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## **KEEN INDEPENDENT RESEARCH 2015 MADISON PUBLIC WORKS DISPARITY STUDY**

April 16, 2015

### **Prepared for:**

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### **Executive Summary**

The City of Madison seeks to ensure equity in its contracting activities. It commissioned a disparity study to assist in determining if there is a level playing field for minority- and women-owned firms when competing for City public works contracts and subcontracts. This research helps the City determine if its current Small Business Enterprise (SBE) Program is effective in encouraging utilization of minority- and women-owned firms in City public works contracts. The study reviewed other potential City actions as well, recognizing the legal case law, restrictions and issues that limit the ability of cities to implement minority and women business enterprise programs.

The City of Madison contracted with Keen Independent Research LLC (Keen Independent) to perform the City of Madison Public Works Contracting Disparity Study. The Keen Independent study team includes three minority- or women-owned firms (Lauber Consulting, The Davis Group and Customer Research International), a national law firm (Holland & Knight LLP) and an economic research firm (BBC Research & Consulting).

In addition to the SBE Program for its City-funded contracts, the City operates contracting programs for Minority Business Enterprises (MBEs), Women Business Enterprises (WBEs) and Disadvantaged Business Enterprises (DBEs) for certain state- and federally-funded contracts. The City also uses Tax Increment Financing (TIF) as a tool for construction projects, which was not examined in the study. Although the focus of the disparity study was City-funded contracts, some of the programs discussed in this report might apply to other City contracts as well.

#### **A. Conditions for Minorities and Women in the Local Construction Marketplace**

Because 90 percent of City public works prime contract and subcontract dollars go to firms with locations in Dane County, the study team focused its analysis of local marketplace conditions on the Dane County construction market. Research included in-depth interviews with 40 local businesses and trade associations, telephone interviews with local businesses, and analysis of Census data and other information.

As explained in the report, there is evidence of racial and gender discrimination in the Dane County construction industry that affects opportunities to work and advance in the industry and start construction businesses. That may be one reason why minority- and women-owned firms comprise a relatively small number of firms in the local marketplace. There is also evidence of discrimination affecting minority- and women-owned businesses as they compete in the local construction industry.

#### **B. Availability of Minority- and Women-owned Firms for Public Works Contracts**

Representation of minority- and women-owned public works contracting firms in the local construction industry is less than what might be expected if there were a level playing field for minorities and women in the local industry. About 2 percent of businesses related to public works construction contracting in Dane County are owned by racial and ethnic minorities. About 7 percent

of public works contracting businesses are owned by non-minority women. Minority residents comprise 15 percent and women are 49 percent of the Dane County workforce.

### C. Utilization of Minority- and Women-owned Firms on Public Works Contracts

The study team identified 600 City-funded public works contracts totaling \$331 million awarded from 2008 through 2013. Keen Independent determined the share of those dollars going to minority- and women-owned firms (MBEs and WBEs). This analysis includes work performed by prime contractors, subcontractors, trucking firms and materials suppliers. The utilization totals for minority- or women-owned businesses included non-certified and certified firms.

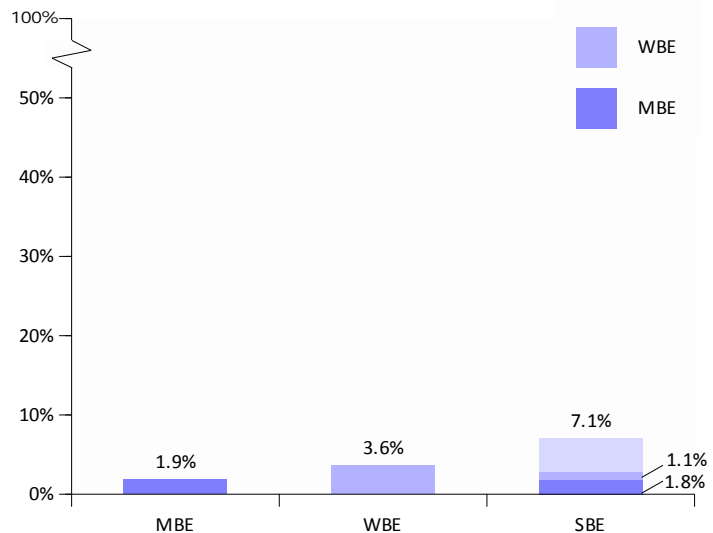
**MBE utilization.** Minority-owned firms received about \$6 million in City-funded public works contract dollars from 2008 through 2013, including subcontracts. MBE utilization was 1.9 percent of the \$331 million in City-funded public works contract dollars (see Figure ES-1 below). Nearly all of the MBE participation was from firms certified as SBEs.

**WBE utilization.** For 2008-2013, white women-owned firms obtained about \$11 million or 3.6 percent of City public works contracts. About one-third of this participation was by SBE-certified white women-owned firms (see Chapter 4).

**SBE utilization.** The study team determined that certified SBEs received \$23 million in City public works contract dollars during the study period, or 7 percent of the contract dollars (a higher percentage than the City previously reported). About two-fifths of total SBE utilization was minority- and women-owned firms and three-fifths was white male-owned firms. Figure ES-1 shows these results.

Figure ES-1.  
MBE, WBE and SBE share of prime contract/subcontract dollars for City-funded public works contracts, 2008-2013

Note:  
Number of contracts/subcontracts analyzed is 2,834  
Source:  
Keen Independent from data on City of Madison public works contracts 2008-2013.



**Disparity analysis.** MBE and WBE utilization is the first part of the disparity analysis. The study team compared these results to benchmarks developed from the availability analysis.

- **Minority-owned firms.** Based on telephone interviews with local contractors, minority-owned firms account for 2 percent of the firms available for City public works contracts. After adjusting for the types and sizes of City prime contracts and subcontracts, the percentage of City-funded public works contract dollars that might be expected to go to MBEs is only 0.1 percent (see Appendix D).

Therefore, the 1.9 percent utilization of MBEs is substantially above the 0.1 percent participation that might be expected from the availability analysis. There is no disparity between the utilization and availability of minority-owned firms in City-funded public works contracts, a positive result of the City’s SBE Program.

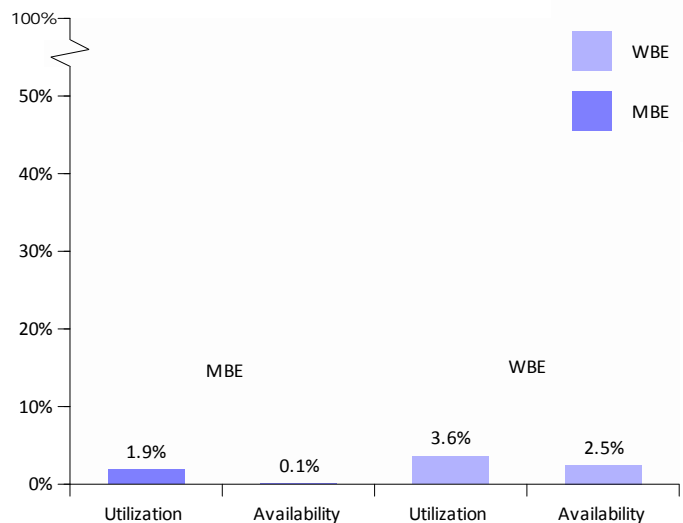
- **White women-owned firms.** Although white women-owned firms are 7 percent of the businesses available for public works contracts, only about 2.5 percent of contract dollars might be expected to go to WBEs after accounting for sizes and types of prime contracts and subcontracts. The 3.6 percent utilization of white women-owned firms on City-funded public works contracts is higher than what might be expected from the availability analysis. There is no disparity between the utilization and availability of white women-owned firms in City-funded public works contracts.

Figure ES-2 shows these results.

**Figure ES-2.**  
**MBE and WBE utilization and availability on City-funded public works contracts, 2008-2013**

Note:  
 Number of contracts/subcontracts analyzed is 2,834.

Source:  
 Keen Independent from data on City of Madison public works contracts 2008-2013.



## **D. Conclusions and Potential Actions for City Consideration**

The SBE Program appears to have encouraged MBE and WBE utilization to the point that there were no disparities between the utilization and dollar-weighted availability of minority- and women-owned firms on City-funded contracts.

- Almost all of the utilization of minority-owned firms was from firms certified as SBEs. The SBE Program appears to have contributed to most of the MBE utilization in City-funded public works contracts.
- About one-third of the utilization of white women-owned firms on City-funded public works contracts was from businesses certified as SBEs.
- Although some of the individuals interviewed in this study were concerned that the SBE Program would favor white female-owned firms, utilization of SBE-certified minority-owned firms (\$5.9 million) in fact exceeded SBE-certified white female-owned firms (\$3.6 million) on City-funded public works contracts from 2008 through 2013.
- Minority- and women-owned businesses comprise more than one-half of the construction-related firms certified as SBEs.

The SBE Program alone does not create a level playing field for local minority- and women-owned construction firms. The study identified barriers for minorities and women in the local construction industry that appear to impact MBEs and WBEs in ways that an SBE contracting goals program may not effectively address. These issues appear to be widely known in the industry, and there are more than 40 organizations providing different types of business assistance in the local community. The City may need to take a larger role in helping the industry and business assistance organizations develop minority- and women-owned businesses outside of public works contracting. This might include more support to encourage minorities and women to enter and receiving training in local construction trades.

In addition, the City might consider some operational improvements to the SBE contract goals program outlined in the full study report. It can also do more to remove barriers to participating in City contracts. Figure ES-3 on the following page summarizes possible initiatives and program changes for the City to consider. The study team does not necessarily recommend each of these initiatives at this time, but they merit further exploration by the City.

## **E. Public Comment Process for the Draft 2015 Disparity Study Report**

One of the purposes of the disparity study was to generate broader discussion and input about City public works contracting and methods to promote a level playing field for minority- and women-owned construction businesses. The City of Madison distributed the Draft Availability Study report for public comment and held public meetings about the draft report on March 4 and March 5, 2015 at the Madison Municipal Building, Room 260. The City made video of each meeting available on The Madison City Channel.

The public was encouraged to provide feedback at those meetings and provide written comments at the hearings, online or via email at [contractingdisparitystudy@cityofmadison.com](mailto:contractingdisparitystudy@cityofmadison.com).



Keen Independent reviewed feedback and comments before preparing the final 2015 Disparity Study report in April 2015. The final report also summarizes public comments. The City of Madison will also review comments as it considers actions to take based on the study.

Figure ES-3. Actions for City consideration based on disparity study results

<b>Potential actions for City review and exploration</b>
<p><b>1. Further improving the SBE contract goals program</b></p> <ul style="list-style-type: none"> <li>a. Respond to industry and community concerns about program operation</li> <li>b. Monitor concentration of SBE participation in only a few firms</li> <li>c. Encourage small businesses to become SBE-certified and participate in City contracting</li> <li>d. Improve data collection and reporting of SBE participation on City-funded contracts</li> <li>e. Monitor SBE participation, by race, ethnicity and gender</li> <li>f. Monitor representation of MBEs and WBEs among certified SBEs</li> <li>g. Monitor local versus non-local SBE participation</li> <li>h. Better connect new SBEs with prime contractors</li> <li>i. Consider refinement of revenue limits by specialization</li> <li>j. Consider time limits for SBE certification, with flexibility for exceeding size limit</li> <li>k. Consider prime contractor scorecards for cumulative SBE (and MBE/WBE) participation</li> <li>l. Consider extending the Program to other City-supported construction such as TIF projects</li> </ul> <p><b>2. Further building an SBE prime contracting part of the Program</b></p> <ul style="list-style-type: none"> <li>a. Make greater efforts to identify small contracts for SBE participation</li> <li>b. Review accelerating City payment of SBE prime contractors</li> <li>c. Review opportunities for minority- and women-owned SBEs to bid on small contracts</li> <li>d. Monitor and report SBE participation as prime contractors</li> </ul> <p><b>3. Creating a business development component to the SBE Program, including mentorship and a City SBE coach</b></p> <ul style="list-style-type: none"> <li>a. Explore partnerships with large contractors to provide SBE mentoring</li> <li>b. Consider an SBE coach position at the City</li> </ul> <p><b>4. Minimizing barriers in public works prequalification</b></p> <ul style="list-style-type: none"> <li>a. Perform review of prequalification requirements and thresholds</li> <li>b. Phase in prequalification requirements for SBEs over their first two years in the Program</li> </ul> <p><b>5. Expanding communication of City bid opportunities</b></p> <ul style="list-style-type: none"> <li>a. Conduct further outreach and education about how to identify City bid opportunities</li> <li>b. Further promote City quarterly meetings with contractors</li> </ul> <p><b>6. Improving prime contractor payment of subcontractors and relaxing retainage policies</b></p> <ul style="list-style-type: none"> <li>a. Better enforce prompt payment policy</li> <li>b. Review ways to more quickly release City retainage</li> </ul> <p><b>7. Supporting local technical assistance, bonding and financing programs, and creating new programs when necessary</b></p> <ul style="list-style-type: none"> <li>a. Consider assembling and marketing an integrated network of local business assistance</li> <li>b. Support specialized business training for small construction businesses</li> </ul> <p><b>8. Supporting local efforts to encourage minorities and women to enter, receive training and obtain jobs in the construction industry</b></p> <ul style="list-style-type: none"> <li>a. Review the effectiveness of current City programs regarding affirmative action for contractors</li> <li>b. Support other organizations' efforts to build a pipeline of minority and female workers</li> </ul>

# CHAPTER 1.

## Introduction

The City of Madison seeks to ensure equity in its contracting activities. It commissioned a disparity study to determine if there is a level playing field for minority- and women-owned firms when competing for City public works contracts and subcontracts. This research helps the City determine if its current Small Business Enterprise (SBE) Program is effective in encouraging utilization of minority- and women-owned firms in City public works contracts and whether additional or different measures are needed.

The ability of cities to address any racial discrimination in contracting is limited by the 1989 U.S. Supreme Court decision in *City of Richmond v. J.A. Croson Company*. The U.S. Supreme Court provided guidance for when a minority business enterprise program might be legally defensible. One reason for the disparity study is to help determine whether any City contracting programs that specifically focus on minority- and women-owned firms are needed and supportable in light of this U.S. Supreme Court decision.

A disparity study calculates the share of contract dollars going to minority- and women-owned firms and the share going to other businesses. A “disparity” exists if the share for minority- and women-owned businesses is below what might be expected based on their relative availability to perform that work. The City of Madison study focuses on City public works prime contracts and subcontracts. (See Appendix A for definitions of key terms used in this report.)

The study team also collected information about the experiences of minorities and women in the Madison construction industry. These results will help the City assess whether there is a level playing field for minorities and women in the industry.

Chapter 1 of the Disparity Study:

- A. Reviews City public works contracts;
- B. Explains the City’s Small Business Enterprise Programs;
- C. Introduces the study team;
- D. Outlines the analyses and describes where results appear in the report; and
- E. Describes the public input process, including comments for the draft report.

### **A. City of Madison Public Works Contracts**

The study team identified \$331 million in City-funded public works contracts awarded from 2008 through 2013. City public works contracts that use state or federal funds were not examined in the study, as the State MBE/WBE Programs or the Federal DBE Program applied to many of these contracts. The City applies those programs as a condition of receiving state or federal funds.

The City contracts for a wide range of construction projects, from road work to water and sewer lines and construction of public buildings. Keen Independent identified the primary type of work involved in each of the 600 prime contracts and 2234 subcontracts awarded during the study period. As shown in Figure 1-1, much of the dollars of work was related to roads, water and sewer lines, public buildings and building trades such as electrical work, plumbing and HVAC. In total, the study team examined 29 different construction specializations. Appendix C provides more information about how the study team collected and analyzed City public works contract dollars.

Figure 1-1.  
Dollars of City public works prime contracts and subcontracts, by type of work, 2008-2013

Type of work	Dollars (millions)	Percent of total
General road construction	\$ 95.9	29.0 %
Asphalt paving	54.9	16.6
Water and sewer lines	23.2	7.0
General public building construction	19.1	5.8
Concrete flatwork (sidewalk, curb, gutter and paths)	18.3	5.5
Electrical work	15.8	4.8
Plumbing and HVAC	12.7	3.8
Other concrete work	11.4	3.4
Landscaping and related work	10.9	3.3
Trucking and hauling	9.8	3.0
Culverts, drainage and water retention	8.7	2.6
Excavation, demolition and other site prep	7.1	2.1
Other building construction related	6.7	2.0
Roofing, siding and sheet metal work	5.3	1.6
Water and sewer plants	5.2	1.6
Construction materials supply	2.9	0.9
Waterways and dams	2.9	0.9
Drywall and insulation	2.9	0.9
Carpentry and floor work	2.8	0.9
Masonry, stonework, tile setting and plastering	2.2	0.7
Temporary traffic control	1.9	0.6
Windows and doors	1.6	0.5
Bridge construction	1.4	0.4
Structural steel work	1.3	0.4
Drilling and foundations	1.2	0.4
Office furniture and equipment installation	1.0	0.3
Bridge and other structure painting	1.0	0.3
Concrete cutting	1.0	0.3
Fencing and gates	0.8	0.3
Pavement marking	0.8	0.2
Other roadway work	0.4	0.1
Other construction (not otherwise specified)	0.2	0.1
<b>Total</b>	<b>\$ 331.1</b>	<b>100.0 %</b>

More than 90 percent of City of Madison public works contract dollars went to firms with locations in Madison or other parts of Dane County. Therefore, analyses of local construction marketplace conditions focused on Dane County.

## **B. City of Madison Small Business Enterprise (SBE) Program**

One of the purposes of the disparity study is to evaluate the effectiveness of the City's SBE Program applied to City-funded public works contracts. The SBE Program is one of several Targeted Business Enterprise Programs encouraging participation of different types of businesses on City projects. The current program has been in place since 1991. During the study period, the City had approximately 286 construction-related businesses certified as SBEs.

In order to be certified as an SBE, a business must be:

- Organized as a for-profit business, performing a commercially useful function;
- Independently owned and controlled by individuals possessing a net worth of no more than \$1,320,000; and
- Averaging annual gross receipts of \$4 million or less over the last three year period.

The City calculates an SBE contract goal by comparing the work areas listed in a project cost estimate with the list of certified businesses that perform those types of work. SBE contract goals are applied to City public works contracts that exceed \$100,000. Prime contractors are required to solicit bids from SBE-certified businesses for subcontracting opportunities on those projects. A responsive bidder on a project with an SBE goal must submit a complete SBE Compliance Report which shows that the bidder has met the goal or has shown good faith efforts to do so.

## **C. Study Team**

In 2014, the City of Madison contracted with Keen Independent Research LLC (Keen Independent) to perform the City of Madison Public Works Contracting Disparity Study. Keen Independent is based in Denver and opened a Madison office upon initiation of the study. Two local Diversity Scholar Interns from Keen Independent participated in this study.

Figure 1-2 presents the Keen Independent study team, which includes three minority- or women-owned firms (Lauber Consulting, The Davis Group and Customer Research International).

David Keen, Principal of Keen Independent, directed this study. He has conducted similar studies for about 80 cities and other public agencies throughout the country.

Figure 1-2.  
2015 Disparity Study team

Firm	Location	Team Leader	Responsibilities
Keen Independent Research LLC, prime consultant	Denver, CO Wickenburg, AZ Madison, WI	David Keen Principal Linsay Edinger Consultant	All study phases
Holland & Knight LLP (H&K)	Atlanta, GA	Keith Wiener Partner	Legal framework
Lauber Consulting, LLC	Madison, WI	Renée Lauber Principal	In-depth interviews, public outreach
The Davis Group	Sun Prairie, WI	Stan Davis Attorney	In-depth interviews public outreach
Customer Research International (CRI)	San Marcos, TX	Sanjay Vrudhula President	Availability telephone interviews
BBC Research & Consulting (BBC)	Denver, CO	Kevin Williams Director	Quantitative analysis of marketplace conditions

#### D. Analyses Performed in the Disparity Study

The study team performed research concerning MBE/WBE utilization and availability, local marketplace conditions and program options for the City as part of this disparity study.

**Legal analysis.** Keith Wiener of Holland & Knight analyzed legal issues surrounding MBE/WBE programs and small business programs. Chapter 2 summarizes this research and Appendix B discusses relevant court decisions.

#### **Collection of prime contract and subcontract information for past City public works contracts.**

The study team collected information about City public works contracts from January 2008 through December 2013. Appendix C outlines the data collection process and describes the prime contracts and subcontracts involved in City public works projects.

#### **Determination of relevant geographic market area and subindustries for City contracts.**

Through analysis of City contracts and the construction firms involved in those contracts, the study team identified the relevant geographic market area for the study (Dane County) and types of work involved in City public works contracts (29 areas of specialization). Keen Independent used this information to design the availability data collection effort and to define the local market for further research.

**Utilization analysis.** The study team identified \$331 million in City-funded public works contracts from 2008 through 2013. Keen Independent determined the share of those dollars going to minority- and women-owned firms (MBEs and WBEs). This analysis includes work performed by prime contractors, subcontractors and trucking firms, and the materials provided by suppliers. The

utilization totals for minority- or women-owned businesses included non-certified firms as well as companies certified as MBEs, WBEs or DBEs.

Because the City does not currently track race/ethnicity or gender ownership data for all firms utilized on these contracts, the study team primarily collected firm ownership information through phone calls to companies receiving City prime contracts and subcontracts. Keen Independent also examined small business participation in City public works contracts.

Chapter 4 reports the results of the utilization analysis.

**Availability and disparity analysis.** The study team compared the utilization of minority- and women-owned firms to what might be expected based on availability of minority-, women- and majority-owned firms to do that work. (“Majority-owned firms” are businesses not owned by minorities or women.)

**Database of firms available for City prime contracts and subcontracts.** The first step in the availability analysis was to build a database of firms available to perform City public works prime contracts and subcontracts. Although the City maintains a list of firms it has prequalified for public works contracts, Keen Independent built an independent list of available firms as part of this study. This independence from a City list is important because the availability analysis generates a benchmark to evaluate how well the City is doing to involve minority- and women-owned businesses in its contracting. Because the prequalification process might be a barrier to minority- and women-owned firms or small businesses in general, prequalified firms should not form the sole benchmark to determine whether the City underutilizes MBEs and WBEs.

To build this availability list, the study team attempted to contact each of the companies in 29 construction subindustries in Dane County (including home-based businesses). There were 1,381 such firms with working phone numbers, and the study team was able to successfully contact 696 of them. After answering questions about the types of work they perform and whether they were qualified and interested in City public works prime contracts or subcontracts (or trucking or materials supply) 145 firms were included in the final availability database for the study. Results are summarized in Chapter 3 and explained in detail in Appendix D.

**Availability benchmark.** Keen Independent used this availability database to determine the relative number of MBEs, WBEs and majority-owned firms available for each City public works prime contract and subcontract from 2008 through 2013. After conducting availability analyses for each specific prime contract and subcontract, the study team dollar-weighted those results. This “dollar-weighted” overall availability forms the benchmark used in the disparity analysis (see Chapter 3 and Appendix D).

**Disparity analysis.** The disparity analysis for minority-owned firms compares the percentage of dollars going to MBEs with what might be expected from the results of the dollar-weighted availability analysis. For example, if MBEs received 1 percent of City contract dollars but the availability analysis indicated that 2 percent should have gone to minority-owned firms, there would be a disparity between the utilization and availability of MBEs in City public works contracts. The study team performed the same type of analysis for white women-owned firms. Chapter 4 presents results.

**Evaluation of the City's SBE Program.** Since the City's SBE Program applied to most of the City-funded public works contracts, Keen Independent was able to evaluate the success of the SBE Program from the results of the disparity analysis in Chapter 4.

**Analysis of marketplace conditions.** The Keen Independent study team examined data concerning pathways to construction business ownership and success, access to capital and other information about the Madison area construction marketplace. The information includes:

- Any evidence of barriers for minorities and women to enter and advance in their careers in the local construction industry (Appendix E);
- Any differences in rates of business ownership in the local construction industry (discussed in Appendix F);
- Access to business credit, insurance and bonding (Appendix G); and
- Any differences in business success in the local marketplace (Appendix H). (Appendix I describes data sources for these analyses.)

Chapter 3 summarizes research results for these topics.

**Qualitative information.** Lauber Consulting and the Davis Group conducted in-depth, in-person interviews with minority, female and white male business owners. They also interviewed trade associations (40 total in-depth interviews of businesses, trade associations and other groups). The study team also analyzed complaints firms made with the City since 2008.

In addition, Keen Independent reviewed public input related to the draft report (discussed below).

Chapter 3 summarizes these results and Appendix J provides analyses of interview information by topic. The marketplace information was also used when evaluating program options (see Chapter 5).

**Review of current and potential programs.** Chapter 5 of the report summarizes study results and analyzes different options for the City to address barriers for minorities and women and MBE/WBEs identified in the study.

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

The City of Madison distributed the draft Public Works Disparity Study report for public comment. The City held public meetings about the draft report on March 4 and 5, 2015. The public had the opportunity to provide feedback at those meetings and by submitting written comments. Seventeen people representing interested parties attended the public meetings. Four written comments were submitted during the review period.

Keen Independent reviewed feedback and comments before preparing the final 2015 Disparity Study report in spring 2015. The final report summarizes public comments in Appendix J. The City of Madison also reviewed comments as it considers actions to take based on the study.

## CHAPTER 2.

### Legal Issues for Race- and Gender-based Programs

Madison and other cities adopted minority and women business programs for public contracting in the 1970s and 1980s. In 1989, the U.S. Supreme Court established substantial limitations on the ability of state and local governments to have MBE programs or any other programs benefitting a group based on race. Legal restrictions also apply to gender-conscious programs.

The 1989 U.S. Supreme Court decision in *City of Richmond v. J.A. Croson Company*<sup>1</sup> held there are only certain limited permissible reasons for a local government to have a race-conscious program, and set specific conditions for such programs:

1. A city such as Madison must establish and thoroughly examine evidence to determine whether there is a *compelling governmental interest* in remedying specific past identified discrimination or its present effects; and
2. A city must also ensure that any program adopted is *narrowly tailored* to achieve the goal of remedying the identified discrimination.

These two requirements must both be satisfied to meet the U.S. Supreme Court's *strict scrutiny* standard of review for race-conscious programs. Many cities, including Madison, eliminated their MBE programs after the *Croson* decision. Appendix B discusses how courts have applied the strict scrutiny standard when evaluating the legality of race-conscious programs.<sup>2</sup>

Disparity studies examine whether there is a disparity between the utilization and availability of minority- and women-owned firms in a city's contracting, which is key information in determining whether there is evidence that race or gender discrimination affects a city's contracting. Because the U.S. Supreme Court held that a city could take action if it had become a passive participant in a system of racial exclusion practiced by elements of the local construction industry, local marketplace conditions are also examined.

There are a number of factors used to determine whether a program is narrowly tailored, including consideration of whether workable "race-neutral measures," such as the City's SBE Program, are sufficient to remedy the identified discrimination. This is a reason why the study team analyzed whether or not there was underutilization of minority- and women-owned firms in City contracting with the SBE Program in place. The study team examined other neutral measures as well.

Cities not meeting the standard for defensible MBE programs can still enact small business assistance programs as long as race or gender is not considered in the eligibility for the program or as a factor in the award of contracts. Madison's SBE Program is one example of a neutral measure.

Madison also follows state and federal requirements to apply MBE/WBE or DBE programs for certain state- or federally-funded contracts. Analysis of these programs was not part of the study.

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<sup>1</sup> *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989). See Appendix B for thorough discussion of the legal issues.

<sup>2</sup> Certain Federal Courts of Appeal, although not the Seventh Circuit, apply the "intermediate scrutiny" standard to gender-conscious programs. Appendix B describes the intermediate scrutiny standard in detail.



## **CHAPTER 3.**

# **Local Marketplace Conditions and Availability of Minority- and Women-owned Firms**

The Keen Independent study team examined quantitative and qualitative information about the Dane County construction marketplace, paths to business ownership within the local industry and the availability of minority- and women-owned businesses to work on City public works contracts. The Chapter also summarizes information about the relative success of minority- and women-owned construction firms in the local marketplace.

Chapter 3 draws upon quantitative information from Appendices E, F, G and H and in-depth interview results from Appendix J. These appendices provide much more information than is summarized here.

There are five parts to Chapter 3:

- A. Participation of minorities and women in the Dane County construction industry;
- B. Minority- and women-owned construction businesses in Dane County;
- C. Dollar-weighted availability of MBE/WBEs for City public works contracts;
- D. Relative success of minority- and women-owned firms in the local marketplace; and
- E. Summary of marketplace conditions and availability of minority- and women-owned firms.

### **A. Minorities and Women in the Dane County Construction Marketplace**

About 2 percent of businesses related to public works construction contracting in Dane County are owned by racial and ethnic minorities.<sup>1</sup> About 7 percent of public works contracting businesses are owned by non-minority women. Keen Independent conducted telephone interviews with local construction businesses to develop these statistics.

Minority residents comprise 15 percent of the workforce of Dane County and that women are 49 percent of the local workforce. There are many reasons why the relative number of minority- and female-owned construction businesses does not match the Dane County workforce. As explained in this chapter, there is evidence that racial, ethnicity and gender-specific barriers in the path to business ownership are one factor. This is important background information to understand before examining the utilization of minority- and women-owned firms in City public works contracts (the subject of Chapter 4).

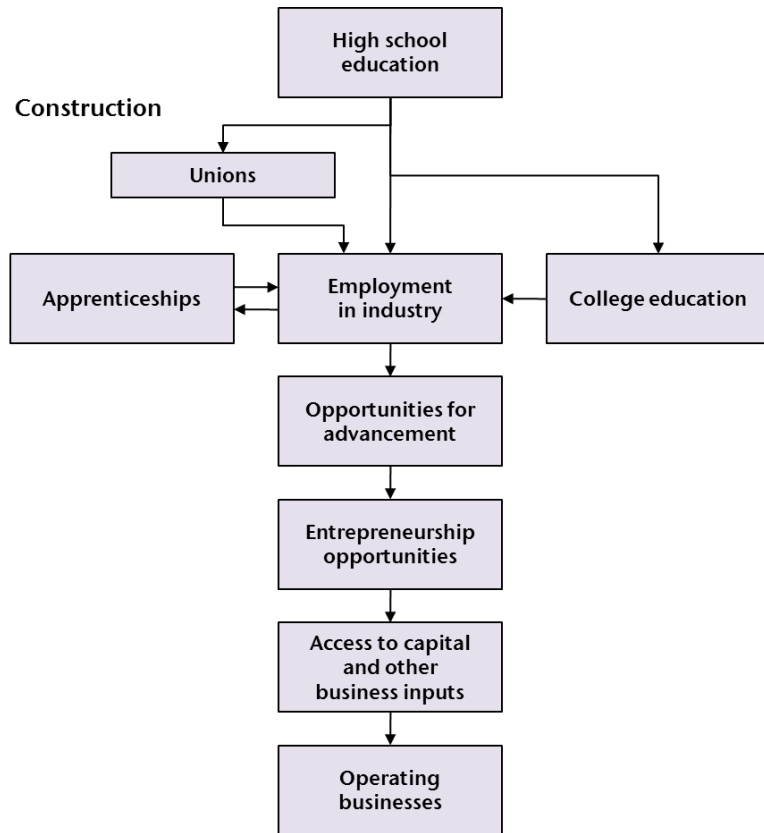
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<sup>1</sup> Most of the City of Madison public works dollars go to construction businesses in Dane County (90%). Therefore, analysis of the local construction industry focused on Dane County (inside and outside of the City of Madison).

**Paths to entry, advancement and business ownership in the construction industry.** Business ownership typically results from an individual entering an industry as an employee and then advancing within that industry to the point where he or she could become a business owner. Construction business owners and trade association representatives interviewed in the Madison area said that most owners first work in the industry and “worked their way up the ladder,” sometimes for family construction businesses and sometimes for other companies (see Appendix J).

This path involves many steps in the education and working life of an individual, as shown in Figure 3-1. Appendix E of this report describes in detail the role of each step in this figure.

Figure 3-1.  
Model for studying entry and business ownership for the construction industry



Source:  
Keen Independent Research.

**Minorities and women among the pool of potential construction business owners in Dane County.** Review of the path to construction business ownership begins by analyzing the relative number of minorities and women in the Dane County working age population and its construction workforce.

**Non-construction workforce living in Dane County.** As a starting point, the study team examined the racial, ethnic and gender representation among people in the non-construction workforce who live in Dane County. Figure 3-2 shows the non-construction workforce living in Dane County by race and ethnic group and gender based on the most current data at the time of this report.

Figure 3-2.  
Demographics of workers in construction and non-construction industries, 2008-2012

Note:

All self-identified Hispanics (based on the Census HISPAN variable) were considered Hispanic American, regardless of any other race or ethnicity identification.

Source:

Keen Independent Research study team from 2000 U.S. Census 5% sample and 2008-2012 ACS Public Use Microdata samples. The raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Dane County	Construction industry	Non-construction industries
<b>Race/ethnicity</b>		
African American	2.8	4.7
Asian Pacific American	1.9	3.6
Subcontinent Asian American	0.0	1.2
Hispanic American	6.8	5.2
Native American	0.5	0.6
Other minority group	0.0	0.0
<b>Total minority</b>	<u>12.0 %</u>	<u>15.2 %</u>
Non-Hispanic white	88.0	84.8
<b>Total</b>	<u>100.0 %</u>	<u>100.0 %</u>
<b>Gender</b>		
Female	10.1 %	50.4 %
Male	89.9	49.6
<b>Total</b>	<u>100.0 %</u>	<u>100.0 %</u>

Minorities as a percent of total non-construction workforce nearly tripled between 1990 (5.4%) and 2008-2012 (15.2%). The Latino workforce grew rapidly, but so did the relative number of African American and Asian American workers. Overall, Hispanic Americans, African Americans and Asian Americans each represent about one-third of the minority non-construction workforce in Dane County.

The gender composition of the non-construction workforce has remained constant since 1990. Women account for about half of the non-construction workforce.

**Construction workforce.** Nationally, the representation of minorities in the construction workforce is very similar to that of the overall workforce.<sup>2</sup> However, in Dane County, racial and ethnic minorities were 12 percent of the construction workforce in 2008-2012, less than representation in

<sup>2</sup> The labor force consists of the civilian labor force (employed and unemployed) as well as active duty members of the U.S. Armed Forces. Civilians 16 years and older who are not classified in the labor force include students, homemakers, retired workers, seasonal workers interviewed in an off season who were not seeking work, persons doing incidental unpaid family work of less than 15 hours and the institutionalized population (see [http://www.census.gov/acs/www/Downloads/data\\_documentation/SubjectDefinitions/2010\\_ACS/SubjectDefinitions.pdf](http://www.census.gov/acs/www/Downloads/data_documentation/SubjectDefinitions/2010_ACS/SubjectDefinitions.pdf) for more information).

the non-construction workforce (15.2%). This gap has existed at least since 1990, and was even more severe in 2000 when minorities only accounted for 5 percent of the construction workforce, less than one-half of minority representation in the overall workforce (10.6%).

Latino construction workers accounted for most of the increase in minority representation in the Dane County construction workforce since 1990. The Latino construction workforce grew from less than 1 percent in 1990 to 6.8 percent in 2008-2012. Overall, Hispanic Americans represent just over one-half of the minority construction workforce. African Americans represent about one-fourth and Asian Americans represent about one-in-six minority workers in construction.

The gap between representation in construction workers and non-construction workers living in Dane County is highest for African Americans. African Americans are only 2.8 percent of the construction workforce compared with 4.7 percent of the non-construction workforce. Asian Americans are also underrepresented in the local construction workforce.

In 2008-2012, women accounted for about 10 percent of the local construction workforce, which includes office staff. The size of the gap between representation of women in construction and other industries has existed for many years, and is similar to what is found for the nation. Limiting the analysis to specific trades (and not including office staff), women account for only 1 to 4 percent of workers in most trades.

**Construction trades.** There appears to be substantial differences in opportunities for minorities and women in construction work based on specific construction trades. Although there is not a large enough sample of workers by trade in the ACS data for the Madison area, data from Wisconsin for 2008-2012 show that minorities (mostly Latinos) comprise almost one-half of people working as drywall installers and 20 percent of cement masons but only 5 percent of carpenters in the state. (In 2008-2012, minorities were 9 percent of the statewide construction workforce.)

The growth in minority employment in construction has been concentrated in certain trades and among lower skill workers. Trades such as drywall, roofing, cement masonry and painting had minority representation of only about 10 percent statewide as recently as 2000, but each of these trades now has at least 16 percent minority workers. Trades such as carpentry and electrical work have seen much smaller changes.

There has been very low representation of women in most construction trades for many years (typically 4 percent or less of workers in a trade). One of the commenters on the draft report pointed out that contractors complain about the limited availability of women in the trades. The Southwest Area Construction Apprentice Snapshot Report for March 1, 2015, produced by the Department of Workforce Development for the Wisconsin Department of Transportation, provides a point-in-time count of active and unassigned construction apprentices. The report shows that 12.4 percent of current active apprentices in Dane County were minority and 2.8 percent were female.

**Management ranks.** None of the minorities in Dane County working in construction in the ACS 2008-2012 sample were managers. In contrast, 8 percent of non-minorities in construction were managers. Keen Independent found similar disparities in 1990 and 2000 for Dane County.

The percentage of local women working in the construction industry who were managers was similar and not statistically different from the percentage of men in the construction industry who were managers (6.6% and 7.4%, respectively) in 2008 through 2012. Census data indicate a substantial increase in representation of women as managers since 2000.

**Qualitative information about barriers to employment.** A number of minority, female and white male business owners and trade association representatives indicated that there was not a level playing field for minorities and women to obtain jobs and advance within the local construction industry. There were reports that worksites have a tone of racism and bias and that the construction industry stands out as not being welcoming to minorities and women. One interviewee discussed how racial slurs are directed at African American working on job sites. The qualitative information is consistent with the disparities for minorities and women in employment in the industry presented above.

**Academic research concerning the effect of race- and gender-based discrimination on employment in construction.** Many academic studies indicate that race- and gender-based discrimination affects opportunities for minorities and women in the construction industry in the United States.

- The literature concerning women in construction trades has identified substantial barriers to entry and advancement due to gender discrimination and sexual harassment (see Appendix E of this report).
- Some researchers blame the importance of social networks for the high degree of ethnic segmentation in the construction industry, as explained in Appendix E. They argue that African Americans and other minorities faced long-standing historical barriers to entering the industry, because they have been unable to integrate themselves into traditionally white social networks that exist in the construction industry (see Appendix E).
- Some researchers have identified racial discrimination by trade unions that has historically prevented minorities from obtaining employment in skilled trades (see Appendix E).
- However, more recent research suggests that the relationship between minorities and unions has been changing. As a result, historical observations may not be indicative of current dynamics in construction unions.

**Conclusions from the analysis of entry and advancement in construction.** Even though the demographics of this industry are rapidly changing, there is evidence that minorities and women in Dane County continue to face barriers to entry and advancement within the construction industry, which have persisted over at least the last two decades.

## **B. Minority-and Women-owned Construction Businesses in Dane County**

Keen Independent examined many types of information about construction business ownership in Dane County, from very general statistics to data specific to public works construction businesses. This discussion begins with analysis of minority-owned companies. Data sources are:

- Population data from the U.S. Bureau of the Census;
- Business establishment data from the Survey of Business Owners;
- Construction business data from Dun & Bradstreet;
- Keen Independent survey of businesses qualified and interested in City construction projects; and
- Construction firms the City has prequalified for public works contracts.

**Population data from the U.S. Bureau of the Census.** U.S. Bureau of the Census captures information about business ownership in its different population surveys. Because ownership of even small, part-time businesses is counted, even if an individual has another job, these data present a very broad measure of business ownership. “Self-employment” in incorporated or unincorporated businesses is the measure used in these population surveys. Compared to other industries, construction has a relatively large number of self-employed business owners. In the 2008-2012 ACS data, about one in four construction industry workers in Dane County were self-employed business owners.

Based upon ACS data for 2008-2012, minorities were 7 percent of construction business owners in Dane County in 2008-2012. Because minorities comprised 12 percent of the construction workforce, there are substantially fewer construction businesses owned by minorities in Dane County than one might expect based on those working in the industry.

Women were 10 percent of the construction workforce in Dane County and about 8 percent of business owners in construction in 2008-2012. Therefore, fewer construction businesses are owned by women than one might expect based on the number of women in the construction industry.

Another way to look at business ownership is based on the percentage of people working in an industry who are self-employed. In 2008-2012, 15 percent of minorities in Dane County who worked in construction were self-employed compared with 24 percent of non-minorities. These disparities in business ownership rates have persisted in Dane County since at least 1990 and the 15 percent rate for minority business ownership in Dane County appears to lag behind the national rate for minorities (18% self-employment rate for construction).

In 2008-2012, about 19 percent of women working in the construction industry in Dane County were self-employed. The percentage of women who work in construction and are self-employed has doubled since 1990, narrowing the gap among self-employment rates of men and women in the industry. Self-employment among men in the construction industry in Dane County has changed little since 1990 (27% in 1990 and 25% in 2008-2012).

Business establishment data from the Survey of Business Owners. The study team also examined the most recent U.S. Census data for the Madison metro area from the Survey of Business Owners.<sup>3</sup> In 2007, about 5 percent of all businesses in the Madison metro area were minority-owned. Hispanic-owned businesses represented about 1 percent all businesses.<sup>4</sup>

Among construction businesses, only 1.5 percent of businesses were minority-owned. Hispanic-owned businesses accounted for about 1 percent of construction businesses.

Census population-based data show about 12 percent of the construction workforce are minority. Business ownership rates for minority workers in construction are substantially lower than for non-Hispanic whites (15% compared to 25%). Establishment-based data support these findings as less than 2 percent of construction businesses are minority-owned.

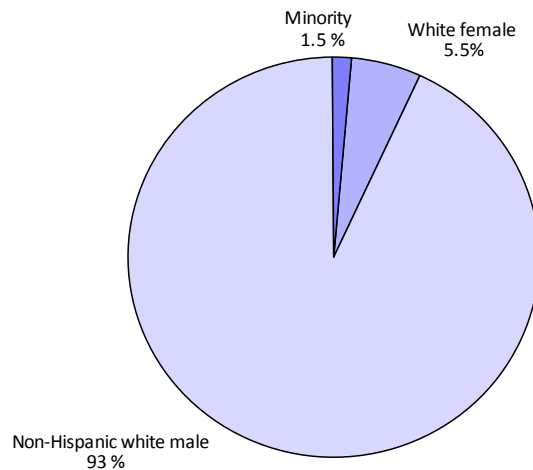
**Figure 3-3.**  
Survey of Business Owners data on ownership of construction businesses by race and ethnicity in Madison, 2007.

Note:

All firms with equal ownership between Hispanic and non-Hispanic were classified as non-Hispanic white.

Source:

Keen Independent Research study team from 2007 U.S. Census Bureau Survey of Business Owners. Data represent all firms classifiable by gender, ethnicity, race and veteran status, with or without paid employees.



The establishment data also show that about 28 percent of all businesses in the Madison metropolitan area in 2007 were women-owned. Among construction businesses, only about 6 percent were women-owned, all of which were white women-owned. These data are consistent with the population-based data that show women represent 8 percent of construction business owners.

**Construction business data from Dun & Bradstreet.** Keen Independent analyzed data for the construction industry from Dun & Bradstreet, which is the most current and comprehensive available source of information for individual businesses in the United States. D&B collects information about whether firms are minority- or women-owned.

Keen Independent’s analysis of the construction firms identified by Dun & Bradstreet in 2014 indicated that 1 percent of construction firms were minority-owned and that 3 percent were white women-owned, as shown in Figure 3-4 on the following page.

<sup>3</sup> For the 2007 Survey of Business Owners, the Madison, WI metropolitan statistical area includes Columbia County, Dane County and Iowa County, as delineated by the Office of Management and Budget.

<sup>4</sup> Each owner had the option of selecting more than one race and is included in each race selected. A Hispanic-owned firm may be of any race.

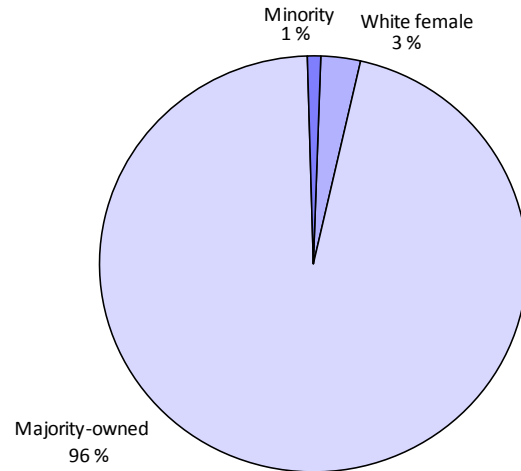
**Figure 3-4.**  
**Dun & Bradstreet data on ownership of construction businesses in Dane County, 2014.**

Note:

Data include all construction firms in Dane County with working phone numbers.

Source:

Keen Independent Research study team from 2014 Dun & Bradstreet database.



D&B counts established companies. D&B includes home-based companies and unincorporated businesses to provide a reasonably accurate picture of companies in operation within a community.

The number of construction firms identified in the D&B database is less than the number of construction firms identified in the 2007 Economic Census. While both the Dun & Bradstreet data and the Census data include home-based construction businesses, D&B requires substantive data on companies before they may be incorporated into their database. D&B counts establishments operating as stand-alone firms while Census data include people conducting construction work as a secondary occupation.

**Dun & Bradstreet data for public works-related firms.** Keen Independent also examined Dun & Bradstreet information for firms in construction subindustries related to public works contracting. For example, firms that primarily build single family or multifamily housing were not included (see Appendix D). After removing business listings that were found to have non-working phone numbers, Keen Independent found that 2 percent of public works-related firms in Dane County were minority-owned and that 3 percent were white women-owned. Figure 3-5 presents these results.

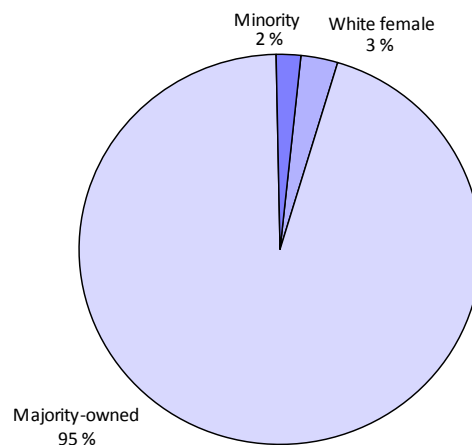
**Figure 3-5.**  
**Dun & Bradstreet data on ownership of public works subsector businesses in Dane County, 2014.**

Note:

Data include all firms in public works subsector in Dane County with working phone numbers.

Source:

Keen Independent Research study team from 2014 Dun & Bradstreet database.





**Keen Independent survey of businesses qualified and interested in City public works construction projects.** Keen Independent conducted telephone interviews with the firms discussed above to ask whether those firms were, in fact, qualified and interested in City of Madison public works contracts (as a prime contractor, subcontractor, trucking firm or materials supplier). Appendix D provides detailed information about the data sources, steps and results for the telephone survey.

In total, 145 companies indicated qualifications and interest in City public works contracts. Two percent of those businesses were minority-owned, very consistent with other results for Dane County construction firms. Seven percent of those companies were white women-owned, higher than found for other subsets of Dane County construction businesses.

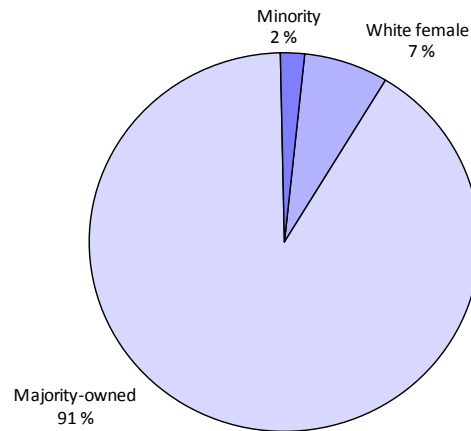
**Figure 3-6.**  
**Ownership of firms in Dane County**  
**available for City public works contracts,**  
**2014.**

Note:

Data include all firms indicating qualifications and interest in City public works projects.

Source:

Keen Independent Research study team from 2014  
Availability Telephone Interviews.



**Statistical models of business ownership rates.** Researchers have examined whether there are disparities in business ownership rates after considering certain personal characteristics of business owners such as education and age. Several studies have found that disparities in business ownership for women and minorities still exist across the country and by region even after accounting for such race- and gender-neutral factors.

The Keen Independent study team developed statistical models (“regression models”) that examined whether non-race and gender factors such as age and education could explain differences in business ownership rates. Because of the small size of the data set for Dane County, the study team used data for the state and controlled for a Dane County residence. Results showed that neutral factors did not explain disparities in business ownership rates for African Americans, Hispanic Americans and females in 2000. In other words, African Americans, Hispanic Americans and females working in construction in 2000 were less likely to own businesses than non-minorities and males with similar personal characteristics. Model results were mixed for 2008-2012.

**Analysis of business failure rates.** Another reason there may be relatively few minority-owned firms is higher failure rates for those firms compared with majority-owned firms. A 2010 U.S. Small Business Administration study analyzed business closure rates between 2002 and 2006 for minority- and non-Hispanic white-owned firms by state, including Wisconsin.

- About 39 percent of African American-owned firms that were operating in Wisconsin in 2002 had closed by the end of 2006, a higher rate than non-Hispanic white-owned firms (25%).
- Hispanic American- (29%) and Asian American-owned firms (30%) also had closure rates that were higher than that of non-Hispanic white-owned firms.

The results for Wisconsin are for all firms, not just construction firms, but national results for the construction industry show consistent results (see Appendix H).

In sum, the disparities in business ownership rates for minorities and females working in construction are substantial and some analyses for the local marketplace find that those disparities are related to race, ethnicity and gender rather than other personal characteristics. This is consistent with national research.

**Qualitative information about starting a construction business in Dane County.** Some business owners and trade association representatives in the Madison area reported that there were race and gender barriers to starting a business for minorities and women working in the local industry. One interviewee said that discrimination made minorities and women less likely to take on the risk of business ownership. One interviewee reported that some women business owners in contracting feared for their physical safety because of men on worksites who felt women did not belong on the construction site.

**Access to capital to start and operate a business.** One of the reasons behind relatively low business ownership rates and higher closure rates might be access to capital necessary to start a business and sustain its operation. Research has shown that on average, minority- and women-owned businesses have less start-up capital than majority-owned and male-owned businesses (see Appendix G).

There is evidence that minorities and women continue to face certain disadvantages in accessing capital that is necessary to start, operate, and expand businesses.

- Fewer minorities in Dane County own homes compared with non-Hispanic whites. African Americans, Hispanic Americans, and Native Americans who do own homes tend to have lower home values than non-Hispanic whites.
- High income Asian Americans and Hispanic Americans applying for home mortgages in Dane County have been more likely than non-Hispanic whites to have their applications denied. African American, Hispanic American, and Native American mortgage borrowers in Dane County have been more likely than non-Hispanic whites to be issued subprime loans.

- There is national evidence that African American, Hispanic American, Asian American and female business owners were more likely to have been denied business loan applications than similarly situated non-minorities.
- Study team research identified evidence of higher rates of business loan denials for African Americans and Hispanic Americans in the East North Central Region of the country after controlling for other factors. Statistical models also indicated that African American business owners were more likely to not apply for a loan due to fear of loan denial (after controlling for other factors).
- Among business owners who reported needing business loans, there is evidence that African Americans, Hispanic Americans and Asian Americans are more likely to forgo applying for loans due to fear of denial than similarly-situated non-minorities.

Madison area business owners and trade association representatives interviewed as part of this study indicated the importance of access to capital to start and operate construction businesses. Some interviewees reported continued barriers to business startup capital and access to business financing for minorities and women (see Appendix J).

Financial resources are needed to start businesses and to develop those businesses to the point they can work on public works contracts. Not only is capital needed to purchase equipment, but to cover expenses before being paid for work and to obtain bonding for public sector projects. Access to capital affects the size of projects firms can bid.

Interviewees reported that even established business owners with assets need to personally guarantee their business loans, which further demonstrates the importance of personal wealth to success in business. (Appendix J provides a detailed review of business owner and trade association comments.)

**Conclusions from the analysis of business ownership in construction.** The analysis of business ownership data shows that the percentage of construction businesses owned by minorities and women has increased over the past decade. However, business ownership rates for minorities and women remain lower than that of non-Hispanic whites and lower than one might expect given their respective representation in the construction workforce. Some differences persist after controlling for race- and gender-neutral factors affecting business ownership.

The most recent Census information on business closure rates for Wisconsin shows relatively high rates for firms owned by African Americans, Asian Americans and Hispanic Americans compared with non-minority-owned firms.

### C. Dollar-weighted Availability of MBE/WBEs for City Public Works Contracts

In addition to relatively small numbers of minority- and women-owned firms to participate in City public works contracts, those firms tend to be younger and bid on smaller contracts and subcontracts than majority-owned firms. MBEs and WBEs are also more likely to be in trades such as landscaping or trucking that do not account for a large share of public works contract dollars.

After controlling for firm specialization, bid capacity and whether they work as a prime contractor or subcontractor, one might expect about 0.1 percent of public works contract dollars to go to minority-owned firms and 2.5 percent to go to white women-owned firms (see Appendix D).

One of the results of this analysis was the length of time some local majority-owned public works contractors have been in business — about 25 percent of majority-owned firms started before 1970 (compared with only 7 percent of minority- and women-owned firms). In general, the longer a firm has been in business, the larger and more diversified the firm and the bigger the projects it bids on (see Appendix H). Because of both pre-1970 or post-1970 race and gender discrimination in the local area, or other factors, there are relatively few minority- and women-owned firms today of that longevity.

### D. Relative Success of Minority- and Women-owned Firms in the Local Marketplace

Information about the relative success of minority- and women-owned construction firms in the local marketplace is also important to this study.

**Quantitative information.** Overall, minority- and women-owned construction firms have lower revenue than non-minority and male-owned firms in the local area.

- For example, U.S. Bureau of the Census data for 2007 indicate that average revenue of minority-owned firms is only 56 percent of the average for majority-owned firms. Women-owned firms had average revenue that was just 60 percent of male-owned firms.
- Census of Population data for 2000 and American Community Survey Data for 2008-2012 also show large disparities in earnings for minority and female construction firm owners. After controlling for factors such as age and education, race and gender disparities remain.

Appendix H provides additional information about success of minority- and women-owned businesses in the local construction marketplace.

**Qualitative information.** Interviews with business owners and trade association representatives indicated disadvantages for small businesses in general in the local marketplace, from accessing financing to some evidence of race and gender discrimination affecting opportunities for minority- and women-owned construction businesses in the Madison area. One interviewee said that there are very few minority-owned firms in the community now and those that exist are small and trying to get a footing in a marketplace where they must compete against much larger firms. “The larger firms have better capital, networking ... and connections to get contracts.”

Interviewees discussed the importance of networks and some said that a “good ol’ boy network” exists that affects opportunities for minority- and women-owned firms. Others said that there was not such a network, but that known companies have an advantage getting work over unknown businesses. Appendix J provides a detailed analysis of this information.

### **E. Summary of Marketplace Conditions and Availability of Minority- and Women-owned Firms**

There is evidence of barriers to entry into the Dane County construction industry for minorities and women. There are also fewer minority and female construction business owners than what one might expect based on representation of minorities and women among construction workers. Study team research found evidence that some of these barriers are race-, ethnicity- and gender-specific.

As a result, minority- and women-owned firms comprise a relatively small number of firms available for City public works contracts. And, relatively few of those minority- and women-owned firms bid on the largest prime contractors or subcontracts and are in construction specializations that account for the most dollars of City work. Analysis of the local construction marketplace shows that minority- and women-owned firms in the local marketplace generally have lower revenues than majority-owned firms.

Chapter 4, which follows, compares the City’s utilization of minority- and women-owned firms in public works contracts with what one might expect based on the current availability of MBEs and WBEs to perform this work.

## **CHAPTER 4.**

### **Utilization and Disparity Analyses for Madison Public Works Contracts**

Keen Independent examined the participation of minority- and women-owned firms on City public works contracts from 2008 through 2013. Appendix C explains the methods used to collect and analyze these data.

There were 600 City-funded public works contracts awarded during this time period totaling \$331 million. The study team attempted to exclude from this analysis those City projects with state or federal funding (see Appendix C). In total, the study team examined 2,834 prime contracts and subcontracts on those City-funded public works contracts.

The SBE contract goals program applies to City-funded public works contracts of more than \$100,000. For contracts \$100,000 and below, the City encourages participation of SBE prime contractors. From 2008 through 2013, the study team identified \$317 million in City-funded contracts with SBE goals and \$14 million without SBE contract goals.

#### **A. MBE and WBE Utilization on City Public Works Contracts**

The City of Madison does not currently track utilization of minority- and women-owned firms on a comprehensive basis. The City has some information about minority- and women-owned firms that are not certified as MBE/WBEs or DBEs, but the study team had to develop information about ownership status from other sources, including contacting individual firms. City staff reviewed coding of individual firms before the study team analyzed MBE/WBE utilization.

The following presents best estimates of the participation of minority- and women-owned firms.

**MBE utilization.** Minority-owned firms received about \$6 million in City-funded public works contract dollars from 2008 through 2013, including subcontracts, trucking work and materials supplies. MBE utilization was 1.9 percent of the \$331 million in City-funded public works contract dollars (see Figure 4-1 on the following page).

Keen Independent examined trends in annual MBE utilization from 2008 through 2013. MBE participation by year varied from 1 percent in 2009 to 3 percent in 2013.

**WBE utilization.** White women-owned firms obtained about \$11 million in 2008-2013 City public works contracts. WBE utilization was 3.6 percent of total City-funded public works contracts.

WBE participation has varied somewhat by year from 2008 through 2013. WBE utilization was highest for contracts awarded in 2010 (6%) and lowest for contracts in 2013 (2%).

## B. SBE Utilization on City Public Works Contracts

**Study team analysis of SBE utilization.** The study team determined that certified SBEs received \$23.3 million in City public works contract dollars during the study period, or 7.1 percent of the contract dollars. This estimate is higher than the City previously reported, as explained below. Figure 4-1 summarizes these results.

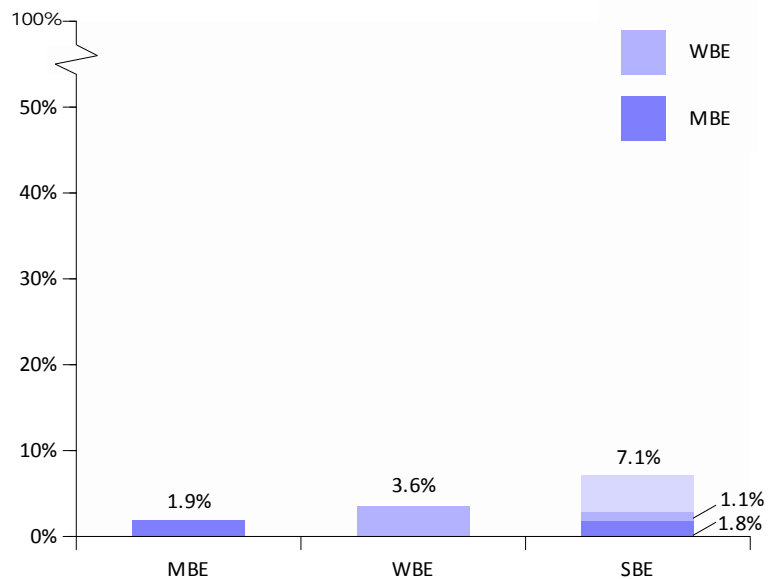
Figure 4-1.  
MBE, WBE and SBE share of prime contract/subcontract dollars for City-funded public works contracts, 2008-2013

Note:

Number of contracts/subcontracts analyzed is 2,834

Source:

Keen Independent from data on City of Madison public works contracts 2008-2013.



**Portion of SBE participation that was MBE/WBEs.** Majority-owned SBEs received \$13.9 million out of the \$23.3 million in SBE participation on City-funded public works contracts. This indicates that MBE/WBEs together received two-fifths and majority-owned firms received three-fifths of dollars going to SBEs. The right-most bar in Figure 4-2 shows the distribution of SBE dollars to majority-owned firms (the light part of the bar) and to minority- and women-owned firms (1.8% to MBEs and 1.1% to WBEs).

**Portion of MBE/WBE participation that is certified SBEs.** Keen Independent also analyzed whether minority- and women-owned firms receiving public works contract dollars were certified as SBEs. This provides one measure of the possible impact of the SBE Program on MBE and WBE opportunities on City public works contracts.

- Firms certified as SBEs accounted for \$5.9 million out of the \$6.2 million total participation of minority-owned firms in City-funded public works contracts. Based on these data, 93 percent of the MBE participation on City-funded contracts was minority-owned firms certified as SBEs.
- White women-owned firms certified as SBEs accounted for nearly one-third of total WBE participation (\$3.6 million out of \$11.7 million total WBE utilization).
- Of the total amount going to MBE/WBE businesses certified as SBEs, minority-owned firms obtained more contract dollars (\$5.9 million) than white women-owned firms (\$3.6 million).

**Trends in SBE participation.** Based on study team analyses, SBE utilization grew from 6 percent of City-funded public works contract dollars in 2008 to 9 percent in 2013.

**City reports of SBE utilization on contracts with SBE goals.** The City's past analyses of SBE participation on public works contracts with SBE goals indicate \$16 million of SBE participation in \$290 million of public works contracts from 2008 through 2013, or about 6 percent SBE utilization.

Refinements in data collection and analysis account for the higher estimates of SBE participation in the disparity study than the City previously reported, as explained in Appendix C.

### **C. Disparity Analysis**

Keen Independent compared the MBE and WBE utilization results discussed above to the utilization that might be expected for minority- and women-owned firms based on the availability analysis. (It was not necessary to perform a disparity analysis for SBE firms.)

**Minority-owned firms.** The 1.9 percent utilization of minority-owned firms on City-funded public works contracts exceeded what might be expected based on the availability of local area minority-owned firms to perform this work. There is no disparity between the utilization and availability of minority-owned firms in City-funded public works contracts. This is largely due to the City's SBE Program.

As presented in Chapter 3, minority-owned firms account for 2 percent of the firms available for City public works contracts interviewed as part of the availability analysis. After adjusting for the types of work performed, whether firms bid on prime contracts or subcontracts, and the size of contracts firms bid on, the percentage of contract dollars that might be expected to go to MBEs is only 0.1 percent. (Appendix D discusses the availability analysis.)

Figure 4-2 compares MBE utilization and availability on City-funded public works contracts.

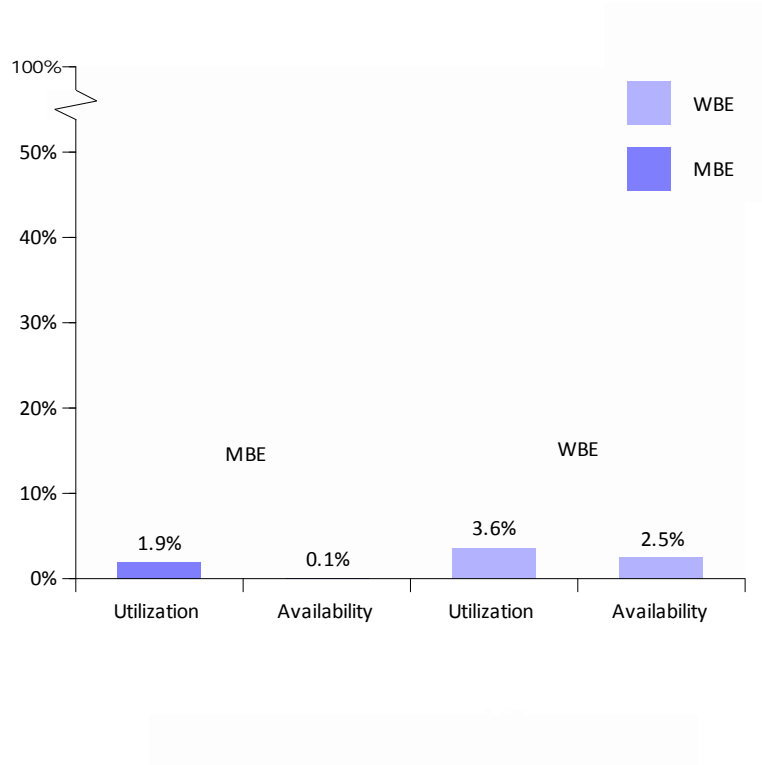


**White women-owned firms.** As with MBEs, the 3.6 percent utilization of white women-owned firms on City-funded public works contracts is higher than the 2.5 percent utilization that might be expected based on the availability of local area WBEs for these contracts. There is no disparity between the utilization and availability of white women-owned firms in City-funded public works contracts. As with MBEs, this may be due to the City’s SBE Program. Figure 4-2 shows these results as well.

