,112	\$65,122	1.8	1.9	-0.1	92.6
(10) Unknown minority-owned	0	\$0					
(11) Minority-owned or woman-owned DBE	2,380	\$581,460	\$585,893	16.2			
(12) Non-Hispanic white woman-owned DBE	1,020	\$219,117	\$221,312	6.1			
(13) Minority-owned DBE	1,360	\$362,343	\$364,581	10.1			
(14) Asian Pacific American-owned DBE	220	\$34,439	\$34,660	1.0			
(15) Black American-owned DBE	129	\$18,847	\$18,848	0.5			
(16) Hispanic American-owned DBE	754	\$178,171	\$180,161	5.0			
(17) Native American-owned DBE	205	\$65,774	\$65,789	1.8			
(18) Subcontinent Asian American-owned DBE	52	\$65,112	\$65,122	1.8			
(19) Unknown minority-owned DBE	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses and unknown minority-owned DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the Agency awarded.

Figure F-14.

Agency: Caltrans and Local Assistance

Bay Area

Time period: 01/01/2015 - 12/31/2019

Contract area: All industries

Contract role: Prime contracts and subcontracts

Funding source: All funding sources

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	4,277	\$3,279,705	\$3,284,468				
(2) Minority and woman-owned businesses	1,855	\$498,881	\$499,400	15.2	25.7	-10.5	59.1
(3) Non-Hispanic white woman-owned	618	\$112,914	\$113,220	3.4	5.3	-1.9	65.1
(4) Minority-owned	1,237	\$385,967	\$386,180	11.8	20.4	-8.7	57.6
(5) Asian Pacific American-owned	177	\$72,583	\$72,621	2.2	3.0	-0.7	74.8
(6) Black American-owned	88	\$9,772	\$9,775	0.3	1.7	-1.4	17.9
(7) Hispanic American-owned	733	\$247,932	\$248,024	7.6	13.4	-5.8	56.6
(8) Native American-owned	72	\$9,625	\$9,625	0.3	1.3	-1.0	22.1
(9) Subcontinent Asian American-owned	167	\$46,054	\$46,135	1.4	1.1	0.3	125.8
(10) Unknown minority-owned	0	\$0					
(11) Minority-owned or woman-owned DBE	1,632	\$306,430	\$306,920	9.3			
(12) Non-Hispanic white woman-owned DBE	548	\$94,639	\$94,917	2.9			
(13) Minority-owned DBE	1,084	\$211,790	\$212,003	6.5			
(14) Asian Pacific American-owned DBE	159	\$48,902	\$48,939	1.5			
(15) Black American-owned DBE	87	\$9,532	\$9,535	0.3			
(16) Hispanic American-owned DBE	636	\$108,333	\$108,425	3.3			
(17) Native American-owned DBE	67	\$9,009	\$9,009	0.3			
(18) Subcontinent Asian American-owned DBE	135	\$36,014	\$36,095	1.1			
(19) Unknown minority-owned DBE	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses and unknown minority-owned DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the Agency awarded.

Figure F-15.