**Figure 4-2.**  
**MBE and WBE utilization and availability on City-funded public works contracts, 2008-2013**

Note:  
 Number of contracts/subcontracts analyzed is 2,834.

Source:  
 Keen Independent from data on City of Madison public works contracts 2008-2013.



## **CHAPTER 5.**

### **Conclusions and Actions for City Consideration**

The study team concludes that the SBE Program has encouraged MBE and WBE utilization to the point that there were no disparities between the utilization and dollar-weighted availability of minority- and women-owned firms on City-funded contracts. However, this is not because of a high MBE and WBE participation in City-funded public works contracts — it is because of low current availability of minority- and women-owned firms for this work after considering the types and sizes of prime contracts and subcontracts.

Therefore, it appears that the SBE Program alone does not create a level playing field for minority- and women-owned firms in City public works contracting. The study identified barriers for minorities and women in the local construction industry that go beyond what an SBE contracting goals program can effectively address.

This chapter outlines eight areas of potential action for City consideration:

1. Further improving the SBE contract goals program;
2. Further building an SBE prime contracting part of the Program;
3. Creating a business development component to the SBE Program, including mentorship and a City SBE coach;
4. Minimizing barriers in public works prequalification;
5. Expanding communication of City bid opportunities;
6. Improving prime contractor payment of subcontractors and relaxing retainage policies;
7. Supporting local technical assistance, bonding and financing programs, and creating new programs when necessary; and
8. Supporting local efforts to encourage minorities and women to enter, receive training and obtain jobs in the construction industry.

We begin this chapter by presenting steps the City might consider to improve the SBE Program and other aspects of City contracting.

#### **A. Assisting MBE/WBEs and other Small Business in City Public Works Contracting**

The City has many opportunities to further improve its SBE Program and promote inclusion of minority- and women-owned firms in its public works contracting.

**1. Further improving the SBE contract goals program.** Although the SBE Program appears to somewhat increase participation of minority- and women-owned firms, the City might consider ways to further strengthen the program.

a. **Respond to industry and community concerns regarding program operation.** Some business owners and trade association representatives interviewed in the study were supportive of the City’s SBE Program, but others were critical of the Program.

- Some prime contractors reported being opposed to having to subcontract work out that they might have performed themselves.
- Some prime contractors said that the City sets SBE goals on certain projects that were unrealistically high, and that in industries such as road work, available SBE subcontractors were often limited to fields such as trucking and landscaping.
- One interviewee said that prime contractors are having problems getting bids from subcontractors “because there is just not the capacity out there.” He explained that some subcontractors have not fully recovered after the Great Recession. Another prime contractor complained about the difficulty meeting SBE goals on City projects, reporting that the SBE directory was not well-maintained and that the SBEs he calls on the list either do not answer the phone or say that they do not work in Madison.
- Other interviewees were skeptical that the SBE Program would help minority-owned firms, and anticipated that the benefits would go to other types of businesses. “Probably good for white guys with assets” was a typical comment. One minority business owner observed that keeping minority-owned firms in business was the key issue, and that firms might be out of business before they could benefit from the Program.

These are valid perspectives that the City should consider as it continues to improve its operation of the SBE Program. Design and operation of the Program must be flexible and consider market realities.

And, although the Program did assist minority-owned companies in recent years, whether it continues to have that positive impact must be closely monitored. Study team experience cautions that the benefit of small business programs for minority-owned companies can erode over time. The SBE Program alone does not create a level playing field for minority- and women-owned firms in City public works contracting. The City can do more to promote equity in the contracting marketplace in which it spends its tax dollars.

Once the City reviews the results of the disparity study, receives public input and considers other relevant information, it should clearly state its overall plan to promote equity in contracting to different stakeholder groups and individual businesses. It needs to reinforce in the community that strong efforts are needed to promote equity within the industry, and that the City is a partner in this effort with its contractors and many other groups.

**b. Monitor concentration of SBE participation in only a few firms.** Keen Independent analyzed utilization of individual companies on City-funded public works contracts that were certified as SBEs during at least some years of the 2008 through 2013 study period.

- A total of 72 SBE-certified firms received work.
- 14 different SBE-certified MBEs received work and two firms — Astle Trucking (\$2.7 million) and JR's Construction and Landscaping (\$1.9 million) — accounted for most of the \$5.9 million in total work going to minority-owned firms that are SBE-certified.
- 16 different SBE-certified WBEs received work and two firms — Bullet Transit Company (\$1.3 million) and Economy Cement (\$0.8 million) — received most of the \$3.6 million going to those companies.
- The 42 majority-owned SBE-certified firms were awarded contracts in a greater number of industries than SBE-certified minority- and women-owned firms. Dane County Contracting (\$4.5 million) and Neil Schlough Trucking (\$1 million) were the majority-owned SBEs that obtained the most work on City-funded public works contracts.

In total, the study team identified 543 firms that participated in City-funded public works contracts from 2008 through 2013. Although the SBE contractors identified above received the most public works dollars of any SBE-certified firms, their utilization was still small compared with non-SBEs. Overall, from 2008 through 2013, 47 different businesses received at least \$1 million in work as part of City-funded public works contracts and only four were SBEs.

The City should monitor the concentration of SBE participation in a few firms and work to encourage utilization of newly-certified SBEs and other firms that may not have had opportunities to develop relationships with prime contractors as part of the Program. Many of the potential initiatives below might accomplish this objective.

**c. Encourage small businesses to become SBE-certified and participate in public works contracting.** The City might further promote SBE certification to local contractors. It should review whether firms that appear to meet the certain SBE certification requirements (including firms already certified as DBEs) have also applied for City SBE certification.

Many interviewees commented that the SBE certification process is time consuming or difficult. Some prime contractors said that they have small businesses as subcontractors that are unwilling to seek certification because of the paperwork involved. Although they are using small businesses as subcontractors, those prime contractors receive no credit for doing so.

Although it should retain a gross receipts limit and the personal net worth limit (and thus must require documentation to ensure that the firm qualifies), the City should review the certification application to see if it could be streamlined in other ways. It might provide more staff resources to explain the certification process. The City might also identify resources in the community that could assist firms with SBE certification at no or low cost. Finally, a new “SBE coach” position, discussed below, might help remove barriers to certification.

**d. Improve data collection and reporting of SBE participation on City-funded contracts.** In the course of completing the study, Keen Independent worked closely with Madison Department of Civil Rights staff to improve existing data on City-funded public works contracts and the firms participating in those contracts. As a result, study team analysis of SBE participation found it to be higher than previously reported by the City.

As it goes forward, Public Works and Civil Rights staff should build procedures to be able to more consistently identify City-funded contracts and record SBE participation, including SBEs beyond those used to meet contract goals by tracking this data electronically.

**e. Monitor SBE participation, by race, ethnicity and gender.** Keen Independent’s research found that most SBE participation among minority-owned firms was by African American- and Native American-owned firms, and that there was minimal utilization of other minority-owned SBEs (Hispanic American-, Subcontinent Asian American- and Asian-Pacific American-owned firms).

As the SBE Program continues to grow, the City should monitor and report overall SBE participation by race, ethnicity and gender ownership of the SBE-certified firm and for all firms (SBEs and non-SBEs). The City should build capabilities to report that information for all minority- and women-owned firms, not just those that are certified as MBE/WBEs or DBEs. This will require the City to collect race/ethnicity and gender ownership information for all companies participating in its public works contracts, and to regularly update these data.

The City might also report MBE, WBE and SBE participation by subindustry. Keen Independent examined the concentration of MBE and WBE participation among different types of work on City-funded public works contracts. As shown in Figure 5-1 on the following page, much of the utilization of MBEs and WBEs that were certified as SBEs was in landscaping and trucking.

The subindustry distribution of work also reflects the SBEs that receive the most public works contract dollars, so the issue may be high use of individual firms as well as concentration in specific fields.

If participation of SBE-certified minority- and women-owned firms continues to be concentrated in fields such as trucking and materials supply, the City might need to consider program changes so that the program benefits MBEs and WBEs across the construction industry.

The City might also track success of individual SBE businesses over time, including minority- and women-owned firms. One person interviewed in this study suggested that the measure of success of City efforts is whether businesses that become SBE-certified are still around in five years.

Figure 5-1.  
 MBE and WBE City public works contract dollars, by subindustry, 2008-2013

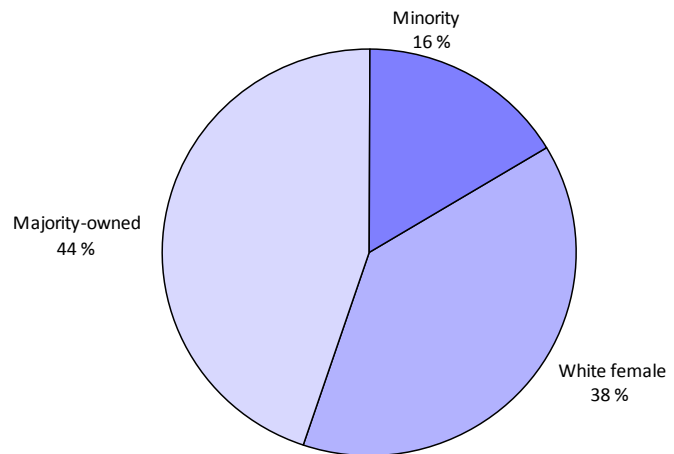
Type of work	SBE dollars (millions)			Total dollars
	MBE	WBE	Majority	(millions)
General road construction	\$ 0.0	\$ 0.0	\$ 2.3	\$ 95.9
Asphalt paving	0.0	0.0	0.0	54.9
Water and sewer lines	0.0	0.0	1.5	23.2
General public building construction	0.1	0.0	0.0	19.1
Concrete flatwork (sidewalk, curb, gutter and paths)	0.0	0.7	0.2	18.3
Electrical work	0.1	0.1	1.5	15.8
Plumbing and HVAC	0.0	0.0	0.0	12.7
Other concrete work	0.0	0.1	0.1	11.4
Landscaping and related work	1.9	0.4	1.9	10.9
Trucking and hauling	2.7	2.0	4.2	9.8
Culverts, drainage and water retention	0.0	0.0	0.1	8.7
Excavation, demolition and other site prep	0.1	0.0	0.5	7.1
Other building construction related	0.0	0.1	0.0	6.7
Roofing, siding and sheet metal work	0.0	0.2	0.0	5.3
Water and sewer plants	0.0	0.0	0.3	5.2
Construction materials supply	0.2	0.0	0.0	2.9
Waterways and dams	0.0	0.0	0.1	2.9
Drywall and insulation	0.1	0.0	0.0	2.9
Carpentry and floor work	0.0	0.0	0.0	2.8
Masonry, stonework, tile setting and plastering	0.3	0.1	0.4	2.2
Temporary traffic control	0.0	0.0	0.0	1.9
Windows and doors	0.0	0.0	0.0	1.6
Bridge construction	0.0	0.0	0.0	1.4
Structural steel work	0.0	0.0	0.4	1.3
Drilling and foundations	0.0	0.0	0.0	1.2
Office furniture and equipment installation	0.0	0.0	0.0	1.0
Bridge and other structure painting	0.0	0.0	0.0	1.0
Concrete cutting	0.0	0.0	0.4	1.0
Fencing and gates	0.3	0.0	0.0	0.8
Pavement marking	0.0	0.0	0.0	0.8
Other roadway work	0.0	0.0	0.0	0.4
Other construction (not otherwise specified)	<u>0.0</u>	<u>0.0</u>	<u>0.0</u>	<u>0.2</u>
<b>Total</b>	<b>\$ 5.9</b>	<b>\$ 3.6</b>	<b>\$ 13.9</b>	<b>\$ 331.1</b>

f. **Monitor representation of MBEs and WBEs among certified SBEs.** The study team identified the race, ethnicity and gender ownership of certified SBEs that perform construction-related work. As of fall 2014, there were 110 minority-owned firms out of 286 total construction-related SBEs, or 38 percent of the total. There were 46 white women-owned firms among the SBE-certified firms prequalified for construction work (16% of the total). Figure 5-2 shows these results.

**Figure 5-2.**  
**Minority- and women-owned firms among all construction-related SBEs**

Source:

Keen Independent Research study team from City of Madison SBE and prequalification lists.



MBE and WBE representation among construction-related SBEs should be a key program metric the City monitors and reports going forward. If representation of minority- and women-owned firms among SBE-certified construction companies falls, the Program’s effectiveness in encouraging MBE/WBE participation may diminish.

g. **Monitor local versus non-local SBE participation.** Keen Independent examined whether the SBE Program benefits small businesses in the Madison area. From 2008 through 2013, 81 percent of the contract dollars going to SBEs went to firms in Dane County. Going forward, the City should monitor whether the Program continues to primarily benefit local companies. If participation in the Program changes so that local companies are not benefiting, the City should consider whether it can, under applicable law, restrict the program to Dane County companies (or another definition of “local” companies).

h. **Better connect new SBEs with prime contractors.** Many of the individuals interviewed in the study said that it was difficult for subcontractors to obtain business with prime contracts without past experience with those firms. Many prime contractors say they use the subcontractors they already know. Successful MBE/WBE firms often cited good relationships with prime contractors who contact them directly for work as a factor for their success.

Their strong relationships make it difficult for newer firms, or firms not in established networks, to obtain work with prime contractors. “People do not find work by looking in the papers; it’s by knowing someone, networking,” according to one interviewee.

A potential benefit of the SBE Program is that it can encourage prime contractors to consider new subcontractors (which was confirmed in the interviews with local businesses).

The City might work with prime contractors to further develop incentives to use new SBEs as well as established SBEs they have not worked with in the past.

**i. Consider refinement of revenue limits by specialization.** The City of Madison currently has a \$4 million size limit for SBE certification. Many small business programs and similar programs operated by federal, state and local governments use size standards that vary by subindustry. The City should continue to monitor whether a single size standard is best for the program. (It also might consider future increases to the size standard to reflect inflation.)

For example, U.S. Small Business Administration defines a specialty trade contractor as a small business if it has annual revenue under \$15 million, but increases that ceiling to \$36.5 million for highway contractors (SBE currently applies just those two size standards for all the different types of construction firms). The U.S. SBA regularly updates these size standards to reflect current market conditions. Agencies certifying DBEs under the Federal DBE Program use these SBA size standards, with an overall cap of an average of \$23.98 million annual gross receipts over three years.

Many local and state governments with small business programs use much lower size limits for defining a small business compared with the U.S. SBA size standards. Those size standards can vary based on types of work performed. In a contracting market such as Madison, a landscape contractor with \$4 million in annual gross receipts may be a large firm for its field, but a highway contractor with the same annual revenue may be small and at a disadvantage relative to its competition.

If the City were to consider any changes to the size standards for its SBE Program for different construction industries, it might use the same ratios within construction as found in the SBA size standards (e.g., size limit for general contractors is 2.43 times the limit for specialty trade contractors). In this example, if the size limit for specialty trade contractors were kept at \$4 million, the limit for general contractors for the SBE Program would be \$9.7 million in annual gross receipts. The City might conduct its own assessment of the size break between “small” and large general contractors in the local market.

**j. Consider time limits for SBE certification, possibly with flexibility for exceeding the size limit.**

Another approach to an SBE Program is to allow firms to grow under the program past the revenue ceiling, but to limit the participation to a certain number of years. The Federal 8(a) Business Development Program works in this way.

The City might consider this alternative approach if it found that participation of SBEs was consistently concentrated in just a few firms. Those firms could grow under the program and eventually graduate based on time in the program rather than revenue. This would make it more difficult for prime contractors to consistently use the same SBEs to meet goals and would open opportunities for other SBEs.

**k. Consider prime contractor scorecards for cumulative SBE (and MBE/WBE) participation.** The City might consider creating individual reports on its largest prime contractors concerning participation of SBEs and minority- and women-owned firms in City-funded public works projects and possibly other City-supported projects. These reports should consider cumulative SBE participation (and potentially MBE/WBE utilization) over several years, and compare SBE participation with what would be achieved if the firm had just met the goals for those projects. The City might then publicly



recognize contractors that have consistently met or exceeded those goals. If some contractors fall far below the norm for SBE and MBE/WBE participation, the City might look into potential explanations and assist the company in improving future participation.

The City might consider incorporating this information into assessment of good faith efforts of those firms if they report that they cannot meet a goal on a future City-funded public works project. One of the frequent complaints of prime contractors around the country is that they do not receive consideration of past success in meeting goals when a government agency evaluates their good faith efforts when they cannot meet a goal.

**I. Consider extending the Program to other City-supported construction such as TIF projects.** The City currently encourages SBE participation in tax increment financing (TIF) projects. The City might more formally extend the SBE Program to these and other projects that receive City financial support, with adjustments as necessary. (Utilization of businesses on TIF projects was not a part of this study.)

**2. Further building an SBE prime contracting part of the Program.** Many local contractors available for public works contracts reported working as both a prime contractor and a subcontractor. Some of the firm owners interviewed said that they primarily work as subcontractors on City public works contracts even though they are prime contractors on other projects. Therefore, City encouragement of SBE participation as prime contractors is important to breaking down barriers to winning prime contracts at the City.

The City is not required to publicly advertise City-funded public works contracts under \$25,000. This gives the City an opportunity to directly solicit bids from SBE-certified prime contractors.

Of the 162 small contracts the study team identified for 2008 through 2013, 30 contracts went to SBEs (see Figure 5-3). None of those SBEs were minority- or women-owned. Based on these data, City efforts to promote SBE utilization as prime contractors on small public works contracts have not benefited minority- and women-owned firms.

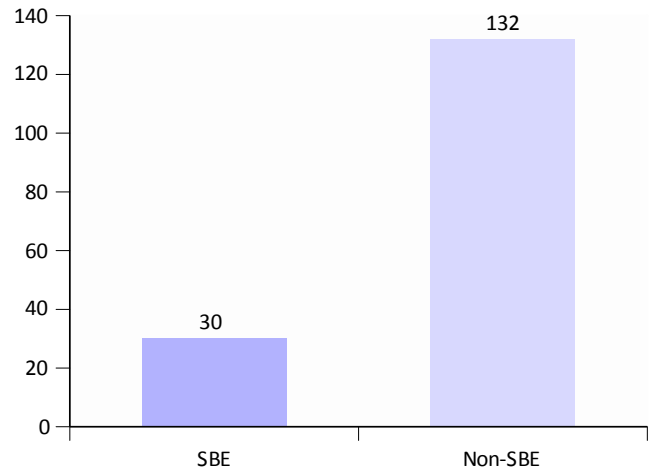
**Figure 5-3.**  
Number of small City-funded public works contracts going to SBE and non-SBE prime contractors, 2008-2013

Note:

Contracts under \$100,000.

Source:

Keen Independent from data on City of Madison public works contracts 2008-2013.



Keen Independent did identify one of the 162 small public works contracts that went to a minority-owned firm and five that went to WBEs (none of which were SBE-certified).

The City might consider:

- a. Making greater efforts to identify small contracts for SBE participation and encouraging use of SBE prime contractors on these contracts.
- b. Reviewing whether the City could accelerate payment of SBE prime contractors.
- c. Further reviewing why there was no participation of minority- and women-owned SBEs on these contracts (including whether MBEs and WBEs certified as SBEs requested to bid and whether there were any MBE/WBE firms among the SBEs that performed that work).
- d. Monitoring and reporting future SBE participation as prime contractors on small contracts and on larger contracts, including participation of minority- and women-owned SBEs.
- e. Evaluating whether the City could have a separate pre-qualification for companies to bid on small “set-aside” contracts with SBE certification being one requirement considered for that prequalification. (The City might explore the legal constraints related to State of Wisconsin public works bidding requirements for this type of program.)

**3. Creating a business development component to the SBE Program, including mentorship and a City SBE coach.** The City might partner with its largest contractors (or companies performing the largest contracts) to further identify and develop SBEs. One opportunity is to encourage or require the City’s largest contractors to enter long-term mentorship programs with emerging SBEs.

The City might also consider designating a staff person as an “SBE coach” that can assist and advocate for SBEs within public contracting at the City. Each initiative is discussed below.

**a. Explore partnerships with large contractors to provide SBE mentoring.** There are a number of models for mentor-protégé programs throughout the country that the City might consider. The goal would be for each of the larger contractors that work with the City to enter at least one meaningful mentoring relationship with an SBE that is not one of their regular subcontractors (perhaps an “emerging SBE”).

Because of the small size of the local contracting community, the City might be able to accomplish this through partnerships with the largest contractors and trade associations. Large City-funded public works contracts might include mentoring as a contract element that would be reimbursed by the City. The City would need to coordinate with other mentoring programs such as the Wisconsin Department of Transportation program to avoid overlap in mentor-protégé relationships.

The City could also evaluate whether the largest, most established SBEs might be asked to provide mentoring to emerging SBEs.

If such partnering is not possible, the City might consider mentoring as a mandatory component of the prequalification of contractors for certain sizes of City public works projects and for continuation as a certified SBE after a certain number of years in the program.

**b. Consider an “SBE coach” position at the City.** Many contractors interviewed in the study, including minority and female business owners, expressed frustration with the City about the difficulty of attempting to get work through the City. Public Works and Civil Rights staff at the City are primarily tasked with ensuring compliance with City programs and policies and not assisting potential City contractors. Although they answer questions and provide other help to SBEs and other firms, no one at the City has small contractor support as their primary duty, and sometimes such assistance is in conflict with the regulatory culture of these departments.

The City might consider appointing a staff person to serve as an SBE coach who could recruit MBEs, WBEs and other small companies into the City public works contracting process and navigate them through the complexities of prequalification, workforce requirements, SBE certification, prevailing wage requirements and other issues. This individual might also help introduce SBEs to prime contractors and steer firms toward technical assistance and other resources in the community. A single point of contact who can advocate for a firm (i.e., a “coach”) can help to change the view that the City is unhelpful and a firm will be burdened with red tape if it seeks to participate in public works contracts.

**4. Minimizing barriers in public works prequalification.** State statute<sup>1</sup> and City municipal code require that contractors and many subcontractors on City public works contracts be prequalified before bidding on or performing work. Bidders provide information on the following:

- Maintain licenses, registrations or certificates for types of work a company seeks to perform;
- Meet bonding and insurance requirements of applicable law or contract specifications;
- Maintain a substance abuse policy for public works contract employees compliant with state statute;
- Pay craft employees on public works contracts wages and benefits required under applicable prevailing wage law; and
- Disclose additional company information as required by City ordinance.

In addition, general contracting companies bidding on Best Value Contracting (BVC) contracts must participate in a Class A Apprenticeship Program for each trade in which it employs craft employees (and continue to participate for the duration of the project) or have an apprenticeship program that is pre-certified by the Wisconsin Bureau of Apprenticeship Standards on the date of bid award. Subcontractors bidding on BVC contracts must submit the BVC Contracting Compliance form for prequalification. The BVC contract dollar benchmark is based on the Construction Cost Index (CCI) and is computed yearly. For 2015, the single-trade minimum is \$55,500 and the multi-trade minimum is \$271,500.

The City Engineer reviews each prequalification application for approval or denial. If approved, a firm's prequalification with the City is valid for two years. All contractors have the right to appeal any denial to the City of Madison Board of Public Works.

If a contractor has been certified as a DBE, MBE, SBE or WBE, and the City determines that the contractor fails to meet the prequalification requirements under this ordinance, the City Engineer will notify and discuss the determination with the Affirmative Action Division prior to issuing any notice of non-qualification.

**Industry comments about City prequalification process.** As discussed in Appendix J, the “paperwork” involved in doing business with the City was a barrier cited by many trade associations and business owners, especially for small businesses. One interviewee said that “red tape” and other issues with public sector contracts made him stay away from that work. Others said that prevailing wage requirements and preference for union contractors made small businesses shy away from public sector work.

Many interviewees specifically pointed to City prequalification as overly burdensome. Interviewees indicated that general prequalification and the workforce requirements are difficult, especially for small companies. One owner of a WBE construction company said that it was atypical of other cities and even the state's prequalification process.

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<sup>1</sup> Wisconsin State Statute Section 66.0901.

Even supporters of the City’s prequalification process acknowledged that it creates a barrier to working with the City. One interviewee said, “It’s a necessary evil in a way.” He said that “it’s kind of a catch 22” in that prequalification requires prior experience with the type of jobs which would require prequalification, but added, “At the same time, we don’t want to have somebody that doesn’t know what they’re doing when they’re out there.”

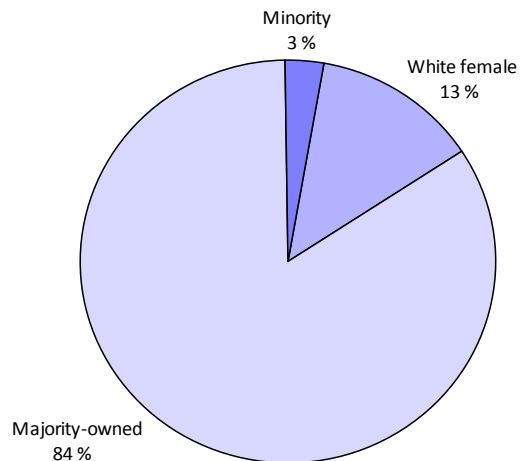
**Results of telephone interviews with local contractors.** When asked if Madison prequalification requirements present a barrier to obtaining work, almost one-half of the MBE/WBE respondents said “yes” compared with only 14 percent of majority-owned firms (see Appendix H).

**MBE/WBE representation among prequalified firms.** Because these requirements restrict the pool of firms that can participate on City public works contracts and may be most burdensome for small contractors and MBE/WBEs, Keen Independent examined whether prequalification negatively affected representation of minority- and women-owned firms on the list of contractors prequalified by the City.

There were 234 firms on the City’s prequalification list at the time of this study, including firms located within and outside Dane County. Keen Independent determined the ownership status of those firms based on certification records, study team interviews with those firms and other data. As shown in Figure 5-4, about 3 percent of prequalified firms were minority-owned and 13 percent were white women-owned.

**Figure 5-4.**  
**Ownership of firms prequalified by the City for public works contracts**

Source:  
Keen Independent Research study team from City of Madison prequalification list.



Representation of MBEs and WBEs on the City’s prequalification list is above what might be expected from the availability surveys that identified public works contractors qualified and interested in City work (2% MBE and 7% WBE). Although prequalification is a barrier for individual companies, it does not appear to disproportionately affect minority- and women-owned firms as a group.

Based on the information summarized here, the City might consider the following initiatives.

**a. Perform review of prequalification requirements and thresholds.** The City might work with industry and community representatives to perform a complete review of all prequalification requirements and thresholds for public works contracts. It might explore potential changes to the prequalification requirements to make it less of a barrier to new businesses working with the City, and to preclude that prequalification will have a disproportionate negative effect on minority- and women-owned firms.

For example, to encourage more contractors to prequalify for at least the City’s small public works contracts, it might consider increasing the size threshold for applying workforce requirements.

According to the current Madison General Ordinances, the following contractors are exempt from the Active Apprenticeship Requirements:

- Contractors with fewer than five employees;
- Contractors performing work not considered to be an apprenticeable trade;
- Contractors performing work with no available trade training program within 90 miles, or the contractor has been rejected by the only available trade training program;
- Contractors not using an apprentice due to having a journeyworker on layoff status (provided the journeyworker was employed for the Contractor in the past six months); and/or
- Contractors in business less than one year;

First-time contractors may request a onetime exemption if they take steps typical of a good faith effort and intend to comply on all future contracts. An exemption may also be granted in accordance with a time period of a “documented depression” as defined by the State of Wisconsin.

**b. Phase in prequalification requirements for SBEs over their first two years in the Program.** The City might consider relaxing prequalification and apprenticeship requirements for SBEs that are new to City public works contracts. Requirements for SBEs might be phased in for those firms over the first few years after they are SBE certified.

**5. Expanding communication of City bid opportunities.** The City published public works bid notices in *The Wisconsin State Journal* and on its webpage.<sup>2</sup> Email notification of bid opportunities is also available, which generated a positive comment from at least one contractor interviewed in the study. The City also makes planholders lists available.

Private bid notice service companies further disseminate this information to their subscribers. Some contractors interviewed mentioned Bid+ (managed by Associated General Contractors of Wisconsin) and Bid Express as relatively inexpensive sources of where to learn of public and private sector

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<sup>2</sup> <http://www.cityofmadison.com/business/pw/contracts/openforBid.cfm>.

projects, including the City of Madison. Others mentioned iSqFt. (Both prime contractors and subcontractors mentioned these sources.)

Even with these multiple resources, some minority- and women-owned firms said that they had difficulty learning about City of Madison bid opportunities.

- The telephone interviews with public works contractors asked firms whether they had difficulties learning about bid opportunities with the City of Madison. About one-quarter of MBE/WBEs said that they had difficulty, more than majority-owned firms.
- Several WBE contractors interviewed said that they do not hear about bidding opportunities from the City or, more generally, from public sector agencies.
- A representative of a minority chamber perceived that small businesses had difficulty seeking public sector work because government agencies have lists they go off of, and if a firm is not on the list, then it does not have an opportunity to compete.

In sum, the research identified contractors and trade association representatives who are not familiar with City processes or other ways to learn about City bid opportunities.

Interviewees who were somewhat familiar with the City's processes did not appear to know of the upcoming projects listed on the City's website.

- One interviewee recommended that the City communicate information about contract opportunities as project progress through the design process. In addition, he recommended advance notification of when the bid documents might be released.
- A minority business owner said that the City sends him notices of bid opportunities, but that they are too late to act on. He also recommended that the City provide a more comprehensive report on upcoming projects.

The City appears to provide this information on the Upcoming Project page of the Public Works website.

**a. Conduct further outreach and education about how to identify City bid opportunities.** Although it was a small number of respondents and interviewees who indicated that learning of bid opportunities was a barrier, the research indicates that City efforts to communicate current and upcoming bid opportunities are not fully successful. The City might do more to educate potential contractors about how they can easily learn of City public works contracts that are out for bid.

**b. Further promote City quarterly meetings with contractors.** The City currently holds quarterly meetings with contractors, which may be an ideal venue to educate newer contractors about ways to identify public works bid opportunities and to meet prime contractors. The City might research the ideal number and timing of meetings each year to achieve maximum participation from prime contractors and subcontractors.

**6. Improving prime contractor payment of subcontractors and relaxing retainage policies.** Both timely payment and release of retainage concern local contractors.

**a. Better enforce prompt payment policy.** Many minority- and women-owned businesses interviewed in the study said that receiving timely payment from public agencies and prime contractors is an issue. This particularly affects small businesses and those with limited working capital.

The City of Madison requires prime contractors on public works contracts to pay subcontractors within seven days of receiving payment from the City. It currently does not track whether those payments are made within that time frame.

Subcontractors can and do contact the City with complaints about slow payment, and the City has investigated and acted on these complaints. Based on study team review of three formal complaints from SBEs during the 2008 through 2013 study period regarding non-payment, the City took strong action to resolve each of those complaints. One resulted in barring the prime contractor from future City work.

Although the City has taken action upon receiving subcontractor complaints about payment, it might strengthen its prompt pay policy by better tracking prime contractor information about payment to its subcontractors. One business owner interviewed in the study recommended that the City implement a process similar to WisDOT where it verifies online that subs are being paid by the prime contractor. The City might also consider a system whereby subcontractors are notified of when the City has made a payment to the prime contractor.

**b. Review ways to more quickly release City retainage.** Some businesses interviewed reported that the amount of retainage the City of Madison withholds until closeout is excessive. Businesses reported that this problem is particularly difficult for subcontractors that may have completed their work long before the project is complete. The City might consider changes to allow for mid-contract release of retainage for portions of work that are satisfactorily completed, and ensuring corresponding payments to those subcontractors involved in the work.

## **B. Developing Local MBE/WBE Contractors**

Many of the disadvantages for minority- and women-owned contractors as well as individuals who might start construction businesses occur in the local marketplace outside the City's public works contracting process.

- Utilization of minority- and women-owned firms on City-funded public works contracts is impacted by the relatively low number of MBEs and WBEs in the construction industry and by the types of work and sizes of contracts those firms bid.
- There are public works requirements such as bonding for contracts that may negatively affect minority- and women-owned firms because of disadvantages accessing capital and other barriers. Some of those requirements are state-wide and cannot be changed by the City.
- City tax dollars flow into this broader system, and to the extent discrimination affects the marketplace, those tax dollars may be reinforcing a discriminatory system.



- Business owners and residents of the City are affected by those barriers.
- The City has a broad policy of promoting equity in the local community.

These are some of the reasons that the City might take a broader role in addressing those disadvantages in the local marketplace.

**7. Supporting local technical assistance, bonding, financing and mentor-protégé programs and creating new programs when necessary.** Businesses, trade associations and other small business service providers interviewed as part of this disparity study identified barriers faced by minority- and women-owned businesses and other small businesses in the City of Madison. The most commonly mentioned needs include:

- Basic business know-how and training;
- Bonding assistance; and
- Assistance with financing.

Many interviewees reported that construction business owners start their companies with experience in the trades, but not necessarily in operating a company. Skills deficiencies range from a lack of basic business management and recordkeeping skills to limitations in bidding and navigating public procurement processes. MBE/WBEs and other small businesses need easy access to basic business training. Some may benefit from business training in their preferred language.

There are many business assistance organizations already operating in the Madison area. As part of this disparity study, the City of Madison assembled a list of targeted business assistance programs available to local businesses. More than 40 area service providers offer basic business to specialized business assistance services for businesses in all stages of development (startup and business development through growth planning). Some of these business service providers specifically target needs of MBE/WBEs through one-on-one consulting and business counseling.

However, knowledge of available business assistance programs appears to be limited among MBE/WBEs and other small businesses conducting contracting in the City of Madison.

A complete listing of Targeted Business Assistant Programs in the Madison area can be found at: <http://www.cityofmadison.com/dcr/documents/TargetedBusAssistProg.pdf>.

a. **Consider assembling and marketing an integrated network of local business assistance.** Because local assistance providers are not integrated into a network and relatively few interviewees knew of the extent of local resources, the City of Madison might consider ways to better link local service providers with MBE/WBEs and other small businesses.

- One model is the City of San José, California’s “BusinessOwnerSpace.com” (BOS).<sup>3</sup> This integrated source of information links startups and existing businesses with assistance providers (“BOS partners”). Rather than duplicate existing small business services, the City of San José invested in integrating partners into a network that could more seamlessly be marketed to and help entrepreneurs in the region.
- Another model is KCSOURCELINK, a network of more than 200 nonprofit resource organizations that provide business-building services for small companies in the Kansas City region.<sup>4</sup>

The City can help promote this network and review whether there are gaps in assistance resources. For example, a representative of a non-profit financing agency reported that local business assistance programs do help startups but more can be done to help businesses stay successful once they start.

b. **Support specialized business training for construction owners.** Many of the existing business assistance providers and business chambers in Madison have relatively few construction companies as clients or members. The City could help existing organizations expand their reach to the local construction community, and develop specialized assistance. There might be large gaps in local assistance for growing construction businesses.

One possible aspect of this specialized assistance is to help construction companies that lack computer technology to acquire and be trained in needed technology (see Appendix J).

c. **Support financing and bonding assistance for SBE construction businesses.** Overwhelmingly, MBE/WBEs and other small businesses interviewed as part of this disparity study reported access to financing as a major barrier to starting, sustaining and growing a business. Some business owners reported multiple or even failed attempts to secure financing with at least one business identified as having gone out of business after not being able to secure a loan. One business owner said that limited financing impeded her growth. One minority business owner said that he does not have the capital to work for the City of Madison, and therefore does not pursue this work. Information in Appendix G indicates that minority-owned firms may face additional barriers to financing.

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<sup>3</sup> <http://www.businessownerspace.com/>.

<sup>4</sup> <http://www.kcsourcelink.com/home>.

The City might work with other partners to strengthen access to capital through:

- Providing small businesses more information about SBA loans and other financing avenues, including information about the financial institutions and other organizations active in these programs;
- Educating and training business owners about how to choose a type of financing and how to apply for that financing (including loan application prep); and
- Providing additional financial resources that can expand existing programs or capitalize on a new revolving loan fund specifically for equipment and working capital needed by SBEs involved in public works contracting.

Improving access to low interest business loans could lessen barriers for MBE/WBEs and other small businesses needing capital to launch, sustain or grow operations.

Access to bonding is a related issue. There were a number of small companies in the in-depth interviews that reported that they do not bid on City public works in part because of bonding. Training and assistance to obtain needed bonding may be necessary for more SBEs to compete for small City public works contracts.

**8. Supporting local efforts to encourage minorities and women to enter, receive training and obtain jobs in the construction industry.** Many business owners and trade association representatives interviewed in the study commented on the workforce shortages they see in many local trades. Interviewees also reported that the pipeline of minority and female construction workers is very limited. The City currently has a number of regulatory efforts in place, including affirmative action plan requirements for its contractors, but it might also consider assisting local partners in efforts to encourage minorities and women to enter, receive training and obtain jobs in the industry.

a. Review the effectiveness of current City programs regarding affirmative action for contractors. Madison General Ordinance Section 39.02 requires companies doing business with the City to submit an Affirmative Action Plan. The model Affirmative Action Plan utilized by contractors is designed to ensure that the contractor provides equal employment opportunity to all and takes affirmative action in its utilization of applicants and employees who are women, individuals who fall within the racial/ethnic category and persons with disabilities. The City's Department of Civil Rights reviews a contractor's practices and policies in the following areas:

- EEO/AA Policy Statements and Plans;
- Recruitment;
- Selection criteria;
- Payroll practices;
- Staff development;
- Harassment-free work environment; and
- Complaint procedures.

The Affirmative Action Plan must be submitted on an annual basis. Contracts with contractors who employ fewer than 15 employees or whose aggregate annual business with the City for the calendar year in which the contract takes effect is less than \$25,000 are not required to submit an Affirmative Action Plan.

Contractors had a number of negative comments about these requirements and their effectiveness, as explained in Appendix J. Some reported that contractors will falsely report the number of employees they have in order to avoid the affirmative action requirements. Others reported that the City requirements are inflexible and disruptive to a business. One interviewee said that when a worker completes a segment of work and is later brought back for another component, that the City counts this as a termination and a new hire. The firm is penalized for not bringing in a new employee for that work (see Appendix J). Another interviewee recommended modifying City apprenticeship requirements to be more flexible. One interviewee summed up the City's efforts as "It's a hoop you have to jump through; they don't care if we discriminate or not, they just want the numbers."

Given the substantial negative feedback about its current efforts, the City might undertake a review of existing requirements. There may be avenues for greater success with less burden on small to medium-sized contractors.

**b. Support other organizations' efforts to build a pipeline of minority and female workers.** Chapter 3 of this report discussed the relatively low overall representation of minorities and women in the Madison construction marketplace, especially in certain trades. The City already supports other organizations' programs to develop the local construction workforce, but might consider investing more in these efforts. Long-term, there will continue to be relatively few minority- and women-owned firms in the local marketplace without building a stronger pipeline of minorities and women entering and advancing within construction trades.

For example, the author of Public Written Comment (PWC) #1 discussed the Madison College Construction & Remodeling (C&R) Program. The Program produces quality graduates with broad and current carpentry skills, and reflects the diversity of the community;

The program recently received a grant enabling it to expand its delivery options, and will offer a Construction Essentials pathway designed to allow participants to take the classes in smaller, more accessible segments. The coursework is offered at night to accommodate the schedules of working adults. A shorter certificate program option provides coursework designed to lead directly into entry level employment within the skilled trades. Subsequent coursework will be offered in Fall of 2015 so that students might work toward completion of the one-year Construction and Remodeling Diploma while earning credentialed certificates along the way.

The 2015 graduating class includes 15 percent women and 26 percent minority students, all of whom can enter the trade as beginning residential carpenters or apprentice carpenters in commercial work. The City might consider offering scholarship funding for low income, minority, and women students interested in the program.

Figure 5-5 summarizes the discussion of action items for consideration described in this Chapter.

Figure 5-5. Actions for City consideration based on disparity study results

<b>Potential actions for City review and exploration</b>
<p><b>1. Further improving the SBE contract goals program</b></p> <ul style="list-style-type: none"> <li>a. Respond to industry and community concerns about program operation</li> <li>b. Monitor concentration of SBE participation in only a few firms</li> <li>c. Encourage small businesses to become SBE-certified and participate in City contracting</li> <li>d. Improve data collection and reporting of SBE participation on City-funded contracts</li> <li>e. Monitor SBE participation, by race, ethnicity and gender</li> <li>f. Monitor representation of MBEs and WBEs among certified SBEs</li> <li>g. Monitor local versus non-local SBE participation</li> <li>h. Better connect new SBEs with prime contractors</li> <li>i. Consider refinement of revenue limits by specialization</li> <li>j. Consider time limits for SBE certification, with flexibility for exceeding size limit</li> <li>k. Consider prime contractor scorecards for cumulative SBE (and MBE/WBE) participation</li> <li>l. Consider extending the Program to other City-supported construction such as TIF projects</li> </ul> <p><b>2. Further building an SBE prime contracting part of the Program</b></p> <ul style="list-style-type: none"> <li>a. Make greater efforts to identify small contracts for SBE participation</li> <li>b. Review accelerating City payment of SBE prime contractors</li> <li>c. Review opportunities for minority- and women-owned SBEs to bid on small contracts</li> <li>d. Monitor and report SBE participation as prime contractors</li> </ul> <p><b>3. Creating a business development component to the SBE Program, including mentorship and a City SBE coach</b></p> <ul style="list-style-type: none"> <li>a. Explore partnerships with large contractors to provide SBE mentoring</li> <li>b. Consider an SBE coach position at the City</li> </ul> <p><b>4. Minimizing barriers in public works prequalification</b></p> <ul style="list-style-type: none"> <li>a. Perform review of prequalification requirements and thresholds</li> <li>b. Phase in prequalification requirements for SBEs over their first two years in the Program</li> </ul> <p><b>5. Expanding communication of City bid opportunities</b></p> <ul style="list-style-type: none"> <li>a. Conduct further outreach and education about how to identify City bid opportunities</li> <li>b. Further promote City quarterly meetings with contractors</li> </ul> <p><b>6. Improving prime contractor payment of subcontractors and relaxing retainage policies</b></p> <ul style="list-style-type: none"> <li>a. Better enforce prompt payment policy</li> <li>b. Review ways to more quickly release City retainage</li> </ul> <p><b>7. Supporting local technical assistance, bonding and financing programs, and creating new programs when necessary</b></p> <ul style="list-style-type: none"> <li>a. Consider assembling and marketing an integrated network of local business assistance</li> <li>b. Support specialized business training for small construction businesses</li> </ul> <p><b>8. Supporting local efforts to encourage minorities and women to enter, receive training and obtain jobs in the construction industry</b></p> <ul style="list-style-type: none"> <li>a. Review the effectiveness of current City programs regarding affirmative action for contractors</li> <li>b. Support other organizations' efforts to build a pipeline of minority and female workers</li> </ul>

## APPENDIX A.

### Definition of Terms

Appendix A provides explanations and definitions useful to understanding the 2015 Public Works Disparity Study. The following definitions are only relevant in the context of this report.

**Anecdotal evidence.** Anecdotal evidence includes personal accounts and perceptions of incidents — including any incidents of discrimination — told from each individual interviewee’s or participant’s perspective.

**Wisconsin Department of Transportation (WisDOT).** WisDOT is the steward of the State of Wisconsin transportation system. WisDOT is responsible for building, maintaining, and operating the state highway system. In addition, WisDOT works with various partners to maintain and improve local transportation infrastructure. As a recipient of USDOT funds, WisDOT operates the Federal DBE Program on USDOT-funded contracts.

**Availability analysis.** The availability analysis examines the number of minority-, women-owned and majority-owned businesses ready, willing and able to perform public works-related construction work for the City of Madison.

“Availability” is often expressed as the percentage of contract dollars that might be expected to go to minority- or women-owned firms if based on analysis of the specific type, size and timing of each City prime contract and subcontract and the relative number of minority- and women-owned firms available for that work.

**Business.** A business is a for-profit company, including all of its establishments (synonymous with “firm” and “company”).

**Business listing.** A business listing is a record in the Dun & Bradstreet (D&B) database (or other database) of business information. A D&B record is a “listing” until the study team determines it to actually be a business establishment with a working phone number.

**Business establishment.** A business establishment (or simply, “establishment”) is a place of business with an address and working phone number. One business can have many business establishments.

**City-funded contract.** In this study, a public works contract that solely uses City funds and no state or federal funds.

**Code of Federal Regulations or CFR.** Code of Federal Regulations (“CFR”) is a codification of the federal agency regulations. An electronic version can be found at <http://www.gpo.gov/fdsys/browse/collectionCfr.action?collectionCode=CFR>.

**Contract.** A contract is a legally binding relationship between the seller of goods or services and a buyer.

**Contract element.** A contract element is either a prime contract or subcontract that the study team included in its analyses.

**Contractor.** A contractor is a business performing construction contracts.

**Controlled.** Controlled means exercising management and executive authority for a company.

**Disadvantaged Business Enterprise (DBE).** A small business that is 51 percent or more owned and controlled by one or more individuals who are both socially and economically disadvantaged according to the guidelines in the Federal DBE Program (49 CFR Part 26). Membership in certain race and ethnic groups identified under “minority-owned business enterprise” in this appendix may meet the presumption of socially and economically disadvantaged. Women are also presumed to be socially and economically disadvantaged. Examination of economic disadvantage also includes investigating the three-year average gross revenues and the business owner’s personal net worth (at the time of this report, a maximum of \$1.32 million excluding equity in the business and primary personal residence).

Some minority- and women-owned businesses do not qualify as DBEs because of gross revenue or net worth limits.

A business owned by a non-minority male can be certified as a DBE if the enterprise meets the requirements in 49 CFR Part 26.

**Disparity.** A disparity is a difference or gap between an actual outcome and a reference point or benchmark. For example, a difference between an outcome for one racial/ethnic group and an outcome for non-Hispanic whites may constitute a disparity.

**Disparity analysis.** A disparity analysis compares actual outcomes with what might be expected based on other data. Analysis of whether there is a “disparity” between the utilization and availability of minority- and women-owned businesses is one tool in examining whether there is evidence consistent with discrimination against such businesses.

**Dun & Bradstreet (D&B).** D&B is the leading global provider of lists of business establishments and other business information (see [www.dnb.com](http://www.dnb.com)). Hoover’s is the D&B company that provides these lists.

**Employer firms.** Employer firms are firms with paid employees other than the business owner and family members.

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

**Establishment.** See “business establishment.”

**Federal Disadvantaged Business Enterprise (DBE) Program.** Federal DBE Program refers to the Disadvantaged Business Enterprise Program established by the United States Department of Transportation after enactment of the Transportation Equity Act for the 21st Century (TEA-21) as amended in 1998. The regulations for the Federal DBE Program are set forth in 49 CFR Part 26.

**Firm.** See “business.”

**Federally-funded contract.** A federally-funded contract is any contract or project funded in whole or in part (a dollar or more) with United States Department of Transportation or other federal agency financial assistance, including loans.

**Industry.** An industry is a broad classification for businesses providing related goods or services.

**Majority-owned business.** A majority-owned business is a for-profit business that is not owned and controlled by minorities or women (see definition of “minorities” below).

**MBE.** See minority-owned business.

**Minorities.** Minorities are individuals who belong to one of the racial/ethnic groups identified in the federal regulations in 49 CFR Section 26.5:

- Black Americans (or “African Americans” in this study), which include persons having origins in any of the black racial groups of Africa;
- Hispanic Americans, which include persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;
- Native Americans, which include persons who are American Indians, Eskimos, Aleuts or Native Hawaiians;
- Asian-Pacific Americans, which include persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, Hong Kong, and other countries and territories in the Pacific set forth in 49 CFR Section 26.5; and
- Subcontinent Asian Americans, which include persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka.

**Minority Business Enterprise (MBE) Program.** A program that specifically provides benefits to certified minority-owned businesses such as eligibility to meet MBE contract goals or price preferences in procurement. The State of Wisconsin operates a Minority Business Enterprise Program, as does Dane County. For these two programs, there are no size restrictions for MBE certification.

**Minority-owned business (MBE).** An MBE is a business with at least 51 percent ownership and control by minorities. Minority groups in this study are those listed in 49 CFR Section 26.5. For purposes of this study, a business need not be certified as such to be counted as a minority-owned business. Businesses owned by minority women are also counted as MBEs in this study (where that information is available).

**North American Industry Classification System (NAICS) codes.** NAICS codes identify the primary line of business of a business enterprise. See <http://www.census.gov/epcd/www/naics.html>.



**Non-DBEs.** Non-DBEs are firms that are not certified as DBEs, regardless of the race/ethnicity or gender of the owner.

**Non-response bias.** Non-response bias occurs when the observed responses to a survey question differ from what would have been obtained if all individuals in a population, including non-respondents, had answered the question.

**Owned.** Owned indicates at least 51 percent ownership of a company. For example, a “minority-owned” business is at least 51 percent owned by one or more minorities.

**Personal net worth (PNW).** Personal net worth is defined as the assets of an individual or household less outstanding loans and other liabilities. For example, if an individual owned a car worth \$20,000 but still had \$5,000 in a car loan to pay on the vehicle, that asset would be counted as \$15,000 toward the personal net worth of the individual.

To be eligible to be certified as a Disadvantaged Business Enterprise, the Federal DBE Program requires that the firm owner’s personal net worth does not exceed \$1.32 million (at the time of this report). In determining an individual’s net worth, federal guidelines include all assets except for the worth of the business and the primary residence of the individual. Other assets, including retirement savings, are included in the calculation.<sup>1</sup>

The City of Madison’s personal net worth assessment for SBE certification mirrors that of the Federal DBE Program.

**Prime contract.** A prime contract is a contract between a prime contractor or a prime consultant and the end user, such as the City of Madison.

**Prime contractor.** A prime contractor is a construction firm that performs a prime contract for an end user, such as the City of Madison.

**Public works contract.** As defined under Wisconsin state law, public works contracts generally pertain to any type of construction, repair, remodeling or improvement of a public facility or building.

**Race-and gender-conscious measures.** Race-and gender-conscious measures are programs in which businesses owned by some racial/ethnic groups may participate but non-minority-owned firms may not, or that apply to businesses owned by women but not men. A DBE or an MBE/WBE contract goal is one example of a race- and gender-conscious measure.

Note that the term is a shortened version of “race-, ethnicity-, and gender-conscious measures.” For ease of communication, the study team has truncated the term to “race- and gender-conscious measures.”

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<sup>1</sup> 49 CFR Section 26.67 (a)(2).

**Race- and gender-neutral measures.** Race- and gender-neutral measures apply to businesses regardless of the race/ethnicity or gender of firm ownership. Race- and gender-neutral measures may include assistance in overcoming bonding and financing obstacles, simplifying bidding procedures, providing technical assistance, establishing programs to assist start-up firms, and other methods open to all businesses or any disadvantaged business regardless of race or gender of ownership. (A broader list of examples can be found in 49 CFR Section 26.51(b).)

Note that the term is more accurately “race, ethnicity, and gender-neutral” measures. However, for ease of communication, the study team has shortened the term to “race- and gender-neutral measures.”

**Relevant geographic market area.** The relevant geographic market area is the geographic area in which the businesses receiving most City public works contracting dollars are located. The relevant geographic market area is also referred to as the “local marketplace.” Case law related to MBE/WBE programs requires disparity analyses to focus on the “relevant geographic market area.”<sup>2</sup>

**Remedy.** A remedy is a contracting program measure that is designed to address barriers to full participation of a particular group of businesses.

**Small business.** A small business is a business with low revenues or size (based on revenue or number of employees) relative to other businesses in the industry. “Small business” as used in this report does not necessarily mean that the business is certified as such.

**Small Business Enterprise (SBE).** An SBE is a firm certified as a small business enterprise by the City of Madison. At the time of this report, the firm must be independently owned and controlled with annual receipts limits of \$4 million or less when averaged over the most recent three years. The owner must be below personal net worth limits of \$1.32 million (see above).

**Small Business Administration (SBA).** The SBA refers to the United States Small Business Administration, which is an independent agency of the United States government that assists small businesses.

**State-funded contract.** A state-funded contract is any contract or project that is funded with State of Wisconsin monies. Some City of Madison public works contracts are state-funded.

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

**Subcontract.** A subcontract is a contract between a prime contractor or prime consultant and another business selling goods or services to the prime contractor as part of the prime contractor’s contract for a customer such as the City of Madison.

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<sup>2</sup> See, e.g., *Croson*, 448 U.S. at 509; 49 CFR Section 26.35; *Rothe*, 545 F.3d at 1041-1042; *N. Contracting*, 473 F.3d at 718, 722-23; *Western States Paving*, 407 F.3d at 995.

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

**Supplier.** A supplier is a firm that sold supplies to a prime contractor as part of a larger project.

**Tax Increment Financing (TIF) project.** A TIF project in the City of Madison is a project funded using tax increment financing. Developers can apply for TIF assistance if the proposed development project meets City policies and guidelines.

**United States Department of Transportation (USDOT).** USDOT refers to the United States Department of Transportation, which includes the Federal Highway Administration, the Federal Transit Administration, the Federal Aviation Administration and the Federal Rail Administration. Note that the Federal DBE Program does not apply to contracts solely using funds from Federal Rail Administration, and such contracts would not be included in the Disparity Study.

**Utilization.** Utilization refers to the percentage of total contracting dollars of a particular type of work going to a specific group of businesses (e.g., MBEs).

**WBE.** See women-owned business.

**Women-owned Business Enterprise (WBE) Program.** A program that specifically provides benefits to certified women-owned businesses such as eligibility to meet WBE contract goals or price preferences in procurement. Firms certified as WBEs in the State of Wisconsin's Women Business Enterprise Program are listed in a directory, but receive no price preferences and do not benefit from WBE contract goals. There is no size restriction for WBE certification by the State of Wisconsin.

**Women-owned business (WBE).** A WBE is a business with at least 51 percent ownership and control by non-minority women. A business need not be certified as such to be included as a WBE in this study. For this study, businesses owned and controlled by minority women are counted as minority-owned businesses.

## APPENDIX B.

### LEGAL FRAMEWORK AND ANALYSIS

#### Prepared by Holland & Knight LLP

##### A. Introduction

In this Appendix, Holland & Knight LLP analyzes recent cases regarding state and local minority and women-owned business enterprise (“MBE/WBE”)<sup>1</sup> programs and disadvantaged business enterprise (“DBE”) programs to provide a summary of the legal framework and analysis for the disparity study as applicable to the City of Madison.

Appendix B begins with a brief review of the 1989 landmark United States Supreme Court decision in *City of Richmond v. J.A. Croson*.<sup>2</sup> *Croson* sets forth the strict scrutiny constitutional analysis applicable in the legal framework for conducting a disparity study. This section also notes the United States Supreme Court decision in *Adarand Constructors, Inc. v. Peña*,<sup>3</sup> (“*Adarand P*”), which applied the strict scrutiny analysis set forth in *Croson* to federal programs that provide federal assistance to a recipient of federal funds. The Supreme Court’s decisions in *Adarand I* and *Croson*, and subsequent cases and authorities provide the basis for the legal analysis in connection with the study for the City of Madison (“Madison”).

The legal framework analyzes and reviews in detail significant recent court decisions that have followed, interpreted and applied *Croson* and *Adarand I* to the present and that are applicable or instructive to Madison’s disparity study and the strict scrutiny analysis. This analysis reviews cases in the Seventh Circuit Court of Appeals, which is the federal appellate court controlling on Madison, and recent decisions from other federal courts in this area of the law.

In addition, the analysis reviews recent federal cases that have considered the validity of the Federal DBE Program<sup>4</sup>, implementation of the DBE program by a state or local government agency recipient of federal funds, and state or local government DBE Programs, including *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation (“Caltrans”), et al., (“AGC, SDC v. Cal. DOT”* or “*Caltrans*”<sup>5</sup>), *Northern Contracting, Inc. v. Illinois DOT*,<sup>6</sup> *Western States Paving Co. v. Washington State DOT*,<sup>7</sup> *Sherbrooke Turf, Inc. v. Minn DOT* and *Gross Seed v. Nebraska*

<sup>1</sup> Some of the case law and materials included herein also utilize the term Minority- and Female-Owned Business Enterprise, or MBE/FBE. The terms MBE/WBE and MBE/FBE are used interchangeably throughout this section.

<sup>2</sup> *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989).

<sup>3</sup> *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

<sup>4</sup> Moving Ahead for Progress in the 21st Century Act (“MAP-21”), Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat. 405.; preceded by Pub L. 109-59, Title I, § 1101(b), August 10, 2005, 119 Stat. 1156; preceded by Pub L. 105-178, Title I, § 1101(b), June 9, 1998, 112 Stat. 107. 49 CFR Part 26 (Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs (“Federal DBE Program”).

<sup>5</sup> 713 F.3d 1187 (9<sup>th</sup> Cir. 2013).

<sup>6</sup> 473 F.3d 715 (7<sup>th</sup> Cir. 2007).

<sup>7</sup> *Western States Paving v. Washington State DOT*, 407 F.3d 983 (9<sup>th</sup> Cir. 2005).

*Department of Roads*,<sup>8</sup> *Adarand Construction, Inc. v. Slater*<sup>9</sup> (“*Adarand VII*”), *Geyer Signal, Inc. v. Minnesota DOT*,<sup>10</sup> *Dunnet Bay Construction Co. v. Illinois DOT, et al.*,<sup>11</sup> *M.K. Weeden Construction v. State of Montana, Montana DOT*,<sup>12</sup> *Geod Corporation v. New Jersey Transit Corporation*<sup>13</sup>, *South Florida Chapter of the A.G.C. v. Broward County, Florida*.<sup>14</sup>

The analyses of cases involving the Federal DBE program are instructive to Madison and the disparity study because they are the most recent and significant decisions by federal courts construing the validity of government programs involving MBE/WBEs and DBEs and applying the “Compelling Interest” and “Narrowly tailoring” tests under the strict scrutiny analysis. They also are instructive in terms of the preparation of any legislation or programs by Madison in this area concerning contracting and providing a non-discriminatory equal business opportunity for contractors. In addition, these cases consider disparity studies and set forth the legal framework applied to MBE/WBE programs, the Federal DBE Program, and state or local government DBE programs implementing the Federal DBE Program as recipients of federal financial assistance governed by 49 CFR Part 26.<sup>15</sup>

For example, in the most recent Federal Court of Appeals decision, the Ninth Circuit Court of Appeals in *AGC, San Diego Chapter, Inc. v. California DOT, et al.* held that Caltrans’ DBE Program is constitutional.<sup>16</sup> The Court held that Caltrans’ 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

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<sup>8</sup> 345 F.3d 964 (8<sup>th</sup> Cir. 2003), *cert. denied*, 541 U.S. 1041 (2004).

<sup>9</sup> 228 F.3d 1147 (10<sup>th</sup> Cir. 2000) (“*Adarand VIP*”).

<sup>10</sup> *Geyer Signal, Inc. v. Minnesota, DOT*, 2014 WL 1309092 (D. Minn. March 31, 2014).

<sup>11</sup> *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. Feb 12, 2014), *appeal pending* in the U.S. Court of Appeals for the Seventh Circuit.

<sup>12</sup> *M.K. Weeden Construction v. State of Montana, Montana Department of Transportation, et al.* 2013 WL 4774517 (D. Mont.) (September 4, 2013).

<sup>13</sup> 766 F. Supp.2d 642, (D. N.J. 2010).

<sup>14</sup> 544 F. Supp.2d 1336 (S.D. Fla. 2008).

<sup>15</sup> See *AGC, San Diego Chapter, In. v. Cal. DOT*, 713 F.3d 1187 (9<sup>th</sup> Cir. 2013); *Northern Contracting, Inc. v. Illinois DOT*, 473 F.3d 715 (7<sup>th</sup> Cir. 2007); *Western States Paving*, 407 F.3d 983 (9<sup>th</sup> Cir. 2005); *Sherbrooke Turf, Inc. v. Minn. DOT*, 345 F.3d 964 (8<sup>th</sup> Cir. 2003), *cert. denied*, 541 U.S. 1041 (2004); *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10<sup>th</sup> Cir. 2000) (“*Adarand VIP*”).

<sup>16</sup> *Associated General Contractors of America, San Diego Chapter, Inc. v. California DOT*, 713 F. 3d 1187 (9<sup>th</sup> Cir. 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, (9<sup>th</sup> Cir. April 16, 2013).

actually suffered discrimination.<sup>17</sup> Thus, this recent decision, along with the other cases involving local and state government DBE programs, are instructive to local government MBE/WBE programs.

## **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. J.A. Croson Co. (“Croson”) challenged the City of Richmond’s minority contracting preference plan, which required prime contractors to subcontract at least 30 percent of the dollar amount of contracts to one or more Minority Business Enterprises (“MBE”). In enacting the plan, the City cited past discrimination and an intent to increase minority business participation in construction projects as motivating factors.

The Supreme Court held the City of Richmond’s “set-aside” action plan violated the Equal Protection Clause of the Fourteenth Amendment. The Court applied the “strict scrutiny” standard, generally applicable to any race-based classification, which requires a governmental entity to have a “compelling governmental interest” in remedying past identified discrimination and that any program adopted by a local or state government must be “narrowly tailored” to achieve the goal of remedying the identified discrimination.

The Court determined that the plan neither served a “compelling governmental interest” nor offered a “narrowly tailored” remedy to past discrimination. The Court found no “compelling governmental interest” because the City had not provided “a strong basis in evidence for its conclusion that [race-based] remedial action was necessary.” 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. 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.

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<sup>17</sup> 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. *Associated General Contractors of America, San Diego Chapter, Inc. v. California DOT*, U.S.D.C., E.D., Cal., Civil Action No. 5:09-cv-01622, Slip Opinion Transcript of U.S. District Court at 42-56.

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, ... [i]t could take affirmative steps to dismantle such a system.”

The Court held that “[w]here there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality’s prime contractors, an inference of discriminatory exclusion could arise.” The Supreme Court noted 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.”

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

In *Adarand I*, the U.S. Supreme Court extended the holding in *Croson* and ruled that all federal government programs that use racial or ethnic criteria as factors in procurement decisions must pass a test of strict scrutiny in order to survive constitutional muster. The cases interpreting *Adarand I* are the most recent and significant decisions by federal courts setting forth the legal framework for disparity studies as well as the predicate to satisfy the constitutional strict scrutiny standard of review, which applies to the implementation of the Federal DBE Program by recipients of federal funds and to local or state MBE/WBE programs.

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

The following provides an analysis for the legal framework focusing on recent key cases regarding state and local MBE/WBE programs, and the Federal DBE Program, and their implications for a disparity study. The recent decisions involving MBE/WBE and local and state DBE Programs are instructive to Madison and the disparity study because they concern the strict scrutiny analysis and legal framework in this area of the law.

### **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.<sup>18</sup> The strict scrutiny analysis is comprised of two prongs:

- The program must serve an established compelling governmental interest; and
- The program must be narrowly tailored to achieve that compelling government interest.<sup>19</sup>

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<sup>18</sup> *Croson*, 448 U.S. at 492-493; *Adarand Constructors, Inc. v. Peña (Adarand I)*, 515 U.S. 200, 227 (1995); See *Fisher v. University of Texas*, \_\_\_ U.S. \_\_\_, 133 S.Ct. 2411 (2013).

<sup>19</sup> *Adarand I*, 515 U.S. 200, 227 (1995); *AGC, SDC v. Caltrans*, 713 F.3d 1187, 1195-1200 (9<sup>th</sup> Cir. 2013); *Northern Contracting*, 473 F.3d at 721; *Western States Paving*, 407 F.3d at 991; *Sherbrooke Turf*, 345 F.3d at 969; *Adarand VII*, 228 F.3d at 1176; *Associated Gen. Contractors of Ohio, Inc. v. Drabik (“Drabik II”)*, 214 F.3d 730 (6<sup>th</sup> Cir. 2000); *Eng’g Contractors Ass’n of South Florida, Inc. v. Metro. Dade County*, 122 F.3d 895 (11<sup>th</sup> Cir. 1997); *Contractors Ass’n of E. Pa. v. City of Philadelphia (“CAEP I”)*, 6 F.3d 990 (3<sup>d</sup> Cir. 1993).

## 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. State and local governments cannot rely on national statistics of discrimination in an industry to draw conclusions about the prevailing market conditions in their own regions.<sup>20</sup> Rather, state and local governments must measure discrimination in their state or local market. However, that is not necessarily confined by the jurisdiction’s boundaries.<sup>21</sup>

The federal courts have held that, with respect to the Federal DBE Program, recipients of federal funds do not need to independently satisfy this prong because Congress has satisfied the compelling interest test of the strict scrutiny analysis.<sup>22</sup> The federal courts 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 C.F.R. Part 26).<sup>23</sup> Specifically, the federal courts found Congress “spent decades compiling evidence of race discrimination in government highway contracting, of barriers to the formation of minority-owned construction businesses, and of barriers to entry.”<sup>24</sup> The evidence found to satisfy the compelling

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<sup>20</sup> See e.g., *Concrete Works, Inc. v. City and County of Denver* (“*Concrete Works I*”), 36 F.3d 1513, 1520 (10th Cir. 1994).

<sup>21</sup> *Id.*

<sup>22</sup> *N. Contracting*, 473 F.3d at 721; *Western States Paving*, 407 F.3d at 991; *Sherbrooke Turf*, 345 F.3d at 969; *Adarand VII*, 228 F.3d at 1176.

<sup>23</sup> *Id.* In the case of *Rothe Dev. Corp. v. U.S. Dept. of Defense*, 545 F.3d 1023 (Fed. Cir. 2008), the Federal Circuit Court of Appeals pointed out it had questioned in its earlier decision whether the evidence of discrimination before Congress was in fact so “outdated” so as to provide an insufficient basis in evidence for the Department of Defense program (*i.e.*, whether a compelling interest was satisfied). 413 F.3d 1327 (Fed. Cir. 2005). The Federal Circuit Court of Appeals after its 2005 decision remanded the case to the district court to rule on this issue. *Rothe* considered the validity of race- and gender-conscious Department of Defense (“DOD”) regulations (2006 Reauthorization of the 1207 Program). The decisions in *N. Contracting*, *Sherbrooke Turf*, *Adarand VII*, and *Western States Paving* held the evidence of discrimination nationwide in transportation contracting was sufficient to find the Federal DBE Program on its face was constitutional. On remand, the district court in *Rothe* on August 10, 2007 issued its order denying plaintiff *Rothe’s* Motion for Summary Judgment and granting Defendant United States Department of Defense’s Cross-Motion for Summary Judgment, holding the 2006 Reauthorization of the 1207 DOD Program constitutional. *Rothe 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 in *Rothe* 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.).

<sup>24</sup> *Sherbrooke Turf*, 345 F.3d at 970, (citing *Adarand VII*, 228 F.3d at 1167 – 76); *Western States Paving*, 407 F.3d at 992-93.



interest standard included numerous congressional investigations and hearings, and outside studies of statistical and anecdotal evidence (e.g., disparity studies).<sup>25</sup>

The evidentiary basis on which Congress relied to support its finding of discrimination that is instructive to local and state governments and their MBE/WBE programs, includes:

- **Barriers to minority business formation.** Congress found that discrimination by prime contractors, unions, and lenders has woefully impeded the formation of qualified minority business enterprises in the subcontracting market nationwide, noting the existence of “good ol’ boy” networks, from which minority firms have traditionally been excluded, and the race-based denial of access to capital, which affects the formation of minority subcontracting enterprise.<sup>26</sup>
- **Barriers to competition for existing minority enterprises.** Congress found evidence showing systematic exclusion and discrimination by prime contractors, private sector customers, business networks, suppliers, and bonding companies precluding minority enterprises from opportunities to bid. When minority firms are permitted to bid on subcontracts, prime contractors often resist working with them. Congress found evidence of the same prime contractor using a minority business enterprise on a government contract not using that minority business enterprise on a private contract, despite being satisfied with that subcontractor’s work. Congress found that informal, racially exclusionary business networks dominate the subcontracting construction industry.<sup>27</sup>
- **Local disparity studies.** Congress found that local studies throughout the country tend to show a disparity between utilization and availability of minority-owned firms, raising an inference of discrimination.<sup>28</sup>
- **Results of removing affirmative action programs.** Congress found evidence that when race-conscious public contracting programs are struck down or discontinued, minority business participation in the relevant market drops sharply or even disappears, which courts have found strongly supports the government’s claim that there are significant barriers to minority competition, raising the specter of discrimination.<sup>29</sup>
- **MAP-21.** Recently, in July 2012, Congress passed MAP-21 (see above), which made “Findings” that “discrimination and related barriers continue to pose significant obstacles for minority- and women-owned businesses seeking to do business in federally-assisted surface transportation markets,” and that the continuing barriers “merit the continuation” of the Federal DBE Program.<sup>30</sup> Congress also found that it received and reviewed testimony and documentation of

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<sup>25</sup> See, e.g., *Adarand VII*, 228 F.3d at 1167–76; see also *Western States Paving*, 407 F.3d at 992 (Congress “explicitly relied upon” the Department of Justice study that “documented the discriminatory hurdles that minorities must overcome to secure federally funded contracts”).

<sup>26</sup> *Adarand VII*, 228 F.3d. at 1168-70; *Western States Paving*, 407 F.3d at 992; see *DynaLantic*, 885 F.Supp.2d 237.

<sup>27</sup> *Adarand VII*. at 1170-72; see *DynaLantic*; 885 F.Supp.2d 237.

<sup>28</sup> *Id.* at 1172-74; see *DynaLantic*, 885 F.Supp.2d 237.

<sup>29</sup> *Id.* at 1174-75.

<sup>30</sup> Pub L. 112-141, H.R. 4348, § 1101(b), July 6, 2012, 126 Stat 405.

race and gender discrimination which “provide a strong basis that there is a compelling need for the continuation of the” Federal DBE Program.<sup>31</sup>

**Burden of proof.** Under the strict scrutiny analysis, and to the extent a state or local governmental entity has implemented a race- and gender-conscious program, the governmental entity has the initial burden of showing a strong basis in evidence (including statistical and anecdotal evidence) to support its remedial action.<sup>32</sup> If the government makes its initial showing, the burden shifts to the challenger to rebut that showing.<sup>33</sup> The challenger bears the ultimate burden of showing that the governmental entity’s evidence “did not support an inference of prior discrimination.”<sup>34</sup>

**Statistical evidence.** Statistical evidence of discrimination is a primary method used to determine whether or not a strong basis in evidence exists to develop, adopt and support a remedial program (i.e., to prove a compelling governmental interest), or in the case of a recipient complying with the Federal DBE Program, to prove narrow tailoring of program implementation at the state recipient level.<sup>35</sup> “Where gross statistical disparities can be shown, they alone in a proper case may constitute prima facie proof of a pattern or practice of discrimination.”<sup>36</sup>

One form of statistical evidence is the comparison of a government’s utilization of MBE/WBEs compared to the relative availability of qualified, willing and able MBE/WBEs.<sup>37</sup> The federal courts have held that a significant statistical disparity between the utilization and availability of minority- and women-owned firms may raise an inference of discriminatory exclusion.<sup>38</sup> However, a small statistical disparity, standing alone, may be insufficient to establish discrimination.<sup>39</sup>

Other considerations regarding statistical evidence include:

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<sup>31</sup> *Id.* at § 1101(b)(1).

<sup>32</sup> See *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, 991 (9th Cir. 2005) (Federal DBE Program); *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d 964, 969 (8th Cir. 2003) (Federal DBE Program); *Adarand Constructors Inc. v. Slater* (“Adarand VII”), 228 F.3d 1147, 1166 (10th Cir. 2000) (Federal DBE Program); *Eng’g Contractors Ass’n*, 122 F.3d at 916; *Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 713 (9th Cir. 1997); *DynaLantic*, 885 F.Supp.2d 237, *Hershell Gill Consulting Engineers, Inc. v. Miami Dade County*, 333 F. Supp.2d 1305, 1316 (S.D. Fla. 2004).

<sup>33</sup> *Adarand VII*, 228 F.3d at 1166; *Eng’g Contractors Ass’n*, 122 F.3d at 916.

<sup>34</sup> See, e.g., *Adarand VII*, 228 F.3d at 1166; *Eng’g Contractors Ass’n*, 122 F.3d at 916; see also *Sherbrooke Turf*, 345 F.3d at 971; *N. Contracting*, 473 F.3d at 721.

<sup>35</sup> See, e.g., *Croson*, 488 U.S. at 509; *AGC, SDC v. Caltrans*, 713 F.3d at 1195-1196; *N. Contracting*, 473 F.3d at 718-19, 723-24; *Western States Paving*, 407 F.3d at 991; *Adarand VII*, 228 F.3d at 1166.

<sup>36</sup> *Croson*, 488 U.S. at 501, quoting *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08 (1977).

<sup>37</sup> *Croson*, 448 U.S. at 509; see *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *Rothe*, 545 F.3d at 1041-1042; *Concrete Works of Colo., Inc. v. City and County of Denver* (“Concrete Works IP”), 321 F.3d 950, 959 (10th Cir. 2003); *Drabik II*, 214 F.3d 730, 734-736.

<sup>38</sup> See, e.g., *Croson*, 488 U.S. at 509; *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *Rothe*, 545 F.3d at 1041; *Concrete Works II*, 321 F.3d at 970; see *Western States Paving*, 407 F.3d at 1001.

<sup>39</sup> *Western States Paving*, 407 F.3d at 1001.

- **Availability analysis.** A disparity index requires an availability analysis. MBE/WBE and DBE availability measures the relative number of MBE/WBEs and DBEs among all firms ready, willing and able to perform a certain type of work within a particular geographic market area.<sup>40</sup> There is authority that measures of availability may be approached with different levels of specificity and the practicality of various approaches must be considered,<sup>41</sup> “An analysis is not devoid of probative value simply because it may theoretically be possible to adopt a more refined approach.”<sup>42</sup>
- **Utilization analysis.** Courts have accepted measuring utilization based on the proportion of an agency’s contract dollars going to MBE/WBEs and DBEs.<sup>43</sup>
- **Disparity index.** An important component of statistical evidence is the “disparity index.”<sup>44</sup> A disparity index is defined as the ratio of the percent utilization to the percent availability times 100. A disparity index below 80 has been accepted as evidence of adverse impact. This has been referred to as “The Rule of Thumb” or “The 80 percent Rule.”<sup>45</sup>
- **Two standard deviation test.** The standard deviation figure describes the probability that the measured disparity is the result of mere chance. Some courts have held that a statistical disparity corresponding to a standard deviation of less than two is not considered statistically significant.<sup>46</sup>

**Anecdotal evidence.** Anecdotal evidence includes personal accounts of incidents, including of discrimination, told from the witness’ perspective. Anecdotal evidence of discrimination, standing alone, generally is insufficient to show a systematic pattern of discrimination.<sup>47</sup> But personal

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<sup>40</sup> See, e.g., *Croson*, 448 U.S. at 509; 49 C.F.R. § 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.

<sup>41</sup> *Contractors Ass’n of Easton Pennsylvania, Inc. v. City of Philadelphia (“CAEP II”)*, 91 F.3d 586, 603 (3d Cir. 1996).

<sup>42</sup> *Id.*

<sup>43</sup> See *AGC, SDC v. Caltrans*, 713 F.3d at 1191-1197; *Eng’g Contractors Ass’n*, 122 F.3d at 912; *N. Contracting*, 473 F.3d at 717-720; *Sherbrooke Turf*, 345 F.3d at 973.

<sup>44</sup> *Eng’g Contractors Ass’n*, 122 F.3d at 914; *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206, 218 (5th Cir. 1999); *Contractors Ass’n of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 6 F.3d 990 at 1005 (3rd Cir. 1993).

<sup>45</sup> See, e.g., *Ricci v. DeStefano*, 557 U.S. 557, 129 S.Ct. 2658, 2678 (2009); *AGC, SDC v. Caltrans*, 713 F.3d at 1191; *Rothe*, 545 F.3d at 1041; *Eng’g Contractors Ass’n*, 122 F.3d at 914, 923; *Concrete Works I*, 36 F.3d at 1524.

<sup>46</sup> *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.

<sup>47</sup> See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1192, 1196-1198; *Eng’g Contractors Ass’n*, 122 F.3d at 924-25; *Coral Constr. Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991); *O’Donnel Constr. Co. v. District of Columbia*, 963 F.2d 420, 427 (D.C. Cir. 1992).

accounts of actual discrimination may complement empirical evidence and play an important role in bolstering statistical evidence.<sup>48</sup> It has been held that anecdotal evidence of a local or state government’s institutional practices that exacerbate discriminatory market conditions are often particularly probative.<sup>49</sup>

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.<sup>50</sup>
- Courts have accepted and recognize that anecdotal evidence is the witness’ narrative of incidents told from his or her perspective, including the witness’ thoughts, feelings, and perceptions, and thus anecdotal evidence need not be verified.<sup>51</sup>

#### **b. The Narrow Tailoring Requirement**

The second prong of the strict scrutiny analysis requires that a race- or ethnicity-based program or legislation implemented to remedy past identified discrimination in the relevant market be “narrowly tailored” to reach that objective.

The narrow tailoring requirement has several components and the courts analyze several criteria or factors in determining whether a program or legislation satisfies this requirement including:

- The necessity for the relief and the efficacy of alternative race-, ethnicity-, and gender-neutral remedies;
- The flexibility and duration of the relief, including the availability of waiver provisions;
- The relationship of numerical goals to the relevant labor market; and

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<sup>48</sup> See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1192, 1196-1198; *Eng’g Contractors Ass’n*, 122 F.3d at 925-26; *Concrete Works*, 36 F.3d at 1520; *Contractors Ass’n*, 6 F.3d at 1003; *Coral Constr. Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991).

<sup>49</sup> *Concrete Works I*, 36 F.3d at 1520.

<sup>50</sup> See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1197; *Northern Contracting*, 2005 WL 2230195, at 13-15 (N.D. Ill. 2005), *affirmed*, 473 F.3d 715 (7th Cir. 2007); e.g., *Concrete Works*, 321 F.3d at 989; *Adarand VII*, 228 F.3d at 1166-76. For additional examples of anecdotal evidence, see *Eng’g Contractors Ass’n*, 122 F.3d at 924; *Concrete Works*, 36 F.3d at 1520; *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 915 (11th Cir. 1990); *DynaLantic*, 885 F.Supp.2d 237; *Florida A.G.C. Council, Inc. v. State of Florida*, 303 F. Supp.2d 1307, 1325 (N.D. Fla. 2004).

<sup>51</sup> See, e.g., *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 impact of a race-, ethnicity-, or gender-conscious remedy on the rights of third parties.<sup>52</sup>

The second prong of the strict scrutiny analysis requires the implementation of the Federal DBE Program by recipients of federal funds be “narrowly tailored” to remedy identified discrimination in the particular recipient’s contracting and procurement market.<sup>53</sup> The narrow tailoring requirement has several components.

It should be pointed out that in the *Northern Contracting* decision (2007), the Seventh Circuit Court of Appeals addressed a challenge to a state government’s DBE program implementing the Federal DBE Program. As a result, the Court cited its earlier precedent in *Milwaukee County Pavers v. Fielder* to hold “that a state is insulated from [a narrow tailoring] constitutional attack, absent a showing that the state exceeded its federal authority. IDOT [Illinois DOT] here is acting as an instrument of federal policy and Northern Contracting (NCI) cannot collaterally attack the federal regulations through a challenge to IDOT’s program.”<sup>54</sup> The Seventh Circuit Court of Appeals distinguished both the Ninth Circuit Court of Appeals decision in *Western States Paving* and the Eighth Circuit Court of Appeals decision in *Sherbrooke Turf*, relating to an as-applied narrow tailoring analysis.

The Seventh Circuit Court of Appeals held that the state DOT’s [Illinois DOT] application of a federally mandated program is limited to the question of whether the state exceeded its grant of federal authority under the Federal DBE Program.<sup>55</sup> The Seventh Circuit Court of Appeals analyzed IDOT’s compliance with the federal regulations regarding calculation of the availability of DBEs, adjustment of its goal based on local market conditions and its use of race-neutral methods set forth in the federal regulations.<sup>56</sup> The court held NCI failed to demonstrate that IDOT did not satisfy compliance with the federal regulations (49 C.F.R. Part 26).<sup>57</sup> Accordingly, the Seventh Circuit Court of Appeals affirmed the district court’s decision upholding the validity of IDOT’s DBE program.<sup>58</sup> See the discussion of the *Northern Contracting* decision below in Section D<sup>59</sup>.

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<sup>52</sup> See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1198-1199; *Rothe*, 545 F.3d at 1036; *Western States Paving*, 407 F.3d at 993-995; *Sherbrooke Turf*, 345 F.3d at 971; *Adarand VII*, 228 F.3d at 1181; *Eng’g Contractors Ass’n*, 122 F.3d at 927 (internal quotations and citations omitted).

<sup>53</sup> *Western States Paving*, 407 F.3d at 995-998; *Sherbrooke Turf*, 345 F.3d at 970-71.

<sup>54</sup> 473 F.3d at 722.

<sup>55</sup> *Id.* at 722.

<sup>56</sup> *Id.* at 723-24.

<sup>57</sup> *Id.*

<sup>58</sup> See, e.g., *Geod Corp. v. New Jersey Transit Corp., et al.*, 746 F.Supp.2d 642 (D.N.J. 2010); *South Florida Chapter of the A.G.C. v. Broward County, Florida*, 544 F.Supp.2d 1336 (S.D. Fla. 2008).

<sup>59</sup> In *Western States Paving*, the Ninth Circuit held the recipient of federal funds must have independent evidence of discrimination within the recipient’s own transportation contracting and procurement marketplace in order to determine whether or not there is the need for race-, ethnicity-, or gender-conscious remedial action. Thus, the Ninth Circuit held in *Western States Paving* that mere compliance with the Federal DBE Program does not satisfy strict scrutiny. *Western States Paving*, 407 F.3d at 997-98, 1002-03. The Seventh Circuit Court of Appeals in *Northern Contracting* stated in a footnote that the court in *Western States Paving* “misread” the decision in *Milwaukee County Pavers*. 473 F.3d at 722, n. 5.

In *Western States Paving*, the Ninth Circuit Court of Appeals 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, there must be evidence that the minority group suffered discrimination within the recipient's marketplace.<sup>60</sup>

To satisfy the narrowly tailored prong of the strict scrutiny analysis, it is instructive for local government MBE/WBE programs that the federal courts, which evaluated local and state DBE Programs in the context of the Federal DBE Program, have held the following factors are pertinent:

- Evidence of discrimination or its effects in the state Transportation contracting industry;
- Flexibility and duration of a race- or ethnicity-conscious remedy;
- Relationship of any numerical DBE goals to the relevant market;
- Effectiveness of alternative race- and ethnicity-neutral remedies;
- Impact of a race- or ethnicity-conscious remedy on third parties; and
- Application of any race- or ethnicity-conscious program to only those minority groups who have actually suffered discrimination.<sup>61</sup>

The Eleventh Circuit described the “the essence of the ‘narrowly tailored’ inquiry [as] the notion that explicitly racial preferences ... must only be a ‘last resort’ option.”<sup>62</sup> Courts have found that “[w]hile narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, it does require serious, good faith consideration of whether such alternatives could serve the governmental interest at stake.”<sup>63</sup>

Similarly, the Sixth Circuit Court of Appeals in *Associated Gen. Contractors v. Drabik* (“*Drabik II*”), stated: “*Adarand* teaches that a court called upon to address the question of narrow tailoring must ask, “for example, whether there was ‘any consideration of the use of race-neutral means to increase minority business participation’ in government contracting ... or whether the program was appropriately limited such that it ‘will not last longer than the discriminatory effects it is designed to eliminate.’”<sup>64</sup>

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<sup>60</sup> 407 F.3d at 996-1000.

<sup>61</sup> See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1198-1199; *Western States Paving*, 407 F.3d at 998; *Sherbrooke Turf*, 345 F.3d at 971; *Adarand VII*, 228 F.3d at 1181; *Kornbass Construction, Inc. v. State of Oklahoma, Department of Central Services*, 140 F.Supp.2d at 1247-1248.

<sup>62</sup> *Eng’g Contractors Ass’n*, 122 F.3d at 926 (internal citations omitted); see also *Virdi v. DeKalb County School District*, 135 Fed. Appx. 262, 264, 2005 WL 138942 (11th Cir. 2005) (unpublished opinion); *Webster v. Fulton County*, 51 F. Supp.2d 1354, 1380 (N.D. Ga. 1999), *aff’d per curiam* 218 F.3d 1267 (11th Cir. 2000).

<sup>63</sup> See *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509-10 (1989); *Western States Paving*, 407 F.3d at 993; see also *Adarand I*, 515 U.S. at 237-38.

<sup>64</sup> *Associated Gen. Contractors of Ohio, Inc. v. Drabik* (“*Drabik II*”), 214 F.3d 730, 738 (6th Cir. 2000).

The Supreme Court in *Parents Involved in Community Schools v. Seattle School District*<sup>65</sup> also found that race- and ethnicity-based measures should be employed as a last resort. The majority opinion stated: “Narrow tailoring requires ‘serious, good faith consideration of workable race-neutral alternatives,’ and yet in Seattle several alternative assignment plans—many of which would not have used express racial classifications—were rejected with little or no consideration.”<sup>66</sup> The Court found that the District failed to show it seriously considered race-neutral measures.

The “narrowly tailored” analysis is instructive in terms of developing any potential legislation or programs that involve MBE/WBE/DBEs, or in connection with determining appropriate remedial measures to achieve legislative objectives.

**Race-, ethnicity-, and gender-neutral measures.** To the extent a “strong basis in evidence” exists concerning discrimination in a local or state government’s relevant contracting and procurement market, the courts analyze several criteria or factors to determine whether a state’s implementation of a race- or ethnicity-conscious program is necessary and thus narrowly tailored to achieve remedying identified discrimination. One of the key factors discussed above is consideration of race-, ethnicity- and gender-neutral measures.

The courts require that a local or state government seriously consider race-, ethnicity- and gender-neutral efforts to remedy identified discrimination.<sup>67</sup> And the courts have held unconstitutional those race- and ethnicity-conscious programs implemented without consideration of race- and ethnicity-neutral alternatives to increase minority business participation in state and local contracting.<sup>68</sup>

The Court in *Croson* followed by decisions from federal courts of appeal found that local and state governments have at their disposal a “whole array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races.”<sup>69 70</sup>

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

- Providing assistance in overcoming bonding and financing obstacles;
- Relaxation of bonding requirements;
- Providing technical, managerial and financial assistance;

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<sup>65</sup> 551 U.S. 701, 734-37, 127 S.Ct. 2738, 2760-61 (2007)

<sup>66</sup> 551 U.S. 701, 734-37, 127 S.Ct. at 2760-61; *see also Grutter v. Bollinger*, 539 U.S. 305 (2003).

<sup>67</sup> *See, e.g., AGC, SDC v. Caltrans*, 713 F.3d at 1199; *Western States Paving*, 407 F.3d at 993; *Sherbrooke Turf*, 345 F.3d at 972; *Adarand VII*, 228 F.3d at 1179; *Eng’g Contractors Ass’n*, 122 F.3d at 927; *Coral Constr.*, 941 F.2d at 923.

<sup>68</sup> *See Croson*, 488 U.S. at 507; *Drabik I*, 214 F.3d at 738 (citations and internal quotations omitted); *see also Eng’g Contractors Ass’n*, 122 F.3d at 927; *Virdi*, 135 Fed. Appx. At 268.

<sup>69</sup> *Croson*, 488 U.S. at 509-510.

<sup>70</sup> 49 C.F.R. § 26.51(a) requires recipients of federal funds to “meet the maximum feasible portion of your overall goal by using race-neutral means of facilitating DBE participation.” *See, e.g., Adarand VII*, 228 F.3d at 1179; *Western States Paving*, 407 F.3d at 993; *Sherbrooke Turf*, 345 F.3d at 972.

- Establishing programs to assist start-up firms;
- Simplification of bidding procedures;
- Training and financial aid for all disadvantaged entrepreneurs;
- Non-discrimination provisions in contracts and in state law;
- Mentor-protégé programs and mentoring;
- Efforts to address prompt payments to smaller businesses;
- Small contract solicitations to make contracts more accessible to smaller businesses;
- Expansion of advertisement of business opportunities;
- Outreach programs and efforts;
- “How to do business” seminars;
- Sponsoring networking sessions throughout the state acquaint small firms with large firms;
- Creation and distribution of MBE/WBE and DBE directories; and
- Streamlining and improving the accessibility of contracts to increase small business participation.<sup>71</sup>

The courts have held that while the narrow tailoring analysis does not require a governmental entity to exhaust every possible race-, ethnicity-, and gender-neutral alternative, it does “require serious, good faith consideration of workable race-neutral alternatives”.<sup>72</sup>

**Additional factors considered under narrow tailoring.** In addition to the required consideration of the necessity for the relief and the efficacy of alternative remedies (race- and ethnicity-neutral efforts), the courts require evaluation of additional factors as listed above.<sup>73</sup> For example, to be considered narrowly tailored, courts have held that a MBE/WBE- or DBE-type program should include: (1) built-in flexibility;<sup>74</sup> (2) good faith efforts provisions;<sup>75</sup> (3) waiver provisions;<sup>76</sup> (4) a rational basis for goals;<sup>77</sup> (5) graduation provisions;<sup>78</sup> (6) remedies only for groups for which there

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<sup>71</sup> See, e.g., *Croson*, 488 U.S. at 509-510; *N. Contracting*, 473 F.3d at 724; *Adarand VII*, 228 F.3d 1179; 49 C.F.R. § 26.51(b); *Eng’g Contractors Ass’n*, 122 F.3d at 927-29; 49 C.F.R. § 26.51(b).

<sup>72</sup> See, e.g., *AGC, SDC v. Caltrans*, 713 F.3d at 1199; citing *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003); *Western States Paving*, 407 F.3d at 993.

<sup>73</sup> *Eng’g Contractors Ass’n*, 122 F.3d at 927.

<sup>74</sup> *CAEPI*, 6 F.3d at 1009; *Associated Gen. Contractors of Ca., Inc. v. Coalition for Economic Equality* (“AGC of Ca.”), 950 F.2d 1401, 1417 (9th Cir. 1991); *Coral Constr. Co. v. King County*, 941 F.2d 910, 923 (9th Cir. 1991); *Cone Corp. v. Hillsborough County*, 908 F.2d 908, 917 (11th Cir. 1990).

<sup>75</sup> *CAEPI*, 6 F.3d at 1019; *Cone Corp.*, 908 F.2d at 917.

<sup>76</sup> *CAEPI*, 6 F.3d at 1009; *AGC of Ca.*, 950 F.2d at 1417; *Cone Corp.*, 908 F.2d at 917.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*



were findings of discrimination;<sup>79</sup> (7) sunset provisions;<sup>80</sup> and (8) limitation in its geographical scope to the boundaries of the enacting jurisdiction.<sup>81</sup>

## 2. Intermediate Scrutiny Analysis.

Certain Federal Courts of Appeal apply intermediate scrutiny to gender-conscious programs.<sup>82</sup> The Courts have interpreted this standard to require that gender-based classifications be:

1. Supported by both “sufficient probative” evidence or “exceedingly persuasive justification” in support of the stated rationale for the program; and
2. Substantially related to the achievement of that underlying objective.<sup>83</sup>

Under the traditional intermediate scrutiny standard, the court reviews a gender-conscious program by analyzing whether the state actor has established a sufficient factual predicate for the claim that female-owned businesses have suffered discrimination, and whether the gender-conscious remedy is an appropriate response to such discrimination. This standard requires the state actor to present “sufficient probative” evidence in support of its stated rationale for the program.<sup>84</sup>

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. The Seventh Circuit Court of Appeals in *Builders Ass’n* rejected the distinction applied by the Eleventh Circuit in *Engineering Contractors Ass’n*.<sup>85</sup>

Intermediate scrutiny, as interpreted by federal circuit courts of appeal other than the Seventh Circuit, requires a direct, substantial relationship between the objective of the gender preference and the means chosen to accomplish the objective. The measure of evidence required to satisfy intermediate scrutiny is less than that necessary to satisfy strict scrutiny. Unlike strict scrutiny, it has been held that the intermediate scrutiny standard does not require a showing of government involvement, active or passive, in the discrimination it seeks to remedy.<sup>86</sup> And the Eleventh Circuit has held that “[w]hen a gender-conscious affirmative action program rests on sufficient evidentiary foundation, the government is not required to implement the program only as a last resort ....

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<sup>79</sup> *Western States Paving*, 407 F.3d at 998; *AGC of Ca.*, 950 F.2d at 1417.

<sup>80</sup> *Peightal*, 26 F.3d at 1559.

<sup>81</sup> *Coral Constr.*, 941 F.2d at 925.

<sup>82</sup> See generally, *AGC, SDC v. Caltrans*, 713 F.3d at 1195; *Western States Paving*, 407 F.3d at 990 n. 6; *Coral Constr. Co.*, 941 F.2d at 931-932 (9th Cir. 1991); *Equal Found. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997); *Eng’g Contractors Ass’n*, 122 F.3d at 905, 908, 910; *Ensley Branch N.A.A.C.P. v. Seibels*, 31 F.3d 1548 (11th Cir. 1994); see also *U.S. v. Virginia*, 518 U.S. 515, 532 and n. 6 (1996) (“exceedingly persuasive justification.”)

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> 256 F.3d 642, 644-45 (7th Cir 2001).

<sup>86</sup> *Coral Constr. Co.*, 941 F.2d at 931-932; See *Eng’g Contractors Ass’n*, 122 F.3d at 910.

Additionally, under intermediate scrutiny, a gender-conscious program need not closely tie its numerical goals to the proportion of qualified women in the market.”<sup>87</sup>

### **3. Pending Cases (at the time of this report).**

There are pending cases in the federal courts, at the time of this report, that may potentially impact and be instructive to Madison, including the following:

*Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.* 2014 WL 6686734 (D. Mont. Nov. 26, 2014) *appeal pending* in the U.S. Court of Appeals, Ninth Circuit, Docket Numbers 14-36097 and 15-35003.

*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. Feb 12, 2014), *appeal pending* in the U.S. Court of Appeals, Seventh Circuit. (see Section D.8 below).

This list of pending cases is not exhaustive, but is illustrative of current pending cases that may impact MBE/WBE and DBE Programs.

**Ongoing review.** The above represents a brief summary of the legal framework pertinent to implementation of DBE, MBE/WBE, or race-, ethnicity-, or gender-neutral programs. Because this is a dynamic area of the law, the framework is subject to ongoing review as the law continues to evolve. The following provides more detailed summaries of key recent decisions.

## **D. Recent Decisions Involving State or Local Government MBE/WBE and DBE Programs in the Seventh Circuit Court of Appeals**

### **1. *Northern Contracting, Inc. v. Illinois*, 473 F.3d 715 (7<sup>th</sup> 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 (7<sup>th</sup> 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

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<sup>87</sup> 122 F.3d at 929 (internal citations omitted.)

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 five 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 (9<sup>th</sup> Cir. 2005), *cert. denied*, 126 S.Ct. 1332 (Feb. 21, 2006) and *Sherbrooke Turf, Inc. v. Minnesota DOT*, 345 F.3d 964, 970 (8<sup>th</sup> 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 (7<sup>th</sup> 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 C.F.R. § 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.*

## **2. Northern Contracting, Inc. v. Illinois, 2005 WL 2230195 (N.D. Ill. Sept. 8, 2005), aff'd 473 F.3d 715 (7<sup>th</sup> 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 (7<sup>th</sup> 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 eight percent of all contracts. *Id.*, *citing Adarand Constructors, Inc. v. Slater* “*Adarand VII*”, 228 F.3d 1147, 1177 (10<sup>th</sup> 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.

### **3. *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 C.F.R. 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 complaint 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 (8<sup>th</sup> Cir. 2003) and *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10<sup>th</sup> 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 C.F.R. § 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 complaint 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 complaint 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 C.F.R. § 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 C.F.R. § 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 C.F.R. § 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 C.F.R. § 26.53(a)(2). The regulations also prohibit the use of quotas. 49 C.F.R. § 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 women 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 C.F.R. § 26.67(b)(1). In addition, a firm owned by a white male may qualify as socially and economically disadvantaged. 49 C.F.R. § 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.

#### **4. *Rapid Test Prods., Inc. v. Durham Sch. Servs., Inc.*, 460 F.3d 859 (7<sup>th</sup> 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.

#### **5. *Builders Ass'n of Greater Chicago v. County of Cook, Chicago*, 256 F.3d 642 (7<sup>th</sup> 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 (7<sup>th</sup> 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 (11<sup>th</sup> 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.

#### **6. *Milwaukee County Pavers, Association v. Fiedler*, 922 F.2d 419 (7th Cir. 1991).**

**State and federal programs challenged.** In this case an association of highway contractors in Wisconsin brought suit to enjoin programs by which the State of Wisconsin “sets aside” certain highway contracts for firms that are certified as disadvantaged business enterprises (DBEs), and also requires highway contractors to give preferential treatment to subcontractors that are certified as DBE’s. 922 F.2d at 421. In the first type of program challenged by the highway contractors, according to the Court, the State of Wisconsin is the principal, rather than an agent of federal highway authorities, because the state receives no money from the federal government. *Id.* The state program involving non-federal funds was enjoined by the district court. *Id.*

In a second type of program challenged by the highway contractors, the Court finds the State of Wisconsin is the administrator and disbursing agent of federal highway grants. *Id.* at 421. This federal program the district court refused to enjoin. *Id.*

**State Program.** The Court states that the majority of the Justices of the Supreme Court believe that racial discrimination in any form, including reverse discrimination, is unconstitutional when done by states or municipalities, unless the purpose is to provide a remedy for discrimination against the favored group. *Id.* at 421-422. The Court found that Wisconsin made no effort to show that its

program was remedial in any sense. The Court rejected Wisconsin's argument that *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989), does not apply because its program involved DBEs and not MBEs.

The Court affirmed the injunction against the State of Wisconsin Program because the state did not establish that the purpose was to remedy discrimination.

**Role of states as agent under the federal program for DBEs.** The Court states that the basic question raised by the contractors' appeal is the proper characterization of the state's role under the 1987 Congressional Act relating to providing financial assistance to states for highway construction. *Id.* at 422. The Court points out that the Congressional Act offers the states financial assistance, and the receipt of funds under the Federal Act is voluntary, but a state that decides to receive such funds is bound by the federal regulations. *Id.*

The contractors did not question the validity of the 1987 federal Act authorizing the DBE program, the validity of the "set-aside provision" in the Act, or the validity of the federal regulations that implement that provision. *Id.* at 423. The contractors challenged the 1987 Act neither on its face nor as applied. *Id.* But, they argued that the Supreme Court decision in *Croson* prevents the state from playing the role envisaged for it by the Act and federal regulations unless the state is able to show that the "set-aside program", as implemented in Wisconsin, is necessary to rectify invidious discrimination. *Id.* at 423.

The Court found that these arguments, whatever merit they have or lack, are inconsistent with the contractors' decision not to challenge the validity of the federal statute or regulations. *Id.* at 423. The Court held as follows: "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 servants who drafted the regulations." *Id.* at 423.

The Court concludes the federal statute contemplates that states which decide to accept funds under it will reserve a portion of those funds for a class of disadvantaged contractors. *Id.* at 423. And, by virtue of a presumption created by federal regulations, which in this case were conceded to be valid, the disadvantaged contractors are likely to consist for the most part of enterprises controlled by members of the favored groups. *Id.* at 423. The Court held that if the state of Wisconsin does exactly what the statute expects it to do, and the statute is conceded for purposes of the litigation to be constitutional, the state cannot have violated the Constitution. *Id.* at 423.

The federal statute does not "require" the states to accept funds under it, but it authorizes them to do so, and the Court states that an action pursuant to a valid authorization is valid. *Id.* at 423. The lesson of the U.S. Supreme Court decisions, including *Croson*, according to the Court, is that the federal government can, by virtue of the enforcement clause of the Fourteenth Amendment, engage in affirmative action with a freer hand than states and municipalities can do. *Id.* at 424. And, the Court finds one way the federal government can do that is by authorizing states to do things that they could not do without federal authorization. *Id.*

**Vulnerable to challenge or impermissible collateral attack depending on if state complied with or exceeded its federal authority.** The Court makes clear that the plaintiffs in this case did not challenge the federal "set-aside program", a creature of federal statute and federal regulations. *Id.* at 424. Rather, they challenged the state's role in the federal program. *Id.* The Court thus held as

follows: “Insofar as the state is merely doing what the statute and regulations envisage and permit, the attack on the state is an impermissible collateral attack on the statute and regulations.” *Id.* at 424.

The Court also held that if the state exceeded its federal authority, it would be vulnerable to challenge under *Croson*. *Id.* at 424. The Court concluded that the state is vulnerable to such challenge insofar as it took the presumption in the federal regulations and applied it to programs not funded under, and therefore not governed by, the federal statute. *Id.*

The district court found that the state exceeded its authority under the federal statute in two other minor ways in addition to applying the presumption in the federal regulations to state funded programs, and the lower court enjoined those violations. *Id.* at 425. The Court agreed with the district court in connection with the ruling that the state exceeded its authority under the federal statute. *Id.* at 425, citing the district court decision in *Milwaukee County Pavers*, 731 F.Supp. at 1413-15. The district court enjoined the State of Wisconsin program in which the state was acting as the principal, not an agent, under a program in which Wisconsin set aside certain exclusively state-funded highway contracts for firms certified as DBEs. *Id.* The state Program was in violation of equal protection based on the absence of showing by the state of Wisconsin that discrimination was necessary to rectify discrimination against such minorities. *Id.*

However, the Court found that the contractors’ complaint about the state’s *administration* of the racial presumption in the federal regulations was not sufficient to rebut the presumption. *Id.* at 425. The contractors acknowledged that they made no effort to present, in proceedings for the certification of DBEs, evidence rebutting the presumption accorded the members of the favored groups. *Id.* The contractors, the Court states, are quarreling with the federal regulation whose validity they have conceded. *Id.*

**Holding.** The Court held that the state funded program under which Wisconsin “set aside” certain state-funded contracts for firms certified as DBEs racially discriminates in favor of minorities in violation of the Equal Protection Clause because there was no evidence presented by the state showing that discrimination was necessary to rectify discrimination against such minorities. The Court also held that the state, by accepting federal funds under the federal statute and federal regulations, did not violate equal protection. The Court further held that the state, to the extent it exceeded its authority under the federal law and the federal regulations, its conduct was vulnerable to an equal protection challenge.

***7. Midwest Fence Corporation v. United States Department of Transportation and Federal Highway Administration, the Illinois Department of Transportation, the Illinois State Toll Highway Authority, et al., 2015 WL 1396376 (N.D. Ill, March 24, 2015).***

In *Midwest Fence Corporation v. USDOT, the FHWA, the Illinois DOT and the Illinois State Toll Highway Authority*, Case No. 1:10-3-CV-5627, United States District Court for the Northern District of Illinois, Eastern Division, Plaintiff Midwest Fence Corporation, which is a guardrail, bridge rail and fencing contractor owned and controlled by white males challenged the constitutionality and the application of the USDOT, Disadvantaged Business Enterprise (“DBE”) Program. In addition, Midwest Fence similarly challenged the Illinois Department of Transportation’s (“IDOT”) implementation of the Federal DBE Program for federally-funded projects, IDOT’s implementation of its own DBE Program for state-funded projects and the Illinois State Tollway Highway Authority’s (“Tollway”) separate DBE Program.



The federal district court in 2011 issued an Opinion and Order denying the Defendants' Motion to Dismiss for lack of standing, denying the Federal Defendants' Motion to Dismiss certain Counts of the Complaint as a matter of law, granting IDOT Defendants' Motion to Dismiss certain Counts and granting the Tollway Defendants' Motion to Dismiss certain Counts, but giving leave to Midwest to replead subsequent to this Order. *Midwest Fence Corp. v. United States DOT, Illinois DOT, et al.*, 2011 WL 2551179 (N.D. Ill. June 27, 2011).

Midwest Fence in its Third Amended Complaint challenged the constitutionality of the Federal DBE Program on its face and as applied, and challenged the IDOT's implementation of the Federal DBE Program. Midwest Fence also sought a declaration that the USDOT regulations have not been properly authorized by Congress and a declaration that SAFETEA-LU is unconstitutional. Midwest Fence sought relief from the IDOT Defendants, including a declaration that state statutes authorizing IDOT's DBE Program for State-funded contracts are unconstitutional; a declaration that IDOT does not follow the USDOT regulations; a declaration that the IDOT DBE Program is unconstitutional and other relief against the IDOT. The remaining Counts sought relief against the Tollway Defendants, including that the Tollway's DBE Program is unconstitutional, and a request for punitive damages against the Tollway Defendants. The court in 2012 granted the Tollway Defendants' Motion to Dismiss Midwest Fence's request for punitive damages.

**Equal protection framework, strict scrutiny and burden of proof.** The court held that under a strict scrutiny analysis, the burden is on the government to show both a compelling interest and narrowly tailoring. 2015 WL 1396376 at \*7. The government must demonstrate a strong basis in evidence for its conclusion that remedial action is necessary. *Id.* Since the Supreme Court decision in *Crosson*, numerous courts have recognized that disparity studies provide probative evidence of discrimination. *Id.* The court stated that an inference of discrimination may be made with empirical evidence that demonstrates a significant statistical disparity between the number of qualified minority contractors and the number of such contractors actually engaged by the locality or the locality's prime contractors. *Id.* The court said that anecdotal evidence may be used in combination with statistical evidence to establish a compelling governmental interest. *Id.*

In addition to providing "hard proof" to back its compelling interest, the court stated that the government must also show that the challenged program is narrowly tailored. *Id.* at \*7. While narrow tailoring requires "serious, good faith consideration of workable race-neutral alternatives," the court said it does not require "exhaustion of every conceivable race-neutral alternative." *Id.*, citing *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003); *Fischer v. Univ. of Texas at Austin*, 133 S.Ct. 2411, 2420 (2013).

Once the governmental entity has shown acceptable proof of a compelling interest in remedying past discrimination and illustrated that its plan is narrowly tailored to achieve this goal, the party challenging the affirmative action plan bears the ultimate burden of proving that the plan is unconstitutional. 2015 WL 1396376 at \*7. To successfully rebut the government's evidence, a challenger must introduce "credible, particularized evidence" of its own. *Id.*

This can be accomplished, according to the court, by providing a neutral explanation for the disparity between DBE utilization and availability, showing that the government's data is flawed, demonstrating that the observed disparities are statistically insignificant, or presenting contrasting statistical data. *Id.* Conjecture and unsupported criticisms of the government's methodology are insufficient. *Id.*

**Standing.** The court found that Midwest had standing to challenge the Federal DBE Program, IDOT's implementation of it, and the Tollway Program. *Id.* at \*8. The court, however, did not find that Midwest had presented any facts suggesting its inability to compete on an equal footing for the Target Market Program contracts. The Target Market Program identified a variety of remedial actions that IDOT was authorized to take in certain Districts, which included individual contract goals, DBE participation incentives, as well as set-asides. *Id.* at \*9.

The court noted that Midwest did not identify any contracts that were subject to the Target Market Program, nor identify any set-asides that were in place in these districts that would have hindered its ability to compete for fencing and guardrails work. *Id.* at \*9. Midwest did not allege that it would have bid on contracts set aside pursuant to the Target Market Program had it not been prevented from doing so. *Id.* Because nothing in the record Midwest provided suggested that the Target Market Program impeded Midwest's ability to compete for work in these Districts, the court dismissed Midwest's claim relating to the Target Market Program for lack of standing.

**Facial challenge to the Federal DBE Program.** The court found that remedying the effects of race and gender discrimination within the road construction industry is a compelling governmental interest. The court also found that the Federal Defendants have supported their compelling interest with a strong basis in evidence. *Id.* at \*11. The Federal Defendants, the court said, presented an extensive body of testimony, reports, and studies that they claim provided the strong basis in evidence for their conclusion that race and gender-based classifications are necessary. *Id.* The court took judicial notice of the existence of Congressional hearings and reports and the collection of evidence presented to Congress in support of the Federal DBE Program's 2012 reauthorization under MAP-21, including both statistical and anecdotal evidence. *Id.*

The court also considered a report from a consultant who reviewed 95 disparity and availability studies concerning minority- and women-owned businesses, as well as anecdotal evidence, that were completed from 2000 to 2012. *Id.* at \*11. Sixty-four of the studies had previously been presented to Congress. *Id.* The studies examine procurement for over 100 public entities and funding sources across 32 states. *Id.* The consultant's report opined that metrics such as firm revenue, number of employees, and bonding limits should not be considered when determining DBE availability because they are all "likely to be influenced by the presence of discrimination if it exists" and could potentially result in a built-in downward bias in the availability measure. *Id.* at \*11.

To measure disparity, the consultant divided DBE utilization by availability and multiplied by 100 to calculate a "disparity index" for each study. *Id.* at \*11. The report found 66 percent of the studies showed a disparity index of 80 or below, that is, significantly underutilized relative to their availability. *Id.* The report also examined data that showed lower earnings and business formation rates among women and minorities, even when variables such as age and education were held constant. *Id.* The report concluded that the disparities were not attributable to factors other than race and sex and were consistent with the presence of discrimination in construction and related professional services. *Id.*

The court distinguished the Federal Circuit decision in *Rothe Dev. Corp. v. Dep't. of Def.*, 545 F. 3d 1023 (Fed. Cir. 2008) where the Federal Circuit Court held insufficient the reliance on only six disparity studies to support the government's compelling interest in implementing a national program. *Id.* at \*12, *citing Rothe*, 545 F. 3d at 1046. The court here noted the consultant report supplements the

testimony and reports presented to Congress in support of the Federal DBE Program, which courts have found to establish a “strong basis in evidence” to support the conclusion that race-and gender-conscious action is necessary. *Id. at \*12.*

The court found through the evidence presented by the Federal Defendants satisfied their burden in showing that the Federal DBE Program stands on a strong basis in evidence. *Id. at \*12.* The Midwest expert’s suggestion that the studies used in consultant’s report do not properly account for capacity, the court stated, does not compel the court to find otherwise. The court *quoting Adarand VII*, 228 F.3d at 1173 N.H. (10<sup>th</sup> Cir. 2000) said that general criticism of disparity studies, as opposed to particular evidence undermining the reliability of the particular disparity studies relied upon by the government, is of little persuasive value and does not compel the court to discount the disparity evidence. *Id.* Midwest failed to present “affirmative evidence” that no remedial action was necessary. *Id.*

**Federal DBE Program is narrowly tailored.** Once the government has established a compelling interest for implementing a race-conscious program, it must show that the program is narrowly tailored to achieve this interest. *Id. at \*12.* In determining whether a program is narrowly tailored, courts examine several factors, including (a) the necessity for the relief and efficacy of alternative race-neutral measures, (b) the flexibility and duration of the relief, including the availability of waiver provisions, (c) the relationship of the numerical goals to the relevant labor market, and (d) the impact of the relief on the rights of third parties. *Id.* The court stated that courts may also assess whether a program is “overinclusive.” *Id.* The court found that each of the above factors supports the conclusion that the Federal DBE Program is narrowly tailored. *Id.*

First, the court said that under the federal regulations, recipients of federal funds can only turn to race- and gender-conscious measures after they have attempted to meet their DBE participation goal through race-neutral means. *Id. at \*13.* The court noted that race-neutral means include making contracting opportunities more accessible to small businesses, providing assistance in obtaining bonding and financing, and offering technical and other support services. *Id.* The court found that the regulations require serious, good faith consideration of workable race-neutral alternatives. *Id.*

Second, the federal regulations contain provisions that limit the Federal DBE Program’s duration and ensure its flexibility. *Id. at \*13.* The court found that the Federal DBE Program lasts only as long as its current authorizing act allows, noting that with each reauthorization, Congress must reevaluate the Federal DBE Program in light of supporting evidence. *Id.* The court also found that the Federal DBE Program affords recipients of federal funds and prime contractors substantial flexibility. *Id. at \*13.* Recipients may apply for exemptions or waivers, releasing them from program requirements. *Id.* Prime contractors can apply to IDOT for a “good faith efforts waiver” on an individual contract goal. *Id.*

The court stated the availability of waivers is particularly important in establishing flexibility. *Id. at \*13.* The court rejected Midwest’s argument that the federal regulations impose a quota in light of the Program’s explicit waiver provision. *Id.* Based on the availability of waivers, coupled with regular congressional review, the court found that the Federal DBE Program is sufficiently limited and flexible. *Id.*

Third, the court said that the Federal DBE Program employs a two-step goal-setting process that ties DBE participation goals by recipients of federal funds to local market conditions. *Id.* at \*13. The court pointed out that the regulations delegate goal setting to recipients of federal funds who tailor DBE participation to local DBE availability. *Id.* The court found that the Federal DBE Program’s goal-setting process requires states to focus on establishing realistic goals for DBE participation that are closely tied to the relevant labor market. *Id.*

Fourth, the federal regulations, according to the court, contain provisions that seek to minimize the Program’s burden on non-DBEs. *Id.* at \*13. The court pointed out the following provisions aim to keep the burden on non-DBEs minimal: the Federal DBE Program’s presumption of social and economic disadvantage is rebuttable; race is not a determinative factor; in the event DBEs become “overconcentrated” in a particular area of contract work, recipients must take appropriate measures to address the overconcentration; the use of race-neutral measures; and the availability of good faith efforts waivers. *Id.* at \*13.

The court said Midwest’s primary argument is that the practice of states to award prime contracts to the lowest bidder, and the fact the federal regulations prescribe that DBE participation goals be applied to the value of the entire contract, unduly burdens non-DBE subcontractors. *Id.* at \*14. Midwest argued that because most DBEs are small subcontractors, setting goals as a percentage of all contract dollars, while requiring a remedy to come only from subcontracting dollars, unduly burdens smaller, specialized non-DBEs. *Id.* The court found that the fact innocent parties may bear some of the burden of a DBE program is itself insufficient to warrant the conclusion that a program is not narrowly tailored. *Id.* The court also found that strong policy reasons support the Federal DBE Program’s approach. *Id.*

The court stated that congressional testimony and the expert report from the Federal Defendants provide evidence that the Federal DBE Program is not overly inclusive. *Id.* at \*14. The court noted the report observed statistically significant disparities in business formation and earnings rates in all 50 states for all minority groups and for non-minority women. *Id.*

The court said that Midwest did not attempt to rebut the Federal Defendants’ evidence. *Id.* at \*14. Therefore, because the Federal DBE Program stands on a strong basis in evidence and is narrowly tailored to achieve the goal of remedying discrimination, the court found the Program is constitutional on its face. *Id.* at \*14. The court thus granted summary judgment in favor of the Federal Defendants. *Id.*

**As-applied challenge to IDOT’s implementation of the Federal DBE Program.** In addition to challenging the Federal DBE Program on its face, Midwest also argued that it is unconstitutional as applied. *Id.* The court stated because the Federal DBE Program is applied to Midwest through IDOT, the court must examine IDOT’s implementation of the Federal DBE Program. *Id.* Following the Seventh Circuit’s decision in *Northern Contracting v. Illinois DOT*, the court said that whether the Federal DBE Program is unconstitutional as applied is a question of whether IDOT exceeded its authority in implementing it. *Id.* at \*14, citing *Northern Contracting, Inc. v. Illinois*, 473 F.3d 715 at 722 (7<sup>th</sup> Cir. 2007). The court, quoting *Northern Contracting*, held that a challenge to a state’s application of a federally mandated program must be limited to the question of whether the state exceeded its authority. *Id.* at \*14.

IDOT not only applies the Federal DBE Program to USDOT-assisted projects, but it also applies the Federal DBE Program to state-funded projects. *Id. at \*14.* The court, therefore, held it must determine whether the IDOT Defendants have established a compelling reason to apply the IDOT Program to state-funded projects in Illinois. *Id.*

The court pointed out that the Federal DBE Program delegates the narrow tailoring function to the state, and thus, IDOT must demonstrate that there is a demonstrable need for the implementation of the Federal DBE Program within its jurisdiction. *Id. at \*14.* Accordingly, the court assessed whether IDOT has established evidence of discrimination in Illinois sufficient to (1) support its application of the Federal DBE Program to state-funded contracts, and (2) demonstrate that IDOT's implementation of the Federal DBE Program is limited to a place where race-based measures are demonstrably needed. *Id.*

**IDOT's evidence of discrimination and DBE availability in Illinois.** The evidence that IDOT has presented to establish the existence of discrimination in Illinois included two studies, one that was done in 2004 and the other in 2011. *Id. at \*15.* The court said that the 2004 study uncovered disparities in earnings and business formation rates among women and minorities in the construction and engineering fields that the study concluded were consistent with discrimination. IDOT maintained that the 2004 study and the 2011 study must be read in conjunction with one another. *Id. at \*15.* The court found that the 2011 study provided evidence to establish the disparity from which IDOT's inference of discrimination primarily arises. *Id. at \*15.*

The 2011 study compared the proportion of contracting dollars awarded to DBEs (utilization) with the availability of DBEs. *Id.* The study determined availability through multiple sources, including bidders lists, prequalified business lists, and other methods recommended in the federal regulations. *Id.* The study applied NAICS codes to different types of contract work, assigning greater weight to categories of work in which IDOT had expended the most money. *Id.* This resulted in a "weighted" DBE availability calculation. *Id.*

The 2011 study examined prime and subcontracts and anecdotal evidence concerning race and gender discrimination in the Illinois road construction industry, including one-on-one interviews and a survey of more than 5,000 contractors. *Id. at \*15.* The 2011 study, the court said, contained a regression analysis of private sector data and found disparities in earnings and business ownership rates among minorities and women, even when controlling for race- and gender-neutral variables. *Id.*

The study concluded that there was a statistically significant underutilization of DBEs in the award of both prime and subcontracts in Illinois. *Id.* For example, the court noted the difference the study found in the percentage of available prime construction contractors to the percentage of prime construction contracts under \$500,000, and the percentage of available construction subcontractors to the amount of percentage of dollars received of construction subcontracts. *Id.*

IDOT presented certain evidence to measure DBE availability in Illinois. The court pointed out that the 2004 study and two subsequent Goal-Setting Reports were used in establishing IDOT's DBE participation goal. *Id. at \*15.* The 2004 study arrived at IDOT's 22.77 percent DBE participation goal in accordance with the two-step process defined in the federal regulations. *Id.* The court stated the 2004 study employed a seven-step "custom census" approach to calculate baseline DBE availability under step one of the regulations. *Id.*

The process begins by identifying the relevant markets in which IDOT operates and the categories of businesses that account for the bulk of IDOT spending. *Id. at \*15*. The industries and counties in which IDOT spends relatively more contract dollars receive proportionately higher weights in the ultimate calculation of statewide DBE availability. *Id.* The study then counts the number of businesses in the relevant markets, and identifies which are minority- and women-owned. *Id.* To ensure the accuracy of this information, the study provides that it takes additional steps to verify the ownership status of each business. *Id.* Under step two of the regulations, the study adjusted this figure to 27.51 percent based on Census Bureau data. *Id.* According to the study, the adjustment takes into account its conclusion that baseline numbers are artificially lower than what would be expected in a race-neutral marketplace. *Id.*

IDOT used separate Goal-Setting Reports that calculated IDOT's DBE participation goal pursuant to the two-step process in the federal regulations, drawing from bidders lists, DBE directories, and the 2011 study to calculate baseline DBE availability. *Id. at \*16*. The study and the Goal-Setting Reports gave greater weight to the types of contract work in which IDOT had expended relatively more money. *Id.*

**Court rejected Midwest arguments as to the data and evidence.** The court rejected the challenges by Midwest to the accuracy of IDOT's data. For example, Midwest argued that the anecdotal evidence contained in the 2011 study does not prove discrimination. *Id. at \*16*. The court stated, however, where anecdotal evidence has been offered in conjunction with statistical evidence, it may lend support to the government's determination that remedial action is necessary. *Id. at \*16*. The court noted that anecdotal evidence on its own could not be used to show a general policy of discrimination. *Id.*

The court rejected another argument by Midwest that the data collected after IDOT's implementation of the Federal DBE Program may be biased because anything observed about the public sector may be affected by the DBE Program. *Id. at \*16*. The court rejected that argument finding post-enactment evidence of discrimination permissible. *Id.*

Midwest's main objection to the IDOT evidence, according to the court, is that it failed to account for capacity when measuring DBE availability and underutilization. *Id. at \*16*. Midwest argued that IDOT's disparity studies failed to rule out capacity as a possible explanation for the observed disparities. *Id. at \*16*.

IDOT argued that on prime contracts under \$500,000, capacity is a variable that makes little difference. *Id. at \*17*. Prime contracts of varying sizes under \$500,000 were distributed to DBEs and non-DBEs alike at approximately the same rate. *Id. at \*17*. IDOT also argued that through regression analysis, the 2011 study demonstrated factors other than discrimination did not account for the disparity between DBE utilization and availability. *Id.*

The court stated that despite Midwest's argument that the 2011 study took insufficient measures to rule out capacity as a race-neutral explanation for the underutilization of DBEs, the Supreme Court has indicated that a regression analysis need not take into account "all measurable variables" to rule out race-neutral explanations for observed disparities. *Id. at \*17 quoting Bazemore v. Friday, 478 U.S. 385, 400 (1986)*.

Midwest criticisms insufficient, speculative and conjecture – no independent statistical analysis; IDOT followed *Northern Contracting* and did not exceed the federal regulations. The court found Midwest’s criticisms insufficient to rebut IDOT’s evidence of discrimination or discredit IDOT’s methods of calculating DBE availability. *Id.* at \*17. First, the court said, the “evidence” offered by Midwest’s expert reports “is speculative at best.” *Id.* at \*17. The court found that for a reasonable jury to find in favor of Midwest, Midwest would have to come forward with “credible, particularized evidence” of its own, such as a neutral explanation for the disparity, or contrasting statistical data. *Id.* at \*17. The court held that Midwest failed to make the showing in this case. *Id.*

Second, the court stated that IDOT’s method of calculating DBE availability is consistent with the federal regulations and has been endorsed by the Seventh Circuit. *Id.* at \*17. The federal regulations, the court said, approve a variety of methods for accurately measuring ready, willing, and available DBEs, such as the use of DBE directories, Census Bureau data, and bidders lists. *Id.* The court found that these are the methods the 2011 study adopted in calculating DBE availability. *Id.*

The court said that the Seventh Circuit Court of Appeals approved the “custom census” approach as consistent with the federal regulations. *Id.* at \*17, citing to *Northern Contracting v. Illinois DOT*, 473 F.3d at 723. The court noted the Seventh Circuit rejected the argument that availability should be based on a simple count of registered and prequalified DBEs under Illinois law, finding no requirement in the federal regulations that a recipient must so narrowly define the scope of ready, willing, and available firms. *Id.* The court also rejected the notion that an availability measure should distinguish between prime and subcontractors. *Id.* at \*17.

The court held that through the 2004 and 2011 studies, and Goal-Setting Reports, IDOT provided evidence of discrimination in the Illinois road construction industry and a method of DBE availability calculation that is consistent with both the federal regulations and the Seventh Circuit decision in *Northern Contract v. Illinois DOT*. *Id.* at \*18. The court said that in response to the Seventh Circuit decision and IDOT’s evidence, Midwest offered only conjecture about how these studies supposed failure to account for capacity may or may not have impacted the studies’ result. *Id.*

The court pointed out that although Midwest’s expert’s reports “cast doubt on the validity of IDOT’s methodology, they failed to provide any independent statistical analysis or other evidence demonstrating actual bias.” *Id.* at \*18. Without this showing, the court stated, the record fails to demonstrate a lack of evidence of discrimination or actual flaws in IDOT’s availability calculations.

**Burden on non-DBE subcontractors; overconcentration.** The court addressed the narrow tailoring factor concerning whether a program’s burden on third parties is undue or unreasonable. The parties disagreed about whether the IDOT program resulted in an overconcentration of DBEs in the fencing and guardrail industry. *Id.* at \*18. IDOT prepared an overconcentration study comparing the total number of prequalified fencing and guardrail contractors to the number of DBEs that also perform that type of work and determined that no overconcentration problem existed. Midwest presented its evidence relating to overconcentration. *Id.* The court found that Midwest did not show IDOT’s determination that overconcentration does not exist among fencing and guardrail contractors to be unreasonable. *Id.* at \*18.

The court stated the fact IDOT sets contract goals as a percentage of total contract dollars does not demonstrate that IDOT imposes an undue burden on non-DBE subcontractors, but to the contrary,

IDOT is acting within the scope of the federal regulations that requires goals to be set in this manner. *Id.* at \*19. The court noted that it recognizes setting goals as a percentage of total contract value addresses the widespread, indirect effects of discrimination that may prevent DBEs from competing as primes in the first place, and that a sharing of the burden by innocent parties, here non-DBE subcontractors, is permissible. *Id.* at \*19. The court held that IDOT carried its burden in providing persuasive evidence of discrimination in Illinois, and found that such sharing of the burden is permissible here. *Id.*

**Use of race-neutral alternatives.** The court found that IDOT identified several race-neutral programs it used to increase DBE participation, including its Supportive Services, Mentor–Protégé, and Model Contractor Programs. *Id.* at \*19. The programs provide workshops and training that help small businesses build bonding capacity, gain access to financial and project management resources, and learn about specific procurement opportunities. *Id.* IDOT conducted several studies including zero-participation goals contracts in which there was no DBE participation goal, and found that DBEs received only 0.84 percent of the total dollar value awarded. *Id.*

The court held IDOT was compliant with the federal regulations, noting that in the *Northern Contracting v. Illinois DOT* case, the Seventh Circuit found IDOT employed almost all of the methods suggested in the regulations to maximize DBE participation without resorting to race, including providing assistance in obtaining bonding and financing, implementing a supportive services program, and providing technical assistance. *Id.* at \*19. The court agreed with the Seventh Circuit, and found that IDOT has made serious, good faith consideration of workable race-neutral alternatives. *Id.*

**Duration and flexibility.** The court pointed out that the state statute through which the Federal DBE Program is implemented is limited in duration and must be reauthorized every two to five years. *Id.* at \*19. The court reviewed evidence that IDOT granted 270 of the 362 good faith waiver requests that it received from 2006 to 2014, and that IDOT granted 1,002 post-award waivers on over \$36 million in contracting dollars. *Id.* at \*19. The court noted that IDOT granted the only good faith efforts waiver that Midwest requested. *Id.*

The court held the undisputed facts established that IDOT did not have a “no-waiver policy.” *Id.* at \*20. The court found that it could not conclude that the waiver provisions were impermissibly vague, and that IDOT took into consideration the substantial guidance provided in the federal regulations. *Id.* Because Midwest’s own experience demonstrated the flexibility of the Federal DBE Program in practice, the court said it could not conclude that the IDOT program amounts to an impermissible quota system that is unconstitutional on its face. *Id.* at \*20.

The court again stated that Midwest had not presented any affirmative evidence showing that IDOT’s implementation of the Federal DBE Program imposes an undue burden on non-DBEs, fails to employ race-neutral measures, or lacks flexibility. *Id.* at \*20. Accordingly, the court granted IDOT’s motion for summary judgment.

**Facial and as-applied challenges to the Tollway program.** The Illinois Tollway Program exists independently of the Federal DBE Program. Midwest challenged the Tollway Program as unconstitutional on its face and as applied. *Id.* at \*20. Like the Federal and IDOT Defendants, the Tollway was required to show that its compelling interest in remedying discrimination in the Illinois



road construction industry rests on a strong basis in evidence. *Id.* The Tollway relied on a 2006 disparity study, which examined the disparity between the Tollway's utilization of DBEs and their availability. *Id.*

The study employed a "custom census" approach to calculate DBE availability, and examined the Tollway's contract data to determine utilization. *Id.* at \*20. The 2006 study reported statistically significant disparities for all race and sex categories examined. *Id.* The study also conducted an "economy-wide analysis" examining other race and sex disparities in the wider construction economy from 1979 to 2002. *Id.* at \*21. Controlling for race- and gender-neutral variables, the study showed a significant negative correlation between a person's race or sex and their earning power and ability to form a business. *Id.*

**Midwest's challenges to the Tollway evidence insufficient and speculative.** In 2013, the Tollway commissioned a new study, which the court noted was not complete, but there was an "economy-wide analysis" similar to the analysis done in 2006 that updated census data gathered from 2007 to 2011. *Id.* at \*21. The updated census analysis, according to the court, controlled for variables such as education, age and occupation and found lower earnings and rates of business formation among women and minorities as compared to white men. *Id.*

Midwest attacked the Tollway's 2006 study similar to how it attacked the other studies with regard to IDOT's DBE Program. *Id.* at \*21. For example, Midwest attacked the 2006 study as being biased because it failed to take into account capacity in determining the disparities. *Id.* at \*21. The Tollway defended the 2006 study arguing that capacity metrics should not be taken into account because the Tollway asserted they are themselves a product of indirect discrimination, the construction industry is elastic in nature, and that firms can easily ramp up or ratchet down to accommodate the size of a project. *Id.* The Tollway also argued that the "economy-wide analysis" revealed a negative correlation between an individual's race and sex and their earning power and ability to own or form a business, showing that the underutilization of DBEs is consistent with discrimination. *Id.* at \*21.