Agency: Caltrans and Local Assistance

Central California

Time period: 01/01/2015 - 12/31/2019

Contract area: All industries

Contract role: Prime contracts and subcontracts

Funding source: All funding sources

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	7,223	\$4,288,400	\$4,317,064				
(2) Minority and woman-owned businesses	3,102	\$741,784	\$748,854	17.3	26.9	-9.5	64.6
(3) Non-Hispanic white woman-owned	1,071	\$246,116	\$247,386	5.7	6.5	-0.7	88.8
(4) Minority-owned	2,031	\$495,668	\$501,467	11.6	20.4	-8.8	56.9
(5) Asian Pacific American-owned	344	\$51,663	\$52,155	1.2	2.9	-1.7	41.5
(6) Black American-owned	184	\$51,149	\$54,058	1.3	1.6	-0.3	79.3
(7) Hispanic American-owned	1,055	\$299,610	\$301,647	7.0	12.6	-5.6	55.4
(8) Native American-owned	370	\$73,561	\$73,907	1.7	1.5	0.2	113.9
(9) Subcontinent Asian American-owned	78	\$19,684	\$19,700	0.5	1.8	-1.3	25.4
(10) Unknown minority-owned	0	\$0					
(11) Minority-owned or woman-owned DBE	2,901	\$543,390	\$550,225	12.7			
(12) Non-Hispanic white woman-owned DBE	978	\$222,108	\$223,339	5.2			
(13) Minority-owned DBE	1,923	\$321,283	\$326,886	7.6			
(14) Asian Pacific American-owned DBE	334	\$50,346	\$50,831	1.2			
(15) Black American-owned DBE	184	\$51,149	\$54,058	1.3			
(16) Hispanic American-owned DBE	963	\$131,146	\$132,993	3.1			
(17) Native American-owned DBE	364	\$68,957	\$69,303	1.6			
(18) Subcontinent Asian American-owned DBE	78	\$19,684	\$19,700	0.5			
(19) Unknown minority-owned DBE	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses and unknown minority-owned DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the Agency awarded.

Figure F-16.

Agency: Caltrans and Local Assistance

Southern California

Time period: 01/01/2015 - 12/31/2019

Contract area: All industries

Contract role: Prime contracts and subcontracts

Funding source: All funding sources

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	6,660	\$7,413,581	\$7,441,230				
(2) Minority and woman-owned businesses	3,116	\$1,528,358	\$1,535,781	20.6	27.8	-7.2	74.1
(3) Non-Hispanic white woman-owned	916	\$616,296	\$617,117	8.3	5.6	2.7	148.5
(4) Minority-owned	2,200	\$912,061	\$918,664	12.3	22.2	-9.9	55.5
(5) Asian Pacific American-owned	642	\$174,464	\$179,357	2.4	2.8	-0.4	87.3
(6) Black American-owned	216	\$43,102	\$43,110	0.6	1.1	-0.5	53.9
(7) Hispanic American-owned	1,102	\$613,316	\$615,004	8.3	16.2	-7.9	51.0
(8) Native American-owned	95	\$16,686	\$16,697	0.2	0.8	-0.6	27.5
(9) Subcontinent Asian American-owned	145	\$64,493	\$64,495	0.9	1.4	-0.5	62.4
(10) Unknown minority-owned	0	\$0					
(11) Minority-owned or woman-owned DBE	2,846	\$807,315	\$814,707	10.9			
(12) Non-Hispanic white woman-owned DBE	823	\$222,865	\$223,684	3.0			
(13) Minority-owned DBE	2,023	\$584,449	\$591,023	7.9			
(14) Asian Pacific American-owned DBE	625	\$141,378	\$146,271	2.0			
(15) Black American-owned DBE	214	\$42,531	\$42,539	0.6			
(16) Hispanic American-owned DBE	956	\$327,890	\$329,550	4.4			
(17) Native American-owned DBE	85	\$8,228	\$8,239	0.1			
(18) Subcontinent Asian American-owned DBE	143	\$64,423	\$64,424	0.9			
(19) Unknown minority-owned DBE	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses and unknown minority-owned DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the Agency awarded.

Figure F-17.

Agency: Caltrans

Time period: 01/01/2015 - 12/31/2019

Contract area: All industries

Contract role: Prime contracts and subcontracts

Funding source: All funding sources

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	14,717	\$14,147,338	\$14,147,338				
(2) Minority and woman-owned businesses	6,304	\$2,548,172	\$2,548,172	18.0	26.0	-8.0	69.2
(3) Non-Hispanic white woman-owned	2,240	\$978,753	\$978,753	6.9	5.8	1.1	119.7
(4) Minority-owned	4,064	\$1,569,419	\$1,569,419	11.1	20.3	-9.2	54.7
(5) Asian Pacific American-owned	673	\$202,768	\$202,768	1.4	3.0	-1.6	47.9
(6) Black American-owned	431	\$85,266	\$85,266	0.6	1.3	-0.7	46.9
(7) Hispanic American-owned	2,133	\$990,967	\$990,967	7.0	13.4	-6.4	52.2
(8) Native American-owned	567	\$125,002	\$125,002	0.9	1.2	-0.3	76.4
(9) Subcontinent Asian American-owned	260	\$165,416	\$165,416	1.2	1.4	-0.3	82.3
(10) Unknown minority-owned	0	\$0					
(11) Minority-owned or woman-owned DBE	5,942	\$1,664,026	\$1,664,026	11.8			
(12) Non-Hispanic white woman-owned DBE	2,112	\$566,531	\$566,531	4.0			
(13) Minority-owned DBE	3,830	\$1,097,495	\$1,097,495	7.8			
(14) Asian Pacific American-owned DBE	656	\$179,497	\$179,497	1.3			
(15) Black American-owned DBE	421	\$82,913	\$82,913	0.6			
(16) Hispanic American-owned DBE	1,945	\$557,258	\$557,258	3.9			
(17) Native American-owned DBE	550	\$112,463	\$112,463	0.8			
(18) Subcontinent Asian American-owned DBE	258	\$165,364	\$165,364	1.2			
(19) Unknown minority-owned DBE	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses and unknown minority-owned DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the Agency awarded.

Figure F-18.

Agency: Local Assistance

Time period: 01/01/2015 - 12/31/2019

Contract area: All industries

Contract role: Prime contracts and subcontracts

Funding source: All funding sources

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	9,632	\$4,393,802	\$4,479,183				
(2) Minority and woman-owned businesses	4,287	\$867,910	\$892,230	19.9	29.2	-9.3	68.3
(3) Non-Hispanic white woman-owned	1,420	\$220,773	\$225,383	5.0	6.0	-1.0	84.0
(4) Minority-owned	2,867	\$647,136	\$666,847	14.9	23.2	-8.3	64.2
(5) Asian Pacific American-owned	732	\$133,001	\$138,646	3.1	3.3	-0.2	92.8
(6) Black American-owned	195	\$40,541	\$43,465	1.0	1.7	-0.7	57.1
(7) Hispanic American-owned	1,578	\$402,317	\$412,976	9.2	15.0	-5.7	61.6
(8) Native American-owned	180	\$41,350	\$41,723	0.9	1.4	-0.5	65.7
(9) Subcontinent Asian American-owned	182	\$29,927	\$30,036	0.7	1.8	-1.1	37.6
(10) Unknown minority-owned	0	\$0					
(11) Minority-owned or woman-owned DBE	3,816	\$547,569	\$566,718	12.7			
(12) Non-Hispanic white woman-owned DBE	1,256	\$165,198	\$169,721	3.8			
(13) Minority-owned DBE	2,560	\$382,371	\$396,998	8.9			
(14) Asian Pacific American-owned DBE	682	\$95,569	\$101,204	2.3			
(15) Black American-owned DBE	193	\$39,147	\$42,068	0.9			
(16) Hispanic American-owned DBE	1,364	\$188,281	\$193,871	4.3			
(17) Native American-owned DBE	171	\$39,505	\$39,878	0.9			
(18) Subcontinent Asian American-owned DBE	150	\$19,868	\$19,977	0.4			
(19) Unknown minority-owned DBE	0	\$0					

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

*Unknown minority-owned businesses and unknown minority-owned DBEs were allocated to minority and DBE subgroups proportional to the known total dollars of those groups. For example, if total dollars of Black American-owned businesses (column b, row 6) accounted for 25 percent of total minority-owned business dollars (column b, row 4), then 25 percent of column b, row 10 would be added to column b, row 6 and the sum would be shown in column c, row 6. In addition, column c was adjusted for the sampling weights for the contract elements that the Agency awarded.