To successfully rebut the Tollway's evidence of discrimination, the court stated that Midwest must come forward with a neutral explanation for the disparity, show that the Tollway's statistics are flawed, demonstrate that the observed disparities are insignificant, or present contrasting data of its own. *Id.* at \*22. Again, the court found that Midwest failed to make this showing, and that the evidence offered through the expert reports for Midwest was far too speculative to create a disputed issue of fact suitable for trial. *Id.* at \*22. Accordingly, the court found the Tollway Defendants established a strong basis in evidence for the Tollway Program. *Id.*

**Tollway Program is narrowly tailored.** As to determining whether the Tollway Program is narrowly tailored, Midwest also argued that the Tollway Program imposed an undue burden on non-DBE subcontractors. Like IDOT, the Tollway sets individual contract goals as a percentage of the value of the entire contract based on the availability of DBEs to perform particular line items. *Id.* at \*22.

The court reiterated that setting goals as a percentage of total contract dollars does not demonstrate an undue burden on non-DBE subcontractors, and that the Tollway's method of goal setting is identical to that prescribed by the federal regulations, which the court already found to be supported by strong policy reasons. *Id.* at \*22. The court stated that the sharing of a remedial program's burden

is itself insufficient to warrant the conclusion that the program is not narrowly tailored. *Id.* at \*22. The court held the Tollway Program’s burden on non-DBE subcontractors to be permissible. *Id.*

In addressing the efficacy of race-neutral measures, the court found the Tollway implemented race-neutral programs to increase DBE participation, including a program that allows smaller contracts to be unbundled from larger ones, a Small Business Initiative that sets aside contracts for small businesses on a race-neutral basis, partnerships with agencies that provide support services to small businesses, and other programs designed to make it easier for smaller contractors to do business with the Tollway in general. *Id.* at \*22. The court held the Tollway’s race-neutral measures are consistent with those suggested under the federal regulations and found that the availability of these programs, which mirror IDOT’s, demonstrates serious, good faith consideration of workable race-neutral alternatives. *Id.* at \*22.

In considering the issue of flexibility, the court found the Tollway Program, like the Federal DBE Program, provides for waivers where prime contractors are unable to meet DBE participation goals, but have made good faith efforts to do so. *Id.* at \*23. Like IDOT, the court said the Tollway adheres to the federal regulations in determining whether a bidder has made good faith efforts. *Id.* As under the Federal DBE Program, the Tollway Program also allows bidders who have been denied waivers to appeal. *Id.*

From 2006 to 2011, the court stated, the Tollway granted waivers on approximately 20 percent of the 200 prime construction contracts it awarded. *Id.* Because the Tollway demonstrated that waivers are available, routinely granted, and awarded or denied based on guidance found in the federal regulations, the court found the Tollway Program sufficiently flexible. *Id.* at \*23.

**Midwest presented no affirmative evidence.** The court held the Tollway Defendants provided a strong basis in evidence for their DBE Program, whereas Midwest, did not come forward with any concrete, affirmative evidence to shake this foundation. *Id.* at \*23. The court thus held the Tollway Program was narrowly tailored and granted the Tollway Defendants’ motion for summary judgment.

**8. *Dunnet Bay Construction Company v. Gary Hannig, in its official capacity as Secretary of Transportation for the Illinois DOT and the Illinois DOT, 2014 WL 552213 (C.D. Ill. Feb 12, 2014), appeal pending in U.S. Court of Appeals for the Seventh Circuit.***

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 eight 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 (7<sup>th</sup> 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 nine 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.

**Notice of Appeal.** At the time of this report, Dunnet Bay Construction Company has filed a Notice of Appeal to the United States Court of Appeals for the Seventh Circuit, which appeal is pending.

**9. *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 two 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).

**10. *Hispanic Chamber of Commerce of Wisconsin v. City of Milwaukee*, Case No 2:12-CV-00545, U.S. District Court of Wisconsin, Milwaukee Division - Case Dismissed and Settled (August 2013).**

This is a lawsuit initially filed by the Hispanic Chamber of Commerce of Wisconsin (“Hispanic Chamber”) against the City of Milwaukee, Wisconsin challenging the constitutional validity of Milwaukee City Ordinance 370. Subsequently, the American Indian Chamber of Commerce of Wisconsin, Inc. (“American Indian Chamber”), intervened in the case as a plaintiff along with the Hispanic Chamber of Commerce, and the City of Milwaukee added a consulting company as a defendant. Insurance companies also were added as defendants in the litigation.

The Hispanic Chamber and the American Indian Chamber contended that City Ordinance 370 was unconstitutional because it did not withstand the strict scrutiny standard that applies when a local government like the City of Milwaukee enacts a race-based contracting program. The Hispanic Chamber and the American Indian Chamber sought for the Court to declare that City Ordinance 370 violated the equal protection provisions of the U.S. and Wisconsin Constitutions, issue a permanent injunction enjoining the City from enforcing Ordinance 370, and provide the plaintiffs with an award of their attorney fees and costs. The City denied that Ordinance 370 is in any way constitutionally invalid.

In the complaint, the plaintiffs claimed that City Ordinance 370 created minimum annual requirements (as a percentage of contract dollars) for the participation of certain minority-owned business enterprises, small business enterprises and women-owned business enterprises for certain types of City contracts. The City Ordinance 370 established minimum percentage total dollars expended on contracts for construction, purchase of goods and services, and purchase of professional services in the amount of 25 percent, 25 percent and 18 percent respectively.

The plaintiffs claimed that City Ordinance 370 also created minimum annual participation requirements for MBEs, WBEs and SBEs broken down by African-American owned businesses, Asian-American-owned businesses, WBEs and SBEs. For purposes of construction contracts, the Hispanic Chamber and American Indian Chamber members were not allocated a preference in any annual participation requirements for City Ordinance 370.

The City contended that City Ordinance 370 contains preferences that are goals and “not requirements.” The City in 2009 had retained a consultant firm to conduct a disparity study. The legislation establishing the City Ordinance provides references to the results of the disparity study. The City stated that City Ordinance 370 based on the evidence and the study establishes a minority, women and small business enterprise program.



The City contended that City Ordinance 370 does not forestall the Hispanic Chamber and American Chamber members from materially benefiting from preferences, even where no particular preference for Hispanic-owned or Native American-owned businesses applies. The City Ordinance had overall participation goals for WBEs, MBEs, and SBEs, and American Indian Chamber and Hispanic Chamber member businesses could qualify for preferences both under the racial goals under certain contracts, based on their race or ethnicity, and also as SBEs.

After the parties filed pleadings and certain motions to dismiss, including by the insurance company defendants and third-party D. Wilson Consulting Group, all the parties entered into settlement discussions. Subsequently, in May of 2013, the parties informed the Court that they had settled all aspects of the case and prepared a settlement agreement that included dismissal of the case with prejudice. In August of 2013, the district court terminated the case and approved a Stipulation of Dismissal.

Therefore, the case was terminated based upon a settlement agreement and dismissal with prejudice, and thus ended without any rulings on the merits of the complaint.

## **E. Recent Decisions Involving State or Local Government MBE/WBE Programs in Other Jurisdictions**

### **Recent Decisions in Federal Circuit Courts of Appeal**

#### **1. *H. B. Rowe Co., Inc. v. W. Lyndo Tippett, NCDOT, et al.*, 615 F.3d 233 (4th Cir. 2010)**

The State of North Carolina enacted statutory legislation that required prime contractors to engage in good faith efforts to satisfy participation goals for minority and women subcontractors on state-funded projects. (See facts as detailed in the decision of the United States District Court for the Eastern District of North Carolina discussed below.). The plaintiff, a prime contractor, brought this action after being denied a contract because of its failure to demonstrate good faith efforts to meet the participation goals set on a particular contract that it was seeking an award to perform work with the North Carolina Department of Transportation (“NCDOT”). Plaintiff asserted that the participation goals violated the Equal Protection Clause and sought injunctive relief and money damages.

After a bench trial, the district court held the challenged statutory scheme constitutional both on its face and as applied, and the plaintiff prime contractor appealed. 615 F.3d 233 at 236. The Court of Appeals held that the State did not meet its burden of proof in all respects to uphold the validity of the state legislation. But, the Court agreed with the district court that the State produced a strong basis in evidence justifying the statutory scheme on its face, and as applied to African American and Native American subcontractors, and that the State demonstrated that the legislative scheme is narrowly tailored to serve its compelling interest in remedying discrimination against these racial groups. The Court thus affirmed the decision of the district court in part, reversed it in part and remanded for further proceedings consistent with the opinion. *Id.*

The Court found that the North Carolina statutory scheme “largely mirrored the federal Disadvantaged Business Enterprise (“DBE”) program, with which every state must comply in awarding highway construction contracts that utilize federal funds.” 615 F.3d 233 at 236. The Court also noted that federal courts of appeal “have uniformly upheld the Federal DBE Program against

equal-protection challenges.” *Id.*, at footnote 1, *citing, Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10<sup>th</sup> 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 five and 10 percent annual goals that were set in the predecessor statute. 615 F.3d 233 at 238-239. Instead, as amended, the statute requires the NCDOT to “establish annual aspirational goals, not mandatory goals, ... for the overall participation in contracts by disadvantaged minority-owned and women-owned businesses ... [that] shall not be applied rigidly on specific contracts or projects.” *Id.* at 239, quoting, N.C. Gen.Stat. § 136-28.4(b)(2010). The statute further mandates that the NCDOT set “contract-specific goals or project-specific goals ... for each disadvantaged minority-owned and women-owned business category that has demonstrated significant disparity in contract utilization” based on availability, as determined by the study. *Id.*

Third, the amended statute narrowed the definition of “minority” to encompass only those groups that have suffered discrimination. *Id.* at 239. The amended statute replaced a list of defined minorities to any certain groups by defining “minority” as “only those racial or ethnicity classifications identified by [the study] ... that have been subjected to discrimination in the relevant marketplace and that have been adversely affected in their ability to obtain contracts with the Department.” *Id.* at 239 quoting section 136-28.4(c)(2)(2010).

Fourth, the amended statute required the NCDOT to reevaluate the Program over time and respond to changing conditions. 615 F.3d 233 at 239. Accordingly, the NCDOT must conduct a study similar to the 2004 study at least every five years. *Id.* § 136-28.4(b). Finally, the amended statute contained a sunset provision which was set to expire on August 31, 2009, but the General Assembly subsequently extended the sunset provision to August 31, 2010. *Id.* Section 136-28.4(e) (2010).

The Court also noted that the statute required only good faith efforts by the prime contractors to utilize subcontractors, and that the good faith requirement, the Court found, proved permissive in practice: prime contractors satisfied the requirement in 98.5 percent of cases, failing to do so in only 13 of 878 attempts. 615 F.3d 233 at 239.

**Strict scrutiny.** The Court stated the strict scrutiny standard was applicable to justify a race-conscious measure, and that it is a substantial burden but not automatically “fatal in fact.” 615 F.3d 233 at 241. The Court pointed out that “[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it.” *Id.* at 241 quoting *Alexander v. Estepp*, 95 F.3d 312, 315 (4th Cir. 1996). In so acting, a governmental entity must demonstrate it had a compelling interest in “remedying the effects of past or present racial discrimination.” *Id.*, quoting *Shaw v. Hunt*, 517 U.S. 899, 909 (1996).

Thus, the Court found that to justify a race-conscious measure, a state must identify that discrimination, public or private, with some specificity, and must have a strong basis in evidence for its conclusion that remedial action is necessary. 615 F.3d 233 at 241 quoting, *Croson*, 488 U.S. at 504 and *Wygant v. Jackson Board of Education*, 476 U.S. 267, 277 (1986)(plurality opinion).

The Court significantly noted that: “There is no ‘precise mathematical formula to assess the quantum of evidence that rises to the *Croson* ‘strong basis in evidence’ benchmark.” 615 F.3d 233 at 241, quoting *Rothe Dev. Corp. v. Department of Defense*, 545 F.3d 1023, 1049 (Fed.Cir. 2008). The Court stated that the sufficiency of the State’s evidence of discrimination “must be evaluated on a case-by-case basis.” *Id.* at 241. (internal quotation marks omitted).

The Court held that a state “need not conclusively prove the existence of past or present racial discrimination to establish a strong basis in evidence for concluding that remedial action is necessary. 615 F.3d 233 at 241, citing *Concrete Works*, 321 F.3d at 958. “Instead, a state may meet its burden by relying on “a significant statistical disparity” between the availability of qualified, willing, and able minority subcontractors and the utilization of such subcontractors by the governmental entity or its prime contractors. *Id.* at 241, citing *Croson*, 488 U.S. at 509 (plurality opinion). The Court stated that we “further require that such evidence be ‘corroborated by significant anecdotal evidence of racial discrimination.’” *Id.* at 241, quoting *Maryland Troopers Association, Inc. v. Evans*, 993 F.2d 1072, 1077 (4<sup>th</sup> 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’s 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’s 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 (8<sup>th</sup> 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 C.F.R. § 26.51(b). The Court concluded that the State gave serious good faith consideration to race-neutral alternatives prior to adopting the statutory scheme. *Id.*

The Court concluded that despite these race-neutral efforts, the study demonstrated disparities continue to exist in the utilization of African American and Native American subcontractors in state-funded highway construction subcontracting, and that these “persistent disparities indicate the necessity of a race-conscious remedy.” 615 F.3d 233 at 252.

**Duration.** The Court agreed with the district court that the program was narrowly tailored in that it set a specific expiration date and required a new disparity study every five years. 615 F.3d 233 at 253. The Court found that the program’s inherent time limit and provisions requiring regular reevaluation ensure it is carefully designed to endure only until the discriminatory impact has been eliminated. *Id.* at 253, *citing* *Adarand Constructors v. Slater*, 228 F.3d at 1179 (quoting *United States v. Paradise*, 480 U.S. 149, 178 (1987)).

**Program’s goals related to percentage of minority subcontractors.** The Court concluded that the State had demonstrated that the Program’s participation goals are related to the percentage of minority subcontractors in the relevant markets in the State. 615 F.3d 233 at 253. The Court found that the NCDOT had taken concrete steps to ensure that these goals accurately reflect the availability of minority-owned businesses on a project-by-project basis. *Id.*

**Flexibility.** The Court held that the Program was flexible and thus satisfied this indicator of narrow tailoring. 615 F.3d 233 at 253. The Program contemplated a waiver of project-specific goals when prime contractors make good faith efforts to meet those goals, and that the good faith efforts essentially require only that the prime contractor solicit and consider bids from minorities. *Id.* The State does not require or expect the prime contractor to accept any bid from an unqualified bidder, or any bid that is not the lowest bid. *Id.* The Court found there was a lenient standard and flexibility of the “good faith” requirement, and noted the evidence showed only 13 of 878 good faith submissions failed to demonstrate good faith efforts. *Id.*

**Burden on non-MWBE/DBEs.** The Court rejected the two arguments presented by plaintiff that the Program created onerous solicitation and follow-up requirements, finding that there was no need for additional employees dedicated to the task of running the solicitation program to obtain MBE/WBEs, and that there was no evidence to support the claim that plaintiff was required to subcontract millions of dollars of work that it could perform itself for less money. 615 F.3d 233 at

254. The State offered evidence from the study that prime contractors need not submit subcontract work that they can self-perform. *Id.*

**Overinclusive.** The Court found by its own terms the statutory scheme is not overinclusive because it limited relief to only those racial or ethnicity classifications that have been subjected to discrimination in the relevant marketplace and that had been adversely affected in their ability to obtain contracts with the Department. 615 F.3d 233 at 254. The Court concluded that in tailoring the remedy this way, the legislature did not randomly include racial groups that may never have suffered from discrimination in the construction industry, but rather, contemplated participation goals only for those groups shown to have suffered discrimination. *Id.*

In sum, the Court held that the statutory scheme is narrowly tailored to achieve the State's compelling interest in remedying discrimination in public-sector subcontracting against African American and Native American subcontractors. *Id.* at 254.

**Women-owned businesses overutilized.** The study's public-sector disparity analysis demonstrated that women-owned businesses won far more than their expected share of subcontracting dollars during the study period. 615 F.3d 233 at 254. In other words, the Court concluded that prime contractors substantially overutilized women subcontractors on public road construction projects. *Id.* The Court found the public-sector evidence did not evince the "exceedingly persuasive justification" the Supreme Court requires. *Id.* at 255.

The Court noted that the State relied heavily on private-sector data from the study attempting to demonstrate that prime contractors significantly underutilized women subcontractors in the general construction industry statewide and in the Charlotte, North Carolina area. 615 F.3d 233 at 255. However, because the study did not provide a t-test analysis on the private-sector disparity figures to calculate statistical significance, the Court could not determine whether this private underutilization was "the result of mere chance." *Id.* at 255. The Court found troubling the "evidentiary gap" that there was no evidence indicating the extent to which women-owned businesses competing on public-sector road projects vied for private-sector subcontracts in the general construction industry. *Id.* at 255. The Court also found that the State did not present any anecdotal evidence indicating that women subcontractors successfully bidding on State contracts faced private-sector discrimination. *Id.* In addition, the Court found missing any evidence prime contractors that discriminate against women subcontractors in the private sector nevertheless win public-sector contracts. *Id.*

The Court pointed out that it did not suggest that the proponent of a gender-conscious program "must always tie private discrimination to public action." 615 F.3d 233 at 255, n. 11. But, the Court held where, as here, there existed substantial probative evidence of overutilization in the relevant public sector, a state must present something more than generalized private-sector data unsupported by compelling anecdotal evidence to justify a gender-conscious program. *Id.* at 255, n. 11.

Moreover, the Court found the state failed to establish the amount of overlap between general construction and road construction subcontracting. 615 F.3d 233 at 256. The Court said that the dearth of evidence as to the correlation between public road construction subcontracting and private general construction subcontracting severely limits the private data's probative value in this case. *Id.*

Thus, the Court held that the State could not overcome the strong evidence of overutilization in the public sector in terms of gender participation goals, and that the proffered private-sector data failed to establish discrimination in the particular field in question. 615 F.3d 233 at 256. Further, the

anecdotal evidence, the Court concluded, indicated that most women subcontractors do not experience discrimination. *Id.* Thus, the Court held that the State failed to present sufficient evidence to support the Program's current inclusion of women subcontractors in setting participation goals. *Id.*

**Holding.** The Court held that the state legislature had crafted legislation that withstood the constitutional scrutiny. 615 F.3d 233 at 257. The Court concluded that in light of the statutory scheme's flexibility and responsiveness to the realities of the marketplace, and given the State's strong evidence of discrimination against African American and Native American subcontractors in public-sector subcontracting, the State's application of the statute to these groups is constitutional. *Id.* at 257. However, the Court also held that because the State failed to justify its application of the statutory scheme to women, Asian American, and Hispanic American subcontractors, the Court found those applications were not constitutional.

Therefore, the Court affirmed the judgment of the district court with regard to the facial validity of the statute, and with regard to its application to African American and Native American subcontractors. 615 F.3d 233 at 258. The Court reversed the district court's judgment insofar as it upheld the constitutionality of the state legislature as applied to women, Asian American and Hispanic American subcontractors. *Id.* The Court thus remanded the case to the district court to fashion an appropriate remedy consistent with the opinion. *Id.*

**Concurring opinions.** It should be pointed out that there were two concurring opinions by the three Judge panel: one judge concurred in the judgment, and the other judge concurred fully in the majority opinion and the judgment.

## **2. *Jana-Rock Construction, Inc. v. New York State Dept. of Economic Development*, 438 F.3d 195 (2d Cir. 2006)**

This recent case is instructive in connection with the determination of the groups that may be included in a MBE/WBE-type program, and the standard of analysis utilized to evaluate a local government's non-inclusion of certain groups. In this case, the Second Circuit Court of Appeals held racial classifications that are challenged as "under-inclusive" (*i.e.*, those that exclude persons from a particular racial classification) are subject to a "rational basis" review, not strict scrutiny.

Plaintiff Luiere, a 70 percent shareholder of Jana-Rock Construction, Inc. ("Jana Rock") and the "son of a Spanish mother whose parents were born in Spain," challenged the constitutionality of the State of New York's definition of "Hispanic" under its local minority-owned business program. 438 F.3d 195, 199-200 (2d Cir. 2006). Under the USDOT regulations, 49 C.F.R. § 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. *Virdi v. DeKalb County School District*, 135 Fed. Appx. 262, 2005 WL 138942 (11<sup>th</sup> 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 (11<sup>th</sup> 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 or any factual findings of discrimination. *Id.*

The Report recommended that the District: (1) Advertise bids and purchasing opportunities in newspapers targeting minorities, (2) conduct periodic seminars to educate minorities on doing business with the District, (3) notify organizations representing minority firms regarding bidding and purchasing opportunities, and (4) publish a "how to" booklet to be made available to any business interested in doing business with the District.

*Id.* The Report also recommended that the District adopt annual, aspirational participation goals for women- and minority-owned businesses. *Id.* The Report contained statements indicating the selection process should remain neutral and recommended that the Board adopt a non-discrimination statement. *Id.*

In 1991, the Board adopted the Report and implemented several of the recommendations, including advertising in the AJC, conducting seminars, and publishing the "how to" booklet. *Id.* The Board also implemented the Minority Vendor Involvement Program (the "MVP") which adopted the participation goals set forth in the Report. *Id.* at 265.

The Board delegated the responsibility of selecting architects to the Superintendent. *Id.* Virdi sent a letter to the District in October 1991 expressing interest in obtaining architectural contracts. *Id.* Virdi sent the letter to the District Manager and sent follow-up literature; he re-contacted the District Manager in 1992 and 1993. *Id.* In August 1994, Virdi sent a letter and a qualifications package to a project manager employed by Heery International. *Id.* In a follow-up conversation, the project manager allegedly told Virdi that his firm was not selected not based upon his qualifications, but because the "District was only looking for 'black-owned firms.'" *Id.* Virdi sent a letter to the project manager requesting confirmation of his statement in writing and the project manager forwarded the letter to the District. *Id.*

After a series of meetings with District officials, in 1997, Virdi met with the newly hired Executive Director. *Id.* at 266. Upon request of the Executive Director, Virdi re-submitted his qualifications but

was informed that he would be considered only for future projects (Phase III SPLOST projects). *Id.* Virdi then filed suit before any Phase III SPLOST projects were awarded. *Id.*

The Eleventh Circuit considered whether the MVP was facially unconstitutional and whether the defendants intentionally discriminated against Virdi on the basis of his race. The court held that strict scrutiny applies to all racial classifications and is not limited to merely set-asides or mandatory quotas; therefore, the MVP was subject to strict scrutiny because it contained racial classifications. *Id.* at 267. The court first questioned whether the identified government interest was compelling. *Id.* at 268. However, the court declined to reach that issue because it found the race-based participation goals were not narrowly tailored to achieving the identified government interest. *Id.*

The court held the MVP was not narrowly tailored for two reasons. *Id.* First, because no evidence existed that the District considered race-neutral alternatives to “avoid unwitting discrimination.” The court found that “[w]hile narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, it does require serious, good faith consideration of whether such alternatives could serve the governmental interest at stake.” *Id.*, citing *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003), and *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509-10 (1989). The court found that District could have engaged in any number of equally effective race-neutral alternatives, including using its outreach procedure and tracking the participation and success of minority-owned business as compared to non-minority-owned businesses. *Id.* at 268, n.8. Accordingly, the court held the MVP was not narrowly tailored. *Id.* at 268.

Second, the court held that the unlimited duration of the MVP’s racial goals negated a finding of narrow tailoring. *Id.* “[R]ace conscious ... policies must be limited in time.” *Id.*, citing *Grutter*, 539 U.S. at 342, and *Walker v. City of Mesquite, TX*, 169 F.3d 973, 982 (5<sup>th</sup> 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.

**4. *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950 (10<sup>th</sup> Cir. 2003), cert. denied, 540 U.S. 1027, 124 S. Ct. 556 (2003) (Scalia, Justice with whom the Chief Justice Rehnquist, joined, dissenting from the denial of certiorari)**

This case is instructive to the disparity study because it is one of the only recent decisions to uphold the validity of a local government MBE/WBE program. It is significant to note that the Tenth Circuit did not apply the narrowly tailored test and thus did not rule on an application of the

narrowly tailored test, instead finding that the plaintiff had waived that challenge in one of the earlier decisions in the case. This case also is one of the only cases to have found private sector marketplace discrimination as a basis to uphold an MBE/WBE-type program.

In *Concrete Works* the United States Court of Appeals for the Tenth Circuit held that the City and County of Denver had a compelling interest in limiting race discrimination in the construction industry, that the City had an important governmental interest in remedying gender discrimination in the construction industry, and found that the City and County of Denver had established a compelling governmental interest to have a race- and gender-based program. In *Concrete Works*, the Court of Appeals did not address the issue of whether the MWBE Ordinance was narrowly tailored because it held the district court was barred under the law of the case doctrine from considering that issue since it was not raised on appeal by the plaintiff construction companies after they had lost that issue on summary judgment in an earlier decision. Therefore, the Court of Appeals did not reach a decision as to narrowly tailoring or consider that issue in the case.

**Case history.** Plaintiff, Concrete Works of Colorado, Inc. (“CWC”) challenged the constitutionality of an “affirmative action” ordinance enacted by the City and County of Denver (hereinafter the “City” or “Denver”). 321 F.3d 950, 954 (10th Cir. 2003). The ordinance established participation goals for racial minorities and women on certain City construction and professional design projects. *Id.*

The City enacted an Ordinance No. 513 (“1990 Ordinance”) containing annual goals for MBE/WBE utilization on all competitively bid projects. *Id.* at 956. A prime contractor could also satisfy the 1990 Ordinance requirements by using “good faith efforts.” *Id.* In 1996, the City replaced the 1990 Ordinance with Ordinance No. 304 (the “1996 Ordinance”). The district court stated that the 1996 Ordinance differed from the 1990 Ordinance by expanding the definition of covered contracts to include some privately financed contracts on City-owned land; added updated information and findings to the statement of factual support for continuing the program; refined the requirements for MBE/WBE certification and graduation; mandated the use of MBEs and WBEs on change orders; and expanded sanctions for improper behavior by MBEs, WBEs or majority-owned contractors in failing to perform the affirmative action commitments made on City projects. *Id.* at 956-57.

The 1996 Ordinance was amended in 1998 by Ordinance No. 948 (the “1998 Ordinance”). The 1998 Ordinance reduced annual percentage goals and prohibited an MBE or a WBE, acting as a bidder, from counting self-performed work toward project goals. *Id.* at 957.

CWC filed suit challenging the constitutionality of the 1990 Ordinance. *Id.* The district court conducted a bench trial on the constitutionality of the three ordinances. *Id.* The district court ruled in favor of CWC and concluded that the ordinances violated the Fourteenth Amendment. *Id.* The City then appealed to the Tenth Circuit Court of Appeals. *Id.* The Court of Appeals reversed and remanded. *Id.* at 954.

The Court of Appeals applied strict scrutiny to race-based measures and intermediate scrutiny to the gender-based measures. *Id.* at 957-58, 959. The Court of Appeals also cited *Richmond v. J.A. Croson Co.*, for the proposition that a governmental entity “can use its spending powers to remedy private discrimination, if it identifies that discrimination with the particularity required by the Fourteenth Amendment.” 488 U.S. 469, 492 (1989) (plurality opinion). Because “an effort to alleviate the effects

of *societal* discrimination is not a compelling interest,” the Court of Appeals held that Denver could demonstrate that its interest is compelling only if it (1) identified the past or present discrimination “with some specificity,” and (2) demonstrated that a “strong basis in evidence” supports its conclusion that remedial action is necessary. *Id.* at 958, quoting *Shaw v. Hunt*, 517 U.S. 899, 909-10 (1996).

The court held that Denver could meet its burden without conclusively proving the existence of past or present racial discrimination. *Id.* Rather, Denver could rely on “empirical evidence that demonstrates ‘a significant statistical disparity between the number of qualified minority contractors ... and the number of such contractors actually engaged by the locality or the locality’s prime contractors.’” *Id.*, quoting *Croson*, 488 U.S. at 509 (plurality opinion). Furthermore, the Court of Appeals held that Denver could rely on statistical evidence gathered from the six-county Denver Metropolitan Statistical Area (MSA) and could supplement the statistical evidence with anecdotal evidence of public and private discrimination. *Id.*

The Court of Appeals held that Denver could establish its compelling interest by presenting evidence of its own direct participation in racial discrimination or its passive participation in private discrimination. *Id.* The Court of Appeals held that once Denver met its burden, CWC had to introduce “credible, particularized evidence to rebut [Denver’s] initial showing of the existence of a compelling interest, which could consist of a neutral explanation for the statistical disparities.” *Id.* (internal citations and quotations omitted). The Court of Appeals held that CWC could also rebut Denver’s statistical evidence “by (1) showing that the statistics are flawed; (2) demonstrating that the disparities shown by the statistics are not significant or actionable; or (3) presenting contrasting statistical data.” *Id.* (internal citations and quotations omitted). The Court of Appeals held that the burden of proof at all times remained with CWC to demonstrate the unconstitutionality of the ordinances. *Id.* at 960.

The Court of Appeals held that to meet its burden of demonstrating an important governmental interest per the intermediate scrutiny analysis, Denver must show that the gender-based measures in the ordinances were based on “reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions.” *Id.*, quoting *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 726 (1982).

**The studies.** Denver presented historical, statistical and anecdotal evidence in support of its MBE/WBE programs. Denver commissioned a number of studies to assess its MBE/WBE programs. *Id.* at 962. The consulting firm hired by Denver utilized disparity indices in part. *Id.* at 962. The 1990 Study also examined MBE and WBE utilization in the overall Denver MSA construction market, both public and private. *Id.* at 963.

The consulting firm also interviewed representatives of MBEs, WBEs, majority-owned construction firms, and government officials. *Id.* Based on this information, the 1990 Study concluded that, despite Denver’s efforts to increase MBE and WBE participation in Denver Public Works projects, some Denver employees and private contractors engaged in conduct designed to circumvent the goals program. *Id.* After reviewing the statistical and anecdotal evidence contained in the 1990 Study, the City Council enacted the 1990 Ordinance. *Id.*



After the Tenth Circuit decided *Concrete Works II*, Denver commissioned another study (the “1995 Study”). *Id.* at 963. Using 1987 Census Bureau data, the 1995 Study again examined utilization of MBEs and WBEs in the construction and professional design industries within the Denver MSA. *Id.* The 1995 Study concluded that MBEs and WBEs were more likely to be one-person or family-run businesses. The Study concluded that Hispanic-owned firms were less likely to have paid employees than white-owned firms but that Asian/Native American-owned firms were more likely to have paid employees than white- or other minority-owned firms. To determine whether these factors explained overall market disparities, the 1995 Study used the Census data to calculate disparity indices for all firms in the Denver MSA construction industry and separately calculated disparity indices for firms with paid employees and firms with no paid employees. *Id.* at 964.

The Census Bureau information was also used to examine average revenues per employee for Denver MSA construction firms with paid employees. Hispanic-, Asian-, Native American-, and women-owned firms with paid employees all reported lower revenues per employee than majority-owned firms. The 1995 Study also used 1990 Census data to calculate rates of self-employment within the Denver MSA construction industry. The Study concluded that the disparities in the rates of self-employment for blacks, Hispanics, and women persisted even after controlling for education and length of work experience. The 1995 Study controlled for these variables and reported that blacks and Hispanics working in the Denver MSA construction industry were less than half as likely to own their own businesses as were whites of comparable education and experience. *Id.*

In late 1994 and early 1995, a telephone survey of construction firms doing business in the Denver MSA was conducted. *Id.* at 965. Based on information obtained from the survey, the consultant calculated percentage utilization and percentage availability of MBEs and WBEs. Percentage utilization was calculated from revenue information provided by the responding firms. Percentage availability was calculated based on the number of MBEs and WBEs that responded to the survey question regarding revenues. Using these utilization and availability percentages, the 1995 Study showed disparity indices of 64 for MBEs and 70 for WBEs in the construction industry. In the professional design industry, disparity indices were 67 for MBEs and 69 for WBEs. The 1995 Study concluded that the disparity indices obtained from the telephone survey data were more accurate than those obtained from the 1987 Census data because the data obtained from the telephone survey were more recent, had a narrower focus, and included data on C corporations. Additionally, it was possible to calculate disparity indices for professional design firms from the survey data. *Id.*

In 1997, the City conducted another study to estimate the availability of MBEs and WBEs and to examine, *inter alia*, whether race and gender discrimination limited the participation of MBEs and WBEs in construction projects of the type typically undertaken by the City (the “1997 Study”). *Id.* at 966. The 1997 Study used geographic and specialization information to calculate MBE/WBE availability. Availability was defined as “the ratio of MBE/WBE firms to the total number of firms in the four-digit SIC codes and geographic market area relevant to the City’s contracts.” *Id.*

The 1997 Study compared MBE/WBE availability and utilization in the Colorado construction industry. *Id.* The statewide market was used because necessary information was unavailable for the Denver MSA. *Id.* at 967. Additionally, data collected in 1987 by the Census Bureau was used because more current data was unavailable. The Study calculated disparity indices for the statewide construction market in Colorado as follows: 41 for African American firms, 40 for Hispanic firms, 14 for Asian and other minorities, and 74 for women-owned firms. *Id.*

The 1997 Study also contained an analysis of whether African Americans, Hispanics, or Asian Americans working in the construction industry are less likely to be self-employed than similarly situated whites. *Id.* Using data from the Public Use Microdata Samples (“PUMS”) of the 1990 Census of Population and Housing, the Study used a sample of individuals working in the construction industry. The Study concluded that in both Colorado and the Denver MSA, African Americans, Hispanics, and Native Americans working in the construction industry had lower self-employment rates than whites. Asian Americans had higher self-employment rates than whites.

Using the availability figures calculated earlier in the Study, the Study then compared the actual availability of MBE/WBEs in the Denver MSA with the potential availability of MBE/WBEs if they formed businesses at the same rate as whites with the same characteristics. *Id.* Finally, the Study examined whether self-employed minorities and women in the construction industry have lower earnings than white males with similar characteristics. *Id.* at 968. Using linear regression analysis, the Study compared business owners with similar years of education, of similar age, doing business in the same geographic area, and having other similar demographic characteristics. Even after controlling for several factors, the results showed that self-employed African Americans, Hispanics, Native Americans, and women had lower earnings than white males. *Id.*

The 1997 Study also conducted a mail survey of both MBE/WBEs and non-MBE/WBEs to obtain information on their experiences in the construction industry. Of the MBE/WBEs who responded, 35 percent indicated that they had experienced at least one incident of disparate treatment within the last five years while engaged in business activities. The survey also posed the following question: “How often do prime contractors who use your firm as a subcontractor on public sector projects with [MBE/WBE] goals or requirements ... also use your firm on public sector or private sector projects without [MBE/WBE] goals or requirements?” Fifty-eight percent of minorities and 41 percent of white women who responded to this question indicated they were “seldom or never” used on non-goals projects. *Id.*

MBE/WBEs were also asked whether the following aspects of procurement made it more difficult or impossible to obtain construction contracts: (1) bonding requirements, (2) insurance requirements, (3) large project size, (4) cost of completing proposals, (5) obtaining working capital, (6) length of notification for bid deadlines, (7) prequalification requirements, and (8) previous dealings with an agency. This question was also asked of non-MBE/WBEs in a separate survey. With one exception, MBE/WBEs considered each aspect of procurement more problematic than non-MBE/WBEs. To determine whether a firm’s size or experience explained the different responses, a regression analysis was conducted that controlled for age of the firm, number of employees, and level of revenues. The results again showed that with the same, single exception, MBE/WBEs had more difficulties than non-MBE/WBEs with the same characteristics. *Id.* at 968-69.

After the 1997 Study was completed, the City enacted the 1998 Ordinance. The 1998 Ordinance reduced the annual goals to 10 percent for both MBEs and WBEs and eliminated a provision which previously allowed MBE/WBEs to count their own work toward project goals. *Id.* at 969.

The anecdotal evidence included the testimony of the senior vice-president of a large, majority-owned construction firm who stated that when he worked in Denver, he received credible complaints from minority and women-owned construction firms that they were subject to different work rules than majority-owned firms. *Id.* He also testified that he frequently observed graffiti

containing racial or gender epithets written on job sites in the Denver metropolitan area. Further, he stated that he believed, based on his personal experiences, that many majority-owned firms refused to hire minority- or women-owned subcontractors because they believed those firms were not competent. *Id.*

Several MBE/WBE witnesses testified that they experienced difficulty prequalifying for private sector projects and projects with the City and other governmental entities in Colorado. One individual testified that her company was required to prequalify for a private sector project while no similar requirement was imposed on majority-owned firms. Several others testified that they attempted to prequalify for projects but their applications were denied even though they met the prequalification requirements. *Id.*

Other MBE/WBEs testified that their bids were rejected even when they were the lowest bidder; that they believed they were paid more slowly than majority-owned firms on both City projects and private sector projects; that they were charged more for supplies and materials; that they were required to do additional work not part of the subcontracting arrangement; and that they found it difficult to join unions and trade associations. *Id.* There was testimony detailing the difficulties MBE/WBEs experienced in obtaining lines of credit. One WBE testified that she was given a false explanation of why her loan was declined; another testified that the lending institution required the co-signature of her husband even though her husband, who also owned a construction firm, was not required to obtain her co-signature; a third testified that the bank required her father to be involved in the lending negotiations. *Id.*

The court also pointed out anecdotal testimony involving recitations of racially- and gender-motivated harassment experienced by MBE/WBEs at work sites. There was testimony that minority and female employees working on construction projects were physically assaulted and fondled, spat upon with chewing tobacco, and pelted with two-inch bolts thrown by males from a height of 80 feet. *Id.* at 969-70.

**The legal framework applied by the court.** The Court held that the district court incorrectly believed Denver was required to prove the existence of discrimination. Instead of considering whether Denver had demonstrated strong evidence from which an inference of past or present discrimination could be drawn, the district court analyzed whether Denver's evidence showed that there is pervasive discrimination. *Id.* at 970. The court, quoting *Concrete Works II*, stated that "the Fourteenth Amendment does not require a court to make an ultimate finding of discrimination before a municipality may take affirmative steps to eradicate discrimination." *Id.* at 970, quoting *Concrete Works II*, 36 F.3d 1513, 1522 (10th Cir. 1994). Denver's initial burden was to demonstrate that strong evidence of discrimination supported its conclusion that remedial measures were necessary. Strong evidence is that "approaching a prima facie case of a constitutional or statutory violation," not irrefutable or definitive proof of discrimination. *Id.* at 97, quoting *Croson*, 488 U.S. at 500. The burden of proof at all times remained with the contractor plaintiff to prove by a preponderance of the evidence that Denver's "evidence did not support an inference of prior discrimination and thus a remedial purpose." *Id.*, quoting *Adarand VII*, 228 F.3d at 1176.

Denver, the Court held, did introduce evidence of discrimination against each group included in the ordinances. *Id.* at 971. Thus, Denver's evidence did not suffer from the problem discussed by the court in *Croson*. The Court held the district court erroneously concluded that Denver must

demonstrate that the private firms directly engaged in any discrimination in which Denver passively participates do so intentionally, with the purpose of disadvantaging minorities and women. The *Croson* majority concluded that a “city would have a compelling interest in preventing its tax dollars from assisting [local trade] organizations in maintaining a racially segregated construction market.” *Id.* at 971, quoting *Croson*, 488 U.S. 503. Thus, the Court held Denver’s burden was to introduce evidence which raised the inference of discriminatory exclusion in the local construction industry and linked its spending to that discrimination. *Id.*

The Court noted the Supreme Court has stated that the inference of discriminatory exclusion can arise from statistical disparities. *Id.*, citing *Croson*, 488 U.S. at 503. Accordingly, it concluded that Denver could meet its burden through the introduction of statistical and anecdotal evidence. To the extent the district court required Denver to introduce additional evidence to show discriminatory motive or intent on the part of private construction firms, the district court erred. Denver, according to the Court, was under no burden to identify any specific practice or policy that resulted in discrimination. Neither was Denver required to demonstrate that the purpose of any such practice or policy was to disadvantage women or minorities. *Id.* at 972.

The court found Denver’s statistical and anecdotal evidence relevant because it identifies discrimination in the local construction industry, not simply discrimination in society. The court held the genesis of the identified discrimination is irrelevant and the district court erred when it discounted Denver’s evidence on that basis. *Id.*

The court held the district court erroneously rejected the evidence Denver presented on marketplace discrimination. *Id.* at 973. The court rejected the district court’s erroneous legal conclusion that a municipality may only remedy its own discrimination. The court stated this conclusion is contrary to the holdings in *Concrete Works II* and the plurality opinion in *Croson*. *Id.* The court held it previously recognized in this case that “a municipality has a compelling interest in taking affirmative steps to remedy both public *and private* discrimination specifically identified in its area.” *Id.*, quoting *Concrete Works II*, 36 F.3d at 1529 (emphasis added). In *Concrete Works II*, the court stated that “we do not read *Croson* as requiring the municipality to identify an exact linkage between its award of public contracts and private discrimination.” *Id.*, quoting *Concrete Works II*, 36 F.3d at 1529.

The court stated that Denver could meet its burden of demonstrating its compelling interest with evidence of private discrimination in the local construction industry coupled with evidence that it has become a passive participant in that discrimination. *Id.* at 973. Thus, Denver was not required to demonstrate that it is “guilty of prohibited discrimination” to meet its initial burden. *Id.*

Additionally, the court had previously concluded that Denver’s statistical studies, which compared utilization of MBE/WBEs to availability, supported the inference that “local prime contractors” are engaged in racial and gender discrimination. *Id.* at 974, quoting *Concrete Works II*, 36 F.3d at 1529. Thus, the court held Denver’s disparity studies should not have been discounted because they failed to specifically identify those individuals or firms responsible for the discrimination. *Id.*

### The Court’s rejection of CWC’s arguments and the district court findings

**Use of marketplace data.** The court held the district court, inter alia, erroneously concluded that the disparity studies upon which Denver relied were significantly flawed because they measured discrimination in the overall Denver MSA construction industry, not discrimination by the City itself.

*Id.* at 974. The court found that the district court’s conclusion was directly contrary to the holding in *Adarand VII* that evidence of both public and private discrimination in the construction industry is relevant. *Id.*, citing *Adarand VII*, 228 F.3d at 1166-67).

The court held the conclusion reached by the majority in *Croson* that marketplace data are relevant in equal protection challenges to affirmative action programs was consistent with the approach later taken by the court in *Shaw v. Hunt*. *Id.* at 975. In *Shaw*, a majority of the court relied on the majority opinion in *Croson* for the broad proposition that a governmental entity’s “interest in remedying the effects of past or present racial discrimination may in the proper case justify a government’s use of racial distinctions.” *Id.*, quoting *Shaw*, 517 U.S. at 909. The *Shaw* court did not adopt any requirement that only discrimination by the governmental entity, either directly or by utilizing firms engaged in discrimination on projects funded by the entity, was remediable. The court, however, did set out two conditions that must be met for the governmental entity to show a compelling interest. “First, the discrimination must be identified discrimination.” *Id.* at 976, quoting *Shaw*, 517 U.S. at 910. The City can satisfy this condition by identifying the discrimination, “‘public or private, with some specificity.’” *Id.* at 976, citing *Shaw*, 517 U.S. at 910, quoting *Croson*, 488 U.S. at 504 (emphasis added). The governmental entity must also have a “strong basis in evidence to conclude that remedial action was necessary.” *Id.* Thus, the court concluded *Shaw* specifically stated that evidence of either public or private discrimination could be used to satisfy the municipality’s burden of producing strong evidence. *Id.* at 976.

In *Adarand VII*, the court noted it concluded that evidence of marketplace discrimination can be used to support a compelling interest in remedying past or present discrimination through the use of affirmative action legislation. *Id.*, citing *Adarand VII*, 228 F.3d at 1166-67 (“[W]e may consider public and private discrimination not only in the specific area of government procurement contracts but also in the construction industry generally; thus *any findings Congress has made as to the entire construction industry are relevant.*” (emphasis added)). Further, the court pointed out in this case it earlier rejected the argument CWC reasserted here that marketplace data are irrelevant and remanded the case to the district court to determine whether Denver could link its public spending to “the Denver MSA evidence of industry-wide discrimination.” *Id.*, quoting *Concrete Works II*, 36 F.3d at 1529. The court stated that evidence explaining “the Denver government’s role in contributing to the underutilization of MBEs and WBEs in the *private construction market in the Denver MSA*” was relevant to Denver’s burden of producing strong evidence. *Id.*, quoting *Concrete Works II*, 36 F.3d at 1530 (emphasis added).

Consistent with the court’s mandate in *Concrete Works II*, the City attempted to show at trial that it “indirectly contributed to private discrimination by awarding public contracts to firms that in turn discriminated against MBE and/or WBE subcontractors in other private portions of their business.” *Id.* The City can demonstrate that it is a “‘passive participant’ in a system of racial exclusion practiced by elements of the local construction industry” by compiling evidence of marketplace discrimination and then linking its spending practices to the private discrimination. *Id.*, quoting *Croson*, 488 U.S. at 492.

The court rejected CWC’s argument that the lending discrimination studies and business formation studies presented by Denver were irrelevant. In *Adarand VII*, the court concluded that evidence of discriminatory barriers to the formation of businesses by minorities and women and fair competition between MBE/WBEs and majority-owned construction firms shows a “strong link” between a

government’s “disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination.” *Id.* at 977, quoting *Adarand VII*, 228 F.3d at 1167-68. The court found that evidence that private discrimination resulted in barriers to business formation is relevant because it demonstrates that MBE/WBEs are precluded *at the outset* from competing for public construction contracts. The court also found that evidence of barriers to fair competition is relevant because it again demonstrates that *existing* MBE/WBEs are precluded from competing for public contracts. Thus, like the studies measuring disparities in the utilization of MBE/WBEs in the Denver MSA construction industry, studies showing that discriminatory barriers to business formation exist in the Denver construction industry are relevant to the City’s showing that it indirectly participates in industry discrimination. *Id.* at 977.

The City presented evidence of lending discrimination to support its position that MBE/WBEs in the Denver MSA construction industry face discriminatory barriers to business formation. Denver introduced a disparity study prepared in 1996 and sponsored by the Denver Community Reinvestment Alliance, Colorado Capital Initiatives, and the City. The Study ultimately concluded that “despite the fact that loan applicants of three different racial/ethnic backgrounds in this sample were not appreciably different as businesspeople, they were ultimately treated differently by the lenders on the crucial issue of loan approval or denial.” *Id.* at 977-78. In *Adarand VII*, the court concluded that this study, among other evidence, “strongly support[ed] an initial showing of discrimination in lending.” *Id.* at 978, quoting, *Adarand VII*, 228 F.3d at 1170, n. 13 (“Lending discrimination alone of course does not justify action in the construction market. However, the persistence of such discrimination ... supports the assertion that the formation, as well as utilization, of minority-owned construction enterprises has been impeded.”). The City also introduced anecdotal evidence of lending discrimination in the Denver construction industry.

CWC did not present any evidence that undermined the reliability of the lending discrimination evidence but simply repeated the argument, foreclosed by circuit precedent, that it is irrelevant. The court rejected the district court criticism of the evidence because it failed to determine whether the discrimination resulted from discriminatory attitudes or from the neutral application of banking regulations. The court concluded that discriminatory motive can be inferred from the results shown in disparity studies. The court held the district court’s criticism did not undermine the study’s reliability as an indicator that the City is passively participating in marketplace discrimination. The court noted that in *Adarand VII* it took “judicial notice of the obvious causal connection between access to capital and ability to implement public works construction projects.” *Id.* at 978, quoting *Adarand VII*, 228 F.3d at 1170.

Denver also introduced evidence of discriminatory barriers to competition faced by MBE/WBEs in the form of business formation studies. The 1990 Study and the 1995 Study both showed that all minority groups in the Denver MSA formed their own construction firms at rates lower than the total population but that women formed construction firms at higher rates. The 1997 Study examined self-employment rates and controlled for gender, marital status, education, availability of capital, and personal/family variables. As discussed, *supra*, the Study concluded that African Americans, Hispanics, and Native Americans working in the construction industry have lower rates of self-employment than similarly situated whites. Asian Americans had higher rates. The 1997 Study also concluded that minority and female business owners in the construction industry, with the exception of Asian American owners, have lower earnings than white male owners. This conclusion was reached after controlling for education, age, marital status, and disabilities. *Id.* at 978.

The court held that the district court's conclusion that the business formation studies could not be used to justify the ordinances conflicts with its holding in *Adarand VII*. "[T]he existence of evidence indicating that the number of [MBEs] would be significantly (but unquantifiably) higher but for such barriers is nevertheless relevant to the assessment of whether a disparity is sufficiently significant to give rise to an inference of discriminatory exclusion." *Id.* at 979, quoting *Adarand VII*, 228 F.3d at 1174.

In sum, the court held the district court erred when it refused to consider or give sufficient weight to the lending discrimination study, the business formation studies, and the studies measuring marketplace discrimination. That evidence was legally relevant to the City's burden of demonstrating a strong basis in evidence to support its conclusion that remedial legislation was necessary. *Id.* at 979-80.

**Variables.** CWC challenged Denver's disparity studies as unreliable because the disparities shown in the studies may be attributable to firm size and experience rather than discrimination. Denver countered, however, that a firm's size has little effect on its qualifications or its ability to provide construction services and that MBE/WBEs, like all construction firms, can perform most services either by hiring additional employees or by employing subcontractors. CWC responded that elasticity itself is relative to size and experience; MBE/WBEs are less capable of expanding because they are smaller and less experienced. *Id.* at 980.

The court concluded that even if it assumed that MBE/WBEs are less able to expand because of their smaller size and more limited experience, CWC did not respond to Denver's argument and the evidence it presented showing that experience and size are not race- and gender-neutral variables and that MBE/WBE construction firms are generally smaller and less experienced *because* of industry discrimination. *Id.* at 981. The lending discrimination and business formation studies, according to the court, both strongly supported Denver's argument that MBE/WBEs are smaller and less experienced because of marketplace and industry discrimination. In addition, Denver's expert testified that discrimination by banks or bonding companies would reduce a firm's revenue and the number of employees it could hire. *Id.*

Denver also argued its Studies controlled for size and the 1995 Study controlled for experience. It asserted that the 1990 Study measured revenues per employee for construction for MBE/WBEs and concluded that the resulting disparities, "suggest[] that even among firms of the same employment size, industry utilization of MBEs and WBEs was lower than that of non-minority male-owned firms." *Id.* at 982. Similarly, the 1995 Study controlled for size, calculating, *inter alia*, disparity indices for firms with no paid employees which presumably are the same size.

Based on the uncontroverted evidence presented at trial, the court concluded that the district court did not give sufficient weight to Denver's disparity studies because of its erroneous conclusion that the studies failed to adequately control for size and experience. The court held that Denver is permitted to make assumptions about capacity and qualification of MBE/WBEs to perform construction services if it can support those assumptions. The court found the assumptions made in this case were consistent with the evidence presented at trial and supported the City's position that a firm's size does not affect its qualifications, willingness, or ability to perform construction services and that the smaller size and lesser experience of MBE/WBEs are, themselves, the result of industry discrimination. Further, the court pointed out CWC did not conduct its own disparity study using

marketplace data and thus did not demonstrate that the disparities shown in Denver's studies would decrease or disappear if the studies controlled for size and experience to CWC's satisfaction. Consequently, the court held CWC's rebuttal evidence was insufficient to meet its burden of discrediting Denver's disparity studies on the issue of size and experience. *Id.* at 982.

**Specialization.** The district court also faulted Denver's disparity studies because they did not control for firm specialization. The court noted the district court's criticism would be appropriate only if there was evidence that MBE/WBEs are more likely to specialize in certain construction fields. *Id.* at 982.

The court found there was no identified evidence showing that certain construction specializations require skills less likely to be possessed by MBE/WBEs. The court found relevant the testimony of the City's expert, that the data he reviewed showed that MBEs were represented "widely across the different [construction] specializations." *Id.* at 982-83. There was no contrary testimony that aggregation bias caused the disparities shown in Denver's studies. *Id.* at 983.

The court held that CWC failed to demonstrate that the disparities shown in Denver's studies are eliminated when there is control for firm specialization. In contrast, one of the Denver studies, which controlled for SIC-code subspecialty and still showed disparities, provided support for Denver's argument that firm specialization does not explain the disparities. *Id.* at 983.

The court pointed out that disparity studies may make assumptions about availability as long as the same assumptions can be made for all firms. *Id.* at 983.

**Utilization of MBE/WBEs on City projects.** CWC argued that Denver could not demonstrate a compelling interest because it overutilized MBE/WBEs on City construction projects. This argument, according to the court, was an extension of CWC's argument that Denver could justify the ordinances only by presenting evidence of discrimination by the City itself or by contractors while working on City projects. Because the court concluded that Denver could satisfy its burden by showing that it is an indirect participant in industry discrimination, CWC's argument relating to the utilization of MBE/WBEs on City projects goes only to the weight of Denver's evidence. *Id.* at 984.

Consistent with the court's mandate in *Concrete Works II*, at trial Denver sought to demonstrate that the utilization data from projects subject to the goals program were tainted by the program and "reflect[ed] the intended remedial effect on MBE and WBE utilization." *Id.* at 984, quoting *Concrete Works II*, 36 F.3d at 1526. Denver argued that the non-goals data were the better indicator of past discrimination in public contracting than the data on all City construction projects. *Id.* at 984-85. The court concluded that Denver presented ample evidence to support the conclusion that the evidence showing MBE/WBE utilization on City projects not subject to the ordinances or the goals programs is the better indicator of discrimination in City contracting. *Id.* at 985.

The court rejected CWC's argument that the marketplace data were irrelevant but agreed that the non-goals data were also relevant to Denver's burden. The court noted that Denver did not rely heavily on the non-goals data at trial but focused primarily on the marketplace studies to support its burden. *Id.* at 985.

In sum, the court held Denver demonstrated that the utilization of MBE/WBEs on City projects had been affected by the affirmative action programs that had been in place in one form or another since



1977. Thus, the non-goals data were the better indicator of discrimination in public contracting. The court concluded that, on balance, the non-goals data provided some support for Denver's position that racial and gender discrimination existed in public contracting before the enactment of the ordinances. *Id.* at 987-88.

**Anecdotal evidence.** The anecdotal evidence, according to the court, included several incidents involving profoundly disturbing behavior on the part of lenders, majority-owned firms, and individual employees. *Id.* at 989. The court found that the anecdotal testimony revealed behavior that was not merely sophomoric or insensitive, but which resulted in real economic or physical harm. While CWC also argued that all new or small contractors have difficulty obtaining credit and that treatment the witnesses characterized as discriminatory is experienced by all contractors, Denver's witnesses specifically testified that they believed the incidents they experienced were motivated by race or gender discrimination. The court found they supported those beliefs with testimony that majority-owned firms were not subject to the same requirements imposed on them. *Id.*

The court held there was no merit to CWC's argument that the witnesses' accounts must be verified to provide support for Denver's burden. The court stated that anecdotal evidence is nothing more than a witness' narrative of an incident told from the witness' perspective and including the witness' perceptions. *Id.*

After considering Denver's anecdotal evidence, the district court found that the evidence "shows that race, ethnicity and gender affect the construction industry and those who work in it" and that the egregious mistreatment of minority and women employees "had direct financial consequences" on construction firms. *Id.* at 989, quoting *Concrete Works III*, 86 F. Supp.2d at 1074, 1073. Based on the district court's findings regarding Denver's anecdotal evidence and its review of the record, the court concluded that the anecdotal evidence provided persuasive, 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.

#### **5. *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 five 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 five percent as they were non-minority business enterprises. Although the plaintiffs actually submitted the lowest dollar bids, once the five 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 (10<sup>th</sup> 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 (6<sup>th</sup> 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 *Crosby* 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 five 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.

#### **6. *In re City of Memphis*, 293 F.3d 345 (6th Cir. 2002)**

This case is instructive to the disparity study in particular based on its holding that a local government may be prohibited from utilizing post-enactment evidence in support of a MBE/WBE-type program. The United States Court of Appeals for Sixth Circuit held that pre-enactment evidence was required to justify the City of Memphis' MBE/WBE Program. 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 the post-enactment study as evidence of a compelling interest to justify its MBE/WBE Program. 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.

#### **7. *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 held the State could not establish a compelling governmental interest and that the statute was not narrowly tailored. The court held, among other things, the statute failed the narrow tailoring test because there was no evidence that the State had considered race-neutral remedies.

The court was mindful of the fact that 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).

**8. *W.H. Scott Constr. Co. v. City of Jackson*, 199 F.3d 206 (5th Cir. 1999)**

This case is instructive to the disparity study because the decision highlights the evidentiary burden imposed by the courts necessary to support a local MBE/WBE program. In addition, the Fifth Circuit permitted the aggrieved contractor to recover lost profits from the City of Jackson, Mississippi due to the City's enforcement of the MBE/WBE program that the court held was unconstitutional.

The Fifth Circuit, applying strict scrutiny, held that the City of Jackson, Mississippi failed to establish a compelling governmental interest to justify its policy placing 15 percent minority participation goals for City construction contracts. In addition, the court held the evidence upon which the City relied was faulty for several reasons, including because it was restricted to the letting of prime contracts by the City under the City's Program, and it did not include an analysis of the availability and utilization of qualified minority subcontractors, the relevant statistical pool in the City's construction projects. Significantly, the court also held that the plaintiff in this case could recover lost profits against the City as damages as a result of being denied a bid award based on the application of the MBE/WBE program.

**9. *Eng'g Contractors Ass'n of S. Florida v. Metro. Dade County*, 122 F.3d 895 (11th Cir. 1997)**

*Engineering Contractors Association of South Florida v. Metropolitan Engineering Contractors Association* is a paramount case in the Eleventh Circuit and is instructive to the disparity study. This decision has been cited and applied by the courts in various circuits that have addressed MBE/WBE-type programs or legislation involving local government contracting and procurement.

In *Engineering Contractors Association*, six trade organizations (the "plaintiffs") filed suit in the district court for the Southern District of Florida, challenging three affirmative action programs administered by Engineering Contractors Association, Florida, (the "County") as violative of the Equal Protection Clause. 122 F.3d 895, 900 (11<sup>th</sup> 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 (11<sup>th</sup> 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 C.F.R. § 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 (10<sup>th</sup> Cir. 1994) (crediting disparity indices ranging from zero percent to 3.8 percent); *Contractors Ass’n v. City of Philadelphia*, 6 F.3d 990 (3d Cir. 1993) (crediting disparity index of four percent).

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 *Crosson*, 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 five 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.

### **10. *Monterey Mechanical v. Wilson*, 125 F.3d 702 (9<sup>th</sup> 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 (9<sup>th</sup> Cir. 1994). The University rejected the plaintiff’s bid because the plaintiff failed to comply with a state statute requiring prime contractors on such construction projects to subcontract 23 percent of the work to MBE/WBEs or, alternatively, demonstrate good faith outreach efforts. *Id.* The plaintiff conducted good faith outreach efforts but failed to provide the requisite documentation; the awardee prime contractor did not subcontract any portion of the work to MBE/WBEs but did include documentation of good faith outreach efforts. *Id.*

Importantly, the University did not conduct a disparity study, and instead argued that because “the ‘goal requirements’ of the scheme [did] not involve racial or gender quotas, set-asides or preferences,” the University did not need a disparity study. *Id.* at 705. The plaintiff protested the contract award and sued the University’s trustees, and a number of other individuals (collectively the “defendants”) alleging the state law was violative of the Equal Protection Clause. *Id.* The district court denied the plaintiff’s motion for an interlocutory injunction and the plaintiff appealed to the Ninth Circuit Court of Appeals. *Id.*

The defendants first argued that the statute was constitutional because it treated all general contractors alike, by requiring all to comply with the MBE/WBE participation goals. *Id.* at 708. The court held, however, that a minority or women business enterprise could satisfy the participation goals by allocating the requisite percentage of work to itself. *Id.* at 709. The court held that contrary to the district court’s finding, such a difference was not *de minimis*. *Id.*

The defendant’s also argued that the statute was not subject to strict scrutiny because the statute did not impose rigid quotas, but rather only required good faith outreach efforts. *Id.* at 710. The court rejected the argument finding that although the statute permitted awards to bidders who did not meet the percentage goals, “they are rigid in requiring precisely described and monitored efforts to attain those goals.” *Id.* The court cited its own earlier precedent to hold that “the provisions are not immunized from scrutiny because they purport to establish goals rather than quotas ... [T]he relevant question is not whether a statute requires the use of such measures, but whether it authorizes or encourages them.” *Id.* at 710-11 (internal citations and quotations omitted). The court found that the statute encouraged set asides and cited *Concrete Works of Colorado v. Denver*, 36 F.3d 1512 (10<sup>th</sup> 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 (5<sup>th</sup> 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 (9<sup>th</sup> 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 five percent bid preference for LBEs, WBEs and MBEs. 950 F.2d at 1405. Local MBEs and WBEs were eligible for a 10 percent total bid preference, representing the cumulative total of the five percent preference given Local Business Enterprises (“LBEs”) and the five percent preference given MBEs and WBEs. *Id.* The ordinance defined “MBE” as an economically disadvantaged business that was owned and controlled by one or more minority persons, which were defined to include Asian, blacks and Latinos. “WBE” was defined as an economically disadvantaged business that was owned and controlled by one or more women. Economically disadvantaged was defined as a business with average gross annual receipts that did not exceed \$14 million. *Id.*

The Motion for Preliminary Injunction challenged the constitutionality of the MBE provisions of the 1989 Ordinance insofar as it pertained to Public Works construction contracts. *Id.* at 1405. The district court denied the Motion for Preliminary Injunction on the AGCC’s constitutional claim on the ground that AGCC failed to demonstrate a likelihood of success on the merits. *Id.* at 1412.

The Ninth Circuit Court of Appeals applied the strict scrutiny analysis following the decision of the U.S. Supreme Court in *City of Richmond v. Croson*. The court stated that according to the U.S. Supreme Court in *Croson*, a municipality has a compelling interest in redressing, not only discrimination committed by the municipality itself, but also discrimination committed by private parties within the municipalities’ legislative jurisdiction, so long as the municipality in some way perpetuated the

discrimination to be remedied by the program. *Id.* at 1412-13, citing *Croson* at 488 U.S. at 491-92, 537-38. To satisfy this requirement, “the governmental actor need not be an active perpetrator of such discrimination; passive participation will satisfy this sub-part of strict scrutiny review.” *Id.* at 1413, quoting *Coral Construction Company v. King County*, 941 F.2d 910 at 916 (9<sup>th</sup> 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 (9<sup>th</sup> 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 (11<sup>th</sup> Cir. 1990).

The court found that the MBE Program of the County could not stand without a proper statistical foundation. *Id.* at 919. The court addressed whether post-enactment studies done by the County of a statistical foundation could be considered by the court in connection with determining the validity of the County MBE Program. The court held that a municipality must have *some* concrete evidence of discrimination in a particular industry before it may adopt a remedial program. *Id.* at 920. However, the court said this requirement of *some* evidence does not mean that a program will be automatically struck down if the evidence before the municipality at the time of enactment does not completely fulfill both prongs of the strict scrutiny test. *Id.* Rather, the court held, the factual predicate for the program should be evaluated based upon all evidence presented to the district court, whether such evidence was adduced before or after enactment of the MBE Program. *Id.* Therefore, the court adopted a rule that a municipality should have before it some evidence of discrimination before adopting a race-conscious program, while allowing post-adoption evidence to be considered in passing on the constitutionality of the program. *Id.*

The court, therefore, remanded the case to the district court for determination of whether the consultant studies that were performed after the enactment of the MBE Program could provide an adequate factual justification to establish a “propelling government interest” for King County’s adopting the MBE Program. *Id.* at 922.