Figure F-19.

Agency: Caltrans and Local Assistance

Time period: 01/01/2015 - 12/31/2019

Contract area: All industries

Contract role: Prime contracts and subcontracts

Funding source: Federal Highway Administration

Analysis of potential DBEs

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	19,193	\$14,999,642	\$15,038,087				
(2) Minority and woman-owned businesses					22.2		
(3) Non-Hispanic white woman-owned					5.7		
(4) Minority-owned					16.5		
(5) Asian Pacific American-owned					2.7		
(6) Black American-owned					1.4		
(7) Hispanic American-owned					10.0		
(8) Native American-owned					1.0		
(9) Subcontinent Asian American-owned					1.3		
(10) Unknown minority-owned							
(11) Minority-owned or woman-owned DBE							
(12) Non-Hispanic white woman-owned DBE							
(13) Minority-owned DBE							
(14) Asian Pacific American-owned DBE							
(15) Black American-owned DBE							
(16) Hispanic American-owned DBE							
(17) Native American-owned DBE							
(18) Subcontinent Asian American-owned DBE							
(19) Unknown minority-owned DBE							

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-20.

Agency: Caltrans and Local Assistance

Time period: 01/01/2015 - 12/31/2019

Contract area: Construction

Contract role: Prime contracts and subcontracts

Funding source: Federal Highway Administration

Analysis of potential DBEs

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	15,449	\$12,047,311	\$12,077,316				
(2) Minority and woman-owned businesses					22.0		
(3) Non-Hispanic white woman-owned					4.7		
(4) Minority-owned					17.3		
(5) Asian Pacific American-owned					2.0		
(6) Black American-owned					1.2		
(7) Hispanic American-owned					11.8		
(8) Native American-owned					1.1		
(9) Subcontinent Asian American-owned					1.1		
(10) Unknown minority-owned							
(11) Minority-owned or woman-owned DBE							
(12) Non-Hispanic white woman-owned DBE							
(13) Minority-owned DBE							
(14) Asian Pacific American-owned DBE							
(15) Black American-owned DBE							
(16) Hispanic American-owned DBE							
(17) Native American-owned DBE							
(18) Subcontinent Asian American-owned DBE							
(19) Unknown minority-owned DBE							

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

Source: BBC Research & Consulting Disparity Analysis.

Figure F-21.

Agency: Caltrans and Local Assistance

Time period: 01/01/2015 - 12/31/2019

Contract area: Professional services

Contract role: Prime contracts and subcontracts

Funding source: Federal Highway Administration

Analysis of potential DBEs

Business Group	(a) Number of contract elements	(b) Total dollars (thousands)	(c) Estimated total dollars (thousands)*	(d) Utilization percentage	(e) Availability percentage	(f) Utilization - Availability	(g) Disparity index
(1) All businesses	3,744	\$2,952,331	\$2,960,771				
(2) Minority and woman-owned businesses					23.3		
(3) Non-Hispanic white woman-owned					9.9		
(4) Minority-owned					13.5		
(5) Asian Pacific American-owned					5.6		
(6) Black American-owned					2.2		
(7) Hispanic American-owned					2.8		
(8) Native American-owned					0.7		
(9) Subcontinent Asian American-owned					2.1		
(10) Unknown minority-owned	0	\$0					
(11) Minority-owned or woman-owned DBE							
(12) Non-Hispanic white woman-owned DBE							
(13) Minority-owned DBE							
(14) Asian Pacific American-owned DBE							
(15) Black American-owned DBE							
(16) Hispanic American-owned DBE							
(17) Native American-owned DBE							
(18) Subcontinent Asian American-owned DBE							
(19) Unknown minority-owned DBE							

Note: Numbers are rounded to the nearest thousand dollars or tenth of 1 percent. "Woman-owned" refers to non-Hispanic white woman-owned businesses.

Source: BBC Research & Consulting Disparity Analysis.