The court also found that *Croson* does not require a showing of active discrimination by the enacting agency, and that passive participation, such as the infusion of tax dollars into a discriminatory industry, suffices. *Id.* at 922, citing *Croson*, 488 U.S. at 492. The court pointed out that the Supreme Court in *Croson* concluded that if the City had evidence before it, that non-minority contractors were systematically excluding minority businesses from subcontracting opportunities, it could take action to end the discriminatory exclusion. *Id.* at 922. The court points out that if the record ultimately supported a finding of systemic discrimination, the County adequately limited its program to those businesses that receive tax dollars, and the program imposed obligations upon only those businesses which voluntarily sought King County tax dollars by contracting with the County. *Id.*

The court addressed several factors in terms of the narrowly tailored analysis, and found that first, an MBE program should be instituted either after, or in conjunction with, race-neutral means of increasing minority business participation and public contracting. *Id.* at 922, citing *Croson*, 488 U.S. at 507. The second characteristic of the narrowly-tailored program, according to the court, is the use of minority utilization goals on a case-by-case basis, rather than upon a system of rigid numerical quotas. *Id.* Finally, the court stated that an MBE program must be limited in its effective scope to the boundaries of the enacting jurisdiction. *Id.*

Among the various narrowly tailored requirements, the court held consideration of race-neutral alternatives is among the most important. *Id.* at 922. Nevertheless, the court stated that while strict scrutiny requires serious, good faith consideration of race-neutral alternatives, strict scrutiny does not require exhaustion of every possible such alternative. *Id.* at 923. The court noted that it does not



intend a government entity exhaust *every* alternative, however irrational, costly, unreasonable, and unlikely to succeed such alternative might be. *Id.* Thus, the court required only that a state exhausts race-neutral measures that the state is authorized to enact, and that have a reasonable possibility of being effective. *Id.* The court noted in this case the County considered alternatives, but determined that they were not available as a matter of law. *Id.* The County cannot be required to engage in conduct that may be illegal, nor can it be compelled to expend precious tax dollars on projects where potential for success is marginal at best. *Id.*

The court noted that King County had adopted some race-neutral measures in conjunction with the MBE Program, for example, hosting one or two training sessions for small businesses, covering such topics as doing business with the government, small business management, and accounting techniques. *Id.* at 923. In addition, the County provided information on assessing Small Business Assistance Programs. *Id.* The court found that King County fulfilled its burden of considering race-neutral alternative programs. *Id.*

A second indicator of a program's narrowly tailoring is program flexibility. *Id.* at 924. The court found that an important means of achieving such flexibility is through use of case-by-case utilization goals, rather than rigid numerical quotas or goals. *Id.* at 924. The court pointed out that King County used a "percentage preference" method, which is not a quota, and while the preference is locked at five percent, such a fixed preference is not unduly rigid in light of the waiver provisions. The court found that a valid MBE Program should include a waiver system that accounts for both the availability of qualified MBEs and whether the qualified MBEs have suffered from the effects of past discrimination by the County or prime contractors. *Id.* at 924. The court found that King County's program provided waivers in both instances, including where neither minority nor a woman's business is available to provide needed goods or services and where available minority and/or women's businesses have given price quotes that are unreasonably high. *Id.*

The court also pointed out other attributes of the narrowly tailored and flexible MBE program, including a bidder that does not meet planned goals, may nonetheless be awarded the contract by demonstrating a good faith effort to comply. *Id.* The actual percentages of required MBE participation are determined on a case-by-case basis. Levels of participation may be reduced if the prescribed levels are not feasible, if qualified MBEs are unavailable, or if MBE price quotes are not competitive. *Id.*

The court concluded that an MBE program must also be limited in its geographical scope to the boundaries of the enacting jurisdiction. *Id.* at 925. Here the court held that King County's MBE program fails this third portion of "narrowly tailored" requirement. The court found the definition of "minority business" included in the Program indicated that a minority-owned business may qualify for preferential treatment if the business has been discriminated against in the particular geographical areas in which it operates. The court held this definition as overly broad. *Id.* at 925. The court held that the County should ask the question whether a business has been discriminated against in King County. *Id.* This determination, according to the court, is not an insurmountable burden for the County, as the rule does not require finding specific instances of discriminatory exclusion for each MBE. *Id.* Rather, if the County successfully proves malignant discrimination within the King County business community, an MBE would be presumptively eligible for relief if it had previously sought to do business in the County. *Id.*

In other words, if systemic discrimination in the County is shown, then it is fair to presume that an MBE was victimized by the discrimination. *Id.* at 925. For the presumption to attach to the MBE, however, it must be established that the MBE is, or attempted to become, an active participant in the County's business community. *Id.* Because King County's program permitted MBE participation even by MBEs that have no prior contact with King County, the program was overbroad to that extent. *Id.* Therefore, the court reversed the grant of summary judgment to King County on the MBE program on the basis that it was geographically overbroad.

The court considered the gender-specific aspect of the MBE program. The court determined the degree of judicial scrutiny afforded gender-conscious programs was intermediate scrutiny, rather than strict scrutiny. *Id.* at 930. Under intermediate scrutiny, gender-based classification must serve an important governmental objective, and there must be a direct, substantial relationship between the objective and the means chosen to accomplish the objective. *Id.* at 931.

In this case, the court concluded, that King County's WBE preference survived a facial challenge. *Id.* at 932. The court found that King County had a legitimate and important interest in remedying the many disadvantages that confront women business owners and that the means chosen in the program were substantially related to the objective. *Id.* The court found the record adequately indicated discrimination against women in the King County construction industry, noting the anecdotal evidence including an affidavit of the president of a consulting engineering firm. *Id.* at 933. Therefore, the court upheld the WBE portion of the MBE program and affirmed the district court's grant of summary judgment to King County for the WBE program.

### **Recent District Court Decisions**

#### **13. *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 five 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 five percent goals and establishing a fixed expiration date of 2009.

Plaintiff filed its complaint in this case in 2003 against the NCDOT and individuals associated with the NCDOT, including the Secretary of NCDOT, W. Lyndo Tippett. In its complaint, plaintiff alleged that the MWBE statute for NCDOT was unconstitutional on its face and as applied. 589 F.Supp.2d 587.

**March 29, 2007 Order of the District Court.** The matter came before the district court initially on several motions, including the defendants' Motion to Dismiss or for Partial Summary Judgment, defendants' Motion to Dismiss the Claim for Mootness and plaintiff's Motion for Summary Judgment. The court in its October 2007 Order granted in part and denied in part defendants' Motion to Dismiss or for partial summary judgment; denied defendants' Motion to Dismiss the Claim for Mootness; and dismissed without prejudice plaintiff's Motion for Summary Judgment.

The court held the Eleventh Amendment to the United States Constitution bars plaintiff from obtaining any relief against defendant NCDOT, and from obtaining a retrospective damages award against any of the individual defendants in their official capacities. The court ruled that plaintiff's claims for relief against the NCDOT were barred by the Eleventh Amendment, and the NCDOT was dismissed from the case as a defendant. Plaintiff's claims for interest, actual damages, compensatory damages and punitive damages against the individual defendants sued in their official capacities also was held barred by the Eleventh Amendment and were dismissed. But, the court held that plaintiff was entitled to sue for an injunction to prevent state officers from violating a federal law, and under the *Ex Parte Young* exception, plaintiff's claim for declaratory and injunctive relief was permitted to go forward as against the individual defendants who were acting in an official capacity with the NCDOT. The court also held that the individual defendants were entitled to qualified immunity, and therefore dismissed plaintiff's claim for money damages against the individual defendants in their individual capacities. Order of the District Court, dated March 29, 2007.

Defendants argued that the recent amendment to the MWBE statute rendered plaintiff's claim for declaratory injunctive relief moot. The new MWBE statute adopted in 2006, according to the court, does away with many of the alleged shortcomings argued by the plaintiff in this lawsuit. The court found the amended statute has a sunset date in 2009; specific aspirational participation goals by women and minorities are eliminated; defines "minority" as including only those racial groups which disparity studies identify as subject to underutilization in state road construction contracts; explicitly

references the findings of the 2004 Disparity Study and requires similar studies to be conducted at least once every five years; and directs NCDOT to enact regulations targeting discrimination identified in the 2004 and future studies.

The court held, however, that the 2004 Disparity Study and amended MWBE statute do not remedy the primary problem which the plaintiff complained of: the use of remedial race- and gender- based preferences allegedly without valid evidence of past racial and gender discrimination. In that sense, the court held the amended MWBE statute continued to present a live case or controversy, and accordingly denied the defendants' Motion to Dismiss Claim for Mootness as to plaintiff's suit for prospective injunctive relief. Order of the District Court, dated March 29, 2007.

The court also held that since there had been no analysis of the MWBE statute apart from the briefs regarding mootness, plaintiff's pending Motion for Summary Judgment was dismissed without prejudice. Order of the District Court, dated March 29, 2007.

**September 28, 2007 Order of the District Court.** On September 28, 2007, the district court issued a new order in which it denied both the plaintiff's and the defendants' Motions for Summary Judgment. Plaintiff claimed that the 2004 Disparity Study is the sole basis of the MWBE statute, that the study is flawed, and therefore it does not satisfy the first prong of strict scrutiny review. Plaintiff also argued that the 2004 study tends to prove non-discrimination in the case of women; and finally the MWBE Program fails the second prong of strict scrutiny review in that it is not narrowly tailored.

The court found summary judgment was inappropriate for either party and that there are genuine issues of material fact for trial. The first and foremost issue of material fact, according to the court, was the adequacy of the 2004 Disparity Study as used to justify the MWBE Program. Therefore, because the court found there was a genuine issue of material fact regarding the 2004 Study, summary judgment was denied on this issue.

The court also held there was confusion as to the basis of the MWBE Program, and whether it was based solely on the 2004 Study or also on the 1993 and 1998 Disparity Studies. Therefore, the court held a genuine issue of material fact existed on this issue and denied summary judgment. Order of the District Court, dated September 28, 2007.

**December 9, 2008 Order of the District Court (589 F.Supp.2d 587).** The district court on December 9, 2008, after a bench trial, issued an Order that found as a fact and concluded as a matter of law that plaintiff failed to satisfy its burden of proof that the North Carolina Minority and Women's Business Enterprise program, enacted by the state legislature to affect the awarding of contracts and subcontracts in state highway construction, violated the United States Constitution.

Plaintiff, in its complaint filed against the NCDOT alleged that N.C. Gen. St. § 136-28.4 is unconstitutional on its face and as applied, and that the NCDOT while administering the MWBE program violated plaintiff's rights under the federal law and the United States Constitution. Plaintiff requested a declaratory judgment that the MWBE program is invalid and sought actual and punitive damages.

As a prime contractor, plaintiff was obligated under the MWBE program to either obtain participation of specified levels of MBE and WBE subcontractors, or to demonstrate that good faith efforts were made to do so. Following a review of plaintiff's good faith efforts to obtain minority

participation on the particular contract that was the subject of plaintiff's bid, the bid was rejected. Plaintiff's bid was rejected in favor of the next lowest bid, which had proposed higher minority participation on the project as part of its bid. According to NCDOT, plaintiff's bid was rejected because of plaintiff's failure to demonstrate good faith efforts to obtain pre-designated levels of minority participation on the project. 589 F.Supp.2d 587.

**North Carolina's MWBE program.** The MWBE program was implemented following amendments to N.C. Gen. Stat. §136-28.4. Pursuant to the directives of the statute, the NCDOT promulgated regulations governing administration of the MWBE program. See N.C. Admin. Code tit. 19A, § 2D.1101, et seq. The regulations had been amended several times and provide that NCDOT shall ensure that MBEs and WBEs have the maximum opportunity to participate in the performance of contracts financed with non-federal funds. N.C. Admin. Code Tit. 19A § 2D.1101.

North Carolina's MWBE program, which affected only highway bids and contracts funded solely with state money, according to the district court, largely mirrored the Federal DBE Program which NCDOT is required to comply with in awarding construction contracts that utilize federal funds. 589 F.Supp.2d 587. Like the Federal DBE Program, under North Carolina's MWBE program, the targets for minority and female participation were aspirational rather than mandatory, and individual targets for disadvantaged business participation were set for each individual project. N.C. Admin. Code tit. 19A § 2D.1108. In determining what level of MBE and WBE participation was appropriate for each project, NCDOT would take into account "the approximate dollar value of the contract, the geographical location of the proposed work, a number of the eligible funds in the geographical area, and the anticipated value of the items of work to be included in the contract." *Id.* NCDOT would also consider "the annual goals mandated by Congress and the North Carolina General Assembly." *Id.*

A firm could be certified as 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 five 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 (4<sup>th</sup> Cir. 2010), discussed above.

**14. *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 (8<sup>th</sup> Cir. 2009)(unpublished opinion). The Eighth Circuit affirmed based on the decision of the district court and finding no reversible error.

**15. *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.

**16. *Hersbell Gill Consulting Engineers, Inc. v. Miami-Dade County*, 333 F. Supp.2d 1305 (S.D. Fla. 2004)**

The decision in *Hersbell 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 *Hersbell Gill* is instructive as to the analysis relating to architect and engineering services. The decision in *Hersbell 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 (10<sup>th</sup> 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 (10<sup>th</sup> 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.

### **17. *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.

**18. *Associated Utility Contractors of Maryland, Inc. v. Mayor and City Council of Baltimore*, 218 F. Supp.2d 749 (D. Md. 2002)**

This case is instructive because the court found the Executive Order of the Mayor of the City of Baltimore was precatory in nature (creating no legal obligation or duty) and contained no enforcement mechanism or penalties for noncompliance and imposed no substantial restrictions; the Executive Order announced goals that were found to be aspirational only.

The Associated Utility Contractors of Maryland, Inc. (“AUC”) sued the City of Baltimore challenging its ordinance providing for minority and women-owned business enterprise (“MWBE”) participation in city contracts. Previously, an earlier City of Baltimore MWBE program was declared unconstitutional. *Associated Utility Contractors of Maryland, Inc. v. Mayor and City Council of Baltimore*, 83 F. Supp.2d 613 (D. Md. 2000). The City adopted a new ordinance that provided for the establishment of MWBE participation goals on a contract-by-contract basis, and made several other changes from the previous MWBE program declared unconstitutional in the earlier case.

In addition, the Mayor of the City of Baltimore issued an Executive Order that announced a goal of awarding 35 percent of all City contracting dollars to MBE/WBEs. The court found this goal of 35 percent participation was aspirational only and the Executive Order contained no enforcement mechanism or penalties for noncompliance. The Executive Order also specified many “noncoercive” outreach measures to be taken by the City agencies relating to increasing participation of MBE/WBEs. These measures were found to be merely aspirational and no enforcement mechanism was provided.

The court addressed in this case only a motion to dismiss filed by the City of Baltimore arguing that the Associated Utility Contractors had no standing. The court denied the motion to dismiss holding that the association had standing to challenge the new MBE/WBE ordinance, although the court noted that it had significant issues with the AUC having representational standing because of the nature of the MBE/WBE plan and the fact the AUC did not have any of its individual members named in the suit. The court also held that the AUC was entitled to bring an as applied challenge to the Executive Order of the Mayor, but rejected it having standing to bring a facial challenge based on a finding that it imposes no requirement, creates no sanctions, and does not inflict an injury upon any member of the AUC in any concrete way. Therefore, the Executive Order did not create a “case or controversy” in connection with a facial attack. The court found the wording of the Executive Order to be precatory and imposing no substantive restrictions.

After this decision the City of Baltimore and the AUC entered into a settlement agreement and a dismissal with prejudice of the case. An order was issued by the court on October 22, 2003 dismissing the case with prejudice.

**19. *Associated Utility Contractors of Maryland, Inc. v. The Mayor and City Council of Baltimore*, 83 F. Supp.2d 613 (D. Md. 2000)**

The court held unconstitutional the City of Baltimore’s “affirmative action” program, which had construction subcontracting “set-aside” goals of 20 percent for MBEs and three percent for WBEs. The court held there was no data or statistical evidence submitted by the City prior to enactment of the Ordinance. There was no evidence showing a disparity between MBE/WBE availability and utilization in the subcontracting construction market in Baltimore. The court enjoined the City Ordinance.

**21. *Webster v. Fulton County*, 51 F. Supp.2d 1354 (N.D. Ga. 1999), a’ffd per curiam 218 F.3d 1267 (11th Cir. 2000)**

This case is instructive as it is another instance in which a court has considered, analyzed, and ruled upon a race-, ethnicity- and gender-conscious program, holding the local government MBE/WBE-type program failed to satisfy the strict scrutiny constitutional standard. The case also is instructive in its application of the *Engineering Contractors Association* case, including to a disparity analysis, the burdens of proof on the local government, and the narrowly tailored prong of the strict scrutiny test.

In this case, plaintiff Webster brought an action challenging the constitutionality of Fulton County’s (the “County”) minority and female business enterprise program (“M/FBE”) program. 51 F. Supp.2d 1354, 1357 (N.D. Ga. 1999). [The district court first set forth the provisions of the M/FBE program and conducted a standing analysis at 51 F. Supp.2d at 1356-62].

The court, citing *Engineering Contractors Association of S. Florida, Inc. v. Metro. Engineering Contractors Association*, 122 F.3d 895 (11<sup>th</sup> 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 (11<sup>th</sup> Cir. 2000).

## **22. *Associated Gen. Contractors v. Drabik*, 50 F. Supp.2d 741 (S.D. Ohio 1999)**

In this decision, the district court reaffirmed its earlier holding that the State of Ohio's MBE program of construction contract awards is unconstitutional. The court cited to *F. Buddie Contracting v. Cuyaboga Community College*, 31 F. Supp.2d 571 (N.D. Ohio 1998), holding a similar local Ohio program unconstitutional. The court repudiated the Ohio Supreme Court's holding in *Ritchey Produce*, 707 N.E. 2d 871 (Ohio 1999), which held that the State'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 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.

This opinion underscored that governments must show four 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.

## **23. *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.

#### **24. Indianapolis Minority Corrections Assoc., Inc. v. Wiley, 1998 WL 1988826 (S.D. Ind. 1998)**

In this case, plaintiffs, an association of Indianapolis Minority Contractors, brought suit to challenge the manner in which the State of Indiana administered its program for minority and disadvantaged businesses that is a part of the federal DBE program, which is regulated by the United States DOT. The plaintiffs contended that state officials and others engaged in wrongful actions in disbursement of federal highway funds to undeserving businesses that did not qualify for the DBE program because they were not controlled by either minority individuals or financially disadvantaged individuals. In addition, the plaintiffs claimed that because of this wrongdoing, they did not receive their fair share of the federal highway funds as minority contractors. The district court stated that this case concerns whether the State of Indiana complied with federal law related to the receipt of Federal Highway funds or whether it engaged in a practice of discrimination with respect to those funds. 1998 WL 1988826 at \*10. The district court noted the case did not involve a challenge concerning the State of Indiana Minority Business Enterprise Program that did not involve projects utilizing federal funds.

The district court rejected testimony submitted by the plaintiffs as not meeting standards for expert testimony with regard to claims that the defendants were discriminating against African Americans, because the court concluded the claims were conclusory allegations and opinions, based in part on speculation, hearsay and not on any sufficient probative evidence to support the opinions. 1998 WL 1988826 at \*13-15. The court rejected the statistical analysis submitted regarding a disparate impact on African Americans, finding there was no evidence shown concerning any possible error rate, standard deviation or confidence levels related to the proffered results. *Id.* The court found there was no evidence related to whether the proper statistical pool was used to calculate the percentages proffered as evidence of a disparate impact. *Id.* The testimony submitted by the plaintiffs compared Indiana DOT's compliance with the mandatory Federal DBE Program with other states, and concluded that Indiana ranked as one of the worst based on the testimony that Indiana's demographics were eight to nine percent black. *Id.* at \*14. But, the district court found the state-wide demographic utilized may be a statistical universe larger than the number of firms actually qualified, willing and able to work on the construction contracts. *Id.*

The district court also found that the testimony proffered was not sufficient in connection with the claim that the defendants were discriminating against African Americans. *Id.* at \*13. The court stated plaintiffs "merely" concluded that the State was discriminating based upon a review of the percentages of payments which the plaintiffs' witness considered to be "legitimate black companies," as compared to the payments made to what the witness considered to be "front" companies. *Id.* at \*13. The court found that these were conclusory opinions based only on the witness's knowledge of "legitimate black companies," and deemed the opinions "problematic." The court stated the witness admitted he had not been involved in activities within the State for many years, and he did not show any basis for his knowledge as to which companies that were paid funds by Indiana DOT were "legitimate black companies" and which were not. *Id.*

The court rejected plaintiffs' witness's opinion concerning his finding that only 3.8 percent of the total contracts went to "legitimate black-owned businesses." The court noted that the regulations do not provide for a 10 percent participation by African Americans, but a 10 percent participation by many groups, including African Americans, and that the witness did not testify as to whether he performed any study of the federal reports to test Indiana DOT's compliance with the 10 percent

goal based on *all* DBE as defined by federal law. *Id.* at \*13. The district court concluded that unsupported, conclusory testimony is not sufficient. *Id.*

The court also considered the issue raised by the plaintiffs as to whether the then existing federal regulations, 49 C.F.R. Part 23, provided enforceable rights subject to a 42 U.S.C. § 1983 action brought by the plaintiffs. The court concluded that the federal regulations do not provide a basis to conclude that they were intended to provide rights enforceable under Section 1983. *Id.* at \*28. The district court found that the federal regulations provide a means to assure that the federal DBE program benefits legitimate DBEs, and provides the Secretary of the United States DOT a means to ensure its integrity. *Id.*

The court stated these regulations provided a method for the USDOT to oversee the services provided by the States, rather than a means to ensure that individual DBEs receive funds for services. *Id.* at \*28. The federal regulations do not create an individual entitlement to services, but are a yardstick for the USDOT to measure the system-wide performance of the program. *Id.* Therefore, the district court concluded that although the plaintiffs may benefit from their State's plan implemented in order to receive federal transportation funds, they are only indirect beneficiaries. *Id.* at \*29. Further, the court held that as the DBE program is not an entitlement program, the regulations implementing the program do not provide enforceable rights under § 1983.

In conclusion, the court held that the plaintiffs may utilize § 1983 to enforce their right to a state-wide plan that complies with the federal requirements for the receipt of federal transportation and highway funds. *Id.* at \*29. The plaintiffs, the court held, do not have rights under § 1983 to remedy isolated violations of requirements under the plan, which includes claims that certain companies should not have been certified under the DBE program. The court dismissed all claims under 42 U.S.C. § 1983 brought against the State, Indiana DOT and the Indiana Department of Administrative Services and all claims for damages against the State officials sued in their official capacity.

The court then found that Indiana's DBE program met all federal requirements, including ensuring that DBEs have an equitable opportunity to compete for contracts and subcontracts as mandated by 49 C.F.R. § 23.45(c). The court pointed out that Indiana DOT arranges solicitations, time for the presentation of bids, quantities, specifications, and delivery schedules to facilitate participation by DBEs. *Id.* at \*35. The district court pointed out that Indiana DOT requires prime contractors to solicit bids from certified DBEs as part of its good-faith efforts requirements, that certified DBEs are provided notices of bids and that these notices are also posted on the Internet and in Indiana Contractors' Association publications. *Id.*

The court also indicated Indiana DOT's Civil Rights Division had a Supportive Services Division that provided managerial and technical assistance to DBEs, training workshops and one-on-one consultations in estimating, bidding, bookkeeping, marketing, financial issues and other areas directed by Indiana DOT. The DBE assistance provided for business planning, bookkeeping, marketing, accounting, estimating, bidding, employee relations, contract negotiations, computerization, financial decisions and other business related issues. Consultants were contracted to perform selected training or individualized assistance to DBEs. *Id.* at \*35–36.

Specifically, Indiana DOT provided services to assist DBEs, at no cost to them, including conducting internal orientation sessions for newly certified DBEs; provided training on the metric system

through Ivy Tech State College; consulting one-on-one with individual DBE firms to improve their business operations, provided training in finance and bookkeeping analysis, business plan preparation, job cost, cash flow preparation and analysis, bid estimation, computerization, strategic planning, loan packaging assistance and other operations; attended trade fairs, organized meetings, and performed other outreach functions for the purpose of reaching non-certified DBE firms, informing them of Indiana DOT DBE programs, and encouraging them to become certified; referred DBEs to establish state and federal business assistance organizations when appropriate; encouraged DBE firms to contact the civil rights office regarding any problems that arise on the job site or with respect to any aspect of their relationship with Indiana DOT and prime contractors and responded and sought to resolve the problems and complaints in a prompt manner; and provided classroom style training workshops including a twelve-day workshop to instruct 25 to 30 Indiana DBEs on all aspects of operations of the construction business. *Id.* at \*35-36.

The court also found that Indiana DOT strived to remove barriers DBEs frequently encountered in other states by not requiring subcontractors to be bonded, and exploring using Supportive Services funding to provide direct financial assistance to DBEs, utilizing funds from the FHWA exclusively for the recruitment of DBEs, managerial and technical assistance to DBEs, and monitoring DBE activities. Indiana DOT also established a mentor-protégé program for contractors on Indiana DOT contracts. *Id.* at \*37.

The district court stated that Indiana DOT met its overall 10 percent DBE goal and set practical contract goals on individual contracts complying with the requirements of the federal acts and regulations. In setting the individual contracts goal, the Indiana DOT evaluated each contract individually, including factors such as geographic location of the contract, its size, the number of items that can be performed by certified DBEs, the number of certified DBEs that can perform the work, the relative location of certified DBEs who can and are willing to work in the area, the current workload of those DBEs and DBE prequalification limits. *Id.* at \*39.

The district court found that the individual contract goals were not rigid requirements that contractors must meet under all circumstances. The bidder that fails to achieve an individual contract DBE goal may remain eligible to be awarded the contract if it can demonstrate that it has made good faith efforts to meet the goal. *Id.* at \*39. The district court pointed out that Indiana DOT's methods to ensure compliance with the federal regulations, reporting and recordkeeping requirements were met by Indiana DOT and that Indiana DOT's Civil Rights Office responded to requests for assistance as a part of its daily activities. *Id.* at \*42.

The district court noted that none of the plaintiffs complained to Indiana DOT that he bid on a subcontract to a construction contract administered by Indiana DOT and was denied the bid on the basis of race-based discrimination. *Id.* at \*42. The district court analyzed plaintiff's claims that the State does not have a bonding or financial assistance program in place, did not always conduct site visits as part of the DBE certification process, and never met the 10 percent goal requirement. *Id.* at \*43. The court in reviewing the federal regulations concluded that the bonding and financial assistance programs were not mandatory requirements of state wide plans, although they were mentioned in the federal regulations. *Id.* at \*44.

The district court found that although the State may not always conduct site visits in the certification process, the testimony did not conclusively establish that site visits were not conducted. The court



also found that plaintiffs did not establish that Indiana failed to meet the 10 percent goal that existed at this time in the federal regulations. In light of the evidence, the court found that the plaintiffs failed to show any genuine issues of fact regarding the State's compliance with the requirements for the DBE plan necessary to receive federal transportation funds and granted the defendants' Motion for Summary Judgment. *Id.* at \*45.

The district court also considered plaintiffs' claims under § 1983 that the State's administration of the required DBE program violated their rights under the Equal Protection Clause of the Fourteenth Amendment. The court found that the plaintiffs produced no evidence that showed a race-based or discriminatory policy of the State, or barrier otherwise imposed by the State, that impeded the plaintiffs' ability to bid on contracts. *Id.* at \*48. The district court found that the plaintiffs did not show how they were treated differently from all other qualified DBEs in their efforts to obtain contracts, and that the State of Indiana does not have the power to modify the Congressional mandate that all certified DBEs are to compete on an equal basis. *Id.* Thus, the court rejected the plaintiffs' argument that because women-owned DBEs are receiving a disproportionate share of federally funded contracts, a discriminatory practice must be in place. *Id.*

The district court held that the plaintiffs could not show any discriminatory intent by the State of Indiana. Plaintiffs alleged that defendants had raised barriers to their participation in contracts funded by federal dollars and that they had not received their fair percentage of the contracts compared to non-African American DBEs. The court found the plaintiffs failed to demonstrate that such barriers exist, and that they did not demonstrate how they had been treated differently than the other similarly situated minority and disadvantaged enterprises served by the DBE program. *Id.* at \*49. The court held that a showing of a disproportionate impact is not enough, as a state's "official action will not be held unconstitutional solely because it results in a racially disproportionate impact ... Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Id.* at \*49. (citations omitted).

Lastly, the district court pointed out that the plaintiffs did not challenge the constitutionality of the federal DBE program, but only challenged the State's administration of that program. *Id.* at \*50. Thus, the court held "If the DOA and INDOT are only doing 'what federal law requires, [their] conduct is constitutional, at least where, as here, the constitutionality of the federal program is not challenged.'" *Id.* at \*50, quoting *Converse Construction Co., Inc. v. Massachusetts Bay Transportation Authority*, 899 F.Supp. 753, 761 (D.Mass. 1995)(citing *Milwaukee Co. Pavers*, 922 F.2d at 423). The court noted that the Second, Sixth, and Tenth Circuits reached the similar conclusion that 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. *Id.* at \*50 (citations omitted).

Therefore, the court granted summary judgment to the defendants finding that they were complying with federal law and could not be enjoined under the Equal Protection Clause or under a claim based on Title VI.

## **F. Recent Decisions Involving the Federal DBE Program and its Implementation by State or Local Government Agencies in Other Jurisdictions**

There are several recent and pending cases involving challenges to the United States Federal DBE Program and its implementation by the states and their governmental entities for federally-funded

projects. These cases could have a significant impact on the nature and provisions of contracting and procurement on federally-funded projects, including and relating to the utilization of DBEs. In addition, these cases provide an instructive analysis of the recent application of the strict scrutiny test to MBE/WBE- and DBE-type programs.

## **F. Recent Decisions in Federal Circuit Courts of Appeal**

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

The Associated General Contractors of America, Inc., San Diego Chapter, Inc. , (“AGC”) sought declaratory and injunctive relief against the California Department of Transportation (“Caltrans”) and its officers on the grounds that Caltrans’ Disadvantaged Business initial Enterprise (“DBE”) program unconstitutionally provided race -and sex-based preferences to African American, Native American-, Asian-Pacific American-, and women-owned firms on certain transportation contracts. The federal district court upheld the constitutionality of Caltrans’ DBE program implementing the Federal DBE program and granted summary judgment to Caltrans. The district court held that Caltrans’ DBE program implementing the Federal DBE Program satisfied strict scrutiny because Caltrans had a strong basis in evidence of discrimination in the California transportation contracting industry, and the program was narrowly tailored to those groups that actually suffered discrimination. The district court held that Caltrans’ substantial statistical and anecdotal evidence from a disparity study conducted by BBC Research and Consulting, provided a strong basis in evidence of discrimination against the four named groups, and that the program was narrowly tailored to benefit only those groups. 713 F.3d at 1190.

The AGC appealed the decision to the Ninth Circuit Court of Appeals. The Ninth Circuit initially held that because the AGC did not identify any of the members who have suffered or will suffer harm as a result of Caltrans’ program, the AGC did not establish that it had associational standing to bring the lawsuit. *Id.* Most significantly, the Ninth Circuit held that even if the AGC could establish standing, its appeal failed because the Court found Caltrans’ DBE program implementing the Federal DBE program is constitutional and satisfied the applicable level of strict scrutiny required by the Equal Protection Clause of the United States Constitution. *Id.* at 1194-1200.

**Court Applies *Western States Paving Co. v. Washington State DOT* Decision.** In 2005 the Ninth Circuit Court of Appeal decided *Western States Paving Co. v. Washington State Department of Transportation*, 407 F. 3d. 983 (9<sup>th</sup> 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.

**A. Application of strict scrutiny standard articulated in *Western States Paving*.** The Court held that the framework for AGC's as-applied challenge to Caltrans' DBE program is governed by *Western States Paving*. The Ninth Circuit in *Western States Paving* devised a two-pronged test for narrow tailoring: (1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be "limited to those minority groups that have actually suffered discrimination." *Id.* at 1195-1196 (quoting *Western States Paving*, 407 F.3d at 997-99).

**1. Evidence of discrimination in California contracting industry.** The Court held that in Equal Protection cases, courts consider statistical and anecdotal evidence to identify the existence of discrimination. *Id.* at 1196. The U.S. Supreme Court has suggested that a "significant statistical disparity" could be sufficient to justify race-conscious remedial programs. *Id.* at \*7 (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989)). The Court stated that although generally not sufficient, anecdotal evidence complements statistical evidence because of its ability to bring "the cold numbers convincingly to life." *Id.* (quoting *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 (1977)).

The Court pointed out that Washington DOT's DBE program in the *Western States Paving* case was held invalid because Washington DOT had performed no statistical studies and it offered no anecdotal evidence. *Id.* at 1196. The Court also stated that the Washington DOT used an oversimplified methodology resulting in little weight being given by the Court to the purported disparity because Washington's data "did not account for the relative capacity of disadvantaged businesses to perform work, nor did it control for the fact that existing affirmative action programs

skewed the prior utilization of minority businesses in the state.” *Id.* (quoting *Western States Paving*, 407 F.3d at 999-1001). The Court said that it struck down Washington’s program after determining that the record was devoid of any evidence suggesting that minorities currently suffer – or have ever suffered – discrimination in the Washington transportation contracting industry.” *Id.*

Significantly, the Court held in this case as follows: “In contrast, Caltrans’ affirmative action program is supported by substantial statistical and anecdotal evidence of discrimination in the California transportation contracting industry.” *Id.* at 1196. The Court noted that the disparity study documented disparities in many categories of transportation firms and the utilization of certain minority- and 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 ole 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.

**2. Program tailored to groups who actually suffered discrimination.** The Court pointed out that the second prong of the test articulated in *Western States Paving* requires that a DBE program be limited to those groups that actually suffered discrimination in the state's contracting industry. *Id.* at 1198. The Court found Caltrans' DBE program is limited to those minority groups that have actually suffered discrimination. *Id.* The Court held that the 2007 disparity study showed systematic and substantial underutilization of African American-, Native American-, Asian-Pacific American-, and 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 US DOT 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.*

**B. Consideration of race-neutral alternatives.** The Court rejected the AGC assertion that Caltrans' program is not narrowly tailored because it failed to evaluate race-neutral measures before implementing the system of racial preferences, and stated the law imposes no such requirement. *Id.* at 1199. The Court held that *Western States Paving* does not require states to independently meet this aspect of narrow tailoring, and instead focuses on whether the federal statute sufficiently considered race-neutral alternatives. *Id.*

Second, the Court found that even if this requirement does apply to Caltrans' program, narrow tailoring only requires "serious, good faith consideration of workable race-neutral alternatives." *Id.* at 1199, *citing Grutter v. Bollinger*, 539 U.S. 306, 339 (2003). The Court found that the Caltrans program has considered an increasing number of race-neutral alternatives, and it rejected AGC's claim that Caltrans' program does not sufficiently consider race-neutral alternatives. *Id.* at 1199.

**C. Certification affidavits for Disadvantaged Business Enterprises.** The Court rejected the AGC argument that Caltrans' program is not narrowly tailored because affidavits that applicants must submit to obtain certification as DBEs do not require applicants to assert they have suffered discrimination *in California*. *Id.* at 1199-1200. The Court held the certification process employed by Caltrans follows the process detailed in the federal regulations, and that this is an impermissible collateral attack on the facial validity of the Congressional Act authorizing the Federal DBE Program and the federal regulations promulgated by the USDOT (The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, Pub.L.No. 109-59, § 1101(b), 119 Sect. 1144 (2005)). *Id.* at 1200.

**D. Application of program to mixed state- and federally-funded contracts.** The Court also rejected AGC's challenge that Caltrans applies its program to transportation contracts funded by both federal and state money. *Id.* at 1200. The Court held that this is another impermissible collateral attack on the federal program, which explicitly requires goals to be set for mix-funded contracts. *Id.*

**Conclusion.** The Court concluded that the AGC did not have standing, and that further, Caltrans' DBE program survives strict scrutiny by: 1) having a strong basis in evidence of discrimination within the California transportation contracting industry, and 2) being narrowly tailored to benefit



only those groups that have actually suffered discrimination. *Id.* at 1200. The Court then dismissed the appeal. *Id.*

## **2. *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983 (9<sup>th</sup> 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 (9<sup>th</sup> 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 DOT (“WSDOT”) under the Transportation Act for the 21<sup>st</sup> 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 (8<sup>th</sup> 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 (6<sup>th</sup> 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 (9<sup>th</sup> 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 (7<sup>th</sup> Cir. 2001); *Associated Gen. Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 737 (6<sup>th</sup> 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 five percent of its 14 percent goal through race-conscious means based on a nine 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 nine 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.

### **3. *Western States Paving Co. v. Washington DOT, US DOT & 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, US DOT, and FHWA*, 407 F.3d 983 (9<sup>th</sup> 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.

#### **4. *Braunstein v. Arizona DOT*, 683 F.3d 1177 (9th Cir. 2012)**

Braunstein is an engineering contractor that provided subsurface utility location services for Arizona DOT. 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.** The Arizona DOT 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 five points for DBE participation. *Id. at 1182.* All six firms that bid on the prime contract received the maximum five points for DBE participation. All six firms committed to hiring DBE subcontractors to perform at least six 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 the Arizona DOT 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 (9<sup>th</sup> 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.

**5. *Sherbrooke Turf, Inc. v. Minnesota DOT, and Gross Seed Company v. Nebraska Department of Roads*, 345 F.3d 964 (8<sup>th</sup> 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 C.F.R. 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 C.F.R. § 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 C.F.R. § 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 C.F.R. § 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 C.F.R. § 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 C.F.R. § 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 C.F.R. § 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 C.F.R. § 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 C.F.R. § 26.51(f)(3). In addition, DOT may grant an exemption or waiver from any and all requirements of the Program. *See*, 49 C.F.R. § 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 C.F.R. § 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 C.F.R. § 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 C.F.R. § 26.45(c)-(d)(Steps 1 and 2). Though the underlying estimates may be inexact, the exercise requires states to focus on establishing realistic goals for DBE participation in the relevant contracting markets. *Id.* at 972.

Finally, Congress and DOT have taken significant steps, the court held, to minimize the race-based nature of the DBE Program. Its benefits are directed at all small businesses owned and controlled by the socially and economically disadvantaged. While TEA-21 creates a presumption that members of certain racial minorities fall within that class, the presumption is rebuttable, wealthy minority owners and wealthy minority-owned firms are excluded, and certification is available to persons who are not presumptively disadvantaged that demonstrate actual social and economic disadvantage. Thus, race is made relevant in the Program, but it is not a determinative factor. 345 F.3d at 973. For these reasons, the court agreed with the district courts that the revised DBE Program is narrowly tailored on its face.

Sherbrooke and Gross Seed also argued that the DBE Program as applied in Minnesota and Nebraska is not narrowly tailored. Under the Federal Program, states set their own goals, based on local market conditions; their goals are not imposed by the federal government; nor do recipients have to tie them to any uniform national percentage. 345 F.3d at 973, *citing* 64 Fed. Reg. at 5102.

The court analyzed what Minnesota and Nebraska did in connection with their implementation of the Federal DBE Program. Minnesota DOT commissioned a disparity study of the highway contracting market in Minnesota. The study group determined that DBEs made up 11.4 percent of the prime contractors and subcontractors in a highway construction market. Of this number, 0.6 percent were minority-owned and 10.8 percent women-owned. Based upon its analysis of business formation statistics, the consultant estimated that the number of participating minority-owned business would be 34 percent higher in a race-neutral market. Therefore, the consultant adjusted its DBE availability figure from 11.4 percent to 11.6 percent. Based on the study, Minnesota DOT adopted an overall goal of 11.6 percent DBE participation for federally-assisted highway projects. Minnesota DOT predicted that it would need to meet nine 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*).

**6. *Sherbrooke Turf, Inc. v. Minnesota DOT*, 2001 WL 1502841, No. 00-CV-1026 (D. Minn. 2001) (unpublished opinion), aff'd 345 F.3d 964 (8<sup>th</sup> 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 (10<sup>th</sup> 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 C.F.R. 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.*

**7. *Gross Seed Co. v. Nebraska Department of Roads*, Civil Action File No. 4:00CV3073 (D. Neb. May 6, 2002), aff'd 345 F.3d 964 (8<sup>th</sup> 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 C.F.R. 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 C.F.R. 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.

**8. *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10<sup>th</sup> 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 (10<sup>th</sup> Cir. 2000), the Tenth Circuit upheld in general the facial constitutionality of the Federal DBE Program. The court found that the federal government had a compelling interest in not perpetuating the effects of racial discrimination in its own distribution of federal funds and in remediating the effects of past discrimination in government contracting, and that the evidence supported the existence of past and present discrimination sufficient to justify the Federal DBE Program. The court also held that the Federal DBE Program is “narrowly tailored,” and therefore upheld the constitutionality of the Federal DBE Program.

It is significant to note that the court in determining the Federal DBE Program is “narrowly tailored” focused on the current regulations, 49 C.F.R. 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 C.F.R. § 26.51(a)(2000); *see also* 49 C.F.R. § 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 C.F.R. § 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 C.F.R. § 26.51(b). We therefore are dealing here with revisions that emphasize the continuing need to employ non-race-conscious methods even as the need for race-conscious remedies is recognized. 228 F.3d at 1178-1179.

In considering whether the Federal DBE Program is narrowly tailored, the court also addressed the argument made by the contractor that the program is over- and under-inclusive for several reasons, including that Congress did not inquire into discrimination against each particular minority racial or

ethnic group. The court held that insofar as the scope of inquiry suggested was a particular state's construction industry alone, this would be at odds with its holding regarding the compelling interest in Congress's power to enact nationwide legislation. *Id.* at 1185-1186. The court held that because of the "unreliability of racial and ethnic categories and the fact that discrimination commonly occurs based on much broader racial classifications," extrapolating findings of discrimination against the various ethnic groups "is more a question of nomenclature than of narrow tailoring." *Id.* The court found that the "Constitution does not erect a barrier to the government's effort to combat discrimination based on broad racial classifications that might prevent it from enumerating particular ethnic origins falling within such classifications." *Id.*

Finally, the Tenth Circuit did not specifically address a challenge to the letting of federally-funded construction contracts by state departments of transportation. The court pointed out that plaintiff Adarand "conceded that its challenge in the instant case is to 'the federal program, implemented by federal officials,' and not to the letting of federally-funded construction contracts by state agencies." 228 F.3d at 1187. The court held that it did not have before it a sufficient record to enable it to evaluate the separate question of Colorado DOT's implementation of race-conscious policies. *Id.* at 1187-1188.

**9. *Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.* 2014 WL 6686734 (D. Mont. Nov. 26, 2014) appeal pending in the U.S. Court of Appeals, Ninth Circuit, Docket Nos. 14-36097 and 15-35003**

**Factual and procedural background.** *In Mountain West Holding Co., Inc. v. The State of Montana, Montana DOT, et al.*, Case No. 1:13-CV-00049-DLC, United States District Court for the District of Montana, Billings Division, Plaintiff Mountain West Holding Co., Inc. ("Mountain West"), alleged it is a contractor that provides construction-specific traffic planning and staffing for construction projects as well as the installation of signs, guardrails, and concrete barriers. Mountain West sued the Montana Department of Transportation ("MDT") and the State of Montana, challenging their implementation of the Federal DBE Program. Mountain West brought this action alleging violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, Title VI of the Civil Rights Act, 42 USC § 2000(d)(7), and 42 USC § 1983.

The State of Montana commissioned a disparity study, which was completed in in 2009. Based upon the disparity study, Mountain West alleges the State of Montana utilized race, national origin, and gender-conscious goals in highway construction contracts. Mountain West claims the State did not have a strong basis in evidence to show there was past discrimination in the highway construction industry in Montana and that the implementation of race, gender, and national origin preferences were necessary or appropriate. Mountain West also alleges that Montana has instituted policies and practices which exceed the United States Department of Transportation DBE requirements.

Mountain West asserts that the 2009 study concluded all "relevant" minority groups were underutilized in "professional services" and Asian Pacific Americans and Hispanic Americans were underutilized in "business categories combined," but it also concluded that all "relevant" minority groups were significantly overutilized in construction. Mountain West thus alleges that although the disparity study demonstrates that DBE groups are "significantly overrepresented" in the highway construction field, MDT has established preferences for DBE construction subcontractor firms over non-DBE construction subcontractor firms in the award of contracts.

Mountain West also asserts that the Montana DBE Program does not have a valid statistical basis for the establishment or inclusion of race, national origin, and gender conscious goals, that MDT inappropriately relies upon the 2009 study as the basis for its DBE Program, and that the study is flawed. Mountain West claims the Montana DBE Program is not narrowly tailored because it disregards large differences in DBE firm utilization in MDT contracts as among three different categories of subcontractors: business categories combined, construction, and professional services; the MDT DBE certification process does not require the applicant to specify any specific racial or ethnic prejudice or cultural bias that had a negative impact upon his or her business success; and the certification process does not require the applicant to certify that he or she was discriminated against in the State of Montana in highway construction.

Mountain West and the State of Montana and the Montana DOT filed cross Motions for Summary Judgment.

***Western States Paving Co. v. Washington DOT.*** The Court in *Mountain West* applied the decision in *Western States*, 407 F.3d 983 (9th Cir. 2005), and the decision in *AGC, San Diego v. California DOT*, 71 F.3d 1187 (9th Cir. 2013) as establishing the law to be followed in this case. The Court noted that in *Western States*, the Ninth Circuit held that a state’s implementation of the Federal DBE Program can be subject to an as-applied constitutional challenge, despite the facial validity of the Federal DBE Program. 2014 WL 6686734 at \*2 (D. Mont. November 26, 2014). The Court stated the Ninth Circuit held that whether a state’s implementation of the DBE Program “is narrowly tailored to further Congress’s remedial objective depends upon the presence or absence of discrimination in the State’s transportation contracting industry.” *Id.* at \*2, quoting *Western States*, at 997-998. The Court in *Mountain West* also pointed out the Ninth Circuit held that “even when discrimination is present within a State, a remedial program is only narrowly tailored if its application is limited to those minority groups that have actually suffered discrimination.” *Mountain West*, 2014 WL 6686734 at \*2, quoting *Western States*, 407 F.3d at 998.

**Montana DOT study.** The Montana DOT obtained a firm to conduct a disparity study, which was completed in 2009. The Court in *Mountain West* stated that the results of the study indicated significant underutilization of DBEs in all minority groups in “professional services” contracts, significant underutilization of Asian Pacific Americans and Hispanic Americans in “business categories combined,” slight underutilization of nonminority women in “business categories combined,” and overutilization of all groups in subcontractor “construction” contracts. *Mountain West*, 2014 WL 6686734 at \*2.

In addition to the statistical evidence, the 2009 disparity study gathered anecdotal evidence through surveys and other means. The Court stated the anecdotal evidence suggested various forms of discrimination existed within Montana’s transportation contracting industry, including evidence of an exclusive “good ole boy network” that made it difficult for DBEs to break into the market. *Id.* at \*3. The Court said that despite these findings, the consulting firm recommended that Montana DOT continue to monitor DBE utilization while employing only race-neutral means to meet its overall goal. *Id.* The consulting firm recommended that Montana DOT consider the use of race-conscious measures if DBE utilization decreased or did not improve.

Montana followed the recommendations provided in the study, and continued using only race-neutral means in its effort to accomplish its overall goal for DBE utilization. *Id.* Based on the

statistical analysis provided in the study, Montana established an overall DBE utilization goal of 5.83 percent. *Id.*

**Montana's DBE utilization after ceasing the use of contract goals.** The Court found that in 2006, Montana achieved a DBE utilization rate of 13.1 percent, however, after Montana ceased using contract goals to achieve its overall goal, the rate of DBE utilization declined sharply. 2014 WL 6686734 at \*3. The utilization rate dropped, according to the Court, to 5 percent in 2007, 3 percent in 2008, 2.5 percent in 2009, 0.8 percent in 2010, and in 2011, it was 2.8 percent *Id.* In response to this decline, for fiscal years 2011-2014, the Court said Montana DOT 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.

Montana DOT 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 Montana DOT, which does not provide for the use of contract goals to meet the overall goal. *Id.* Thus, the new overall goal is to be made entirely through the use of race-neutral means. *Id.*

**Mountain West's claims for relief.** Mountain West seeks declaratory and injunctive relief, including prospective relief, against the individual defendants, and sought monetary damages against the State of Montana and the Montana DOT 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 Montana DOT on a project that utilized contract goals, and that despite being a low-quoting bidder, Mountain West was not awarded the contract. *Id.* Mountain West brings an as-applied challenge to Montana's DBE program. *Id.*

**The two-prong test to demonstrate that a DBE program is narrowly tailored.** The Court, citing AGC, *San Diego v. California DOT*, 713 F.3d 1187, 1196, stated that under the two-prong test established in *Western States*, in order to demonstrate that its DBE program is narrowly tailored, (1) the state must establish the presence of discrimination within its transportation contracting industry, and (2) the remedial program must be limited to those minority groups that have actually suffered discrimination. *Mountain West*, at \*5.

The Court said that a state implementing the facially valid Federal DBE Program need not demonstrate an independent compelling interest for its implementation of the DBE Program because when Congress passed the relevant legislation it identified a compelling nationwide interest in remedying discrimination in the transportation contracting industry. *Id.* at \*4. In order to pass such scrutiny, the Court found a state need only demonstrate that its program is narrowly tailored. *Id.* at \*3, citing *Western States*, 407 F.3d 997.

The Court held that states can meet the evidentiary standard required by *Western States* if, looking at the evidence in its entirety, "the data shows substantial disparities in utilization of minority firms suggesting that public dollars are being poured into 'a system of racial exclusion practiced by elements of the local construction industry.'" *Mountain West*, at \*5, quoting AGC, *San Diego v. California DOT*, 713 F.3d at 1197. The Court in *Mountain West* said that the federal guidelines provide that narrow tailoring does not require a state to parse its DBE Program to distinguish between certain



types of contracts within the transportation contracting industry. *Mountain West*, at \*5, citing *AGC, San Diego*, 713 F.3d at 1199.

The Court in *Mountain West*, following *AGC, San Diego*, concluded that a state's implementation of the DBE Program need not require minority firms to attest to the fact that they have been discriminated against in the relevant jurisdiction because such a requirement is contrary to federal regulation, and thus would constitute "an impermissible collateral attack on the facial validity of the federal Act and regulations." *Mountain West*, at \*5, quoting *AGC, San Diego*, at 1200.

**Statistical evidence.** The Court held that Montana's DBE program passes strict scrutiny. The Court found that *Mountain West* could not create a genuine dispute about the fact that the 2009 disparity study indicated significant underutilization of all minority groups in the award of professional services contracts in Montana's transportation contracting market. *Mountain West*, at \*5. In addition, the Court found that *Mountain West* could not dispute that the study indicated significant underutilization of Asian Pacific Americans and Hispanic Americans in the award of contracts in business categories combined in Montana's transportation contracting market. *Id.* Also, the Court found that *Mountain West* could not dispute that the study also indicated underutilization of nonminority women and business categories combined, and that the study documented, through surveys and otherwise, significant anecdotal evidence of various forms of discrimination in Montana's transportation contracting industry. *Id.*

The Court noted that *Mountain West* merely disputed the validity of the findings in the study and argued that the methods the study used in gathering statistical and anecdotal evidence were flawed. *Id.* at \*6. The Court found that in mounting this attack on the study, *Mountain West* relied entirely on the expert report of Dr. George "LaNoue" (sic), and that *Mountain West* only cited to two pages in the report in which Dr. LaNoue opined that the table showing DBE utilization and business categories combined was improperly calculated. *Id.*

*Mountain West*, the Court stated, provided no evidence indicating that the data showing significant underutilization of all minority groups and professional services was invalid. *Id.* at \*6. In addition, the Court found contrary to the allegation by *Mountain West*, that the study controlled for factors other than discrimination in calculating DBE utilization and adjusted its calculation of the availability of DBE firms based on its control for factors other than discrimination *Id.*

**Anecdotal evidence.** The Court said that the attack on the study did not diminish the fact the study uncovered substantial anecdotal evidence of discrimination in Montana's transportation contracting market, including evidence of a "good ole boy network." *Id.* at \*6. The Court said that in *AGC, San Diego*, the Ninth Circuit noted "federal courts and regulations have identified precisely [the factors associated with good ole boy networks] as barriers that disadvantage minority firms because of the lingering effects of discrimination." *Mountain West*, at \*6, quoting *AGC, San Diego*, at 1197-98.

In connection with the anecdotal evidence, the Court stated that Dr. LaNoue's report merely criticized the sample size of the responses obtained, and that *Mountain West* also contended the anecdotal evidence is unreliable because Montana did not present affidavits in support of the anecdotal evidence gathered. *Id.* at \*6. Contrary to *Mountain West*'s assertions, the Court held that nothing in *Western States* requires that anecdotal survey evidence gathered by a private firm assisting a state in preparing its goal methodology to the state's DBE program must be supported by affidavits. *Mountain West*, at \*6.

The Court concluded that Mountain West failed to create a genuine dispute that anecdotal evidence indicates the existence of discrimination in Montana’s transportation contracting industry. *Id.* at \*6. The Court pointed out the Ninth Circuit held in *AGC, San Diego* that “substantial statistical disparities alone would give rise to an inference of discrimination, and certainly... statistical evidence combined with anecdotal evidence passes constitutional muster.” *Mountain West* at \*6, quoting *AGC, San Diego*, 713 F.3d at 1196.

**Precipitous drop in utilization.** The Court in *Mountain West* also found that neither Dr. LaNoue’s report nor any other evidence presented by Mountain West created a genuine dispute about the fact DBE utilization in Montana’s transportation contracting industry dropped precipitously after 2006 when Montana ceased using contract goals. *Mountain West* at \*6. The Court found that while the study indicated Montana should utilize DBEs at a rate of 5.83 percent, by 2010, DBE utilization in Montana had fallen “dramatically” to 0.8 percent. *Id.* at \*6. The Court held that this undisputed fact “strongly supports [Defendants’] claim that there are significant barriers to minority competition in the public subcontracting market, raising the specter of racial discrimination.” *Mountain West*, at \*6, quoting *Adarand Contractors, Inc. v. Slater*, 228 F.3d 1147, 1174 (10th Cir. 2000).

**Conclusion and holding.** In sum, the Court held that Montana presented sufficient evidence to demonstrate evidence of discrimination in Montana’s transportation contracting industry. *Id.* at \*7. The Court concluded that Montana’s DBE program is sufficiently narrowly tailored to address discrimination against only those groups that have actually suffered discrimination in the state’s transportation contracting industry based on the facts that (1) statistical evidence suggests that all minority groups in professional services are significantly underutilized, (2) there is evidence of an exclusive “good ole boy network” within the state contracting industry, and (3) DBE underutilization dramatically increased after 2006 when the State ceased using contract goals. *Id.* at \*7.

Therefore, the Court held Montana’s DBE program survives such scrutiny by: (1) having a strong basis in evidence of discrimination within Montana’s transportation contracting industry; and (2) being narrowly tailored to benefit only those groups that have actually suffered discrimination. *Id.* at \*7.

The Court also held that Mountain West failed to create a genuine dispute relative to its claims regarding Montana’s DBE program during 2012-2014 when Montana and Montana DOT utilized contract goals. *Id.* It follows then, according to the Court, that Mountain West’s claims for prospective, injunctive and declaratory relief also failed because Montana has currently ceased using contract goals and any potential utilization of contract goals will be based on a not-yet conducted disparity study. *Id.* Therefore, the Court ordered that Montana and Montana DOT are entitled to summary judgment on all claims.

The decision of the District Court has been appealed by Mountain West to the U.S. Court of Appeals for the Ninth Circuit, Docket No. 14-36097 (December 26, 2014).

#### **10. *Geyer Signal, Inc. v. Minnesota, DOT*, 2014 WL 1309092 (D. Minn. March 31, 2014)**

In *Geyer Signal, Inc., et al. v. Minnesota DOT, U.S. DOT, 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 majority-owned firm 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 ("FHWA") 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 government 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 that 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 C.F.R. § 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 dis-crimination 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.

**11. *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 ("DOT") and others, to the DBE Program adopted by Montana DOT implementing the Federal DBE Program at 49 C.F.R. Part 26. Weeden sought an application for Temporary Restraining Order and Preliminary Injunction against the State of Montana and the Montana DOT.

**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. Montana DOT had established an overall goal of 5.83 percent DBE participation in Montana's highway construction projects. On the Arrow Creek Slide Project, Montana DOT established a DBE goal of two percent. *Id.*

Plaintiff Weeden, although it submitted the low dollar bid, did not meet the two 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 two percent DBE goal. The other five bidders exceeded the two 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. Montana DOT'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 Montana DOT 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 Montana DOT to prevent it from letting the contract to another bidder. Weeden claimed that Montana DOT'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 Montana DOT did not provide reasonable notice of the good faith effort requirements. *Id.*

**No proof of irreparable harm and balance of equities favor Montana DOT.** 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 Montana DOT 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 Montana DOT 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 Montana DOT 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 two 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 Montana DOT's DBE Project as if it were a non-DBE subcontractor because Weeden cannot show that *it* was subjected to a racial or gender-based barrier in its competition for the prime contract. *Id.* at \*3. Because Weeden was not deprived of the ability to compete on equal footing with the other bidders, the Court found Weeden suffered no equal protection injury and lacks standing to assert an equal protection claim as if it were a non-DBE subcontractor. *Id.*

**Court applies *AGC v. California DOT* case; evidence supports narrowly tailored DBE program.**

Significantly, the Court found that even if Weeden had standing to present an equal protection claim, Montana DOT 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 Montana DOT 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 Montana DOT'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.

**12. *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 C.F.R. § 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 (7<sup>th</sup> 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 (6<sup>th</sup> 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 (8<sup>th</sup> 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 (9<sup>th</sup> 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 C.F.R. § 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 C.F.R. § 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 C.F.R. § 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 C.F.R. § 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 C.F.R. § 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.

**13. *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 5<sup>th</sup> and 14<sup>th</sup> 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 C.F.R. 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(9<sup>th</sup> 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 (7<sup>th</sup> 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 (8<sup>th</sup> 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 C.F.R. § 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 C.F.R. § 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 C.F.R. § 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.

**14. *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 (9<sup>th</sup> 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 (7<sup>th</sup> 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 (7<sup>th</sup> 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 (8<sup>th</sup> 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 (6<sup>th</sup> 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 (10<sup>th</sup> 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.

**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 C.F.R. 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.

**G. Recent Decisions and Authorities Involving Federal Procurement that may Impact MBE/WBE/DBE Programs**

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

Although this case does not involve the Federal DBE Program (49 C.F.R. 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 five 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 five 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 five 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 (10<sup>th</sup> 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 five 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 five 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 five 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 (5<sup>th</sup> 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 (11<sup>th</sup> 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 *Crosson* 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 five percent goal is reasonably related to the capacity of firms owned by members of those minority groups — *i.e.*, whether that goal is comparable to the share of contracts minorities would receive in the absence of discrimination.” 545 F.3d at 1049-1050.

**2. *DynaLantic Corp. v. United States Dept. of Defense, et al.*, 885 F.Supp.2d 237, (D.D.C. Aug. 15, 2012), appeals voluntarily dismissed, United States Court of Appeals, District of Columbia, Docket Numbers 12-5329 and 12-5330 (2014).**

Plaintiff, the DynaLantic Corporation (“DynaLantic”), is a small business that designs and manufactures aircraft, submarine, ship, and other simulators and training equipment. DynaLantic sued the United States Department of Defense (“DoD”), the Department of the Navy, and the Small Business Administration (“SBA”) challenging the constitutionality of Section 8(a) of the Small Business Act (the “Section 8(a) program”), on its face and as applied: namely, the SBA’s determination that it is necessary or appropriate to set aside contracts in the military simulation and training industry. 2012 WL 3356813, at \*1, \*37.

The Section 8(a) program authorizes the federal government to limit the issuance of certain contracts to socially and economically disadvantaged businesses. *Id.* at \*1. DynaLantic claimed that the Section 8(a) is unconstitutional on its face because the DoD’s use of the program, which is reserved for “socially and economically disadvantaged individuals,” constitutes an illegal racial preference in violation of the equal protection in violating its right to equal protection under the Due Process Clause of the Fifth Amendment to the Constitution and other rights. *Id.* at \*1. DynaLantic also claimed the Section 8(a) program is unconstitutional as applied by the federal defendants in DynaLantic’s specific industry, defined as the military simulation and training industry. *Id.*

As described in *DynaLantic Corp. v. United States Department of Defense*, 503 F.Supp. 2d 262 (D.D.C. 2007) (*see below*), the court previously had denied Motions for Summary Judgment by the parties and

directed them to propose future proceedings in order to supplement the record with additional evidence subsequent to 2007 before Congress. 503 F.Supp. 2d at 267.

**The Section 8(a) Program.** The Section 8(a) program is a business development program for small businesses owned by individuals who are both socially and economically disadvantaged as defined by the specific criteria set forth in the congressional statute and federal regulations at 15 U.S.C. §§ 632, 636 and 637; *see* 13 C.F.R. § 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 C.F.R. § 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 C.F.R. § 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 C.F.R. § 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 C.F.R. § 124.104(c)(2).

Congress has established an “aspirational goal” for procurement from socially and economically disadvantaged individuals, which includes but is not limited to the Section 8(a) program, of five percent of procurements dollars government wide. *See* 15 U.S.C. § 644(g)(1). *DynaLantic*, at \*3. Congress has not, however, established a numerical goal for procurement from the Section 8(a) program specifically. *See Id.* Each federal agency establishes its own goal by agreement between the agency head and the SBA. *Id.* DoD has established a goal of awarding approximately two percent of prime contract dollars through the Section 8(a) program. *DynaLantic*, at \*3. The Section 8(a) program allows the SBA, “whenever it determines such action is necessary and appropriate,” to enter into contracts with other government agencies and then subcontract with qualified program participants. 15 U.S.C. § 637(a)(1). Section 8(a) contracts can be awarded on a “sole source” basis (i.e., reserved to one firm) or on a “competitive” basis (i.e., between two or more Section 8(a) firms). *DynaLantic*, at \*3-4; 13 C.F.R. 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 (10<sup>th</sup> 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 (10<sup>th</sup> 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 10<sup>th</sup> Circuit Court of Appeals' approach in *Adarand VII*, and reviewed the post-enactment evidence in three broad categories: (1) evidence of barriers to the formation of qualified minority contractors due to discrimination, (2) evidence of discriminatory barriers to fair competition between minority and non-minority contractors, and (3) evidence of discrimination in state and local disparity studies. *DynaLantic*, at \*17.

The Court found that the government presented sufficient evidence of barriers to minority business formation, including evidence on race-based denial of access to capital and credit, lending discrimination, routine exclusion of minorities from critical business relationships, particularly through closed or "old boy" business networks that make it especially difficult for minority-owned businesses to obtain work, and that minorities continue to experience barriers to business networks. *DynaLantic*, at \*17-21. The Court considered as part of the evidentiary basis before Congress multiple disparity studies conducted throughout the United States and submitted to Congress, and qualitative and quantitative testimony submitted at Congressional hearings. *Id.*

The Court also found that the government submitted substantial evidence of barriers to minority business development, including evidence of discrimination by prime contractors, private sector customers, suppliers, and bonding companies. *DynaLantic*, at \*21-23. The Court again based this finding on recent evidence submitted before Congress in the form of disparity studies, reports and Congressional hearings. *Id.*

**State and local disparity studies.** Although the Court noted there have been hundreds of disparity studies placed before Congress, the Court considers in particular studies submitted by the federal defendants of 50 disparity studies, encompassing evidence from 28 states and the District of Columbia, which have been before Congress since 2006. *DynaLantic*, at \*25-29. The Court stated it reviewed the studies with a focus on two indicators that other courts have found relevant in analyzing disparity studies. First, the Court considered the disparity indices calculated, which was a disparity index, calculated by dividing the percentage of MBE, WBE, and/or DBE firms *utilized* in the contracting market by the percentage of M/W/DBE firms *available* in the same market. *DynaLantic*, at \*26. The Court said that normally, a disparity index of 100 demonstrates full M/W/DBE participation; the closer the index is to zero, the greater the M/W/DBE disparity due to underutilization. *DynaLantic*, at \*26.

Second, the Court reviewed the method by which studies calculated the *availability* and *capacity* of minority firms. *DynaLantic*, at \*26. The Court noted that some courts have looked closely at these factors to evaluate the reliability of the disparity indices, reasoning that the indices are not probative unless they are restricted to firms of significant size and with significant government contracting experience. *DynaLantic*, at \*26. The Court pointed out that although discriminatory barriers to formation and development would impact capacity, the Supreme Court decision in *Croson* and the Court of Appeals decision in *O'Donnell Construction Co. v. District of Columbia, et al.*, 963 F.2d 420 (D.C. Cir. 1992) "require the additional showing that eligible minority firms experience disparities, notwithstanding their abilities, in order to give rise to an inference of discrimination." *DynaLantic*, at \*26, n. 10.

**Analysis: strong basis in evidence.** Based on an analysis of the disparity studies and other evidence, the Court concluded that the government articulated a compelling interest for the Section 8(a) program and satisfied its initial burden establishing that Congress had a strong basis in evidence

permitting race-conscious measures to be used under the Section 8(a) program. *DynaLantic*, at \*29-37. The Court held that DynaLantic did not meet its burden to establish that the Section 8(a) program is unconstitutional on its face, finding that DynaLantic could not show that Congress did not have a strong basis in evidence for permitting race-conscious measures to be used under any circumstances, in any sector or industry in the economy. *DynaLantic*, at \*29.

The Court discussed and analyzed the evidence before Congress, which included extensive statistical analysis, qualitative and quantitative consideration of the unique challenges facing minorities from all businesses, and an examination of their race-neutral measures that have been enacted by previous Congresses, but had failed to reach the minority owned firms. *DynaLantic*, at \*31. The Court said Congress had spent decades compiling evidence of race discrimination in a variety of industries, including but not limited to construction. *DynaLantic*, at \*31. The Court also found that the federal government produced significant evidence related to professional services, architecture and engineering, and other industries. *DynaLantic*, at \*31. The Court stated that the government has therefore “established that there are at least some circumstances where it would be ‘necessary or appropriate’ for the SBA to award contracts to businesses under the Section 8(a) program. *DynaLantic*, at \*31, citing 15 U.S.C. § 637(a)(1).

Therefore, the Court concluded that in response to plaintiff’s facial challenge, the government met its initial burden to present a strong basis in evidence sufficient to support its articulated, constitutionally valid, compelling interest. *DynaLantic*, at \*31. The Court also found that the evidence from around the country is sufficient for Congress to authorize a nationwide remedy. *DynaLantic*, at \*31, n. 13.

**Rejection of DynaLantic’s rebuttal arguments.** The Court held that since the federal defendants made the initial showing of a compelling interest, the burden shifted to the plaintiff to show why the evidence relied on by defendants fails to demonstrate a compelling governmental interest. *DynaLantic*, at \*32. The Court rejected each of the challenges by DynaLantic, including holding that: the legislative history is sufficient; the government compiled substantial evidence that identified private racial discrimination which affected minority utilization in specific industries of government contracting, both before and after the enactment of the Section 8(a) program; any flaws in the evidence, including the disparity studies, DynaLantic has identified in the data do not rise to the level of credible, particularized evidence necessary to rebut the government’s initial showing of a compelling interest; DynaLantic cited no authority in support of its claim that fraud in the administration of race-conscious programs is sufficient to invalidate Section 8(a) program on its face; and Congress had strong evidence that the discrimination is sufficiently pervasive across racial lines to justify granting a preference for all five groups included in Section 8(a). *DynaLantic*, at \*32-36.

In this connection, the Court stated it agreed with *Croson* and its progeny that the government may properly be deemed a “passive participant” when it fails to adjust its procurement practices to account for the effects of identified private discrimination on the availability and utilization of minority-owned businesses in government contracting. *DynaLantic*, at \*34. In terms of flaws in the evidence, the Court pointed out that the proponent of the race-conscious remedial program is not required to unequivocally establish the existence of discrimination, nor is it required to negate all evidence of non-discrimination. *DynaLantic*, at \*35, citing *Concrete Work IV*, 321 F.3d at 991. Rather, a strong basis in evidence exists, the Court stated, when there is evidence approaching a *prima facie* case of a constitutional or statutory violation, not irrefutable or definitive proof of discrimination. *Id.*, citing

*Croson*, 488 U.S. 500. Accordingly, the Court stated that DynaLantic’s claim that the government must independently verify the evidence presented to it is unavailing. *Id. DynaLantic*, at \*35.

Also in terms of DynaLantic’s arguments about flaws in the evidence, the Court noted that defendants placed in the record approximately 50 disparity studies which had been introduced or discussed in Congressional Hearings since 2006, which DynaLantic did not rebut or even discuss any of the studies individually. *DynaLantic*, at \*35. DynaLantic asserted generally that the studies did not control for the capacity of the firms at issue, and were therefore unreliable. *Id.* The Court pointed out that Congress need not have evidence of discrimination in all 50 states to demonstrate a compelling interest, and that in this case, the federal defendants presented recent evidence of discrimination in a significant number of states and localities which, taken together, represents a broad cross-section of the nation. *DynaLantic*, at \*35, n. 15. The Court stated that while not all of the disparity studies accounted for the capacity of the firms, many of them did control for capacity and still found significant disparities between minority and non-minority owned firms. *DynaLantic*, at \*35. In short, the Court found that DynaLantic’s “general criticism” of the multitude of disparity studies does not constitute particular evidence undermining the reliability of the particular disparity studies and therefore is of little persuasive value. *DynaLantic*, at \*35.

In terms of the argument by DynaLantic as to requiring proof of evidence of discrimination against each minority group, the Court stated that Congress has a strong basis in evidence if it finds evidence of discrimination is sufficiently pervasive across racial lines to justify granting a preference to all five disadvantaged groups included in Section 8(a). The Court found Congress had strong evidence that the discrimination is sufficiently pervasive across racial lines to justify a preference to all five groups. *DynaLantic*, at \*36. The fact that specific evidence varies, to some extent, within and between minority groups, was not a basis to declare this statute facially invalid. *DynaLantic*, at \*36.

**Facial challenge: conclusion.** The Court concluded Congress had a compelling interest in eliminating the roots of racial discrimination in federal contracting and had established a strong basis of evidence to support its conclusion that remedial action was necessary to remedy that discrimination by providing significant evidence in three different areas. First, it provided extensive evidence of discriminatory barriers to minority business formation. *DynaLantic*, at \*37. Second, it provided “forceful” evidence of discriminatory barriers to minority business development. *Id.* Third, it provided significant evidence that, even when minority businesses are qualified and eligible to perform contracts in both the public and private sectors, they are awarded these contracts far less often than their similarly situated non-minority counterparts. *Id.* The Court found the evidence was particularly strong, nationwide, in the construction industry, and that there was substantial evidence of widespread disparities in other industries such as architecture and engineering, and professional services. *Id.*

**As-applied challenge.** *DynaLantic* also challenged the SBA and DoD’s use of the Section 8(a) program as applied: namely, the agencies’ determination that it is necessary or appropriate to set aside contracts in the military simulation and training industry. *DynaLantic*, at \*37. Significantly, the Court points out that the federal defendants “concede that they do not have evidence of discrimination in this industry.” *Id.* Moreover, the Court points out that the federal defendants admitted that there “is no Congressional report, hearing or finding that references, discusses or mentions the simulation and training industry.” *DynaLantic*, at \*38. The federal defendants also admit that they are “unaware of any discrimination in the simulation and training industry.” *Id.* In addition, the federal defendants

admit that none of the documents they have submitted as justification for the Section 8(a) program mentions or identifies instances of past or present discrimination in the simulation and training industry. *DynaLantic*, at \*38.

The federal defendants maintain that the government need not tie evidence of discriminatory barriers to minority business formation and development to evidence of discrimination in any particular industry. *DynaLantic*, at \*38. The Court concludes that the federal defendants' position is irreconcilable with binding authority upon the Court, specifically, the United States Supreme Court's decision in *Croson*, as well as the Federal Circuit's decision in *O'Donnell Construction Company*, which adopted *Croson's* reasoning. *DynaLantic*, at \*38. The Court holds that *Croson* made clear the government must provide evidence demonstrating there were eligible minorities in the relevant market. *DynaLantic*, at \*38. The Court held that absent an evidentiary showing that, in a highly skilled industry such as the military simulation and training industry, there are eligible minorities who are qualified to undertake particular tasks and are nevertheless denied the opportunity to thrive there, the government cannot comply with *Croson's* evidentiary requirement to show an inference of discrimination. *DynaLantic*, at \*39, citing *Croson*, 488 U.S. 501. The Court rejects the federal government's position that it does not have to make an industry-based showing in order to show strong evidence of discrimination. *DynaLantic*, at \*40.

The Court notes that the Department of Justice has recognized that the federal government must take an industry-based approach to demonstrating compelling interest. *DynaLantic*, at \*40, citing *Cortez III Service Corp. v. National Aeronautics & Space Administration*, 950 F.Supp. 357 (D.D.C. 1996). In *Cortez*, the Court found the Section 8(a) program constitutional on its face, but found the program unconstitutional as applied to the NASA contract at issue because the government had provided no evidence of discrimination in the industry in which the NASA contract would be performed. *DynaLantic*, at \*40. The Court pointed out that the Department of Justice had advised federal agencies to make industry-specific determinations before offering set-aside contracts and specifically cautioned them that without such particularized evidence, set-aside programs may not survive *Croson* and *Adarand*. *DynaLantic*, at \*40.

The Court recognized that legislation considered in *Croson*, *Adarand* and *O'Donnell* were all restricted to one industry, whereas this case presents a different factual scenario, because Section 8(a) is not industry-specific. *DynaLantic*, at \*40, n. 17. The Court noted that the government did not propose an alternative framework to *Croson* within which the Court can analyze the evidence, and that in fact, the evidence the government presented in the case is industry specific. *Id.*

The Court concluded that agencies have a responsibility to decide if there has been a history of discrimination in the particular industry at issue. *DynaLantic*, at \*40. According to the Court, it need not take a party's definition of "industry" at face value, and may determine the appropriate industry to consider is broader or narrower than that proposed by the parties. *Id.* However, the Court stated, in this case the government did not argue with plaintiff's industry definition, and more significantly, it provided no evidence whatsoever from which an inference of discrimination in that industry could be made. *DynaLantic*, at \*40.

**Narrowly tailoring.** In addition to showing strong evidence that a race-conscious program serves a compelling interest, the government is required to show that the means chosen to accomplish the government's asserted purpose are specifically and narrowly framed to accomplish that purpose.

*DynaLantic*, at \*41. The Court considered several factors in the narrowly tailoring analysis: the efficacy of alternative, race-neutral remedies, flexibility, over- or under-inclusiveness of the program, duration, the relationship between numerical goals and the relevant labor market, and the impact of the remedy on third parties. *Id.*

The Court analyzed each of these factors and found that the federal government satisfied all six factors. *DynaLantic*, at \*41-48. The Court found that the federal government presented sufficient evidence that Congress attempted to use race-neutral measures to foster and assist minority owned businesses relating to the race-conscious component in Section 8(a), and that these race-neutral measures failed to remedy the effects of discrimination on minority small business owners. *DynaLantic*, at \*42. The Court found that the Section 8(a) program is sufficiently flexible in granting race-conscious relief because race is made relevant in the program, but it is not a determinative factor or a rigid racial quota system. *DynaLantic*, at \*43. The Court noted that the Section 8(a) program contains a waiver provision and that the SBA will not accept a procurement for award as an 8(a) contract if it determines that acceptance of the procurement would have an adverse impact on small businesses operating outside the Section 8(a) program. *DynaLantic*, at \*44.

The Court found that the Section 8(a) program was not over- and under-inclusive because the government had strong evidence of discrimination which is sufficiently pervasive across racial lines to all five disadvantaged groups, and Section 8(a) does not provide that every member of a minority group is disadvantaged. *DynaLantic*, at \*44. In addition, the program is narrowly tailored because it is based not only on social disadvantage, but also on an individualized inquiry into economic disadvantage, and that a firm owned by a non-minority may qualify as socially and economically disadvantaged. *DynaLantic*, at \*44.

The Court also found that the Section 8(a) program places a number of strict durational limits on a particular firm's participation in the program, places temporal limits on every individual's participation in the program, and that a participant's eligibility is continually reassessed and must be maintained throughout its program term. *DynaLantic*, at \*45. Section 8(a)'s inherent time limit and graduation provisions ensure that it is carefully designed to endure only until the discriminatory impact has been eliminated, and thus it is narrowly tailored. *DynaLantic*, at \*46.

In light of the government's evidence, the Court concluded that the aspirational goals at issue, all of which were less than five percent of contract dollars, are facially constitutional. *DynaLantic*, at \*46-47. The evidence, the Court noted, established that minority firms are ready, willing, and able to perform work equal to two to five percent of government contracts in industries including but not limited to construction. *Id.* The Court found the effects of past discrimination have excluded minorities from forming and growing businesses, and the number of available minority contractors reflects that discrimination. *DynaLantic*, at \*47.

Finally, the Court found that the Section 8(a) program takes appropriate steps to minimize the burden on third parties, and that the Section 8(a) program is narrowly tailored on its face. *DynaLantic*, at \*48. The Court concluded that the government is not required to eliminate the burden on non-minorities in order to survive strict scrutiny, but a limited and properly tailored remedy to cure the effects of prior discrimination is permissible even when it burdens third parties. *Id.* The Court points to a number of provisions designed to minimize the burden on non-minority firms, including the presumption that a minority applicant is socially disadvantaged may be rebutted, an individual who is



not presumptively disadvantaged may qualify for such status, the 8(a) program requires an individualized determination of economic disadvantage, and it is not open to individuals whose net worth exceeds \$250,000 regardless of race. *Id.*

**Conclusion.** The Court concluded that the Section 8(a) program is constitutional on its face. The Court also held that it is unable to conclude that the federal defendants have produced evidence of discrimination in the military simulation and training industry sufficient to demonstrate a compelling interest. Therefore, *DynaLantic* prevailed on its as-applied challenge. *DynaLantic*, at \*51. Accordingly, the Court granted the federal defendants' Motion for Summary Judgment in part (holding the Section 8(a) program is valid on its face) and denied it in part, and granted the Plaintiff's Motion for Summary Judgment in part (holding the program is invalid as applied to the military simulation and training industry) and denied it in part. The Court held that the SBA and the DoD are enjoined from awarding procurements for military simulators under the Section 8(a) program without first articulating a strong basis in evidence for doing so.

**Appeals voluntarily dismissed, and stipulation and agreement of settlement approved and ordered by District Court.** A Notice of Appeal and Notice of Cross Appeal were filed in this case to the United States Court of Appeals for the District of Columbia by the United States and DynaLantic: Docket Numbers 12-5329 and 12-5330. Subsequently, the appeals were voluntarily dismissed, and the parties entered into a Stipulation and Agreement of Settlement, which was approved by the district court (Jan. 30, 2014). The parties stipulated and agreed *inter alia*, as follows: (1) the federal defendants were enjoined from awarding prime contracts under the Section 8(a) program for the purchase of military simulation and military simulation training contracts without first articulating a strong basis in evidence for doing so; (2) the federal defendants agreed to pay plaintiff the sum of \$1,000,000.00; and (3) the Federal defendants agreed they shall refrain from seeking to vacate the injunction entered by the Court for at least two years.

The district court on January 30, 2014 approved the Stipulation and Agreement of Settlement, and So Ordered the terms of the original 2012 injunction modified as provided in the Stipulation and Agreement of Settlement.

### **3. *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 five 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 five percent goal. *Id.* at 264.

This case arose from a Navy contract that the DOD decided to award exclusively through the 8(a) Program. The plaintiff owned a small company that would have bid on the contract but for the fact it was not a participant in the 8(a) Program. After multiple judicial proceedings the D.C. Circuit dismissed the plaintiff's action for lack of standing but granted the plaintiff's motion to enjoin the contract procurement pending the appeal of the dismissal order. The Navy cancelled the proposed procurement but the D.C. Circuit allowed the plaintiff to circumvent the mootness argument by amending its pleadings to raise a facial challenge to the 8(a) program as administered by the SBA and utilized by the DOD. The D.C. Circuit held the plaintiff had standing because of the plaintiff's inability to compete for DOD contracts reserved to 8(a) firms, the injury was traceable to the race-conscious component of the 8(a) Program, and the plaintiff's injury was imminent due to the likelihood the government would in the future try to procure another contract under the 8(a) Program for which the plaintiff was ready, willing, and able to bid. *Id.* at 264-65.

On remand, the plaintiff amended its complaint to challenge the constitutionality of the 8(a) Program and sought an injunction to prevent the military from awarding any contract for military simulators based upon the race of the contractors. *Id.* at 265. The district court first held that the plaintiff's complaint could be read only as a challenge to the DOD's implementation of the 8(a) Program [pursuant to 10 U.S.C. § 2323] as opposed to a challenge to the program as a whole. *Id.* at 266. The parties agreed that the 8(a) Program uses race-conscious criteria so the district court concluded it must be analyzed under the strict scrutiny constitutional standard. The court found that in order to evaluate the government's proffered "compelling government interest," the court must consider the evidence that Congress considered at the point of authorization or reauthorization to ensure that it had a strong basis in evidence of discrimination requiring remedial action. The court cited to *Western States Paving* in support of this proposition. *Id.* The court concluded that because the DOD program was reauthorized in 2006, the court must consider the evidence before Congress in 2006.

The court cited to the recent *Rothe* decision as demonstrating that Congress considered significant evidentiary materials in its reauthorization of the DOD program in 2006, including six recently published disparity studies. The court held that because the record before it in the present case did not contain information regarding this 2006 evidence before Congress, it could not rule on the parties' Motions for Summary Judgment. The court denied both motions and directed the parties to propose future proceedings in order to supplement the record. *Id.* at 267.

## APPENDIX C.

### Contract Data Collection

Keen Independent compiled data about 600 City of Madison public works prime contracts and 2,234 subcontracts, and the firms used as prime and subcontractors on those contracts. From these data, Keen Independent calculated the percentage of contract dollars that went to small, minority-, women- and majority-owned businesses. The study team counted certified as well as non-certified minority- and women-owned businesses when calculating MBE/WBE utilization. Only City certified SBE firms were counted when calculating SBE utilization. The utilization analysis examined public works contracts awarded during the January 2008 through December 2013 study period.

The study team sought sources of contract data that consistently included information about prime contractors and subcontractors regardless of firm ownership or MBE/WBE or SBE status. The study team compiled data for all public works contracts awarded by the City, including City-, federal- and state-funded contracts. The utilization analysis focuses on City-funded contracts.

The City's past Achievement Reports could not provide this comprehensive information. By design, the DBE participation reports only include certified MBE, WBE and DBE firms. Further limitations of the City Achievement Reports are discussed in Section D of this Appendix.

Appendix C describes the study team's utilization data collection processes in five parts:

- A. City Department of Engineering public works contract data;
- B. City Department of Civil Rights data;
- C. Information on firm ownership;
- D. City review; and
- E. Data limitations and differences between disparity study analysis and past city reports.

#### **A. City Department of Engineering Public Works Contract Data**

Keen Independent collected data on City public works prime contracts that the City awarded from January 2008 through December 2013 and the subcontracts associated with those contracts.

**Electronic data.** The City Department of Engineering Project Contract database was a primary source used to identify dollars awarded to prime contractors for each project. The City created these spreadsheets by running reports from its contract database to provide information such as:

- Project and contract number;
- Description of work;
- Award date;
- Award amount and amendment or change order amounts (when applicable);
- Funding source;
- Prime contractor name; and
- Prequalified firm information.

**Hard copy subcontractor data.** The study team also collected subcontract data. The City Department of Engineering provided PDF versions of Subcontract Approval forms for each public works contract during the study period. The forms provided information about:

- Prime and subcontractor name;
- Type of work;
- Estimated subcontract amount;
- Estimated percent of contract value; and
- WBE/MBE/SBE status.

The City obtains subcontractor information as it is required under Article 109.1 of the Standard Specifications for Public Works Construction. The contractor must notify the City Engineer of the subcontractors proposed for the work and shall not employ any that the Engineer may object to as unsatisfactory. The Contractor cannot change subcontractors without written approval of the Engineer. Further, the City monitors the utilization of subcontractors on public works projects to ensure that the prime contractor does not subcontract out more than 40 percent of the contract without the written consent of the Board of Public Works.

## **B. City Department of Civil Rights Data**

The Department of Civil Rights is responsible for administering and monitoring the City SBE Program, which applies to all public works contracts estimated to cost \$100,000 or more that are funded with City dollars. The Civil Rights database provided additional information for public works contracts awarded during the study period including:

- Prime contractors and subcontractors used on all monitored contracts;
- Prime and subcontract amounts;
- Contract goals; and
- Firm WBE/MBE/SBE certification status.

## **C. Information on Firm Ownership**

For each firm identified as working on a City public works contract, Keen Independent attempted to collect business characteristics including the race, ethnicity and gender of the business owner. The study team compiled company information from multiple sources, including:

- Study team telephone interviews with firm owners and managers (attempted with each utilized firm);
- Department of Civil Rights SBE certification data;
- Wisconsin Department of Administration Division of Enterprise Operations Business Certification Program data;
- Information from Dun & Bradstreet/Hoovers;
- Information from U.S. Small Business Administration;
- Wisconsin DOT Uniform Certification Program (UCP) directory; and
- City staff review.

## **D. City Review**

The City reviewed Keen Independent contract data during several stages of the study process. The study team met with City staff multiple times to review data collection, materials the study team gathered, sample data for specific contracts and preliminary results. After the study team developed an initial database for public works contracts, City Engineering and Civil Rights staff conducted a detailed review of those data. City staff also reviewed dollars by industry to ensure that all subcontracts were accounted for. Ownership information, including race, ethnicity and gender of both certified and non-certified firms utilized by the City during the study period was also reviewed by City staff.

Keen Independent reviewed and incorporated City feedback throughout the study process.

## **E. Data Limitations and Differences between Disparity Study Analyses and Past City Reports**

Limitations and other issues concerning contract data collection are noted below.

- Payment data for subcontracts was not tracked by the City. Therefore, subcontractor amounts were determined based on award amounts. Although this data collection method might not have captured all subcontractor utilization, it was the best method available. Any limitations would not have a meaningful effect on overall utilization results.
- The Department of Engineering provided funding source data, while the Department of Civil Rights tracked SBE goal data. SBE goals are only applied to contracts receiving City funds. In the event that the Engineering data reported state or federal funding, but the Civil Rights data indicated an SBE goal was applied, the contract was included in the City-funded analysis. Any limitations would not have a meaningful effect on overall MBE/WBE utilization results.
- SBE certification status at the time of contract award could not be adequately determined for each firm. Certifications expire after three years, but SBEs must submit an annual Affidavit form stating that nothing has changed from their original application that would affect their eligibility. The Department of Civil Rights maintained current SBE certification data, but could not provide the study team with SBE certification status by year. For the purpose of the utilization analysis, firms that were SBE-certified at any point during the study period were considered SBE-certified for the entire study period. This limitation provides some explanation of why SBE-certified firm utilization was higher in the study analysis when compared to the City Achievement Reports. Any limitations would not have a meaningful effect on overall MBE/WBE utilization results.

- Not all prime contractors consistently reported the SBE status of their subcontractors on their Subcontract Forms, and therefore did not apply SBE-certified firm subcontract dollars toward the SBE goal. These dollars were not tracked as SBE-certified dollars by the City, but were considered SBE-certified dollars in the disparity study analysis. This provides some explanation of why SBE-certified firm utilization was higher in the disparity study analysis when compared to the City Achievement Reports.
- Upon closer review of the City public works contracts, an additional 36 contracts totaling \$22 million were identified as missing SBE goal information in the original data received from the Department of Civil Rights. This, in part, explains why the total dollar amount for SBE goals contracts is higher in the study than in the City Achievement Reports. In other words, the disparity study analysis of City-funded contracts is more complete compared with what the City previously reported.
- Electronic data from the City Department of Engineering were limited to prime contract data. Identifying subcontractors and subcontract award amounts required an extensive review of PDF Subcontractor Forms. The review of Subcontract Forms also identified missing and outdated subcontractor information in the Civil Rights data. This, in part, explains why the total dollar amount for SBEs is higher in the study analyses than in the City Achievement Reports.
- City Achievement Reports were developed using contract award amounts, and did not include change orders, which totaled \$8.9 million. Change order data is managed by the Engineering Department. The study team combined data sources to account for changes in award amount. This also is a reason why the total dollar amount for contracts is higher in the disparity study than in the City Achievement Reports.

Keen Independent recommended steps for the City to improve its data collection methods for City-funded projects in Chapter 5 of the report.

## **Appendix D.**

### **General Approach to Availability Analysis**

Keen Independent analyzed the availability of minority- and women-owned business enterprises (MBE/WBEs) that are ready, willing and able to perform City of Madison prime contracts and subcontracts. The City of Madison can use availability results and other information from the study as it makes decisions about its future operation of its programs.

Appendix D describes the study team's availability analysis in eight parts:

- A. Purpose of the availability analysis;
- B. Definitions of MBEs, WBEs and majority-owned businesses;
- C. General approach to collecting availability information;
- D. Development of the interview instruments;
- E. Businesses included in the availability database;
- F. MBE/WBE availability calculations on a contract-by-contract basis;
- G. Dollar-weighted availability results; and
- H. Additional considerations related to measuring availability.

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

Keen Independent examined the availability of MBE/WBEs for public works contracts to develop a benchmark used in the disparity analysis. The disparity study compares the City of Madison's utilization of MBE/WBEs against an availability benchmark.

#### **B. Definitions of MBEs, WBEs and Majority-owned Businesses**

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

**MBE/WBEs.** The availability benchmark uses the same definitions of minority- and women-owned firms (MBE/WBEs), as do other components of the 2015 Public Works Disparity Study.

**Race, ethnic and gender groups.** The study team separately examined utilization, availability and disparity results for businesses owned by:

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

**Firms owned by minority women.** Businesses owned by minority women are included with the results for each minority group. “WBEs” in this report refers to non-Hispanic white women-owned businesses. This definition of WBEs gives the City of Madison information to answer questions that may arise pertaining to the utilization of non-Hispanic white women-owned businesses, such as whether the work that goes to MBE/WBEs disproportionately goes to businesses owned by non-Hispanic white women. Keen Independent’s approach is consistent with court decisions that have considered this issue.

**Majority-owned businesses.** Majority-owned businesses are businesses that are not owned by minorities or women (i.e., businesses owned by non-Hispanic white males). In the utilization and availability analyses, the study team coded each business as minority-, women-, or majority-owned.

### **C. General Approach to Collecting Availability Information**

Keen Independent’s availability analysis focused on firms with Dane County locations that work in subindustries related to City of Madison public works contracts.

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

Keen Independent’s method of examining availability is sometimes referred to as a “custom census” and has been accepted in federal court. Figure D-1 summarizes characteristics of Keen Independent’s custom census approach to examining availability.

**Overview of availability interviews.** The study team conducted telephone interviews with business owners and managers to identify businesses that are potentially available for City of Madison public works prime contracts and subcontracts.<sup>1</sup> Figure D-2 summarizes the process for identifying businesses, contacting them and completing the interviews.

#### **Figure D-1. Summary of the strengths of Keen Independent’s “custom census” approach**

Federal courts have reviewed and upheld “custom census” approaches to examining availability. Compared with some other previous court-reviewed custom census approaches, Keen Independent added several layers of screening to determine which businesses are potentially available for public works contracting contracts in Dane County.

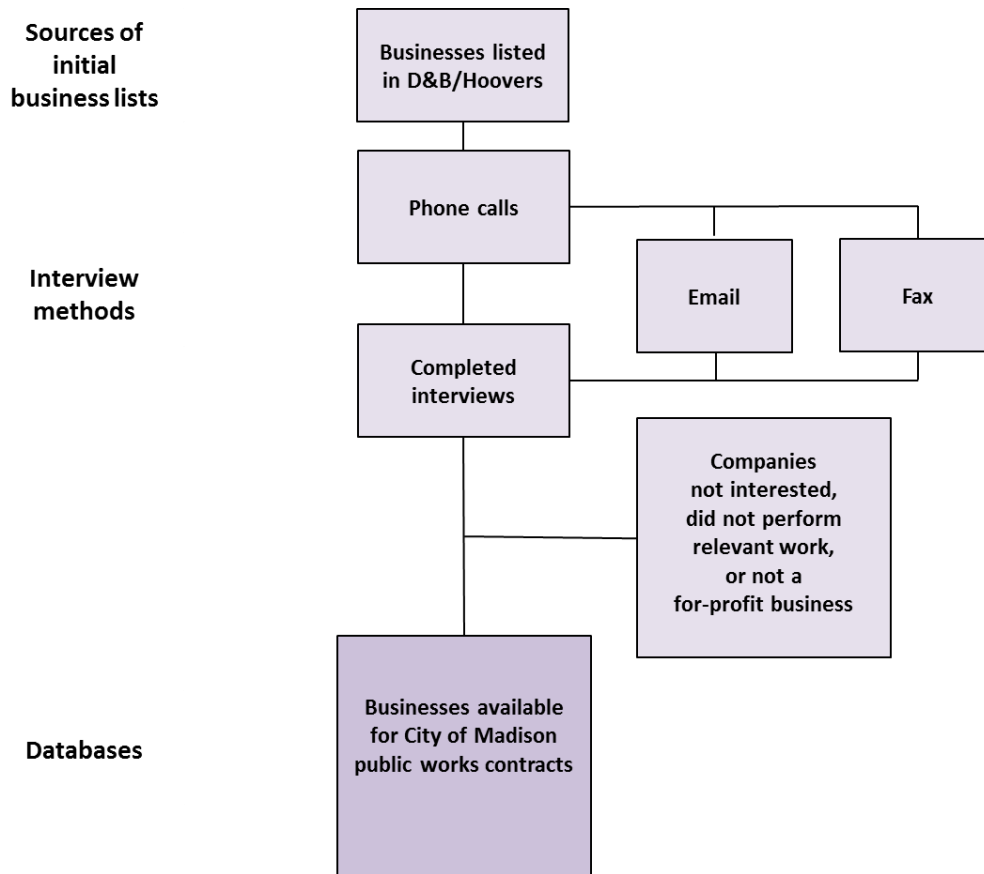
For example, the Keen Independent analysis included discussions with businesses about interest in City of Madison work and contract role — items not included in some of the previous court-reviewed custom census approaches. Keen Independent also analyzed the sizes of contracts and subcontracts on which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

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<sup>1</sup> The study team offered business representatives the option of completing interviews via fax or email if they preferred not to complete interviews via telephone.



Figure D-2.  
Availability interview process



Keen Independent began by compiling lists of business establishments that Dun & Bradstreet/Hoovers identified in certain public works contracting-related subindustries in Dane County.<sup>2</sup>

**Dun & Bradstreet Hoover’s database.** Dun & Bradstreet’s Hoover’s affiliate maintains the largest commercially-available database of businesses in the United States.

Keen Independent determined the types of work involved in City of Madison contract elements by reviewing prime contract and subcontract dollars that went to different types of businesses during the study period. D&B classifies types of work by 8-digit work specialization codes.<sup>3</sup> Figure D-3 on the following page identifies the work specialization codes the study team determined were the most related to the study contract dollars.

<sup>2</sup> D&B’s Hoover’s database is accepted as the most comprehensive and complete source of business listings in the nation. Keen Independent collected information about all business establishments listed under 8-digit work specialization codes (as developed by D&B) that were most related to the public works contracts that the City of Madison awarded during the study period.

<sup>3</sup> D&B has developed 8-digit industry codes to provide more precise definitions of firm specializations than the 4-digit SIC codes or the NAICS codes that the federal government has prepared.

Keen Independent obtained a list of firms from the D&B Hoover's database within relevant work codes that had locations within Dane County. D&B provided phone numbers for these businesses. Keen Independent obtained more than 2,000 business listings from this source (this count includes duplicate records). Keen Independent did not draw a sample of those firms for the availability analysis; rather, the study team attempted to contact each business identified through telephone interviews and other methods described below.

**Telephone interviews.** Keen Independent retained Customer Research International (CRI) to conduct telephone interviews with listed businesses. Interviews began in August 2014 and were completed in September 2014.

After receiving the list described above, CRI used the following steps to complete telephone interviews with business establishments:

- Firms were contacted by telephone. For firms not immediately responding, the study team executed intensive follow-up over many weeks. Up to five phone calls were made at different times of day and different days of the week to attempt to reach each company.
- Interviewers indicated that the calls were made on behalf of the City of Madison for purposes of expanding its list of companies interested in performing City of Madison public works-related work.
- CRI identified and attempted to interview an available company representative such as the owner, manager or other key official who could provide accurate and detailed responses to the questions included in the interview.
- Some firms indicated in the phone calls that they did not work in the public works contracting industry or had no interest in City of Madison work, so no further interview was necessary. (Such interviews were treated as complete at that point.)

CRI provided Keen Independent with weekly data reports.

Figure D-3.  
D&B 8-digit codes for availability list source

Code	Description	Code	Description
07820000	Lawn and garden services	17990000	Special trade contractors
07830001	Ornamental shrub and tree services	24210000	Sawmills and planing mills, general
15210000	Single-family housing construction	24260000	Hardwood dimension and flooring mills
15220000	Residential construction	24310000	Millwork
15310000	Operative builders	24390000	Structural wood members
15410000	Industrial buildings and warehouses	24930000	Reconstituted wood products
15420000	Nonresidential construction	29510000	Asphalt paving mixtures and blocks
16110000	Highway and street construction	32710000	Concrete block and brick
16220000	Bridge, tunnel, and elevated hwy construction	32720000	Concrete products, nec
16230000	Water, sewer and utility lines	32730000	Ready-mixed concrete
16290000	Heavy construction	33120000	Blast furnaces and steel mills
17110000	Plumbing, heating, air conditioning	34410000	Fabricated structural metal
17210000	Painting and paper hanging	34420000	Metal doors, sash and trim
17310000	Electrical work	34460000	Architectural metal work
17410000	Masonry and other stonework	34490000	Miscellaneous metalwork
17420000	Plastering, drywall and insulation	42120000	Local trucking, without storage
17430000	Terrazzo, tile, marble and mosaic work	50230400	Floor coverings
17510000	Carpentry work	50310000	Lumber, plywood and millwork
17520000	Floor laying and floor work	50320000	Brick, stone and related material
17610000	Roofing, siding and sheetmetal work	50330000	Roofing, siding and insulation
17710000	Concrete work	50390000	Construction materials
17810000	Water well drilling	50510000	Metals service centers and offices
17910000	Structural steel erection	50630000	Electrical apparatus and equipment
17930000	Glass and glazing work	50740000	Plumbing and hydronic heating supplies
17940000	Excavation work	50750000	Warm air heating and air conditioning
17950000	Wrecking and demolition work	73899921	Flagging service (traffic control)
17960000	Installing building equipment	73899937	Pilot car escort service

**Other avenues to complete an interview.** Even if a company was not directly contacted by the study team, business owners could ask to complete an availability interview for their public works contracting-related companies.

- Firm owners could also request that questionnaires be faxed or emailed to them. Fifty-six firms returned completed questionnaires via fax/email and four firms returned them.
- The City of Madison posted information about the interviews on the [www.cityofmadison.com/madisoncontractingstudy/](http://www.cityofmadison.com/madisoncontractingstudy/) website maintained throughout the project. Interested companies could request to have a member of the study team contact them for an interview.

**Information collected in availability interviews.** Interview questions covered many topics about each organization, including:

- Status as a private business (as opposed to a public agency or not-for-profit organization);
- Status as a subsidiary or branch of another company;
- Types of public work performed, from asphalt paving to temporary traffic control for construction work (see Appendix C);
- Qualifications and interest in performing public works-related contracts for the City of Madison;
- Qualifications and interest in performing public works-related contracts as a prime contractor or as a subcontractor (or trucking company or materials supplier);
- Past work as a prime contractor or as a subcontractor, trucker or supplier (note that “prime consultant” and “subconsultant” were the terms used in the interviews of professional services companies);
- Largest prime contract or subcontract bid on or performed in the local marketplace in the previous seven years;
- Year of establishment; and
- Race/ethnicity and gender of ownership.

The availability interview instrument can be found at the end of this appendix.

**Screening of firms for the availability database.** The study team asked business owners and managers several questions concerning the types of work that their companies performed; their past bidding history; and their qualifications and interest in working on contracts for the City of Madison, among other topics. Keen Independent considered businesses to be potentially available for City of Madison public works prime contracts or subcontracts if they reported possessing *all* of the following characteristics:

- a. Being a private business (as opposed to a public agency or not-for-profit organization);
- b. Performing work relevant to public works contracting; and
- c. Reporting qualifications for and interest in work for the City of Madison.<sup>4</sup>

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<sup>4</sup> For City of Madison work, separate interview questions were asked about prime contract work and subcontract work.

## D. Development of the Interview Instrument

Keen Independent developed the interview instrument through the following steps:

- Keen Independent drafted an availability interview instrument; and
- City of Madison staff reviewed the draft interview instrument.

The final telephone interview instrument is presented at the end of this appendix.

**Interview structure.** The availability interview included eight sections. The study team did not know the race, ethnicity or gender of the business owner when calling a business establishment. Obtaining that information was a key component of the interview.

Areas of interview questions included:

- **Identification of purpose.** The interviews began by identifying the City of Madison as the interview sponsor and describing the purpose of the study (i.e., “compiling a list of companies interested in working on a wide range of City public works construction contracts”).
- **Verification of correct business name.** CRI confirmed that the business reached was in fact the business sought out.
- **Contact information.** CRI then collected complete contact information for the establishment and the individual who completed the interview.
- **Verification of work related to public works-related projects.** The interviewer asked whether the organization does work or provides materials related to public works construction-related projects (Question 1). Interviewers continued the interview with businesses that responded “yes” to that question.
- **Verification of for-profit business status.** The survey then asked whether the organization was a for-profit business as opposed to a government or not-for-profit entity (Question 2). Interviewers continued the interview with businesses that responded “yes” to that question.
- **Identification of main lines of business.** Businesses then chose from a list of work types that their firm performed in categories of construction-related work, engineering-related work, and supply activities. In addition to choosing all areas that the firms did work, the study team asked businesses to briefly describe their main line of business as an open-ended question.
- **Sole location or multiple locations.** The interviewer asked business owners or managers if their businesses had other locations and whether their establishments were affiliates or subsidiaries of other firms. (Keen Independent combined responses from multiple locations into a single record for multi-establishment firms.)

- **Past bids or work with government agencies and private sector organizations.** The survey then asked about bids and work on past government and private sector contracts. The questions were asked in connection with both prime contracts and subcontracts.
- **Qualifications and interest in future public work.** The interviewer asked about businesses' qualifications and interest in future work with the City of Madison and other government agencies in connection with both prime contracts and subcontracts.
- **Largest contracts.** The study team asked businesses to identify the value of the largest public works-related contract or subcontract on which they had bid or had been awarded during the past seven years.
- **Ownership.** Businesses were asked if at least 51 percent of the firm was owned and controlled by women and/or minorities. If businesses indicated that they were minority-owned, they were also asked about the race and ethnicity of owners. The study team reviewed reported ownership against other available data sources such as DBE and MBE directories.
- **Business background.** The study team asked businesses to identify the approximate year in which they were established. The interviewer asked several questions about the size of businesses in terms of their revenues and number of employees. For businesses with multiple locations, this section also asked about their revenues and number of employees across all locations.
- **Potential barriers in the marketplace.** Establishments were asked a series of questions concerning general insights about the marketplace and City of Madison contracting practices including obtaining loans, bonding and insurance. The interview also included an open-ended question asking for any additional barriers or general thoughts about contracting in the City of Madison. In addition, the interview included a question asking whether interviewees would be willing to participate in a follow-up interview about marketplace conditions.

**Establishments that the study team successfully contacted.** Figure D-4 presents the disposition of the businesses the study team attempted to contact for availability interviews.

Note that the following analysis is based on business counts after Keen Independent removed duplicate listings (beginning list of 1,537 unique businesses).

Figure D-4.  
Disposition of  
attempts to  
interview  
business  
establishments

Note:

Study team made at  
least five attempts to  
complete an interview  
with each establishment.

Source:

Keen Independent from  
2014 availability  
Interviews.

	Number of firms	Percent of business listings
<b>Beginning list (unique businesses)</b>	<b>1,537</b>	
Less non-working phone numbers	153	
Less wrong number	3	
<b>Firms with working phone numbers</b>	<b>1,381</b>	<b>100.0 %</b>
Less no answer	595	43.1
Less could not reach appropriate staff member	38	2.8
Less unreturned fax/email	52	3.8
<b>Firms successfully contacted</b>	<b>696</b>	<b>50.4 %</b>

**Non-working or wrong phone numbers.** Some of the business listings that the study team attempted to contact were:

- Non-working phone numbers (153); or
- Wrong numbers for the desired businesses (3).

Some non-working phone and wrong numbers reflected business establishments that closed, were sold or changed their names and phone numbers between the time that a source listed them and the time that the study team attempted to contact them.

**Working phone numbers.** As shown in Figure D-4, there were 1,381 businesses with working phone numbers that the study team attempted to contact. For various reasons, the study team was unable to contact some of those businesses:

- **No answer.** Some businesses could not be reached after at least five attempts at different times of the day and on different days of the week (595) establishments.
- **Could not reach responsible staff member.** For a small number of businesses (38), a responsible staff person could not be reached after repeated attempts.
- **Unreturned fax/email.** The study team sent faxes or emailed the availability questionnaires upon request. There were 52 businesses that requested such surveys but did not return them.

After taking those unsuccessful attempts into account, the study team was able to successfully contact 696 businesses, or 50 percent of those with working phone numbers.

**Establishments included in the availability database.** Figure D-5 presents the disposition of the 696 businesses the study team successfully contacted and how that number resulted in the 145 businesses the study team included in the availability database.

Figure D-5.  
Disposition of  
successfully  
contacted  
businesses

Source:  
Keen Independent from  
2014 availability  
Interviews.

	<b>Number of firms</b>
<b>Firms successfully contacted</b>	<b>696</b>
Less businesses not interested in discussing availability for Madison work	236
Less language barrier	0
<b>Firms that completed interviews about business characteristics</b>	<b>460</b>
Less no related work	197
Less not a for-profit business	32
Less no longer in business	86
<b>Firms included in availability database</b>	<b>145</b>

**Establishments not interested in discussing availability for City of Madison work.** Of the 696 businesses that the study team successfully contacted, 236 were not interested in discussing their availability for City of Madison work.

**Language barriers.** No language barriers were identified during the availability interviews.

**Businesses included in the availability database.** Many firms completing interviews were excluded from the final availability database because they indicated that they did not perform work related to public works contracting or reported that they were not a for-profit business:

- Keen Independent excluded 197 businesses that indicated that they were not involved in public contracting work.
- Of the completed interviews, 32 indicated that they were not a for-profit business (including non-profits, government agencies or homes). Interviews ended when respondents reported that their establishments were not for-profit businesses.
- Eighty-six of the interviewees indicated that their firm was no longer in business.

After those final screening steps, the interview effort produced a database of 145 businesses potentially available for City of Madison work.

**Coding responses from multi-location businesses.** As described above, there were multiple responses from some firms. Responses from different locations of the same business were combined into a single, summary data record after reviewing the multiple responses.



## **E. Businesses Included in the Availability Database**

After completing interviews with 696 City of Madison businesses, the study team developed a database of information about businesses that are potentially available for City of Madison public works contracting work. The study team used the availability database to produce availability benchmarks to determine whether there were any disparities in City of Madison utilization of MBE/WBEs during the study period.

Data from the availability interviews allowed Keen Independent to develop a representative depiction of businesses that are qualified and interested in the highest dollar volume areas of City of Madison public works-related work, but it should not be considered an exhaustive list of every business that could potentially participate in City of Madison contracts. Part H of this Appendix provides a detailed discussion about why the database should not be considered an exhaustive list of potentially available businesses.

The study team's research identified 145 businesses reporting that they were available for specific public works contracts that the City of Madison awarded during the study period. Of these businesses, one firm was identified as minority-owned and nine firms were identified as woman-owned.

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

## **F. MBE/WBE Availability Calculations on a Contract-by-Contract Basis**

Keen Independent analyzed information from the availability database to develop dollar-weighted availability estimates for use as a benchmark in the disparity analysis.

- Dollar-weighted availability estimates represent the percentage of City of Madison public works contracting dollars that MBE/WBEs might be expected to receive based on their availability for specific types and sizes of City of Madison public works-related prime contracts and subcontracts.
- Keen Independent's approach to calculating availability was a bottom up, contract-by-contract process of "matching" available firms to specific prime contracts and subcontracts.

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

**Steps to the availability calculations.** The study team identified the specific characteristics of each of the 2,901 City of Madison prime contracts and subcontracts included in the utilization analysis and then took the following steps to calculate availability.

1. For each contract element, the study team identified businesses in the availability database that reported that they:
  - ▶ Are qualified and interested in performing public works-related work in that particular role, for that specific type of work, for that particular type of agency (City of Madison) or had actually performed work in that role based on contract data for the study period;
  - ▶ Had bid on or performed work of that size in the past seven years (or had done so based on contract data for the study period); and
  - ▶ Were in business in the year that the contract or task order was awarded.
2. For the specific contract element, the study team then counted the number of MBEs (by race/ethnicity), WBEs and majority-owned businesses among all businesses in the availability database that met the criteria specified in Step 1.
3. The study team translated the numeric availability of businesses for the contract element into percentage availability (as described in Figure D-6).

The study team repeated those steps for each contract element examined in the Availability Study. The study team multiplied the percentage availability for each contract element by the dollars associated with the contract element, added results across all contract elements, and divided by the total dollars for all contract elements. The result was a dollar-weighted estimate of overall availability of MBE/WBEs and estimates of availability for each MBE/WBE group. Figure D-6 provides an example of how the study team calculated availability for a specific subcontract in the study period.

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

One of the subcontracts examined was for electrical work (\$59,000) on a City 2012 public works contract. To determine the number of MBE/WBEs and majority-owned firms available for that subcontract, the study team identified businesses in the availability database that:

- a. Were in business in 2012;
- b. Indicated that they performed electrical work;
- d. Reported bidding on work of similar or greater size in the past seven years; and
- e. Reported qualifications and interest in working as a subcontractor on City public works projects.

There were 27 businesses in the availability database that met those criteria. Of those businesses, 3 were MBEs or WBEs. Therefore, MBE/WBE availability for the subcontract was 44 percent (i.e.,  $3/27 = 11\%$ ).

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

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

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

**Keen Independent’s approach accounts for type of work.** The study team took type of work into account by examining 31 different subindustries related to construction as part of estimating availability for City of Madison work.

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

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

**Keen Independent’s approach accounts for the size of prime contracts and subcontracts.** The study team considered the size — in terms of dollar value — of the prime contracts and subcontracts that a business bid on or received in the previous seven years (i.e., bid capacity) when determining whether to count that business as available for a particular contract element. When counting available businesses for a particular prime contract or subcontract, the study team considered whether businesses had previously bid on or received at least one contract of an equivalent or greater dollar

value in the City of Madison in the previous seven years, based on the most inclusive information from survey results and analysis of past City of Madison prime contracts and subcontracts.

Keen Independent's approach is consistent with many recent, key court decisions that have found relative capacity measures to be important to measuring availability (see Appendix B).

**Keen Independent's approach accounts for the geographic location of the work.** The study team determined the location where work was performed for City of Madison contracts.

**Keen Independent's approach generates dollar-weighted results.** Keen Independent examined availability on a contract-by-contract basis and then dollar-weighted the results for different sets of contract elements. Thus, the results of relatively large contract elements contributed more to overall availability estimates than those of relatively small contract elements.

## **G. Dollar-weighted Availability Results**

Keen Independent used the custom census approach described above to estimate the availability of MBE/WBEs and majority-owned businesses for 2,901 public works prime contracts and subcontracts that the City of Madison awarded during the study period.

Overall, dollar-weighted MBE/WBE availability for contracts is 2.6 percent. This result is lower than the percentage of availability firms that are MBE/WBE (9%). MBE dollar-weighted availability was 0.1 percent and WBE dollar-weighted availability was 2.5 percent.

## **H. Additional Considerations Related to Measuring Availability**

The study team made several additional considerations related to its approach to measuring availability.

**Not providing a count of all businesses available for City of Madison work.** The purpose of the availability interviews was to provide precise and representative estimates of the percentage of MBE/WBEs potentially available for City of Madison work. The availability analysis did not provide a comprehensive listing of every business that could be available for City of Madison work and should not be used in that way. Federal courts have approved the custom census approach to measuring availability that Keen Independent used in this study.

**Not using MBE/WBE or DBE directories, prequalification lists or bidders lists.** The methodology applied in this study takes a custom census approach to measuring availability and adds several layers of refinement to a simple head count approach. For example, the interviews provide data on businesses' qualifications, relative bid capacity and interest in City of Madison work, which allowed the study team to take a more refined approach to measuring availability.

Note that Keen Independent used DBE directories and other sources of information to confirm information about the race/ethnicity and gender of business ownership that it obtained from availability interviews. The study team re-contacted companies for clarification in the event of any inconsistencies in race, ethnicity and gender ownership information for the firm.

**Using D&B lists.** Dun & Bradstreet was the source of business listings in Keen Independent's availability analysis. Note that D&B does not require firms to pay a fee to be included in its listings — it is completely free to listed firms. D&B provides the most comprehensive private database of

business listings in the United States. Even so, the database does not include all establishments operating in the City of Madison due to the following reasons:

- There can be a lag between formation of a new business and inclusion in D&B listings, meaning that the newest businesses may be underrepresented in the sample frame.
- Although D&B includes home-based businesses, those businesses are more difficult to identify and are thus somewhat less likely than other businesses to be included in D&B listings. Small, home-based businesses are more likely than large businesses to be minority- or women-owned, which again suggests that MBE/WBEs might be underrepresented in the final availability database.

Keen Independent is not able to quantify how much, if any, underrepresentation of MBE/WBEs exists in the final availability database. However, Keen Independent concludes that any such underrepresentation would be minor and would not have a meaningful effect on the availability and disparity analyses presented in this report.

**Selection of specific subindustries.** Keen Independent identified specific subindustries when compiling business listings from Dun & Bradstreet. D&B provides highly specialized, 8-digit codes to assist in selecting firms within specific specializations. However, there are limitations when choosing specific D&B work specialization codes to define sets of establishments to be interviewed, which leave some businesses off the contact list.

**Non-response bias.** An analysis of non-response bias considers whether businesses that were not successfully interviewed are systematically different from those that were successfully interviewed and included in the final data set. There are opportunities for non-response bias in any survey effort. The study team considered the potential for non-response bias due to:

- Research sponsorship; and
- Work specializations.

**Research sponsorship.** Interviewers introduced themselves by identifying the City of Madison as the interview sponsor because businesses may be less likely to answer somewhat sensitive business questions if the interviewer was unable to identify the sponsor.

**Work specializations.** Businesses in highly mobile fields, such as trucking, may be more difficult to reach for availability interviews than businesses more likely to work out of fixed offices (e.g., professional firms). That assertion suggests that response rates may differ by work specialization. Simply counting all interviewed businesses across work specializations to determine overall MBE/WBE availability would lead to estimates that were biased in favor of businesses that could be easily contacted by email or telephone.

However, work specialization as a potential source of non-response bias in the availability analysis is minimized because the availability analysis examines businesses within particular work fields before determining an MBE/WBE availability figure. In other words, the potential for trucking firms to be less likely to complete an interview is less important because the percentage of MBE/WBE availability is calculated within trucking before being combined with information from other work fields in a dollar-weighted fashion. In this example, work specialization would be a greater source of

non-response bias if particular subsets of trucking firms were less likely than other subsets to be easily contacted by telephone.

**Response reliability.** Business owners and managers were asked questions that may be difficult to answer, including questions about revenues and employment.

Keen Independent explored the reliability of interview responses in a number of ways. For example:

- Keen Independent reviewed data from the availability interviews in light of information from other sources such as the City of Madison SBE directory and other vendor information that the study team collected from the City. This included data on the race/ethnicity and gender of the owners of SBE-certified businesses and was compared with interview responses concerning business ownership.
- Keen Independent compared interview responses about the largest contracts that businesses won during the past seven years with actual City of Madison contract data.

**Summary of non-response bias.** Based on the MBE and WBE coding of firms by Dun & Bradstreet, Keen Independent researched whether the telephone interview method and availability screening method led to a lower number of MBEs and WBEs in the final availability database than the initial D&B list. The study team found no evidence of any underrepresentation of MBEs and WBEs in the final availability data.

A copy of the interview instrument follows.

# Madison Availability Interview Instrument

Hello. My name is *[interviewer name]*. We are calling on behalf of the City of Madison. This is not a sales call. The City is compiling a list of companies interested in working on a wide range of City public works construction contracts.

Who can I speak with to get the information we need from your firm?

[After reaching THE OWNER OR an appropriately senior staff member, the interviewer should re-introduce the purpose of the interview and begin with questions]

[IF NEEDED ... We are contacting hundreds of contractors, trucking companies, suppliers and other types of businesses in the Madison area.]

[IF INTERVIEWEE REQUESTS ADDITIONAL INFORMATION ... You can call Norman Davis at the City at 608-267-8759.]

[IF ASKED, THE INFORMATION DEVELOPED IN THESE INTERVIEWS WILL ADD TO THE CITY'S DATA ON COMPANIES INTERESTED IN WORKING ON PUBLIC WORKS CONTRACTS]

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 1

2=NOT RIGHT COMPANY – SKIP TO Y1

3=REFUSE TO GIVE INFORMATION – [CODE REFUSALS] TERMINATE

Y1. Can you give me any information about *[firm name]*?

1=Yes, same owner doing business under a different name – SKIP TO Y4

2=Yes, can give information about named company – SKIP TO Y2

3=Company bought/sold/changed ownership – SKIP TO Y4

4=No, does not have information – END, INTERVIEW COMPLETE

5=Refused to give information – END, INTERVIEW COMPLETE

Y2. ENTER NEW NAME

1=VERBATIM

Y3. Can you give me the phone number of *[firm name]*?

(ENTER UPDATED PHONE OF NAMED COMPANY)

1=VERBATIM

Y4. And what is the new name of the business that used to be *[firm name]*?

1=VERBATIM (ENTER UPDATED NAME)

Y5. Can you give me the complete address or city for *[firm name]*?

\*NOTE TO INTERVIEWER - RECORD IN THE FOLLOWING FORMAT:

. STREET ADDRESS

. CITY

. STATE

. ZIP

1=VERBATIM

Y6. Can you give me the name of the owner or manager of the new business?

(ENTER UPDATED NAME)

1=VERBATIM

Y7. Do you work for this new company?

1=Yes – CONTINUE

2=No – END ... INTERVIEW COMPLETE

## **A. Confirmation of Business and Commercial or Public Work**

---

1. Does your firm do any work related to public works contracts? This includes construction, trucking and materials supply. [Public works contracts include construction and repair of public buildings, streets and bridges, water and sewer facilities, and parks and recreation facilities.]

1=Yes – CONTINUE

2=No – END ... INTERVIEW COMPLETE

98=(DON'T KNOW) END ... INTERVIEW COMPLETE

99=(REFUSED) END ... INTERVIEW COMPLETE



2. Is your firm a business, as opposed to a non-profit organization, a foundation or a government office?
- 1=Yes
  - 2=No
  - 98=(DON'T KNOW)
  - 99=(REFUSED)

## **B. Type of Construction Work**

---

3. What types of work does your firm perform related to public works contracts? Is your firm involved in .... [READ LIST ONE AT A TIME, MULTIPUNCH]
- 1=Excavation, demolition and other site prep
  - 2= Trucking and hauling
  - 3= Drilling and foundations
  - 4=Landscaping and related work
  - 5=Fencing and gates
  - 6=Asphalt paving
  - 7= Concrete cutting
  - 8=Concrete flatwork (sidewalk, curb, gutter and paths)
  - 9=Other concrete work
  - 10=Structural steel work
  - 11=Bridge and other structure painting
  - 12=Bridge construction
  - 13=Pavement marking
  - 14=Temporary traffic control
  - 15=General road construction
  - 16=Masonry, stonework, tile setting and plastering
  - 17=Drywall and insulation
  - 18=Windows and doors
  - 19=Carpentry and floor work
  - 20=Roofing, siding and sheet metal work
  - 21=Plumbing and HVAC
  - 22=Electrical work
  - 23=Office furniture and equipment installation
  - 24=General public building construction
  - 25=Culverts, drainage and water retention
  - 26=Water and sewer lines
  - 27=Water and sewer plants
  - 28=Waterways and dams
  - 29=Construction materials supply
  - 88=Other roadway related
  - 89=Other building construction related
  - 96=None of these

4. Please briefly describe the main line of business at your firm. In what industry would you classify the primary line of work at your firm?

---

---

5. 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)

6. Is your company a subsidiary or affiliate of another firm?

1=Independent – SKIP TO 7

2=Subsidiary or affiliate of another firm

98=(DON'T KNOW)

99=(REFUSED)

- 6a. What is the name of your parent or affiliate company?

1=ENTER NAME

98=(DON'T KNOW)

99=(REFUSED)

## C. Contract Role

---

7. During the past seven years, has your company submitted a bid or price quote for any part of a contract for a government agency?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

8. **[Answer if 'Yes' to Q7. Otherwise skip to Q9.]** Were those bids or price quotes to work as a prime contractor, a subcontractor, a trucker/hauler, or as a supplier? SELECT ALL THAT APPLY.

1=Prime contractor  
2=Subcontractor  
3=Trucker/hauler  
4=Supplier  
8=Other ... specify VERBATIM  
98=(DON'T KNOW)  
99=(REFUSED)

9. During the past seven years, has your company worked on any part of a contract for a government agency?

1=Yes  
2=No  
98=(DON'T KNOW)  
99=(REFUSED)

10. **[Answer if 'Yes' to Q9. Otherwise skip to Q11.]** Did your company work as a prime contractor, a subcontractor, a trucker/hauler, or as a supplier? Check all that apply.

1=Prime contractor  
2=Subcontractor  
3=Trucker/hauler  
4=Supplier  
8=Other ... specify VERBATIM  
98=(DON'T KNOW)  
99=(REFUSED)

11. During the past seven years, has your company submitted a bid or a price quote for any part of a contract for a private sector project?

1=Yes  
2=No  
98=(DON'T KNOW)  
99=(REFUSED)

12. **[Answer if 'Yes' to Q11. Otherwise skip to Q13.]** Were those bids or price quotes to work as a prime contractor, a subcontractor, a trucker/hauler, or as a supplier? Check all that apply.
- |                    |                              |
|--------------------|------------------------------|
| 1=Prime contractor | 8=Other ... specify VERBATIM |
| 2=Subcontractor    | 98=(DON'T KNOW)              |
| 3=Trucker/hauler   | 99=(REFUSED)                 |
| 4=Supplier         |                              |
13. During the past seven years, has your company worked on any part of a contract for a private sector project?
- |                 |
|-----------------|
| 1=Yes           |
| 2=No            |
| 98=(DON'T KNOW) |
| 99=(REFUSED)    |
14. **[Answer if 'Yes' to Q13. Otherwise skip to Q15.]** Did your company work as a prime contractor, a subcontractor, a trucker/hauler, or as a supplier? Check all that apply.
- |                              |
|------------------------------|
| 1=Prime contractor           |
| 2=Subcontractor              |
| 3=Trucker/hauler             |
| 4=Supplier                   |
| 8=Other ... specify VERBATIM |
| 98=(DON'T KNOW)              |
| 99=(REFUSED)                 |
15. Thinking about public works contracts, is your company qualified and interested in working with the City of Madison as a *prime contractor*?
- |                 |
|-----------------|
| 1=Yes           |
| 2=No            |
| 98=(DON'T KNOW) |
| 99=(REFUSED)    |
16. Is your company qualified and interested in working with the City of Madison as a subcontractor, trucker/hauler, or supplier on public works contracts?
- |                 |
|-----------------|
| 1=Yes           |
| 2=No            |
| 98=(DON'T KNOW) |
| 99=(REFUSED)    |

## D. Contract History

---

17. In rough dollar terms, what was the largest contract or subcontract your company was awarded in during the past seven years? Please include any government or private sector contracts and any contracts not yet completed.

1=\$100,000 or less

2=More than \$100,000 to \$500,000

3=More than \$500,000 to \$1 million

4=More than \$1 million to \$2 million

5=More than \$2 million to \$5 million

6=More than \$5 million to \$10 million

7=More than \$10 million to \$20 million

8=More than \$20 million

97=(NONE)

98=(DON'T KNOW)

99=(REFUSED)

18. Was this the largest contract or subcontract that your company bid on or submitted quotes for during the past seven years?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

19. **[Answer if 'No' in Q18. Otherwise skip to Q20.]** What was the largest contract or subcontract that your company bid on or submitted quotes for during the past seven years?

1=\$100,000 or less

2=More than \$100,000 to \$500,000

3=More than \$500,000 to \$1 million

4=More than \$1 million to \$2 million

5=More than \$2 million to \$5 million

6=More than \$5 million to \$10 million

7=More than \$10 million to \$20 million

8=More than \$20 million

97=(NONE)

98=(DON'T KNOW)

99=(REFUSED)

## E. Ownership

---

20. 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 your firm a woman-owned business?

1=Yes

2=No

98=(DON'T KNOW)

99=(REFUSED)

21. A business is defined as minority-owned if more than half — that is, 51 percent or more — of the ownership and control is African American, Asian American, Hispanic American or Native American. By this definition, is your firm a minority-owned business?

1=Yes

2=No – SKIP TO 22

3=(OTHER GROUP - SPECIFY)

98=(DON'T KNOW)

99=(REFUSED)

- 21a. OTHER GROUP - SPECIFY

1=VERBATIM

- 21b. Would you say that the minority group ownership is mostly African American, Asian American, Hispanic American, or Native American?

1=African-American

2=Asian American

4=Hispanic American

5=Native American

8=(OTHER - SPECIFY)

98=(DON'T KNOW)

99=(REFUSED)

## F. Business Background

---

22. About what year was your firm established? \_\_\_\_\_ (RECORD YEAR)

23. About how many employees did you have working out of just your location, on average, over the past three years? \_\_\_\_\_ (RECORD NUMBER OF EMPLOYEES)

24. Roughly, what was the average annual gross revenue of your company, just considering your location, from 2011 through 2013? Would you say . . . [READ LIST]

- |                                  |                          |
|----------------------------------|--------------------------|
| 1= \$100,000 or less             | 8=\$22.4 million or more |
| 2=\$100,000 to \$499,000         | 98=(DON'T KNOW)          |
| 3=\$500,000 to \$999,999         | 99=(REFUSED)             |
| 4=\$1 million to \$1.9 million   |                          |
| 5=\$2 million to \$4.9 million   |                          |
| 6=\$5 million to \$9.9 million   |                          |
| 7=\$10 million to \$22.3 million |                          |

25. [IF MULTI-LOCATION BUSINESS] Roughly, what was the average annual gross revenue of your company, for all of your locations from 2011 through 2013? [Or for the years your company was in business if started after 2011] Would you say . . . [READ LIST]

- |                                     |                          |
|-------------------------------------|--------------------------|
| 1= \$100,000 or less                | 8=\$22.4 million or more |
| 2=\$100,000 up to \$499,000         | 98=(DON'T KNOW)          |
| 3=\$500,000 up to \$999,000         | 99=(REFUSED)             |
| 4=\$1 million up to \$1.9 million   |                          |
| 5=\$2 million up to \$4.9 million   |                          |
| 6=\$5 million up to \$9.9 million   |                          |
| 7=\$10 million up to \$22.3 million |                          |

## G. Barriers or Difficulties

---

Finally, we're interested in whether your company has experienced barriers or difficulties associated with starting or expanding a business in your industry or with obtaining work. Think about your experiences within the past seven years as you answer these questions.

26. Has your company experienced any difficulties in obtaining lines of credit or loans?

- 1=Yes  
2=No  
98=(DON'T KNOW)  
99=(DOES NOT APPLY)

27. Has your company obtained or tried to obtain a bond for a project?
- 1=Yes
  - 2=No [SKIP TO 29]
  - 98=(DON'T KNOW) [SKIP TO 29]
  - 99=(DOES NOT APPLY) [SKIP TO 29]
28. Has your company had any difficulties obtaining bonds needed for a project?
- 1=Yes
  - 2=No
  - 98=(DON'T KNOW)
  - 99=(DOES NOT APPLY)
29. Do City of Madison prequalification requirements present a barrier to obtaining work with the City?
- 1=Yes
  - 2=No
  - 98=(DON'T KNOW)
  - 99=(DOES NOT APPLY)
30. Have any insurance requirements on projects presented a barrier to bidding?
- 1=Yes
  - 2=No
  - 98=(DON'T KNOW)
  - 99=(DOES NOT APPLY)
31. Has the size of large projects presented a barrier to bidding?
- 1=Yes
  - 2=No
  - 98=(DON'T KNOW)
  - 99=(DOES NOT APPLY)
32. Has your company experienced any difficulties learning about bid opportunities with the City of Madison?
- 1=Yes
  - 2=No
  - 98=(DON'T KNOW)
  - 99=(DOES NOT APPLY)



33. Has your company experienced any difficulties learning about bid opportunities with other public agencies in the Madison area?
- 1=Yes
  - 2=No
  - 98=(DON'T KNOW)
  - 99=(DOES NOT APPLY)
34. Has your company experienced any difficulties with learning about bid opportunities in the private sector in the Madison area?
- 1=Yes
  - 2=No
  - 98=(DON'T KNOW)
  - 99=(DOES NOT APPLY)
35. Has your company experienced any difficulties learning about subcontracting opportunities from Madison area prime contractors?
- 1=Yes
  - 2=No
  - 98=(DON'T KNOW)
  - 99=(DOES NOT APPLY)
36. Has your company experienced any difficulties obtaining final approval on your work from inspectors or prime contractors?
- 1=Yes
  - 2=No
  - 98=(DON'T KNOW)
  - 99=(DOES NOT APPLY)
37. Has your company experienced any difficulties receiving payment in a timely manner?
- 1=Yes
  - 2=No
  - 98=(DON'T KNOW)
  - 99=(DOES NOT APPLY)

38. Has your company experienced any difficulties obtaining final approval on your work from inspectors or prime contractors?
- 1=Yes
  - 2=No
  - 98=(DON'T KNOW)
  - 99=(DOES NOT APPLY)
39. When it comes to winning work as a prime or subcontractor with the City of Madison or others, are there any other barriers that come to mind? Do you have any general thoughts or insights on starting and expanding a business in your field?
- 1=VERBATIM (PROBE FOR COMPLETE THOUGHTS)
  - 97=(NOTHING/NONE/NO COMMENTS)
  - 98=(DON'T KNOW)
  - 99=(REFUSED)
40. Would you be willing to participate in a follow-up interview about the local marketplace?
- 1=Yes
  - 2=No
  - 98=(DON'T KNOW)
  - 99=(REFUSED)

## H. Interviewee and other Contact Information

---

41. Just a few last questions. What is your name at *[firm name / new firm name]*?  
(RECORD FULL NAME)

1=VERBATIM

42. What is your position?

1=Receptionist

7=Sales manager

2=Owner

8=Office manager

3=Manager

9=President

4=CFO

9=(OTHER - SPECIFY)

5=CEO

99=(REFUSED)

6=Assistant to Owner/CEO

43. For purposes of receiving procurement information from the City, is your mailing address [*firm address*]:
- 1=Yes – SKIP TO 44
  - 2=No
  - 98=(DON'T KNOW)
  - 99=(REFUSED)
- 43a. What mailing address should the City use to get any materials to you?
- 1=VERBATIM
44. What fax number could the City use to fax any materials to you?
- 1=NUMERIC (111-111-1111)
45. What e-mail address could the City use to get any materials to you?
- 1=ENTER E-MAIL
  - 97=(NO EMAIL ADDRESS)
  - 98=(DON'T KNOW)
  - 99=(REFUSED)
- 45a. (RECORD EMAIL ADDRESS) (VERIFY ADDRESS LETTER BY LETTER: EXAMPLE: 'John@CRI-RESEARCH.COM' SHOULD BE VERIFIED AS: J-O-H-N-at-C-R-I-hyphen-R-E-S-E-A-R-C-H-dot-com)
- 1=VERBATIM

**End of survey message:**

**Thank you for your time. This is very helpful for the City.**

## APPENDIX E.

# Entry and Advancement in the Dane County Construction Industry

Federal courts have found that Congress “spent decades compiling evidence of race discrimination in government contracting, of barriers to the formation of minority-owned construction businesses, and of barriers to entry.”<sup>1</sup> Congress found that discrimination had impeded the formation of qualified minority-owned businesses. In the marketplace appendices (Appendix E through Appendix I), the Keen Independent Research study team examines whether some of the barriers to business formation that Congress found for minority- and women-owned businesses also appear to occur in Dane County, Wisconsin.

Potential barriers to business formation include barriers associated with entry and advancement in the construction industry. Appendix E examines recent data on education, employment and workplace advancement that may ultimately influence business formation in the Dane County construction industry.<sup>2</sup>

### A. Introduction

The study team examined whether there were barriers to the formation of minority- and women-owned businesses in Dane County. Business ownership often results from an individual entering an industry as an employee and then advancing within that industry. Within the entry and advancement process, there may be some barriers that limit opportunities for minorities and women. Figure E-1 presents a model of entry and advancement in the construction industry.

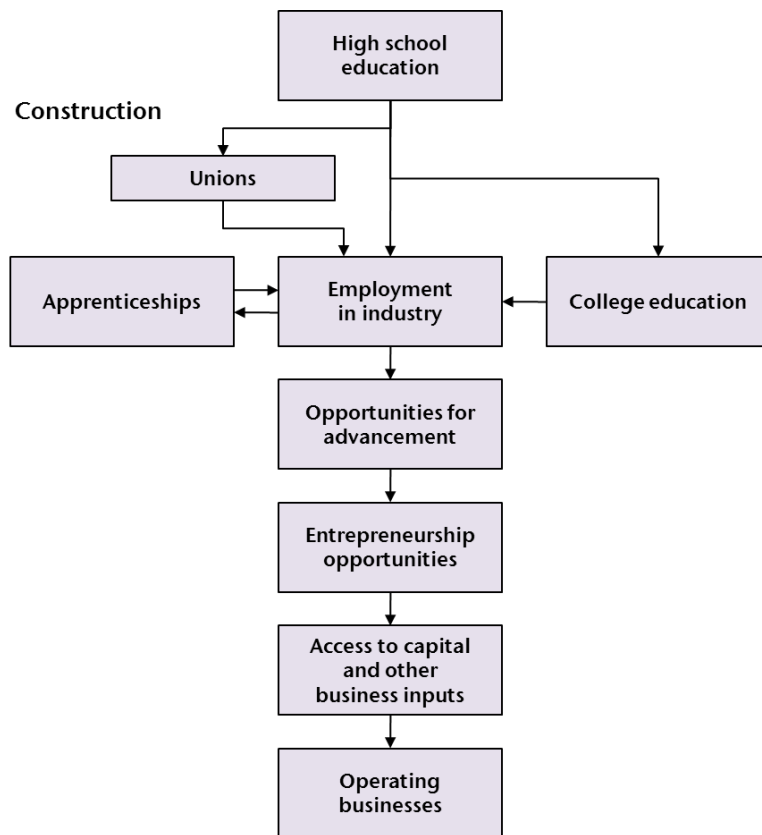
Appendix E uses 1990 and 2000 Census data and 2008-2012 American Community Survey (ACS) data to analyze education, employment and workplace advancement — all factors that may influence whether individuals form construction businesses. Where possible, analyses are presented by detailed race/ethnicity; in most analyses, minorities are grouped into a single category due to small sample sizes.

---

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

<sup>2</sup> Several other report appendices analyze other quantitative aspects of conditions in the Dane County marketplace. Appendix F explores business ownership. Appendix G presents an examination of access to capital. Appendix H considers the success of businesses. Appendix I presents the data sources that the study team used in those appendices.

Figure E-1.  
Model for studying entry into the construction industry



Source:  
Keen Independent Research.

**Representation of minorities among workers and business owners in Dane County.** As a starting point, the study team examined the representation of racial/ethnic minorities among workers and business owners in Dane County and in the United States as a whole. Figure E-2 shows demographics of business owners in construction, business owners in non-construction industries and the labor force, based on 2000 and 2008-2012 data. (Demographics of the construction industry are considered separately later in Appendix E.).

Racial and ethnic minorities comprised 10 percent of the Dane County workforce in 2000 and 15 percent of the local workforce based on 2008 through 2012 data.

Demographic analysis for Dane County in 2000 and 2008 through 2012 indicated that minority representation among business owners in construction and non-construction industries increased from 2000 to 2008 through 2012, though minorities continue to have a lower representation among construction business owners than owners in non-construction industries.

- Minority groups accounted for about 4 percent of business owners in construction in 2000 and about 7 percent in 2008 through 2012.
- Minority groups accounted for about 6 percent of business owners in non-construction industries in 2000 and about 9 percent in 2008 through 2012.

- Minorities accounted for about 10 percent of all workers in 2000 and about 15 percent in 2008 through 2012.

**Representation of women among business owners and workers in Dane County.** Figure E-2 also presents the representation of women among workers and business owners in 2000 and 2008 through 2012, both in Dane County and in the United States. In 2008 through 2012, women accounted for about 49 percent of the Dane County labor force and 45 percent of all non-construction business owners. However, women only accounted for 8 percent of business owners in the construction industry during those years. Similarly, on the national level, women accounted for 47 percent of the workforce, 41 percent of non-construction business owners and only 6 percent of business owners in construction.

Figure E-2.  
Demographic distribution of the workforce and business owners, 2000 and 2008-2012

Dane County, WI	Business owners in construction		Business owners in non-construction		Workforce in all industries	
	2008-12	2000	2008-12	2000	2008-12	2000
<b>Race/ethnicity</b>						
Total minority	7.4 %	3.7 %	9.2 %	5.7 %	15.1 %	10.4 %
Non-Hispanic white	92.6	96.3	90.8	94.3	84.9	89.6
<b>Total</b>	<u>100.0 %</u>	<u>100.0 %</u>	<u>100.0 %</u>	<u>100.0 %</u>	<u>100.0 %</u>	<u>100.0 %</u>
<b>Gender</b>						
Female	8.1 % **	6.6 % **	44.7 %	44.1 %	48.5 %	48.7 %
Male	91.9 **	93.4 **	55.3	55.9	51.5	51.3
<b>Total</b>	<u>100.0 %</u>	<u>100.0 %</u>	<u>100.0 %</u>	<u>100.0 %</u>	<u>100.0 %</u>	<u>100.0 %</u>
United States	Business owners in construction		Business owners in non-construction		Workforce in all industries	
	2008-12	2000	2008-12	2000	2008-12	2000
<b>Race/ethnicity</b>						
Total minority	24.0 % **	15.3 % **	25.9 %	18.2 %	33.9 %	27.3 %
Non-Hispanic white	76.0 **	84.7 **	74.1	81.8	66.1	72.7
<b>Total</b>	<u>100.0 %</u>	<u>100.0 %</u>	<u>100.0 %</u>	<u>100.0 %</u>	<u>100.0 %</u>	<u>100.0 %</u>
<b>Gender</b>						
Female	6.3 % **	7.3 % **	41.1 %	38.8 %	47.2 %	46.5 %
Male	93.7 **	92.7 **	58.9	61.2	52.8	53.5
<b>Total</b>	<u>100.0 %</u>	<u>100.0 %</u>	<u>100.0 %</u>	<u>100.0 %</u>	<u>100.0 %</u>	<u>100.0 %</u>

Note: \*\*, \*\* Denote that the difference in proportions between business owners in construction business owners in non-construction industries for the given Census/ACS year, for a given race/ethnicity/gender group is statistically significant at the 90% or 95% confidence level respectively.

Source: Keen Independent Research study team from 2000 U.S. Census 5% sample and 2008-2012 ACS Public Use Microdata samples. The raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

## B. Construction Industry

Minorities as a percent of construction workforce quadrupled between 1990 (3%) and 2008-2012 (12%). Growth in the Hispanic construction workforce in Dane County accounted for the majority of the increase.

Hispanic Americans represented just over one-half of the minority construction workforce in 2008 through 2012. African Americans represented about one-fourth and Asian Americans represented about one-in-six minority workers in construction. Among the non-construction workforce, Hispanic Americans, African Americans and Asian Americans each represented about one-third of the minority workforce.

The gap between representation in construction workers and non-construction workers living in Dane County is highest for African Americans and Asian Americans. About 4.7 percent of the non-construction workforce is African American compared to 2.8 percent of the construction workforce and about 4.8 percent of the non-construction workforce is Asian American compared to 1.9 percent in construction. Relatively more Hispanic Americans are a part of the construction workforce (6.8%) compared to the non-construction workforce (5.2%).

The study team examined how education, training, employment and advancement may have affected the number of businesses that individuals of different races/ethnicities and gender owned in the Dane County construction industry in 1990, 2000 and 2008 through 2012.

**Education.** Formal education beyond high school is not a prerequisite for most construction jobs. For that reason, the construction industry often attracts individuals who have lower levels of educational attainment. Most construction industry employees in Dane County do not have a four-year college degree. Based on the 2008-2012 ACS, 35 percent of workers in the Dane County construction industry were high school graduates with no post-secondary education and 5 percent had not finished high school. Only 20 percent of those working in the Dane County construction industry had a four-year college degree or higher compared to 44 percent of all non-construction workers.

**Race/ethnicity.** Hispanic Americans working in Dane County were especially unlikely to have a post-secondary education. In 2008 through 2012, only 25 percent of all Hispanic American workers 25 and older in Dane County held at least a four-year college degree, far below the figure for non-Hispanic whites working in the region (49%). The percentage of African American (30%) workers in Dane County with a four-year college degree was also substantially lower than that of non-Hispanic whites in 2008 through 2012. Based on educational requirements of entry-level jobs and the limited education beyond high school for many African Americans and Hispanic Americans in Dane County, one would expect a relatively high representation of those groups in the local construction industry, particularly in entry-level positions.

In contrast to African Americans and Hispanic Americans, a relatively large proportion of Asian-Pacific American workers (58%) and Subcontinent Asian American workers (86%) age 25 and older in Dane County had four-year college degrees in 2008 through 2012. Given the high levels of education for Asian-Pacific Americans and Subcontinent Asian Americans, the representation of those groups in the local construction industry might be lower than that of non-Hispanic whites.

The educational attainment data support the relatively high concentration of Hispanic Americans and the relatively low concentration of Asian Americans working in the Dane County construction industry. The data do not support the relatively low concentration of African Americans among minorities working in the Dane County construction industry.

**Gender.** Female workers age 25 and older in Dane County achieved a similar level of education, on average, as men. Based on 2008 through 2012 data, 49 percent of female workers and 47 percent of male workers age 25 and older had at least a four-year college degree.

**Apprenticeship and training.** Training in the construction industry is largely on-the-job or offered through trade schools and apprenticeship programs. Entry-level jobs for workers out of high school are often for laborers, helpers, or apprentices. More skilled positions in the construction industry may require additional training through a technical or trade school, an apprenticeship, or another employer-provided training program. Apprenticeship programs can be developed by employers, trade associations, trade unions, or other groups. Workers can enter apprenticeship programs from high school or trade school. Apprenticeships have traditionally been three- to five-year programs that combine on-the-job training with classroom instruction.<sup>3</sup> Opportunities for those programs across race/ethnicity are discussed later in Appendix E.

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<sup>3</sup>Bureau of Labor Statistics, U.S. Department of Labor. 2006-07. "Construction." *Career Guide to Industries*. <http://www.bls.gov/oco/cg/cgs003.htm> (accessed February 15, 2007)



**Employment.** With educational attainment for minorities and women as context, the study team examined employment in the Dane County construction industry. Figure E-3 presents data from 1990, 2000 and 2008 through 2012 to compare the demographic composition of the construction industry with the non-construction workforce in Dane County.

Figure E-3.  
Demographics of workers in construction and all non-construction industries in Dane County, 1990, 2000 and 2008-2012

Dane County, WI	Construction			Non-construction industries		
	2008-12	2000	1990	2008-12	2000	1990
<b>Race/ethnicity</b>						
African American	2.8	2.3	1.9	4.7	3.4	2.2
Asian Pacific	1.9	0.5	0.0	3.6	2.5	1.5
Subcontinent Asian	0.0	0.0	0.0	1.2	0.8	0.2
Hispanic American	6.8	1.4	0.8	5.2	3.2	1.1
Native American	0.5	0.8	0.4	0.6	0.6	0.4
Other Minority Group	0.0	0.0	0.0	0.0	0.2	0.0
Non-Hispanic white	88.0	95.0 % **	96.9 % **	84.8 %	89.4 %	94.6 %
<b>Total</b>	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %
<b>Gender</b>						
Female	10.1 % **	9.5 % **	8.9 % **	50.4 %	50.9 %	50.2 %
Male	89.9 % **	90.5 % **	91.1 % **	49.6 %	49.1 %	49.8 %
<b>Total</b>	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %
United States	Construction			Non-construction industries		
	2008-12	2000	1990	2008-12	2000	1990
<b>Race/ethnicity</b>						
Total minority	32.9 % **	24.5 % **	11.0 % **	34.0 %	27.5 %	22.3 %
Non-Hispanic white	67.1 % **	75.5 % **	89.0 % **	66.0 %	72.5 %	77.7 %
<b>Total</b>	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %
<b>Gender</b>						
Female	9.1 % **	9.9 % **	6.9 % **	50.0 %	49.2 %	45.3 %
Male	90.9 % **	90.1 % **	93.1 % **	50.0 %	50.8 %	54.7 %
<b>Total</b>	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %	100.0 %

Note: \*\*, \*\* Denote that the difference in proportions between workers in construction and workers in non-construction industries for the given Census/ACS year, for a given race/ethnicity/gender group is statistically significant at the 90% or 95% confidence level respectively.

Source: Keen Independent Research study team from 1990 and 2000 U.S. Census 5% sample and 2008-2012 ACS Public Use Microdata samples. The raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

**Race/ethnicity.** Based on 2008-2012 ACS data, 12 percent of people working in the Dane County construction industry were part of a minority group compared to only 5 percent in 2000. Minority groups in Dane County made up a smaller percentage of workers in construction (12%) than in non-construction industries (15%).

Overall, the percentage of construction workers who are minorities has increased in Dane County over the past two decades (3% in 1990, 5% in 2000 and 12% in 2008 through 2012), as has the percentage of all Dane County workers in non-construction industries who are minorities (5% in 1990, 11% in 2000 and 15% in 2008 through 2012).

**Gender.** There were large differences between the percentage of all non-construction workers who were women and the percentage of construction workers who were women in Dane County in 2008 through 2012. During those years, women represented 50 percent of all non-construction workers in Dane County but only 10 percent of construction workers.

**Academic research concerning the affect of race- and gender-based discrimination.** There is substantial academic literature that has examined whether race- or gender-based discrimination affects opportunities for minorities and women to enter construction trades in the United States. Many studies indicate that race- and gender-based discrimination affects opportunities for minorities and women in the construction industry. The literature concerning women in construction trades has identified substantial barriers to entry and advancement due to gender discrimination and sexual harassment.<sup>4</sup> Research concerning construction projects in three major U.S. cities (Boston, Los Angeles and Oakland) identified evidence of prevailing attitudes that women do not belong in construction, and that such discrimination was worse for women of color than for white women.<sup>5</sup>

**Importance of unions to entry in the construction industry.** Labor researchers characterize construction as a historically volatile industry that is sensitive to business cycles, making the presence of labor unions important for stability and job security within the industry.<sup>6</sup> The temporary nature of construction work results in uncertain job prospects, and the relatively high turnover of laborers presents a disincentive for construction firms to invest in training. Some researchers have claimed that constant turnover has lent itself to informal recruitment practices and nepotism, compelling laborers to tap social networks for training and work. Those researchers blame the importance of social networks for the high degree of ethnic segmentation in the construction industry.<sup>7</sup> They argue that African Americans and other minorities faced long-standing historical barriers to entering the industry, because they have been unable to integrate themselves into traditionally white social networks that exist in the construction industry.<sup>8</sup>

Construction unions aim to provide a reliable source of labor for employers and preserve job opportunities for workers by formalizing the recruitment process; coordinating training and apprenticeships; enforcing standards of work; and mitigating wage competition. The unionized sector of the construction industry would seemingly be the best road for African Americans and other underrepresented groups into the industry. However, some researchers have identified racial discrimination by trade unions that has historically prevented minorities from obtaining employment in skilled trades.<sup>9</sup> Some researchers argue that union discrimination has taken place in a variety of forms, including the following examples:

- Unions have used admissions criteria that adversely affect minorities. In the 1970s, federal courts ruled that standardized testing requirements for unions unfairly disadvantaged minority applicants who had less exposure to testing. In addition, the policies that required new union

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<sup>4</sup> See, for example, Erickson, Julia A and Donna E. Palladino. 2009. "Women Pursuing Careers in Trades and Construction." *Journal of Career Development*. 36(1): 68-89.

<sup>5</sup> Note that those interviews took place between 1996 and 1999. Price, Vivian, 2002. "Race, Affirmative Action and Women's Participation in U.S. Highway Construction." *Feminist Economics*. 8(2), 87-113.

<sup>6</sup> Applebaum, Herbert. 1999. *Construction Workers, U.S.A.* Westport: Greenwood Press.

<sup>7</sup> Waldinger, Roger and Thomas Bailey. 1991. "The Continuing Significance of Race: Racial Conflict and Racial Discrimination in Construction." *Politics & Society*, 19(3).

<sup>8</sup> Feagin and Imani. 1994. "Racial Barriers to African American Entrepreneurship: An Exploratory Study." *Social Problems*. 41 (4): 562-584.

<sup>9</sup> U.S. Department of Justice. 1996. Proposed Reforms to Affirmative Action in Federal Procurement. 61 FR 26042.

members to have relatives who were already in the union perpetuated the effects of past discrimination.<sup>10</sup>

- Of those minority individuals who are admitted to unions, a disproportionately low number are admitted into union-coordinated apprenticeship programs. Apprenticeship programs are an important means of producing skilled construction laborers, and the reported exclusion of African Americans from those programs has severely limited their access to skilled occupations in the construction industry.<sup>11</sup>
- Although formal training and apprenticeship programs exist within unions, most training of union members takes place informally through social networking. Nepotism characterizes the unionized sector of the construction industry as it does the non-unionized sector, and that practice favors a white-dominated status quo.<sup>12</sup>
- Traditionally, white unions have been successful in resisting policies designed to increase African American participation in training programs. The political strength of unions in resisting affirmative action in construction has hindered the advancement of African Americans in the industry.<sup>13</sup>
- Discriminatory practices in employee referral procedures, including apportioning work based on seniority, have precluded minority union members from having the same access to construction work as their white counterparts.<sup>14</sup>
- According to testimony from African American union members, even when unions implement meritocratic mechanisms of apportioning employment to laborers, white workers are often allowed to circumvent procedures and receive preference for construction jobs.<sup>15</sup>

However, more recent research suggests that the relationship between minorities and unions has been changing. As a result, historical observations may not be indicative of current dynamics in construction unions. Recent studies focusing on the role of unions in apprenticeship programs have compared minority and female participation and graduation rates for apprenticeships in joint programs (that unions and employers organize together) with rates in employer-only programs. Many of those studies conclude that the impact of union involvement is generally positive or neutral for minorities and women, compared to non-Hispanic white males:

- Glover and Bilginsoy (2005) analyzed apprenticeship programs in the U.S. construction industry during the period 1996 through 2003. Their dataset covered about 65 percent of apprenticeships during that time. The authors found that joint programs had “much higher enrollments and participation of women and ethnic/racial minorities” and exhibited “markedly

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<sup>10</sup> Ibid. See *United States v. Iron Workers Local 86 (1971)*, *Sims v. Sheet Metal Workers International Association (1973)*, and *United States v. International Association of Bridge, Structural and Ornamental Iron Workers (1971)*.

<sup>11</sup> Applebaum. 1999. *Construction Workers*, U.S.A.

<sup>12</sup> Ibid. 299. A high percentage of skilled workers reported having a father or relative in the same trade. However, the author suggests this may not be indicative of current trends.

<sup>13</sup> Waldinger and Bailey. 1991. “The Continuing Significance of Race: Racial Conflict and Racial Discrimination in Construction.”

<sup>14</sup> U.S. Department of Justice. 1996. Proposed Reforms to Affirmative Action in Federal Procurement. 61 FR 26042. See *United Steelworkers of America v. Weber (1979)* and *Taylor v. United States Department of Labor (1982)*.

<sup>15</sup> Feagin and Imani. 1994. “Racial Barriers to African American Entrepreneurship: An Exploratory Study.” *Social Problems*. 41 (4): 562-584.

better performance for all groups on rates of attrition and completion” compared to employer-run programs.<sup>16</sup>

- In a similar analysis focusing on female apprentices, Bilginsoy and Berik (2006) found that women were most likely to work in highly-skilled construction professions as a result of enrollment in joint programs as opposed to employer-run programs. Moreover, the effect of union involvement in apprenticeship training was higher for African American women than for white women.<sup>17</sup>
- A recent study on the presence of African Americans and Hispanic Americans in apprenticeship programs found that African Americans were 8 percent more likely to be enrolled in a joint program than in an employer-run program. However, Hispanic Americans were less likely to be in a joint program than in an employer-run program.<sup>18</sup> Those data suggest that Hispanic Americans may be more likely than African Americans to enter the construction industry without the support of a union.

Recent union membership data support those findings as well. For example, 2012 Current Population Survey (CPS) data indicate that the union membership rate for African Americans is slightly higher than for non-Hispanic whites in the United States.<sup>19</sup> The CPS asked participants, “Are you a member of a labor union or of an employee association similar to a union?” CPS data showed union membership to be 13 percent for African American workers, 10 percent for Hispanic American workers and 11 percent non-Hispanic white workers. In the construction industry, the union membership rate for both African American workers and non-Hispanic white workers was 17 percent. In contrast, the CPS showed that only 7 percent of Hispanic Americans in construction are union members.

Other research focusing on specific states also indicates a more productive relationship between unions and minority workers than that which may have prevailed in the past. A study by Berik, Bilginsoy and Williams found minority and white women were overrepresented in union apprenticeship programs in Oregon. Although white women and minorities were less likely to graduate compared to white men, graduation rates for those groups in the union apprenticeship programs were higher than for nonunion programs.<sup>20</sup> Similar research conducted over a ten-year period in Massachusetts found women and minorities were recruited at a higher rate for union apprenticeship programs compared to nonunion programs and that the completion rates for these groups in union programs were consistently higher than those of nonunion programs.<sup>21</sup>

Although union membership and union program participation varies based on race/ethnicity, the causes of those differences and their effects on employment in the construction industry are unresolved. Research is especially limited on the impact of unions on Asian American employment.

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<sup>16</sup> Glover, Robert and Bilginsoy, Cihan. 2005. “Registered Apprenticeship Training in the U.S. Construction Industry.” *Education & Training*, Vol. 47, 4/5, p 337.

<sup>17</sup> Günseli Berik, Cihan Bilginsoy. 2006. "Still a wedge in the door: women training for the construction trades in the USA", *International Journal of Manpower*, Vol. 27 Iss: 4, pp.321 – 341.

<sup>18</sup> Bilginsoy, Cihan. 2005. “How Unions Affect Minority Representation in Building Trades Apprenticeship Programs.” *Journal of Labor Research*, 57(1).

<sup>19</sup> 2012 Current Population Survey (CPS), Merged Outgoing Rotation Groups, U.S. Census Bureau and Bureau of Labor Statistics.

<sup>20</sup> Berik, Bilginsoy and Williams. 2011. “Gender and Racial Training Gaps in Oregon Apprenticeship Programs.” *Labor Studies Journal*: 36(2): 221-244.

<sup>21</sup> Argyres, Annetta and Moir, Susan. 2008. "Building Trades Apprentice Training in Massachusetts: An Analysis of Union and Non-Union Programs, 1997-2007". *Labor Resource Center Publications*. Paper 2.

It is unclear from past studies whether unions presently help or hinder equal opportunity in construction and whether effects in Dane County are different from other parts of the country. In addition, the current research indicates that the effects of unions on entry into the construction industry may be different for different minority groups.

**Union membership in Wisconsin.** Overall, union membership is declining in the United States and Wisconsin is no exception. Data regarding union membership in Wisconsin shows that the percentage of employed wage and salary workers who are members of a union has dropped from 15.0 percent in 2008 to 11.2 percent in 2012.<sup>22</sup> The union membership rate for Wisconsin was at its second lowest point since comparable state data first became available in 1989. Similarly, data for the Madison metropolitan statistical area show union membership has declined from about 20 percent in 2000 to 17 percent in 2008 and 12 percent in 2013; while the percentage of workers covered by unions is slightly greater, it has also declined from about 22 percent in 2000 to 18 percent in 2008 and 13 percent in 2013.<sup>23</sup>

Union membership among private sector construction workers in Wisconsin has also declined considerably. In 2000, nearly half (45 percent) of private sector construction workers in Wisconsin were union members. By 2013, union membership in the private sector construction industry in Wisconsin had dropped to about one-fourth (27 percent).<sup>24</sup>

Other state level data confirm these results, while also highlighting the changes in racial/ethnic composition of apprenticeships. Data from the State of Wisconsin Department of Workforce Development (DWD) show active apprenticeships are on the decline.<sup>25</sup> In 2001, there were 8,890 active apprenticeships in Wisconsin construction trades. By 2014, there were only 4,361 apprenticeships in construction, a decline of 51 percent. The racial/ethnic composition of construction apprenticeships has also changed since 2001, when about 95 percent of construction apprentices were non-Hispanic white, 2 percent were Hispanic, 2 percent were African American and 1 percent were other minorities. As of 2014, total minority representation among construction apprentices had increased to 9 percent (4 percent African American, 3 percent Hispanic and 2 percent other minorities). While the minority composition has changed since 2001, there has been no change in the gender composition of construction apprenticeships over time. Only 2 percent of construction apprentices are female.

Apprenticeship cancellation and completion rates for Wisconsin construction trades vary by race/ethnicity as well, with fewer minorities completing apprenticeships compared to non-Hispanic whites. In 2003, the completion rate of all minorities was 53 percent. By 2008, the latest year for which the DWD has published 6 year cancellation and completion rates, the completion rates had dropped to 31 percent. Non-Hispanic white apprentice completion rates also peaked in 2003, with about two-thirds completing apprenticeship contracts. In 2008, the completion rates had dropped to 51 percent. Cancellation rates in the first year of apprenticeship are also higher for minorities. In 2011, 30 percent of minority construction apprenticeship contracts were cancelled compared to 16 percent of non-Hispanic whites.

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<sup>22</sup> Bureau of Labor Statistics, U.S. Department of Labor. 2014. "Union Membership in Wisconsin – 2013"

<sup>23</sup> Barry Hirsch and David Macpherson. 2014. "Union Membership and Coverage Database from the CPS." <http://unionstats.com> (accessed October 20, 2014).

<sup>24</sup> Ibid.

<sup>25</sup> State of Wisconsin Department of Workforce Development, Apprenticeship Statistics and Data. (2014, July). Retrieved from [https://dwd.wisconsin.gov/apprenticeship/statistics\\_data/active\\_appr\\_characteristics\\_bytrade.pdf](https://dwd.wisconsin.gov/apprenticeship/statistics_data/active_appr_characteristics_bytrade.pdf)

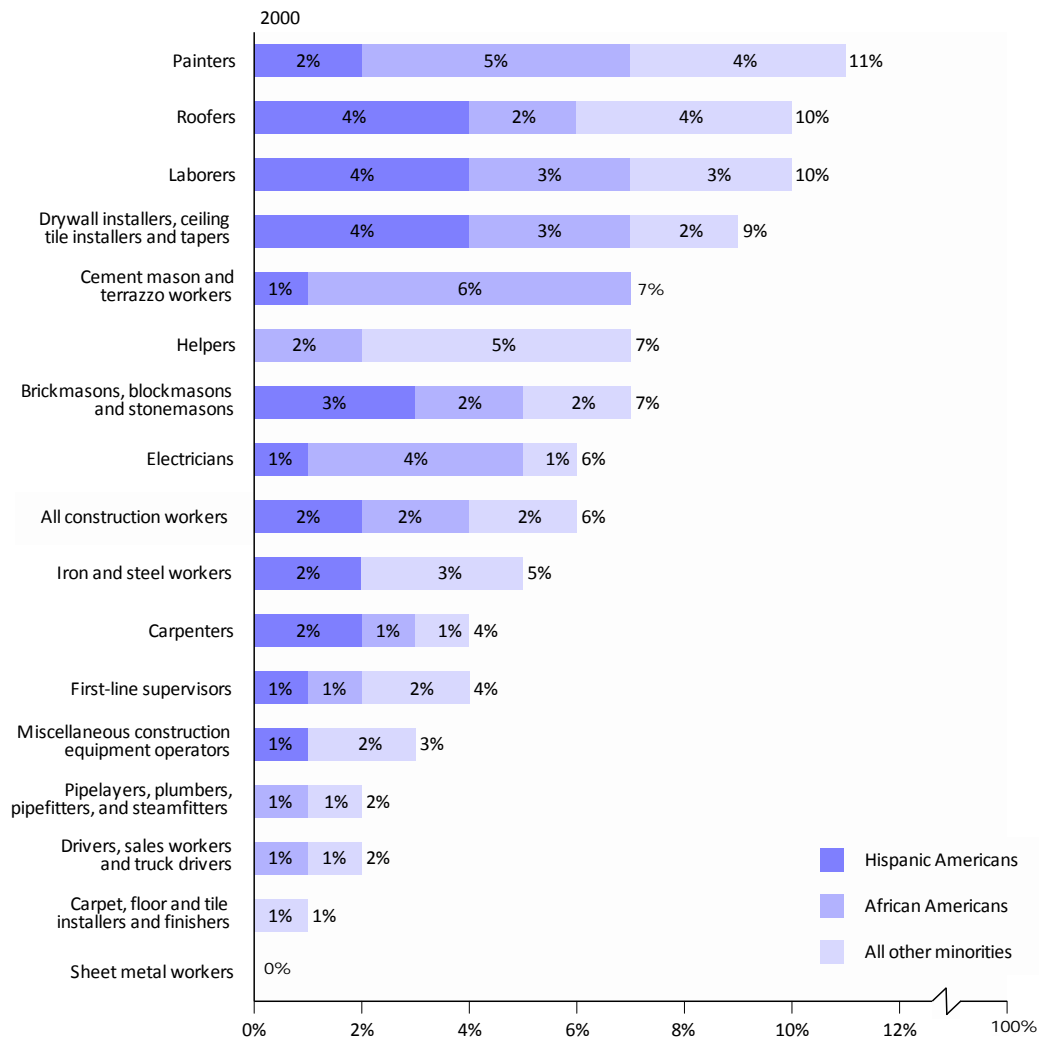
**Advancement.** The study team attempted to research opportunities for advancement in the Dane County construction industry, but due to small sample sizes the study team examined the representation of minorities and women in construction occupations defined by the U.S. Bureau of Labor Statistics for the entire state of Wisconsin.<sup>26</sup> Appendix I provides full descriptions of construction trades with large enough sample sizes for analysis in the 2000 Census and 2008-2012 ACS.

**Racial/ethnic composition of construction occupations.** Figures E-4 and E-5 summarize the race/ethnicity of workers in select construction-related occupations in Wisconsin, including low-skill occupations (e.g., construction laborers), higher-skill construction trades (e.g., electricians) and supervisory roles. Figure E-4 and E-5 present those data for 2000 and 2008 through 2012 respectively.

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<sup>26</sup> Bureau of Labor Statistics, U.S. Department of Labor. 2001. "Standard Occupational Classification Major Groups." [http://www.bls.gov/soc/soc\\_majo.htm](http://www.bls.gov/soc/soc_majo.htm) (accessed February 15, 2007)

Figure E-4.  
 Minorities as a percentage of selected construction occupations in Wisconsin, 2000

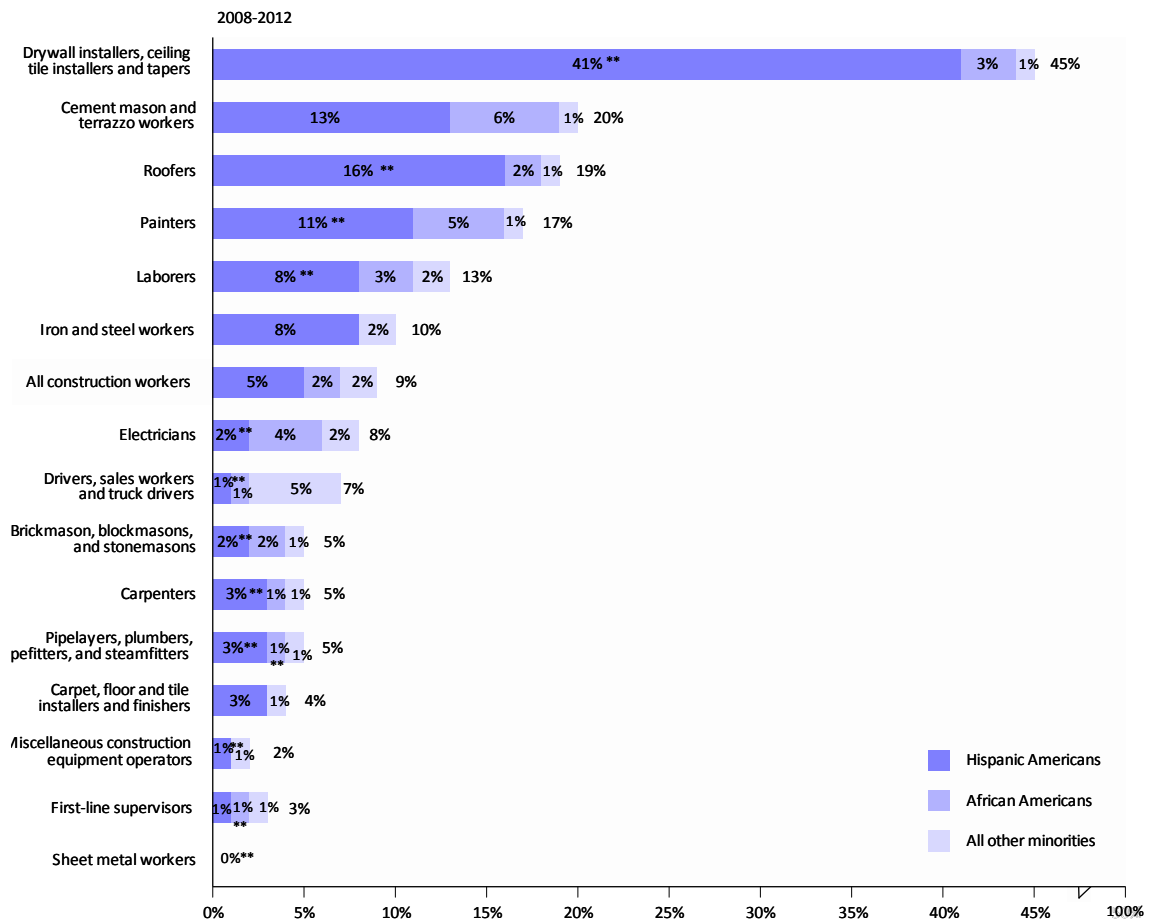


Note: \*,\*\* Denote that the difference in proportions between all workers in the construction industry and those in specific occupations is statistically significant at the 90% or 95% confidence level respectively.

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 equipment operators.

Source: Keen Independent Research study team from 2000 U.S. Census 5% sample Public Use Micro-sample data. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Figure E-5.  
Minorities as a percentage of selected construction occupations in Wisconsin, 2008-2012



Note: \*, \*\* Denote that the difference in proportions between all workers in the construction industry and those in specific occupations is statistically significant at the 90% or 95% confidence level respectively.

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 equipment operators.

Source: Keen Independent Research study team from 2008-2012 American Community Survey data. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Based on 2000 Census and 2008-2012 ACS data, there are large differences in the racial/ethnic makeup of workers in various construction trades in Wisconsin. Overall, minorities comprised 5 percent of construction workers in 2000 and 9 percent of construction workers in 2008 through 2012. Minorities comprised a relatively large share of the workforce of:

- Drywall, ceiling tile installers and tapers (9% in 2000 and 45% in 2008 through 2012);
- Cement masons and terrazzo workers (8% in 2000 and 20% in 2008 through 2012);
- Roofers (10% in 2000 and 19% in 2008 through 2012); and
- Painters (11% in 2000 and 17% in 2008 through 2012).



Some occupations had relatively low representations of minorities, including:

- Miscellaneous construction equipment operators (3% in 2000 and 2% in 2008 through 2012);
- Pipelayers, plumbers, pipefitters and steamfitters (2% in 2000 and 5% in 2008 through 2012);
- Carpet, floor and tile installers and finishers (1% in 2000 and 5% in 2008 through 2012); and
- Sheet metal workers (0% in both 2000 and 2008 through 2012).

About 3 percent of first-line supervisors were minorities in 2000, slightly less than the total percentage of Wisconsin construction workers who were minorities (5%). Minorities made up a smaller percentage of first-line supervisors (2%) in 2008 through 2012, even though the total percentage of construction workers who were minorities increased during those years (9%).

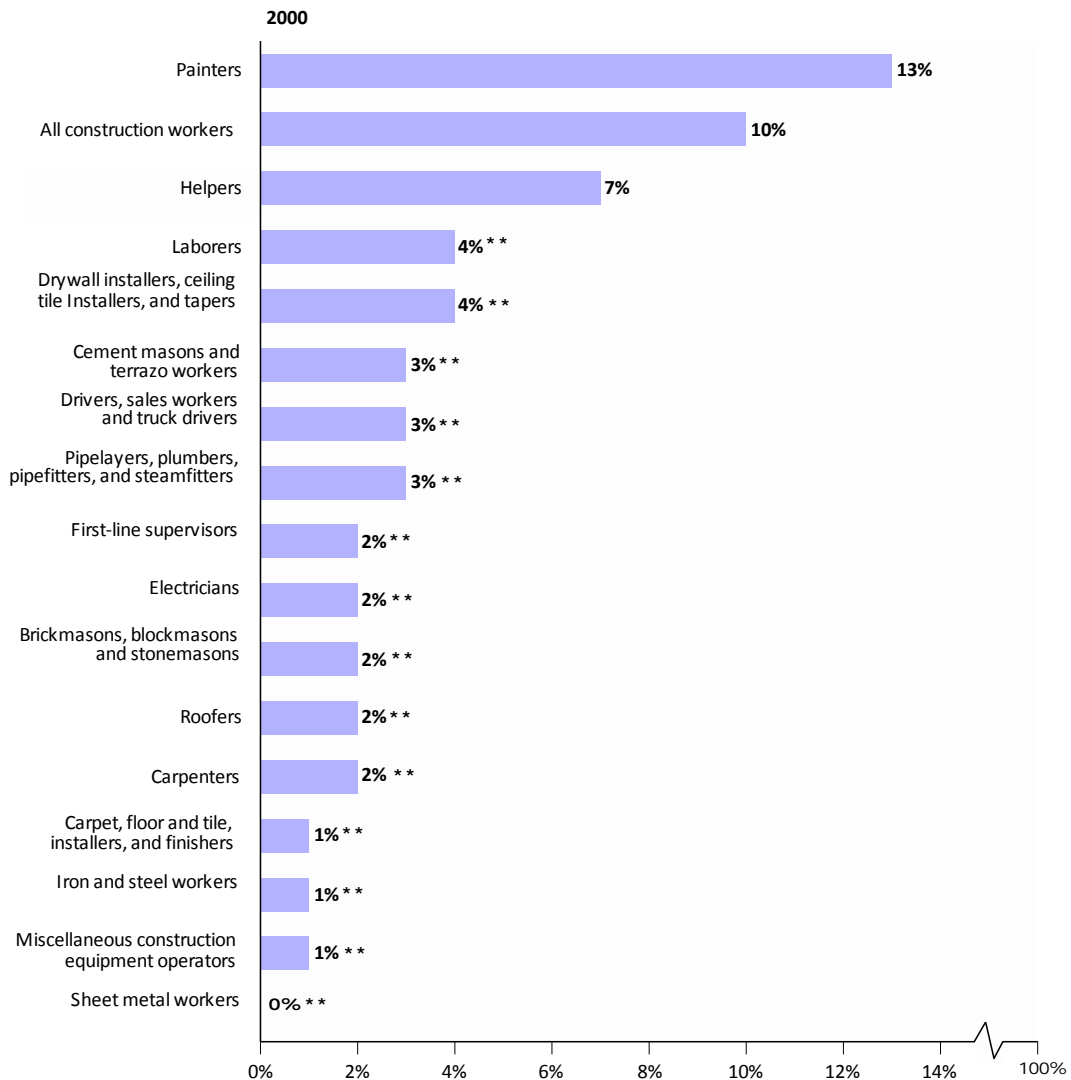
The majority of minorities working in the Wisconsin construction industry in 2008 through 2012 were Hispanic Americans. The representation of Hispanic Americans was substantially larger among drywall, ceiling tile installers and tapers (41%), roofers (16%), cement masons and terrazzo workers (13%), painters (11%) and construction laborers (8%) than among all construction workers (5%). Only 1 percent of first-line supervisors were Hispanic American in Wisconsin in 2008 through 2012.

**Gender composition of construction occupations.** Figures E-6 and E-7 summarize the gender of workers in select construction-related occupations for 2000 and 2008 through 2012, respectively. Overall, only about 10 percent of construction workers in Wisconsin were women in 2000 and 9 percent were women in 2008 through 2012.

In both 2000 and 2008 through 2012, less than 3 percent of workers were women in the following trades:

- Roofers;
- Brickmasons, blockmasons and stonemasons;
- Iron and Steel workers;
- Electricians;
- Carpenters;
- Sheet metal workers; and
- First-line supervisors.

Figure E-6.  
Women as a percentage of construction workers in selected occupations in Wisconsin, 2000

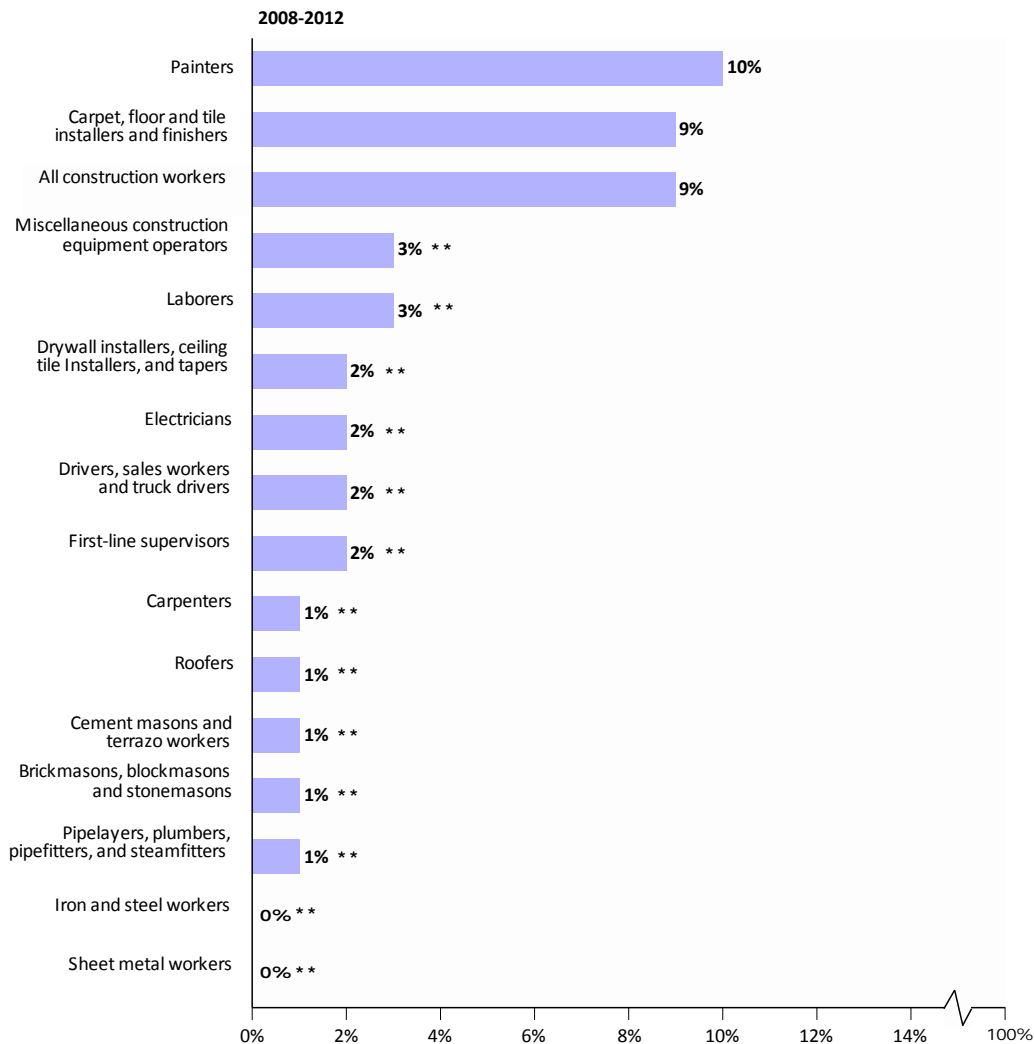


Note: \*,\*\* Denote that the difference in proportions between all workers in the construction industry and those in specific occupations is statistically significant at the 90% or 95% confidence level respectively.

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 equipment operators.

Source: Keen Independent Research study team from 2000 U.S. Census 5% sample Public Use Micro-sample data. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Figure E-7.  
Women as a percentage of construction workers in selected occupations in Wisconsin, 2008-2012



Note: \*\*, \*\* Denote that the difference in proportions between all workers in the construction industry and those in specific occupations is statistically significant at the 90% or 95% confidence level respectively.

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 equipment operators.

Source: Keen Independent Research study team from 2008-2012 American Community Survey data. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Among all of the individual occupations listed in Figures E-6 and E-7, the following occupations showed an increase in the representation of women between 2000 and 2008 through 2012:

- Miscellaneous construction equipment operators; and
- Carpet, floor and tile installers and finishers.

**Percentage of minorities and women who are managers.** To further assess advancement opportunities for minorities and women in the Dane County construction industry, the study team examined differences between groups in the proportion of construction workers who reported being managers. Figure E-8 presents the percentage of construction workers who reported being construction managers in 1990, 2000 and 2008 through 2012 for Dane County and the United States as a whole. Due to small sample sizes, all minority groups are combined together and compared to non-Hispanic whites.

**Racial/ethnic composition of managers.** In 2000, about 9 percent of non-Hispanic whites in the Dane County construction industry were managers. Compared with non-Hispanic whites, minorities (0%) were considerably less likely to be construction managers in the Dane County construction industry. In 2008 through 2012, about 8 percent of non-Hispanic white construction workers in Dane County were managers, a statistically significant difference from the percentage of minority construction workers that worked as managers (0%). Nationally, about 3 percent of minority construction workers worked as managers in 2008 through 2012, compared to 9 percent of non-Hispanic whites.

**Gender composition of managers.** Female construction workers were less likely than their male counterparts to be managers in 2000 in Dane County and the United States as a whole. In Dane County in 2008 through 2012, about 7 percent of both male and female construction workers were managers.

Figure E-8.  
Percentage of construction workers who worked as a manager, 1990, 2000 and 2008-2012

Note:

\*,\*\* Denote that the difference in proportions between the minority group and non-Hispanic whites (or between females and males) for the given Census/ACS year is statistically significant at the 90% or 95% confidence level respectively.

Source:

Keen Independent Research study team from the 2000 U.S. Census 5% sample and 2008-2012 ACS Public Use Microdata samples. The raw data extracts were obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Dane County, WI	2008-2012	2000	1990
<b>Race/ethnicity</b>			
Minority	0.0 % **	0.0 %	0.0 %
Non-Hispanic white	8.3	8.8	11.3
<b>Gender</b>			
Female	6.6 %	0.0 % **	10.6 %
Male	7.4	9.2	10.9
<b>All individuals</b>	7.3 %	8.4 %	10.9 %
United States	2008-2012	2000	1990
<b>Race/ethnicity</b>			
Minority	3.4 % **	3.2 % **	3.6 % **
Non-Hispanic white	8.7	7.5	9.3
<b>Gender</b>			
Female	5.6 % **	4.1 % **	10.8 % **
Male	7.1	6.7	8.0
<b>All individuals</b>	7.0 %	6.5 %	8.2 %

### **C. Summary**

Keen Independent’s analysis suggests that there are barriers to entry for certain minority groups and for women in the construction industry in Dane County. For the construction industry, there appears to be barriers within the industry that continue through occupational advancement.

- Fewer minorities worked in the Dane County construction industry than what might be expected based on representation in the overall workforce.
- Women accounted for particularly few workers in the Dane County construction industry.

Any barriers to advancement in the construction industry may affect the relatively low number of minority and female business owners.

- Representation of minorities and women was much lower in certain construction trades (including first-line supervisors) compared with others.
- Compared to non-Hispanic whites in the construction industry, minority workers were significantly less likely to be managers.

Appendix F, which follows, examines rates of business ownership among individuals working in the Dane County construction industry.

## APPENDIX F.

### Business Ownership in the Dane County Construction Industry

Approximately one in four construction industry workers in Dane County, Wisconsin were self-employed business owners in 2008 through 2012. Keen Independent examined business ownership in the local construction industry for different racial/ethnic and gender groups in Dane County using Public Use Microdata Samples (PUMS) data from the 1990 and 2000 Census and from the 2008 through 2012 American Community Survey (ACS). Note that “self-employment” and “business ownership” are used interchangeably in Appendix F.

#### A. Business Ownership Rates

Many studies have explored differences between minority and non-minority business ownership at the national level. Although overall self-employment rates have increased for minorities and women over time, a number of studies indicate that race/ethnicity and gender continue to affect opportunities for business ownership.<sup>1</sup> The extent to which such individual characteristics may limit business ownership opportunities differs from industry to industry and by location.

**Construction industry.** Compared to other industries, construction has a relatively large number of business owners. In 2008 through 2012, 24 percent of workers in the local construction industry were self-employed (in incorporated or unincorporated businesses) compared with only 7 percent of workers across all non-construction industries. However, rates of self-employment in the local construction industry vary by race/ethnicity and gender. Figure F-1 shows the percentage of workers who were self-employed in the construction industry by group for 1990, 2000 and 2008 through 2012. Due to small sample sizes, all minority groups are combined together and compared to non-Hispanic whites. Figure F-1 presents results for Dane County and for the United States as a whole.

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<sup>1</sup> For example, see Waldinger, Roger and Howard E. Aldrich. 1990. *Ethnicity and Entrepreneurship*. Annual Review of Sociology. 111-135.; Fairlie, Robert W. and Bruce D. Meyer. 1996. *Ethnic and Racial Self-Employment Differences and Possible Explanations*. The Journal of Human Resources, Volume 31, Issue 4, 757-793.; Fairlie, Robert W. and Alicia M. Robb. 2007. *Why are Black-Owned Businesses Less Successful than White-Owned Businesses? The Role of Families, Inheritances and Business Human Capital*. Journal of Labor Economics, 25(2), 289-323.; and Fairlie, Robert W. and Alicia M. Robb. 2006. *Race, Families and Business Success: A Comparison of African-American-, Asian- and White-Owned Businesses*. Russell Sage Foundation.

Figure F-1.  
 Percentage of workers in the construction industry who were self-employed,  
 1990, 2000 and 2008-2012

Dane County, WI	2008-2012	2000	1990
<b>Race/ethnicity</b>			
Minority	15.0 %	15.3 %	16.0 %
Non-Hispanic white	25.6	21.3	26.1
<b>Gender</b>			
Female	19.3 %	14.7 %	9.5 % **
Male	24.9	21.7	27.4
<b>All individuals</b>	24.3 %	21.0 %	25.8 %
United States	2008-2012	2000	1990
<b>Race/ethnicity</b>			
Minority	18.5 % **	14.1 % **	11.1 % **
Non-Hispanic white	27.2	25.4	21.0
<b>Gender</b>			
Female	16.2 % **	16.8 % **	13.5 % **
Male	25.1	23.3	19.7
<b>All individuals</b>	24.3 %	22.6 %	19.1 %

Note: \*, \*\* Denotes that the difference in proportions between the minority and non-Hispanic white groups (or female and male groups) for the given Census/ACS year is statistically significant at the 90% or 95% confidence level, respectively.

Source: Keen Independent Research from 1990 and 2000 U.S. Census 5% sample and 2008-2012 ACS Public Use Microdata samples. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

**Business ownership rates in 2000.** According to the 2000 Census, 21 percent of non-Hispanic whites working in the Dane County construction industry were self-employed. The business ownership rate for all minorities combined was 15 percent. This difference is not statistically different from business ownership rates for non-Hispanic whites due to the small sample size of minority construction workers in Dane County.

Fifteen percent of women working in the construction industry in Dane County were self-employed in 2000, compared with about 22 percent of men. Again, business ownership rates between men and women were not found to be statistically different, due to small sample size of female construction workers in Dane County.

The differences in Dane County construction business ownership rates between minorities and non-minorities as well as between men and women were consistent with the nation.

**Changes in business ownership rates since 2000.** Business ownership rates in the Dane County construction industry among minorities remained unchanged at 15 percent for 2008 through 2012, while the business ownership rate of non-Hispanic whites rose to 26 percent. Business ownership

rates for both males (25%) and females (19%) in the Dane County construction industry increased relative to ownership rates in 2000.

**Potential causes of differences in business ownership rates.** Researchers have examined whether there are disparities in business ownership rates after considering certain personal characteristics of business owners such as education and age. Several studies have found that disparities in business ownership still exist even after accounting for such race- and gender-neutral factors.

- **Financial capital.** Some studies have concluded that access to financial capital is a strong determinant of business ownership. Researchers have consistently found a positive relationship between startup capital and business formation, expansion and survival.<sup>2</sup> In addition, one study found that housing appreciation measured at the Metropolitan Statistical Area level is a positive determinant of becoming self-employed.<sup>3</sup> However, unexplained differences in business ownership rates for minorities still exist after statistically controlling for those factors.<sup>4</sup> Access to capital is discussed in more detail in Appendix G.
- **Education.** Education has a positive effect on the probability of business ownership in most industries. However, results of multiple studies indicate that minorities are still less likely to own a business than non-minorities with similar levels of education.<sup>5</sup> Recent research confirms a significant relationship between education and ability to obtain startup capital.<sup>6</sup>
- **Intergenerational links.** Intergenerational links affect one's likelihood of self-employment. One study found that experience working for a self-employed family member increases the likelihood of business ownership for minorities.<sup>7</sup>
- **Immigration to the United States.** Time since immigration and assimilation into American society are also important determinants of self-employment, but unexplained differences in business ownership between minorities and non-minorities still exist when accounting for those factors.<sup>8</sup>

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<sup>2</sup> See Lofstrom, Magnus and Chunbei Wang. 2006. *Hispanic Self-Employment: A Dynamic Analysis of Business Ownership*. Working paper, Forschungsinstitut zur Zukunft der Arbeit (Institute for the Study of Labor); and Fairlie, Robert W. and Alicia M. Robb. 2006. *Race, Families and Business Success: A Comparison of African-American-, Asian- and White-Owned Businesses*. Russell Sage Foundation.

<sup>3</sup> Fairlie, Robert W. and Harry A. Krashinsky. 2006. Liquidity Constraints, Household Wealth and Entrepreneurship Revisited.

<sup>4</sup> Lofstrom, Magnus and Chunbei Wang. 2006. *Hispanic Self-Employment: A Dynamic Analysis of Business Ownership*. Working paper, Forschungsinstitut zur Zukunft der Arbeit (Institute for the Study of Labor).

<sup>5</sup> See Fairlie, Robert W. and Bruce D. Meyer. 1996. *Ethnic and Racial Self-Employment Differences and Possible Explanations*. The Journal of Human Resources, Volume 31, Issue 4, 757-793; and Butler, John Sibley and Cedric Herring. 1991. *Ethnicity and Entrepreneurship in America: Toward an Explanation of Racial and Ethnic Group Variations in Self-Employment*. Sociological Perspectives. 79-94.

<sup>6</sup> Robb, Alicia, Fairlie, Robert w. and Robinson, David T. 2009. "Capital Injections among New Black and White Business Ventures: Evidence from the Kauffman Firm Survey." Working Paper. Federal Reserve Bank of Cleveland.

<sup>7</sup> See Fairlie, Robert W. and Alicia M. Robb. 2006. *Race, Families and Business Success: A Comparison of African-American-, Asian- and White-Owned Businesses*. Russell Sage Foundation; and Fairlie, Robert W. and Alicia M. Robb. 2007. *Why are Black-Owned Businesses Less Successful than White-Owned Businesses? The Role of Families, Inheritances and Business Human Capital*. Journal of Labor Economics, 25(2), 289-323.

<sup>8</sup> See Fairlie, Robert W. and Bruce D. Meyer. 1996. *Ethnic and Racial Self-Employment Differences and Possible Explanations*. The Journal of Human Resources, Volume 31, Issue 4, 757-793; and Butler, John Sibley and Cedric Herring. 1991. *Ethnicity and*



## B. Business Ownership Regression Analysis

Race/ethnicity and gender can affect opportunities for business ownership, even after accounting for individuals' race- and gender-neutral personal characteristics such as education, age and familial status. Recent research using data from 2007 through 2010 indicates minorities (including African Americans and Hispanic Americans) face greater credit constraints at business startup and throughout business ownership than non-Hispanic whites even after controlling for other factors including credit score.<sup>9</sup>

To further examine factors that predict business ownership, Keen Independent developed multivariate regression models to explore patterns of business ownership in Dane County. Those models estimate the effect of race/ethnicity and gender on the probability of business ownership while statistically controlling for other potentially influential factors.

An extensive body of literature examines whether race- and gender-neutral personal factors such as access to financial capital, education, age and family characteristics (e.g., marital status) help explain differences in business ownership. That subject has also been examined in other disparity studies. For example, prior studies in Minnesota and Illinois have used econometric analyses to investigate whether disparities in business ownership for minorities and women working in the construction industry persist after statistically controlling for race- and gender-neutral personal characteristics.<sup>10, 11</sup> Those studies have incorporated probit econometric models using PUMS data from the 2000 Census and have been among the materials that agencies have submitted to courts in subsequent litigation concerning implementation of the Federal DBE Program.

The Keen Independent study team used similar probit regression models to predict business ownership from multiple independent or “explanatory” variables.<sup>12</sup> Independent variables included:

- Personal characteristics that are potentially linked to the likelihood of business ownership—age, age-squared, disability, marital status, number of children in the household, number of elderly people in the household and English-speaking ability;
- Indicators of educational attainment;
- Measures and indicators related to personal financial resources and constraints—home ownership, home value, monthly mortgage payment, dividend and interest income and additional household income from a spouse or unmarried partner; and

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*Entrepreneurship in America: Toward an Explanation of Racial and Ethnic Group Variations in Self-Employment.* Sociological Perspectives. 79-94.

<sup>9</sup> Robb, Alicia. 2012. “Access to Capital among Young Firms, Minority-owned Firms, Women-owned Firms and High-Tech Firms.” Small Business Administration.

<sup>10</sup> National Economic Research Associates, Inc. 2000. *Disadvantaged Business Enterprise Availability Study*. Prepared for the Minnesota Department of Transportation.

<sup>11</sup> National Economic Research Associates, Inc. 2004. *Disadvantaged Business Enterprise Availability Study*. Prepared for the Illinois Department of Transportation.

<sup>12</sup> Probit models estimate the effects of multiple independent or “predictor” variables in terms of a single, dichotomous dependent or “outcome” variable — in this case, business ownership. The dependent variable is binary, coded as “1” for individuals in a particular industry who are self-employed; “0” for individuals who are not self-employed. The model enables estimation of the probability that a worker in a given estimation sample is self-employed. The study team excluded observations where the Census Bureau had imputed values for the dependent variable, business ownership.

- Variables representing the race/ethnicity and gender of the individuals included in the analysis.

The study team developed one model using PUMS data from the 2000 Census and a model using ACS data for 2008 through 2012.

Due to the small sample size for the Dane County construction industry, Keen Independent developed probit regression models of business ownership in the Wisconsin construction industry for 2000 and 2008 through 2012. All workers in the Wisconsin construction industry are included in the model and any Dane County effects are estimated by using county-level control variables. In addition, the study team developed simulations of business ownership rates if minorities and women had the same probability of business ownership as similarly situated non-Hispanic whites and males, respectively.

**Construction industry in 2000.** Figure F-2 presents the coefficients for the probit model for individuals working in the Wisconsin construction industry in 2000. The model indicates that several race- and gender-neutral factors are statistically significant predictors of business ownership for workers in the construction industry:

- Older individuals were more likely to be business owners, but the effect was smaller for the oldest individuals;
- Individuals with more children were more likely to be business owners;
- Home ownership was associated with a lower probability of business ownership but for those who did own a home, higher home values were associated with a higher likelihood of business ownership;
- Workers with greater interest and dividend income were more likely to own a business;
- Higher income levels of a spouse or partner were associated with a higher probability of business ownership; and
- Having less than a high school education was associated with a higher probability of business ownership.

After statistically controlling for race- and gender-neutral factors, statistically significant disparities in business ownership rates remained for Hispanic Americans and women working in the Wisconsin construction industry and for African Americans in the Dane County construction industry.

Figure F-2.  
Wisconsin construction industry  
business ownership model, 2000

Note:

Hispanic Americans in Dane County, Subcontinent Asian Americans in Dane County, Other Minorities in Dane County and Minority Females in Dane County were excluded from the final regression due to small sample sizes.

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

Source:

Keen Independent Research from 2000 Census data. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Variable	Coefficient
Constant	-3.1289 **
Age	0.0507 **
Age-squared	-0.0003 **
Married	-0.0163
Disabled	-0.0504
Number of children in household	0.0530 **
Number of people over 65 in household	0.0509
Owns home	-0.1147 *
Home value (\$000s)	0.0015 **
Monthly mortgage payment (\$000s)	-0.0618
Interest and dividend income (\$000s)	0.0061 **
Income of spouse or partner (\$000s)	0.0029 **
Speaks English well	0.6932
Less than high school education	0.1431 **
Some college	-0.0002
Four-year degree	0.0206
Advanced degree	0.0375
Hispanic American	-0.4114 **
African American	0.0551
African American in Dane County	-1.0769 *
Native American	-0.2053
Native American in Dane County	1.2485 *
Asian-Pacific American	0.0525
Asian-Pacific American in Dane County	0.4552
Subcontinent Asian American	0.3189
Other minority	0.7325
Female	-0.1363 **
Female in Dane County	-0.3222
Minority Female	0.1538
Dane County	-0.0252

Simulations of business ownership rates. The probit modeling approach allowed for simulations of business ownership rates for minorities and women if they had the same probability of business ownership as similarly situated non-Hispanic whites and males, respectively. To conduct those simulations, Keen Independent took the following steps:

1. Keen Independent performed a probit regression analysis predicting business ownership using only non-Hispanic white (or non-Hispanic white male) construction workers in the dataset.<sup>13</sup>
2. The study team then used the coefficients from that model and the mean personal characteristics of individual minority groups (or women) working in the local construction industry (i.e., personal characteristics, indicators of educational attainment

<sup>13</sup> That version of the model excluded the race/ethnicity and gender indicator variables, because the value of all of those variables would be the same (i.e., 0).

and indicators of personal financial resources and constraints) to estimate the probability of business ownership of such groups.

The results of those simulations yielded estimates of business ownership rates for non-Hispanic whites (or non-Hispanic white males) who shared similar characteristics of minorities (or women) working in the Wisconsin construction industry. Higher simulated rates indicate that, in reality, race/ethnicity or gender makes it less likely for minorities and women to own businesses than similarly-situated non-Hispanic whites (or non-Hispanic white males). Keen Independent performed those calculations for only those groups for which race/ethnicity or gender was a statistically significant negative factor in business ownership (i.e., Hispanic Americans, African Americans in Dane County and women).

Figure F-4 presents simulated business ownership rates (i.e., “benchmark” rates) for Hispanic Americans, African Americans in Dane County and non-Hispanic white women, and compares them to the actual, observed mean probability of business ownership for those groups. The disparity index was calculated by taking the actual business ownership rate for each group and dividing it by each group’s benchmark rate, and then multiplying the result by 100. Values less than 100 indicate that, in reality, the group is less likely to own businesses than what would be expected for similarly-situated non-Hispanic whites (or non-Hispanic white males)—in other words that race/ethnicity (or gender) affects the likelihood of those groups owning businesses in the local construction industry. Similar simulation approaches have been incorporated in other disparity studies that courts have reviewed.

**Figure F-3.**  
**Comparison of actual business ownership rates to simulated rates**  
**for Wisconsin construction workers, 2000**

Group	Self-employment rate		Disparity index (100 = parity)
	Actual	Benchmark	
Hispanic American	8.2%	17.3%	48
African American in Dane County	4.2%	22.4%	19
Non-Hispanic white female	20.9%	23.6%	89

Note: As the benchmark figure can only be estimated for records with an observed (rather than imputed) dependent variable, comparison is made with only this subset of the sample. For this reason, actual self-employment rates may differ slightly from those in Figure F-1.

Source: Keen Independent Research from statistical models of 2000 Census data. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Comparisons of the actual, observed business ownership rate of Hispanic Americans in the Wisconsin construction industry with the benchmark based on simulated business ownership rates of similarly-situated non-Hispanic white construction workers showed that Hispanic Americans own businesses at 48 percent of the rate that would be expected of non-Hispanic white construction workers who share similar personal, financial and educational characteristics. African Americans in Dane County (disparity index of 19) also owned businesses at rates substantially lower than what would be expected based on the simulated business ownership rates of similarly-situated non-Hispanic white construction workers.

Non-Hispanic white women own businesses at 89 percent of the rate that would be expected based on the simulated business ownership rates of similarly-situated non-Hispanic white male construction workers.

**Construction industry in 2008 through 2012.** Figure F-4 presents the coefficients from the probit model predicting business ownership in the Wisconsin construction industry in 2008 through 2012. Many of the same race- and gender-neutral factors important to predicting business ownership in the 2000 model also had an impact in 2008 through 2012:

- Older individuals were more likely to be business owners, but the effect was smaller for the oldest individuals;
- Individuals with more persons over the age of 65 living in the household were more likely to be business owners;
- Higher home values and higher monthly mortgage payments were associated with a higher probability of business ownership;
- Individuals who speak English well were more likely to own a business; and
- Having less than a high school education was associated with a higher probability of business ownership.

After controlling for race- and gender-neutral factors, a statistically significant difference remained in the business ownership rates of female construction workers.

Figure F-4.  
Wisconsin construction industry business ownership model, 2008-2012

Note:

African Americans in Dane County, Subcontinent Asian Americans and Subcontinent Asian Americans in Dane County, Other Minorities in Dane County and Minority Females in Dane County were excluded from the final regression due to small sample size.

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

Source:

Keen Independent Research from 2008-2012 ACS data. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Variable	Coefficient
Constant	-2.7196 **
Age	0.0479 **
Age-squared	-0.0003 **
Married	-0.0302
Disabled	0.0239
Number of children in household	0.0297
Number of people over 65 in household	0.0951 *
Owns home	-0.0434
Home value (\$000s)	0.0007 **
Monthly mortgage payment (\$000s)	0.0595 *
Interest and dividend income (\$000s)	0.0021
Income of spouse or partner (\$000s)	0.0010
Speaks English well	0.5049 **
Less than high school education	0.2317 **
Some college	-0.0717
Four-year degree	-0.0342
Advanced degree	0.1889
Hispanic American	-0.0465
Hispanic American in Dane County	0.1330
African American	-0.0862
Native American	-0.1277
Native American in Dane County	0.4954
Asian-Pacific American	-0.3499
Asian-Pacific American in Dane County	1.3812
Other minority	1.0216
Female	-0.3705 **
Female in Dane County	0.0140
Minority Female	-0.0634
Dane County	-0.0910

**Simulations of business ownership rates.** Using the same approach as for the 2000 data, the study team used the 2008 through 2012 results to simulate business ownership rates if women had the same probability of self-employment as similarly situated non-Hispanic white males. Figure F-5 shows actual and simulated (“benchmark”) business ownership rates for non-Hispanic white women construction workers in Wisconsin. Again, Keen Independent performed those simulations for only those groups where race/ethnicity or gender was a statistically significant predictor of business ownership (i.e., women).

Figure F-5.  
Comparison of actual business ownership rates to simulated rates  
for Wisconsin construction workers, 2008-2012

Group	Self-employment rate		Disparity index (100 = parity)
	Actual	Benchmark	
Non-Hispanic white female	18.0%	28.6%	63

Note: As the benchmark figure can only be estimated for records with an observed (rather than imputed) dependent variable, comparison is made with only this subset of the sample. For this reason, actual self-employment rates may differ slightly from those in Figure F-1.

Source: Keen Independent Research from statistical models of 2008-2012 ACS data. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Non-Hispanic white women construction workers (disparity index of 63) owned construction businesses at rates that were slightly less than two-thirds of what would be expected based on the simulated business ownership rates of similarly-situated non-Hispanic white male construction workers.

### C. Summary

Disparities in business ownership were present in the Wisconsin construction industry:

- In both 2000 and 2008 through 2012, business ownership rates for minorities were lower than that of non-Hispanic whites.
- After statistically controlling for a number of race- and gender-neutral factors affecting business ownership, substantially fewer Hispanic Americans and African Americans in Dane County owned firms than what would be expected if they owned businesses at the same rate as similarly-situated non-Hispanic whites in 2000. Those disparities were not found in the 2008 through 2012 ACS data.
- In 2000 and in 2008 through 2012, women working in the local construction industry had substantially lower rates of business ownership than men. After controlling for a number of race- and gender-neutral factors using 2000 Census data and 2008 through 2012 ACS data, disparities persisted in business ownership rates for women.

## APPENDIX G.

### Access to Capital for Business Formation and Success

Access to capital is one factor that researchers have examined when studying business formation and success. If race- or gender-based discrimination exists in capital markets, minorities and women may have difficulty acquiring the capital necessary to start, operate, or expand businesses.<sup>1, 2</sup> Researchers have also found that the amount of start-up capital can affect long-term business success, and, on average, minority- and women-owned businesses appear to have less start-up capital than majority-owned businesses and male-owned businesses.<sup>3</sup> For example:

- In 2007, 30 percent of non-Hispanic white male-owned businesses that responded to a national U.S. Census Bureau survey indicated that they had start-up capital of \$25,000 or more;<sup>4</sup>
- Only 17 percent of African American-owned businesses indicated a comparable amount of start-up capital;
- Disparities in startup capital were identified for every other minority group except Asian Americans; and
- Nineteen percent of female-owned businesses reported start-up capital of \$25,000 or more compared with 32 percent of male-owned businesses (not including businesses that were owned equally by men and women).

Similar research using longitudinal data from 2004 through 2006 found African American-owned firms received significantly lower levels of external startup capital, after controlling for owner and business characteristics, and relied more on owner equity funding. This finding persisted in subsequent years of business operation.<sup>5</sup>

Race- or gender-based discrimination in start-up capital can have long-term consequences, as can discrimination in access to business loans after businesses have already been formed.<sup>6</sup>

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<sup>1</sup> For example, see: Mitchell, Karlyn and Douglas K. Pearce. 2005. "Availability of Financing to Small Firms Using the Survey of Small Business Finances." U.S. Small Business Administration, Office of Advocacy. 57.

<sup>2</sup> Fairlie, Robert W. and Alicia M. Robb. 2010. *Race and Entrepreneurial Success*. Cambridge: MIT Press.

<sup>3</sup> *Ibid.*

<sup>4</sup> Business owners were asked, "What was the total amount of capital used to start or acquire this business? (Capital includes savings, other assets, and borrowed funds of owner(s))." From U.S. Census Bureau, Statistics for All U.S. Firms by Total Amount of Capital Used to Start or Acquire the Business by Industry, Gender, Ethnicity, Race, and Veteran Status for the U.S.: 2007 Survey of Business Owners  
[http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=SBO\\_2007\\_00CSCB16&prodType=table](http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=SBO_2007_00CSCB16&prodType=table).

<sup>5</sup> Robb, Alicia, Fairlie, Robert w. and Robinson, David T. 2009. "Capital Injections among New Black and White Business Ventures: Evidence from the Kauffman Firm Survey." Working Paper. Federal Reserve Bank of Cleveland.

<sup>6</sup> Fairlie, Robert W. and Alicia M. Robb. 2010. *Race and Entrepreneurial Success*. Cambridge: MIT Press.



Appendix G presents information about homeownership and mortgage lending as home equity can be an important source of capital to start and expand businesses. Appendix G also presents information about business loans, assessing whether minorities and females experience any difficulties acquiring business capital.

## **A. Homeownership and Mortgage Lending**

Keen Independent analyzed homeownership and the mortgage lending industry to explore differences across different racial/ethnic and gender groups that may lead to disparities in access to capital.

**Homeownership.** Wealth created through homeownership can be an important source of capital to start or expand a business.<sup>7</sup> In sum:

- A home is a tangible asset that provides borrowing power;<sup>8</sup>
- Wealth that accrues from housing equity and tax savings from homeownership contributes to capital formation;<sup>9</sup>
- Next to business loans, mortgage loans have traditionally been the second largest loan type for small businesses;<sup>10</sup> and
- Homeownership is associated with an estimated 30 percent reduction in the probability of loan denial for small businesses.<sup>11</sup>

Any barriers to homeownership and home equity growth for minorities or women can affect business opportunities by constraining their available funding. Similarly, any barriers to accessing home equity through home mortgages can also affect available capital for new or expanding businesses. Recent research confirms the importance of homeownership on the likelihood of starting a business, even when examined separately by recent work history (independently examining workers that recently experienced a job loss and those that did not). A strong relationship exists between increases in home equity and entry into self employment for both groups.<sup>12</sup> Keen Independent analyzed homeownership rates and home values before considering loan denial and subprime lending.

It is important to note that the Great Recession depressed homeownership rates, reduced home values and equity in homes, and changed the mortgage finance market. Nationally and in Wisconsin, lower (or negative) equity in a home and tighter lending standards during the Great Recession may

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<sup>7</sup> The housing and mortgage crisis beginning in late 2006 has substantially impacted the ability of small businesses to secure loans through home equity. Later in this appendix, Keen Independent discusses the consequences to small businesses and MBE/WBEs.

<sup>8</sup> Nevin, Allen. 2006. "Homeownership in California: A CBIA Economic Treatise." *California Building Industry Association*. 2.

<sup>9</sup> Jackman, Mary R. and Robert W. Jackman 1980. "Racial Inequalities in Home Ownership." *Social Forces*. 58. 1221-1234.

<sup>10</sup> Berger, Allen N. and Gregory F. Udell. 1998. "The Economics of Small Business Finance: The Roles of Private Equity and Debt Markets in the Financial Growth Cycle." *Journal of Banking and Finance*. 22.

<sup>11</sup> Cavalluzzo, Ken and John Wolken. 2005. "Small Business Loan Turndowns, Personal Wealth and Discrimination." *Journal of Business*. 78:2153-2178.

<sup>12</sup> Fairlie, Robert W. and Harry A. Krashinsky. 2012. "Liquidity Constraints, Household Wealth and Entrepreneurship Revisited." *Review of Income and Wealth*. 58(2).

have limited home equity as a source of capital for many existing or potential business owners. Therefore, the following examination of homeownership and mortgage lending in Wisconsin considers conditions before and after the start of the Great Recession in 2007.

**Homeownership rates.** Many studies have documented past discrimination in the national housing market. The United States has a history of restrictive real estate covenants and property laws that affect the ownership rights of minorities and women.<sup>13</sup> For example, in the past, a woman’s participation in homeownership was secondary to that of her husband and parents.<sup>14</sup>

Keen Independent used 2000 Census and 2008-2012 American Community Survey (ACS) data to examine homeownership rates in Dane County and in the United States. Figure G-1 presents homeownership rates for minority groups and non-Hispanic whites.

**Figure G-1.  
Homeownership  
rates, 2000 and  
2008-2012**

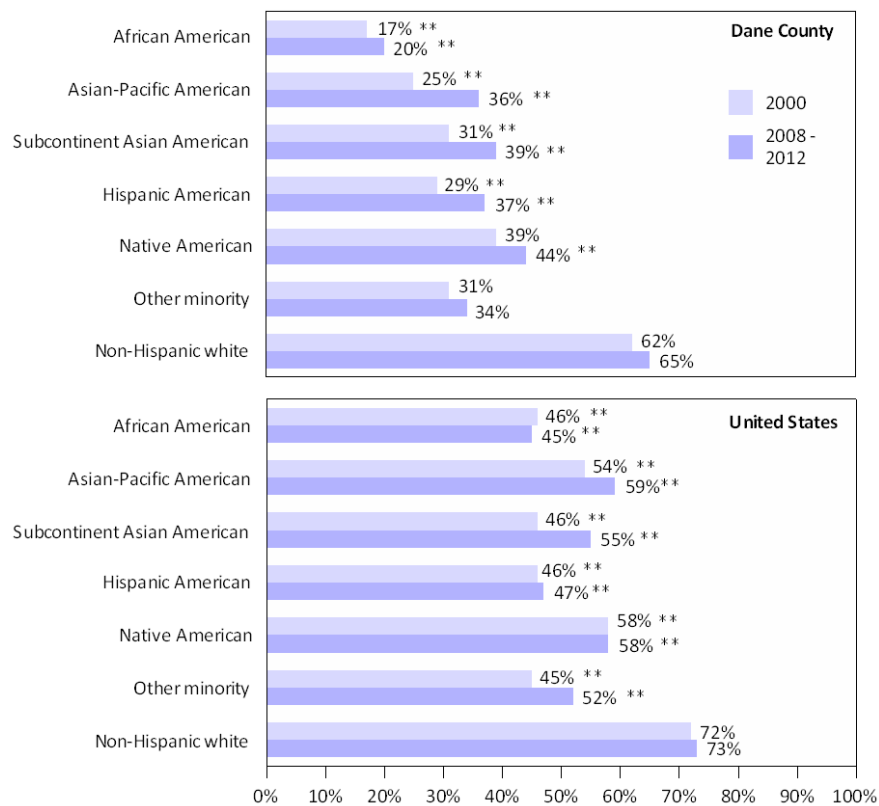
Note:

The sample universe is all households.

\*, \*\* Denote that the difference in proportions from non-Hispanic white for the given year is statistically significant at the 90% or 95% confidence level, respectively.

Source:

Keen Independent Research from 2000 U.S. Census and 2008-2012 ACS data. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.



As shown in Figure G-1, 62 percent of non-Hispanic white households owned homes in Dane County in 2000. Homeownership rates were much lower for African Americans (17%), Asian-Pacific Americans (25%), Subcontinent Asian Americans (31%), and Hispanic Americans (29%). The homeownership rates in 2000 for Native Americans (39%) and Other minorities (31%) were also

<sup>13</sup> Ladd, Helen F. 1982. “Equal Credit Opportunity: Women and Mortgage Credit.” *The American Economic Review*. 72:166-170.

<sup>14</sup> Card, Emily. 1980. “Women, Housing Access, and Mortgage Credit.” *Signs*. 5:215-219.

lower than that of non-Hispanic whites. Disparities in homeownership rates between racial/ethnic minorities and non-minorities were also apparent in 2008 through 2012:<sup>15</sup>

- Approximately 20 percent of African American households in Dane County owned homes in 2008 through 2012, compared to 65 percent of non-Hispanic white households;
- About 37 percent of Hispanic American households owned homes in 2008 through 2012;
- The homeownership rates in 2008 through 2012 for Subcontinent Asian Americans and Asian-Pacific Americans were 39 percent and 36 percent, respectively; and
- Native American households owned homes at a rate of 44 percent.

In general, rates of homeownership were lower in Dane County than in the nation as a whole.

Lower rates of homeownership may reflect lower incomes for minorities. That relationship may be self-reinforcing, as low wealth puts individuals at a disadvantage in becoming homeowners, which has historically been a path to building wealth. An older study found that the probability of homeownership is considerably lower for African Americans than it is for comparable non-Hispanic whites throughout the United States.<sup>16</sup> Recent research shows that while African Americans narrowed the homeownership gap in the 90s, the first half of the following decade brought little change and the second half of the decade brought significant losses, resulting in a widening of the gap between African Americans and non-Hispanic whites.<sup>17</sup>

**Home values.** Research has shown homeownership and home values to be direct determinants of available capital to form or expand businesses.<sup>18</sup> Using 2000 Census and 2008 through 2012 ACS data, Keen Independent compared median home values by racial/ethnic group.

Figure G-2 presents results for Dane County and the United States in 2000. In 2000, the median home value of homes owned by non-Hispanic whites in Dane County was approximately \$147,000, substantially greater than the median value of homes owned by African Americans (\$116,000), Hispanic Americans (\$117,000) and Native Americans (\$129,000). The median home values for Asian-Pacific Americans (\$149,000) and Subcontinent Asian Americans (\$145,000) were similar to that of non-Hispanic whites.

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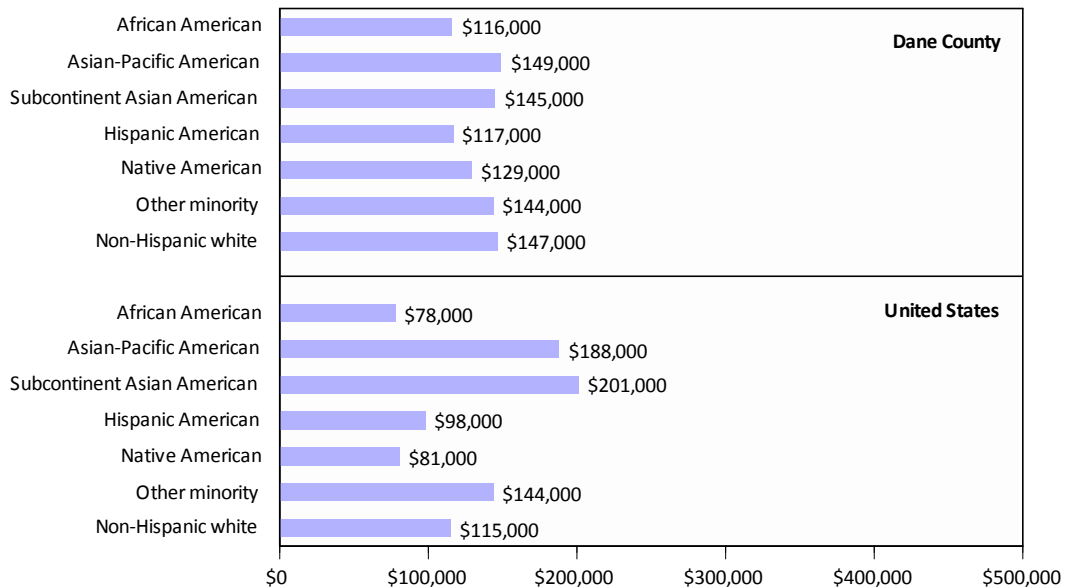
<sup>15</sup> Although not presented in this report, the study team also examined homeownership rates for heads of households working in the construction industry. Each minority group in the construction industry had a lower rate of home ownership than non-Hispanic whites in Dane County.

<sup>16</sup> Jackman. 1980. "Racial Inequalities in Home Ownership."

<sup>17</sup> Rosebaum, E. 2012. "Home Ownership's Wild Ride, 2001-2011." U.S. 2010 Project, Census Brief. New York: Russell Sage Foundation.

<sup>18</sup> Fairlie, Robert W. and Harry A. Krashinsky. 2006. "Liquidity Constraints, Household Wealth, and Entrepreneurship Revisited." IZA Discussion Paper. No. 2201.

Figure G-2.  
Median home values, 2000

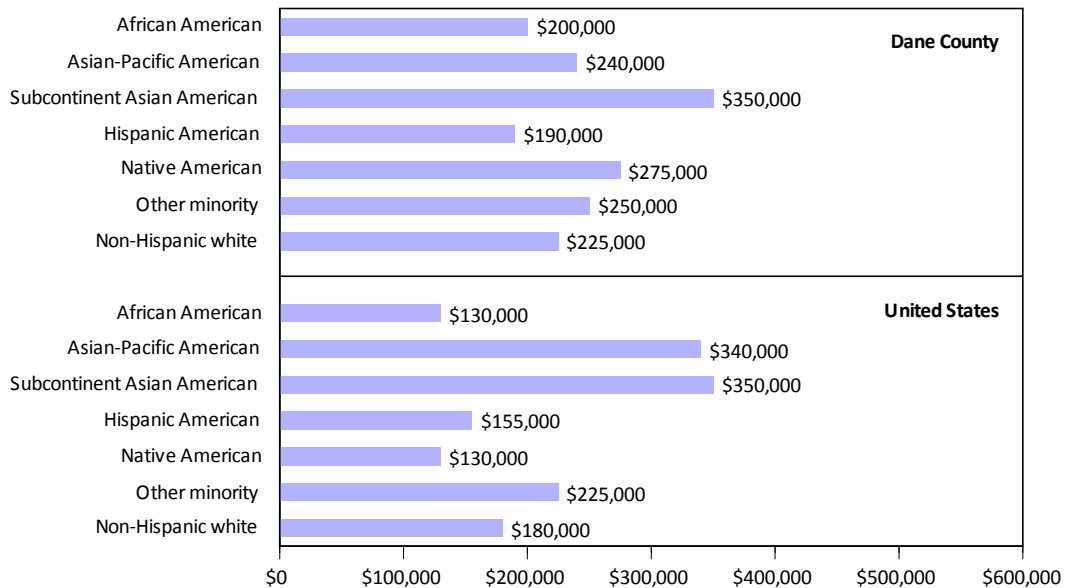


Note: The sample universe is all owner-occupied housing units.

Source: Keen Independent Research from 2000 U.S. Census data. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Figure G-3 presents median home values by racial/ethnic groups in Dane County and the United States based on 2008-2012 ACS data. Similar to 2000 data, African Americans (\$200,000) and Hispanic Americans (\$190,000) exhibited lower median home values than non-Hispanic whites (\$225,000) in Dane County. Median home values for Asian-Pacific Americans (\$240,000), Subcontinent Asian Americans (\$350,000), Native Americans (\$275,000), and Other minorities (\$250,000) were higher than non-Hispanic whites in Dane County. Similar trends were evident in the United States as a whole, except for Native Americans, who had lower median home values than non-Hispanic whites.

Figure G-3.  
Median home values, 2008-2012



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

Source: Keen Independent Research from 2008-2012 American Community Survey data. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

**Mortgage lending.** Minorities may be denied opportunities to own homes, to purchase more expensive homes, or to access equity in their homes if they are discriminated against when applying for home mortgages. Therefore, any such discrimination could have lasting effects. In a recent lawsuit, Bank of America paid \$335 million to settle allegations that its Countrywide Financial unit discriminated against African American and Hispanic American borrowers between 2004 and 2008. The case was brought by the Securities and Exchange Commission after finding evidence of “statistically significant disparities by race and ethnicity” among Countrywide Financial customers.<sup>19</sup> A 2012 study extrapolated that African American borrowers were offered high-cost loans at a rate exceeding that of identically situated Non-Hispanic whites. There was also evidence indicative of structural discrimination against borrowers categorized as Hispanic and, to a lesser extent, for women.<sup>20</sup> Further, minority-owned businesses experience higher loan denial probabilities and pay higher interest rates than white-owned businesses even after controlling for differences in creditworthiness.<sup>21</sup>

Keen Independent explored market conditions for mortgage lending in Dane County and in the nation as a whole. The best available source of information concerning mortgage lending comes from Home Mortgage Disclosure Act (HMDA) data, which contain information on mortgage loan applications that financial institutions, savings banks, credit unions, and some mortgage companies

<sup>19</sup> Savage, Charlie. December 22, 2011. “\$335 Million Settlement on Countywide Lending Bias.” *NYTimes.com*. Available online at <http://www.nytimes.com/2011/12/22/business/us-settlement-reported-on-countrywide-lending.html>.

<sup>20</sup> Maya Sen. 2012. “Quantifying Discrimination: Exploring the Role of Race and Gender and the Awarding of Subprime Mortgage Loans.” Available at SSRN: <http://ssrn.com/abstract=1593183>.

<sup>21</sup> Robb, Alicia. 2012. “Access to Capital among Young Firms, Minority-owned Firms, Women-owned firms and High-Tech Firms.” Small Business Administration.

receive.<sup>22</sup> Those data include information about the location, dollar amount, and types of loans made, as well as race/ethnicity, income, and credit characteristics of all loan applicants. The data are available for home purchases, loan refinances, and home improvement loans.

Keen Independent examined HMDA statistics provided by the Federal Financial Institutions Examination Council (FFIEC) for 2006, 2009, and 2012. Although 2012 provides the most current representation of the home mortgage market, the 2006 data represent market conditions from before the recent mortgage crisis. The 2006 HMDA data include information about 33,000 loan applications in Dane County that about 400 lenders processed. The 2012 HMDA data for the Dane County include information about 45,000 loan applications processed by about 400 lenders.

**Mortgage denials.** Keen Independent examined mortgage denial rates on conventional loan applications made by high-income households. Conventional loans are loans that are not insured by a government program. High-income applicants are those households with 120 percent or more of the U.S. Department of Housing and Urban Development (HUD) area median family income.<sup>23</sup> Loan denial rates are calculated as the percentage of mortgage loan applications that were denied, excluding applications that the potential borrowers terminated and applications that were closed due to incompleteness.<sup>24</sup>

Figure G-4 presents loan denial results for high-income households in Dane County and the United States in 2006, 2009, and 2012. Data for 2006 show higher denial rates for all groups in Dane County compared with 2012, except for Asian Americans. In 2006, African American, Hispanic American, Native American, and Native Hawaiian and other Pacific Islander high-income applicants all exhibited higher loan denial rates compared with non-Hispanic white applicants. In 2012, loan denial rates remained high for Asian and Hispanic Americans:

- Loan denial rates in 2012 were higher for Asian Americans (8%) and Hispanic Americans (7%) compared with non-Hispanic whites (5%).
- African Americans (4%), Native Americans (0%), and Native Hawaiians and Pacific Islanders (0%) experienced lower rates of denial than non-Hispanic whites.

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<sup>22</sup> Financial institutions were required to report 2012 HMDA data if they had assets of more than \$41 million (\$39 million for 2009 and \$35 million for 2006); have a branch office in a metropolitan area; and originated at least one home purchase or refinance loan in the reporting calendar year. Mortgage companies are required to report HMDA if they are for-profit institutions; had home purchase loan originations exceeding 10 percent of all loan obligations in the past year; are located in a Metropolitan Statistical Area (MSA: or originated five or more home purchase loans in a particular MSA); and either had more than \$10 million in assets or made at least 100 home purchase or refinance loans in the calendar year.

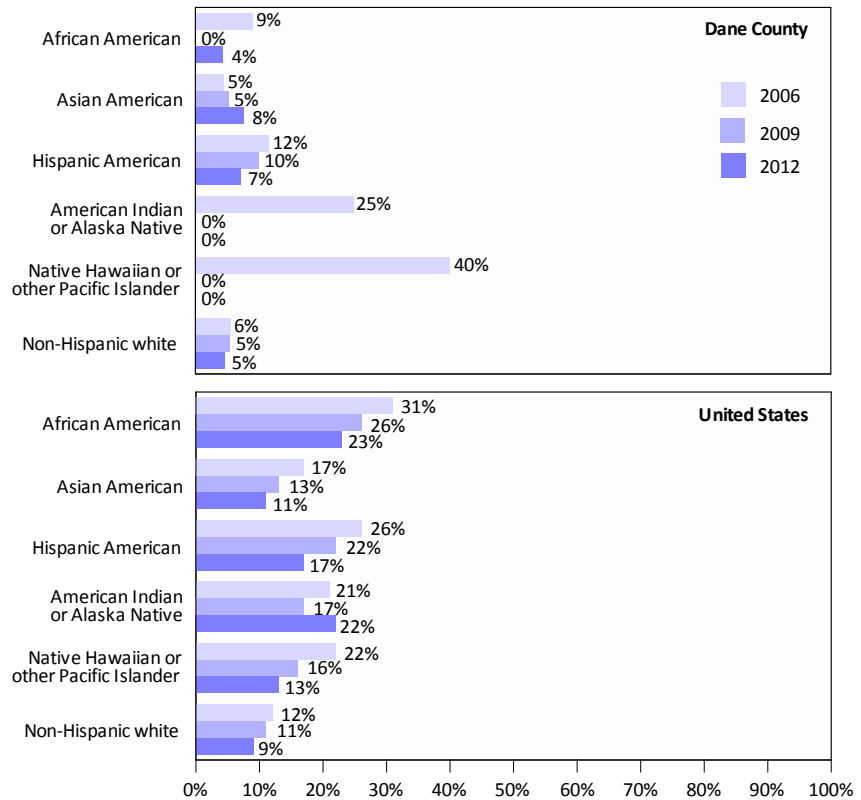
<sup>23</sup> The median family income in 2012 was about \$65,000 for the United States as a whole and \$83,000 for Dane County (in 2012 dollars). Median family income for 2006 was \$68,000 for the United States as a whole and \$72,000 for Dane County (in 2012 dollars). Source: U.S. Department of Housing and Urban Development (HUD) at [www.huduser.org](http://www.huduser.org).

<sup>24</sup> For this analysis, loan applications are considered to be applications for which a specific property was identified, thus excluding preapproval requests.

Figure G-4.  
Denial rates of  
conventional  
purchase loans to  
high-income  
households,  
2006, 2009, and 2012

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

Source:  
FFIEC HMDA data 2006,  
2009 and 2012.



Additional research. Several national studies have examined disparities in loan denial rates and loan amounts for minorities in the presence of other influences. For example:

- A study by the Federal Reserve Bank of Boston is one of the most cited studies of mortgage lending discrimination.<sup>25</sup> It was conducted using the most comprehensive set of credit characteristics ever assembled for a study on mortgage discrimination.<sup>26</sup> The study provided persuasive evidence that lenders in the Boston area discriminated against minorities in 1990.<sup>27</sup>
- Analyses based on the Federal Reserve Board’s 1983 Survey of Consumer Finances and the 1980 Census of Population and Housing data revealed that minority households were one-third as likely to receive conventional loans as non-Hispanic white households after taking into account financial and demographic variables.<sup>28</sup>

<sup>25</sup> Munnell, Alicia H., Geoffrey Tootell, Lynn Browne and James McEneaney. 1996. “Mortgage Lending in Boston: Interpreting HMDA Data.” *The American Economic Review*. 86: 25-53.

<sup>26</sup> Ladd, Helen F. 1998. “Evidence on Discrimination in Mortgage Lending.” *The Journal of Economic Perspectives*. 12:41-62.

<sup>27</sup> Yinger, John. 1995. *Closed Doors, Opportunities Lost: The Continuing Costs of Housing Discrimination*. New York: Russell Sage Foundation, 71.

<sup>28</sup> Canner, Glenn B., Stuart A. Gabriel and J. Michael Woolley. 1991. “Race, Default Risk and Mortgage Lending: A Study of the FHA and Conventional Loan Markets.” *Southern Economic Journal*. 58:249-262.

- Findings from a Midwest study indicate a relationship between race and both the number and size of mortgage loans. Data matched on socioeconomic characteristics revealed that African American borrowers across 13 census tracts received significantly fewer loans and of smaller sizes compared to their white counterparts.<sup>29</sup>

However, other studies have found that differences in preferences for Federal Housing Administration (FHA) loans — mortgage loans that the government insures — versus conventional loans among racial and ethnic groups may partially explain disparities found in conventional loan approvals between minorities and non-minorities.<sup>30</sup> Several studies have found that, historically, minority borrowers are far more likely to seek FHA loans than comparable non-Hispanic white borrowers across different income and wealth levels. The insurance on FHA loans protects the lender, but the borrower can be disadvantaged by higher borrowing costs.<sup>31</sup>

**Subprime lending.** Loan denial is only one way minorities might be discriminated against in the home mortgage market. Mortgage lending discrimination can also occur through higher fees and interest rates. Subprime lending provides a unique environment for such types of discrimination through fees associated with various loan types.

Until the Great Recession, one of the fastest growing segments of the home mortgage industry was subprime lending. From 1994 through 2003, subprime mortgage activity grew by 25 percent per year and accounted for \$330 billion of U.S. mortgages in 2003, up from \$35 billion a decade earlier. In 2006, subprime loans represented about one-fifth of all mortgages in the United States.<sup>32</sup> With higher interest rates than prime loans, subprime loans were historically marketed to customers with blemished or limited credit histories who would not typically qualify for prime loans. Over time, subprime loans also became available to homeowners who did not want to make a down payment; did not want to provide proof of income and assets; or wanted to purchase a home with a cost above that for which they would qualify from a prime lender.<sup>33</sup> Because of higher interest rates and additional costs, subprime loans affected homeowners' ability to grow home equity and increased their risks of foreclosure.

Although there is no standard definition of a subprime loan, there are several commonly-used approaches to examining rates of subprime lending. Keen Independent used a “rate-spread method” — in which subprime loans are identified as those loans with substantially above-average interest rates — to measure rates of subprime lending in 2006, 2009, and 2012.<sup>34</sup> Because lending patterns and borrower motivations differ depending on the type of loan being sought, the study team

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<sup>29</sup> Leahy, Peter J. 1985. “Are Racial Factors Important for the Allocation of Mortgage Money?: A Quasi-Experimental Approach to an Aspect of Discrimination.” *American Journal of Economics and Sociology*. 44:185-196.

<sup>30</sup> Canner. 1991. “Race, Default Risk and Mortgage Lending: A Study of the FHA and Conventional Loan Markets.”

<sup>31</sup> Yinger. 1995. *Closed Doors, Opportunities Lost: The Continuing Costs of Housing Discrimination*. 80.

<sup>32</sup> Avery, Brevoort, and Canner, “The 2006 HMDA Data.” *Federal Reserve Bulletin*, December 2007, pp. A73-A109.

<sup>33</sup> Gerardi, Shapiro, and P. Willen. 2008. “Subprime Outcomes: Risky Mortgages, Homeownership Experiences, and Foreclosure.” *Federal Reserve Bank of Boston*.

<sup>34</sup> Prior to October 2009, first lien loans were identified as subprime if they had an annual percentage rate (APR) that was 3.0 percentage points or greater than the federal treasury security rate of like maturity. As of October 2009, rate spreads in HMDA data were calculated as the difference between APR and Average Prime Offer Rate, with subprime loans defined as 1.5 percentage points of the rate spread or more. KIR identified subprime loans according to those measures in the corresponding time periods.



separately considered home purchase loans and refinance loans. Patterns in subprime lending did not differ substantially between the different types of loans.

Figure G-5 shows the percent of conventional home purchase loans that were subprime in Dane County and the United States, based on 2006, 2009, and 2012 HMDA data. The rates of subprime lending in 2009 and 2012 were dramatically lower overall than in 2006 due to the collapse of the mortgage lending market in the late 2000s.

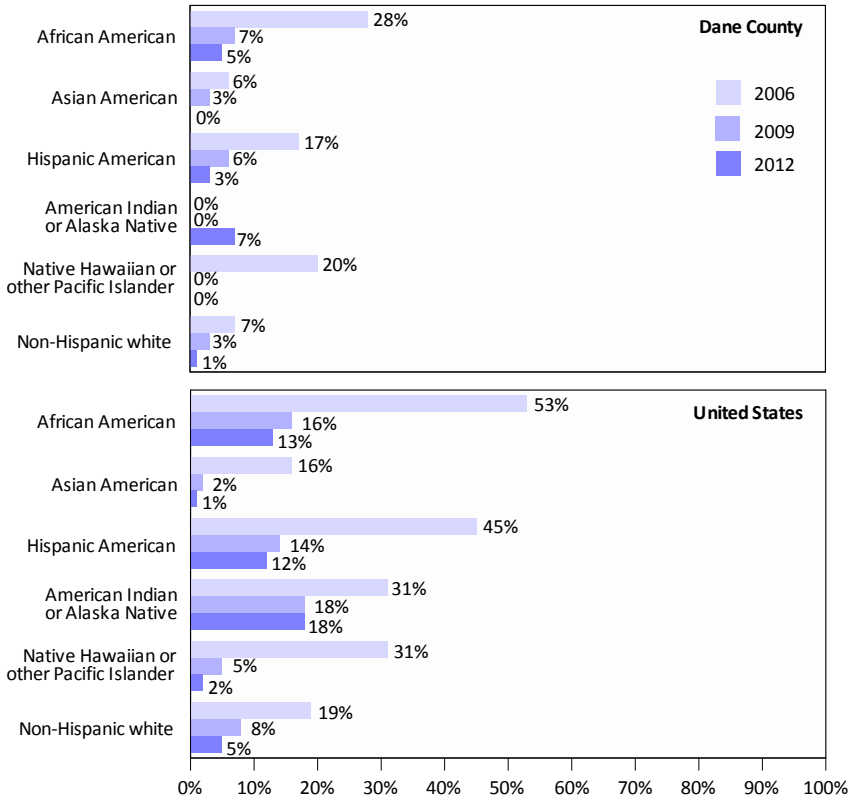
In Dane County, African American and Hispanic American borrowers were more likely to receive subprime home purchase loans than non-Hispanic whites in all three years (2006, 2009, and 2012). Native American borrowers were also more likely than non-Hispanic whites to receive subprime loans in 2012, and Native Hawaiian or other Pacific Islanders were more likely than non-Hispanic whites to receive subprime loans in 2006.

Data for 2006 indicate substantial differences in the percentage of subprime home loans issued to minority groups relative to non-Hispanic whites, with the exception of Asian Americans:

- About 7 percent of home purchase loans issued to non-Hispanic whites were subprime.
- Twenty-eight percent of home purchase loans that were issued to African Americans were subprime.
- Seventeen percent of home purchase loans that were issued to Hispanic Americans were subprime.
- One-fifth (20%) of home purchase loans issued to Native Hawaiians or other Pacific Islanders were subprime.

Figure G-5.  
Percent of  
conventional home  
purchase loans that  
were subprime,  
2006, 2009, and 2012

Source:  
FFIEC HMDA data 2006,  
2009 and 2012.



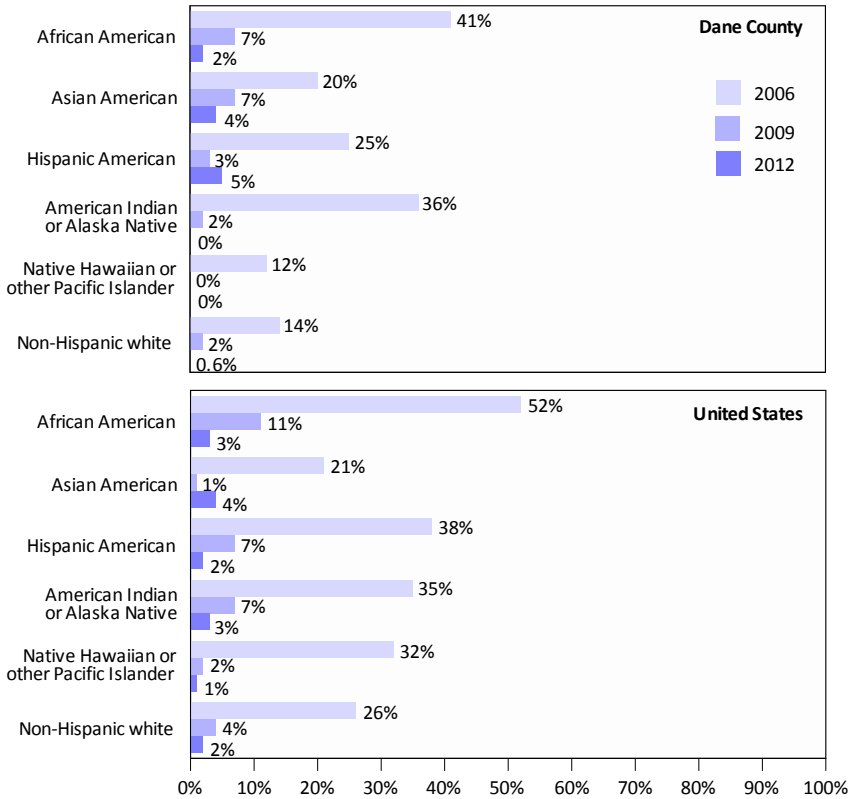
The overall volume of subprime loans in Dane County dropped substantially between 2006 and 2012 and racial/ethnic differences in subprime lending lessened:

- In 2012, 1 percent of conventional home purchase loans issued to non-Hispanic white borrowers were subprime.
- About 5 percent of home purchase loans issued to African Americans were subprime.
- About 3 percent of home purchase loans issued to Hispanic Americans were subprime.
- About 7 percent of home purchase loans issued to Native Americans were subprime.

Figure G-6 presents the percentage of home refinance loans that were subprime in Dane County and the United States. As with home purchase loans, the rates of subprime lending in 2009 and 2012 were dramatically lower for refinance loans than in 2006 due to the collapse of the mortgage lending market.

**Figure G-6.**  
Percent of conventional refinance loans that were subprime, 2006, 2009, and 2012

Source:  
FFIEC HMDA data 2006, 2009 and 2012.



In Dane County, subprime trends for refinance loans were similar to subprime trends for home purchase loans. Compared to non-Hispanic white borrowers, African Americans, Asian Americans, Hispanic Americans, and Native Americans were more likely to receive subprime refinance loans in 2006; Hispanic Americans were more likely to receive subprime refinance loans in 2009; and African Americans and Hispanic Americans were more likely to receive subprime refinance loans in 2012.

In 2006, about 41 percent of refinance loans issued to African Americans, 20 percent of refinance loans issued to Asian Americans, 25 percent of refinance loans issued to Hispanic Americans, and 36 percent of refinance loans issued to Native Americans were subprime compared to only 14 percent of refinance loans issued to non-Hispanic whites.

By 2012, subprime loans made up a much smaller proportion of the total conventional home refinance loans issued in that year (in Dane County and in the United States). The decrease in subprime refinance loans was evident for all racial/ethnic groups but disparities for some minority groups compared to non-Hispanic whites persisted.

- Approximately 2 percent of conventional home refinance loans issued to African American were subprime, compared to 0.6 percent for non-Hispanic white borrowers.
- About 5 percent of home refinance loans issued to Hispanic Americans were subprime — the highest of any racial/ethnic group included in the analysis.
- Asian American (0.4%), Native American (0%), and Native Hawaiian and Other Pacific Islander (0%) borrowers took out subprime home refinance loans at rates lower than the rate for non-Hispanic white borrowers.

**Additional research.** Some evidence suggests that lenders sought out and offered subprime loans to individuals who often would not be able to pay off the loan, a form of “predatory lending.”<sup>35</sup> Furthermore, some research has found that many recipients of subprime loans could have qualified for prime loans.<sup>36</sup> Previous studies of subprime lending suggest that predatory lenders have disproportionately targeted minorities. A 2001 HUD study using 1998 HMDA data found that subprime loans were disproportionately concentrated in African American neighborhoods compared with white neighborhoods, even after accounting for income.<sup>37</sup> For example, borrowers in higher-income African American neighborhoods were six times more likely to refinance with a subprime loan than borrowers in higher-income white neighborhoods. More recent analyses using 2006 HMDA data found that African American borrowers, going to the same lender and displaying similar financial characteristics, were significantly more likely to receive high-cost loans (those with an interest rate more than 3 percent higher than comparable U.S. Treasury instruments) compared to non-Hispanic whites.<sup>38</sup>

**Implications of the recent mortgage lending crisis.** The turmoil in the housing market since late 2006 has been far-reaching, resulting in the loss of home equity, decreased demand for housing, and increased rates of foreclosure.<sup>39</sup> Much of the blame has been placed on risky practices in the mortgage industry including substantial increases in subprime lending. As discussed above, the number of subprime mortgages increased at an extraordinary rate between the mid-1990s and mid-2000s. Those high-cost, high-interest loans increased from 8 percent of originations in 2003 to 20 percent in 2005 and 2006.<sup>40</sup> The preponderance of subprime lending is important, because

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<sup>35</sup> Department of Housing and Urban Development (HUD) and the Department of Treasury. 2001. HUD-Treasury National Predatory Lending Task Force Report. *HUD*; Carr, J. and L. Kolluri. 2001. *Predatory Lending: An Overview*. *Fannie Mae Foundation*; and California Reinvestment Coalition, Community Reinvestment Association of North Carolina, Empire Justice Center, Massachusetts Affordable Housing Alliance, Neighborhood Economic Development Advocacy Project, Ohio Fair Lending Coalition and Woodstock Institute, 2008. “Paying More for the American Dream.”

<sup>36</sup> Freddie Mac. 1996, September. “Automated Underwriting: Making Mortgage Lending Simpler and Fairer for America’s Families.” *Freddie Mac*. (accessed February 5, 2007); and Lanzerotti. 2006. “Homeownership at High Cost: Foreclosure Risk and High Cost Loans in California.” *Federal Reserve Bank of San Francisco*.

<sup>37</sup> Department of Housing and Urban Development (HUD) and the Department of Treasury. 2001.

<sup>38</sup> Maya Sen. 2012. “Quantifying Discrimination: Exploring the Role of Race and Gender and the Awarding of Subprime Mortgage Loans.” Available at SSRN: <http://ssrn.com/abstract=1593183>.

<sup>39</sup> Joint Center for Housing Studies of Harvard University. 2008. “The State of the Nation’s Housing.”

<sup>40</sup> *Ibid.*

households repaying subprime loans have a higher likelihood of delinquency or foreclosure. A 2008 study released from the Federal Reserve Bank of Boston found that, “homeownerships that begin with a subprime purchase mortgage end up in foreclosure almost 20 percent of the time, or more than six times as often as experiences that begin with prime purchase mortgages.”<sup>41</sup>

Such problems substantially impact the ability of homeowners to secure capital through home mortgages to start or expand small businesses. That issue has been highlighted in statements made by members of the Board of Governors of the Federal Reserve System to the U.S. Senate and U.S. House of Representatives:

- On April 16, 2008, Frederic Mishkin informed the U.S. Senate Committee on Small Business and Entrepreneurship that “one of the most important concerns about the future prospects for small business access to credit is that many small businesses use real estate assets to secure their loans. Looking forward, continuing declines in the value of their real estate assets clearly have the potential to substantially affect the ability of those small businesses to borrow. Indeed, anecdotal stories to this effect have already appeared in the press.”<sup>42</sup>
- On November 20, 2008, Randall Kroszner told the U.S. House of Representatives Committee on Small Business that “small business and household finances are, in practice, very closely intertwined. [T]he most recent SSBF indicated that about 15 percent of the total value of small business loans in 2003 was collateralized by ‘personal’ real estate. Because the condition of household balance sheets can be relevant to the ability of some small businesses to obtain credit, the fact that declining house prices have weakened household balance-sheet positions suggests that the housing market crisis has likely had an adverse impact on the volume and price of credit that small businesses are able to raise over and above the effects of the broader credit market turmoil.”<sup>43</sup>

Former Federal Reserve Chairman Ben Bernanke recognized the reality of those concerns in a speech titled “Restoring the Flow of Credit to Small Businesses” on July 12, 2010.<sup>44</sup> Bernanke indicated that small businesses have had difficulty accessing credit and pointed to the declining value of real estate as one of the primary obstacles.

Furthermore, the National Federation of Independent Business (NFIB) conducted a national survey of 751 small businesses in late-2009 to investigate how the recession impacted access to capital.<sup>45,46</sup> NFIB concluded that “falling real estate values (residential and commercial) severely limit small

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<sup>41</sup> Gerardi, Shapiro, and P. Willen. 2008. “Subprime Outcomes: Risky Mortgages, Homeownership Experiences, and Foreclosure. *Federal Reserve Bank of Boston*.

<sup>42</sup> Mishkin, Frederic. 2008. “Statement of Frederic S. Mishkin, Member, Board of Governors of the Federal Reserve System before the Committee on Small Business and Entrepreneurship, U.S. Senate on April 16.”

<sup>43</sup> Kroszner, Randall. 2008. “Effects of the financial crisis on small business.” *Testimony before the Committee on Small Business, U.S. House of Representative on November 20*.

<sup>44</sup> Bernanke, Ben. 2010. Restoring the Flow of Credit to Small Businesses. *Presented at the Federal Reserve Meeting Series: Addressing the Financing Needs of Small Businesses on July 12*.

<sup>45</sup> The study defined a small business as a business employing no less than one individual in addition to the owner(s) and no more than 250 individuals.

<sup>46</sup> National Federation of Independent Business (NFIB). 2010. Small Business Credit in a Deep Recession.

business owner capacity to borrow and strains currently outstanding credit relationships.” Survey results indicated that 95 percent of small business employers owned real estate and 13 percent held “upside-down” property — that is, property for which the mortgage is worth more than its appraised value.<sup>47</sup>

Another study analyzed the Survey of Consumer Finances to explore racial/ethnic disparities in wealth and how those disparities were impacted by the recession.<sup>48</sup> The study showed that there were substantial wealth disparities between African Americans and whites as well as between Hispanics and whites and that those wealth disparities worsened between 1983 and 2010. High wealth families (the top 20% by net worth) saw their average wealth increase by nearly 120% between 1983 and 2010, while middle-wealth families saw their average wealth go up by only 13%. The lowest wealth families (the bottom 20%) saw their average wealth fall below zero, that is to say that their average debts exceeded their assets. In addition to growing over time, the wealth disparity also grows with age — whites are on a higher accumulation curve than African Americans and Hispanic Americans. The study also reports that the 2007 through 2009 recession exacerbated wealth disparities, particularly for Hispanic Americans. In 2010, Non-Hispanic whites on average had six times the wealth of African Americans and Hispanic Americans. The income gap, by comparison, is much smaller. In 2010, the average income for Non-Hispanic whites was twice that of African Americans and Hispanic Americans.<sup>47</sup>

Opportunities to obtain business capital through home mortgages appear to be limited especially for homeowners with little home equity. Furthermore, the increasing rates of default and foreclosure, especially for homeowners with subprime loans, reflect shrinking access to capital available through such loans. Those consequences are likely to have a disproportionate impact on minorities in terms of both homeownership and the ability to secure capital for business start-up and growth.

**Redlining.** Redlining refers to mortgage lending discrimination against geographic areas associated with high lender risk. Those areas are often racially determined, such as African American or mixed-race neighborhoods.<sup>49</sup> That practice can perpetuate problems in already poor neighborhoods.<sup>50</sup> Most quantitative studies have failed to find strong evidence in support of geographic dimensions of lender decisions. Studies in Columbus, Ohio; Boston, Massachusetts; and Houston, Texas found that racial differences in loan denial had little to do with the racial composition of a neighborhood but rather with the individual characteristics of the borrower.<sup>51</sup> Some studies found that the race of an applicant — but not the racial makeup of the neighborhood — to be an important factor in loan denials.

Studies of redlining have primarily focused on the geographic aspect of lender decisions. However, redlining can also include the practice of restricting credit flows to minority neighborhoods through

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<sup>47</sup> “Upside-down property” is defined as a property for which the mortgage is worth more than the property’s appraised value.

<sup>48</sup> McKernan, Signe-Mary, Caroline Ratcliffe, Eugene Steverle and Sisi Zhang. 2013. “Less Than Equal: Racial Disparities in Wealth Accumulation.” Urban Institute.

<sup>49</sup> Holloway, Steven R. 1998. “Exploring the Neighborhood Contingency of Race Discrimination in Mortgage Lending in Columbus, Ohio.” *Annals of the Association of American Geographers*. 88:252-276.

<sup>50</sup> Ladd, Helen F. 1998. “Evidence on Discrimination in Mortgage Lending.” *The Journal of Economic Perspectives*. 12:41-62.

<sup>51</sup> See Holloway. 1998. “Exploring the Neighborhood Contingency of Race Discrimination in Mortgage Lending in Columbus, Ohio.”; Tootell. 1996. “Redlining in Boston: Do Mortgage Lenders Discriminate Against Neighborhoods?”; and Holmes, Andrew and Paul Horvitz. 1994. “Mortgage Redlining: Race, Risk, and Demand.” *The Journal of Finance*. 49:81-99.

procedures that are not observable in actual loan decisions. Examples include branch placement, advertising, and other pre-application procedures.<sup>52</sup> Such practices can deter minorities from starting businesses. Locations of financial institutions are important to small business start up, because local banking sectors often finance local businesses.<sup>53</sup> Redlining practices deny that resource to minorities.

In September of 2014, the New York attorney general filed a lawsuit against a regional lender in the Buffalo area, accusing it of violating the Fair Housing Act by denying mortgages to African Americans, regardless of credit. The suit claims the bank created a map that defined a “trade area” within which the bank would offer loans and the area deliberately excluded all predominately African American neighborhoods. Similarly, in May of 2014, the City of Providence, Rhode Island, filed suit against Santander bank, accusing it of refusing to offer mortgages in predominately minority neighborhoods; during the same month, Los Angeles filed suit against JPMorgan Chase, accusing it of both traditional redlining and reverse redlining (steering minorities toward subprime loans).<sup>54</sup>

**Steering by real estate agents.** Historically, differences in the types of loans that are issued to minorities have also been attributed to “steering” by real estate agents, who serve as an information filter.<sup>55</sup> Despite the fact that steering has been prohibited by law for many decades, some studies claim that real estate brokers provide different levels of assistance and different information on loans to minorities than they do to non-minorities.<sup>56</sup> Such steering can affect the perception of minority borrowers about the availability of mortgage loans.

**Gender discrimination in mortgage lending.** Comparatively little information is available on gender-based discrimination in mortgage lending markets. Historically, lending practices overtly discriminated against women by requiring information on marital and childbearing status. Perceived risk associated with granting loans to women of childbearing age and unmarried women resulted in “income discounting,” limiting the availability of loans to women.<sup>57</sup>

The Equal Credit Opportunity Act (ECOA) in 1973 suspended such discriminatory lending practices. However, certain barriers affecting women have persisted after 1973 in mortgage lending markets. For example, there is some evidence that lenders have under-appraised properties for female borrowers.<sup>58</sup>

## **B. Access to Business Capital**

Barriers to capital markets can have substantial impacts on small business formation and expansion. Several studies have found evidence that start-up capital is important for business profits, longevity, and other outcomes.

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<sup>52</sup> Yinger, John. 1995. “Closed Doors, Opportunities Lost: The Continuing Costs of Housing Discrimination.” Russell Sage Foundation. New York. 78-79.

<sup>53</sup> Holloway. 1998. “Exploring the Neighborhood Contingency of Race Discrimination in Mortgage Lending in Columbus, Ohio.”

<sup>54</sup> The New York Times, New York Accuses Evans Bank of Redlining. (2014, September 2). Retrieved from [http://nytimes.com/2014/09/02/new-york-set-to-accuse-evans-bank-of-redlining/?\\_php=true&\\_type=blogs&\\_php=true&\\_type=blogs&ref=business&\\_r=1](http://nytimes.com/2014/09/02/new-york-set-to-accuse-evans-bank-of-redlining/?_php=true&_type=blogs&_php=true&_type=blogs&ref=business&_r=1).

<sup>55</sup> Kantor, Amy C. and John D. Nystuen. 1982. “De Facto Redlining a Geographic View.” *Economic Geography*. 4:309-328.

<sup>56</sup> Yinger. 1995. Closed Doors, Opportunities Lost: The Continuing Costs of Housing Discrimination. 78–79.

<sup>57</sup> Card. 1980. “Women, Housing Access, and Mortgage Credit.”

<sup>58</sup> Ladd, Helen F. 1982. “Equal Credit Opportunity: Women and Mortgage Credit.” *The American Economic Review*. 72:166-170.

- The amount of start-up capital is positively associated with small business sales and other outcomes;<sup>59</sup>
- African Americans, Hispanic Americans, and women start their firms with about half the capital that Non-Hispanic whites use;<sup>60</sup>
- Limited access to capital has affected the size of African American-owned businesses;<sup>61, 62</sup> and
- Weak financial capital was identified as a reason that more African American-owned businesses than non-Hispanic white-owned businesses closed over a four-year period.<sup>63</sup>

Bank loans are one of the largest sources of debt capital for small businesses.<sup>64</sup> Discrimination in the application and approval processes of those loans and other credit resources could be detrimental to the success of minority- and women-owned businesses. African Americans and Hispanic American business owners rely disproportionately on owner equity investments and employ less debt from outside sources (banks). As a result they operate with substantially less capital overall (both at startup and in subsequent years) relative to their nonminority counterparts. Women-owned businesses show similar disparities in capital structure by operating with much less capital on average. Previous studies have examined race/ethnicity and gender discrimination in capital markets by evaluating:

- Loan denial rates;
- Loan values;
- Interest rates;
- Business owners' fears that loan applications will be rejected;
- Sources of capital; and
- Relationships between start-up capital and business survival.

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<sup>59</sup> See Fairlie, Robert W. and Harry A. Krashinsky. 2006. "Liquidity Constraints, Household Wealth, and Entrepreneurship Revisited;" and Grown. 1991. "Commercial Bank Lending Practices and the Development of Black-Owned Construction Companies."

<sup>60</sup> Robb, Alicia. 2012. "Access to Capital among Young Firms, Minority-owned Firms, Women-owned Firms and High-Tech Firms." Small Business Administration.

<sup>61</sup> Grown, C. and Bates, T. 1992. "Commercial Bank Lending Practices and the Development of Black-Owned Construction Companies." *Journal of Urban Affairs*, 14: 25–41.

<sup>62</sup> Fairlie, Robert W. and Alicia M. Robb. 2010. *Race and Entrepreneurial Success*. Cambridge: MIT Press.

<sup>63</sup> Grown, C. and Bates, T. 1992. "Commercial Bank Lending Practices and the Development of Black-Owned Construction Companies." *Journal of Urban Affairs*, 14: 25–41.

<sup>64</sup> Data from the 1998 SSBF indicates that 70 percent of loans to small business are from commercial banks. This result is present across all gender, race and ethnic groups with the exception of Black Americans, whose rate of lending from commercial banks is even greater than other minorities. See Blanchard, Lloyd, Bo Zhao and John Yinger. 2005. "Do Credit Market Barriers Exist for Minority and Woman Entrepreneurs." *Center for Policy Research, Syracuse University*.



To examine the role of race/ethnicity and gender in capital markets, the study team analyzed data from the Federal Reserve Board’s 1998 and 2003 Survey of Small Business Finances (SSBF)—the most comprehensive national source of credit characteristics of small businesses (those with fewer than 500 employees). The survey contains information on loan denial and interest rates as well as anecdotal information from businesses. The samples from 1998 and 2003 contain records for 3,521 and 4,240 businesses, respectively. The study team applied sample weights to provide representative estimates.

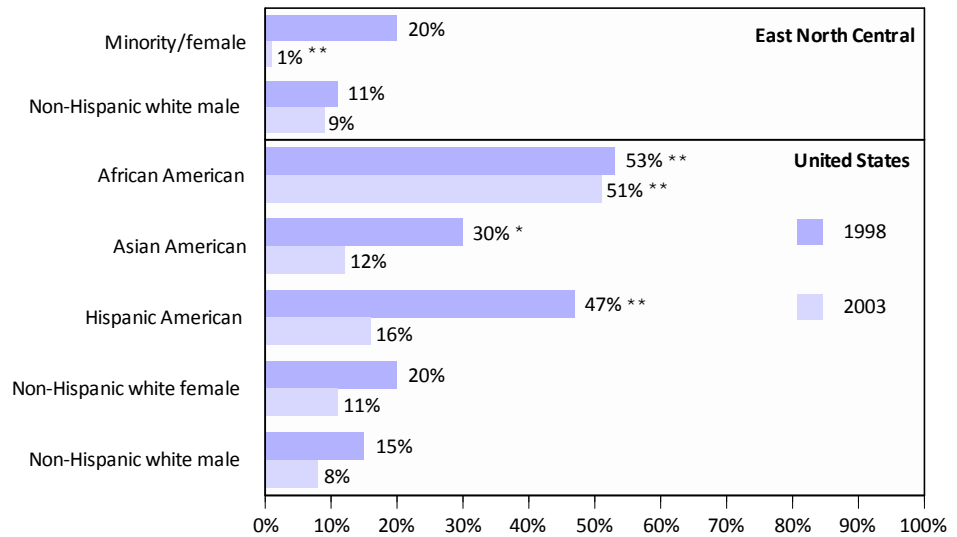
The SSBF records the geographic location of businesses by Census Division not by city, county, or state. The East North Central Census Division (referred to here as the *East North Central region*) contains data for Wisconsin, along with Illinois, Indiana, Ohio, and Michigan. The East North Central region is the level of geographic detail of SSBF data most specific to Dane County, and 2003 is the most recent information available from the SSBF because the survey was discontinued after that year.

**Loan denial rates.** Figure G-7 presents loan denial rates from the 1998 and 2003 SSBFs for the East North Central region and for the United States.<sup>65</sup> National SSBF data for 1998 reveal that African American-, Asian American-, and Hispanic American-owned businesses exhibited loan denial rates considerably higher than that of non-Hispanic white male-owned businesses. In 2003, the loan denial rate for African American-owned businesses (51%) in the United States remained substantially higher than for non-Hispanic white male-owned businesses (8%).

**Figure G-7.**  
Business loan denial rates, 1998 and 2003

Note:  
\*, \*\* Denote that the difference in proportions from non-Hispanic white for the given year is statistically significant at the 90% or 95% confidence level, respectively.

Source:  
Keen Independent Research from 1998 and 2003 Survey of Small Business Finances.



As shown in Figure G-7, about 20 percent of minority- and women-owned businesses in the East North Central region reported being denied loans in 1998, a larger percentage than the 11 percent of non-Hispanic white male-owned businesses that reported being denied loans. According to 2003 SSBF data, a substantially smaller percentage of minority- and female-owned businesses in the East North Central region were denied loans compared to non-Hispanic white male-owned businesses,

<sup>65</sup> The denial rates represent the proportion of business owners whose loan applications over the previous three years were always denied, compared to business owners whose loan applications were always approved or sometimes approved and sometimes denied.

which was inconsistent with national results for that year. (Loan denial statistics on individual minority groups in the East North Central region are not reported in Figure G-7 due to relatively small sample sizes.)

**Other researchers' regression analyses of loan denial rates.** Several studies have investigated whether disparities in loan denial rates for different racial/ethnic and gender groups exist after controlling for other factors that affect loan approvals. Findings from those studies include the following:

- Commercial banks are less likely to loan to African American-owned businesses than to non-Hispanic white-owned businesses after statistically controlling for other factors.<sup>66</sup>
- African American, Hispanic American, and Asian American men are more likely to be denied loans than non-Hispanic white men. However, African American borrowers are more likely to apply for loans.<sup>67</sup>
- Disparities in loan denial rates between African American-owned and non-Hispanic white-owned businesses tend to decrease with increasing competitiveness of lender markets. A similar phenomenon is observed when considering differences in loan denial rates between male- and female-owned businesses.<sup>68</sup>
- The probability of loan denial decreases with greater personal wealth. However, accounting for personal wealth does not resolve the large differences in denial rates across African American-, Hispanic American-, Asian American-, and non-Hispanic white-owned businesses. Specifically, information about personal wealth explained some differences between Hispanic- and Asian American-owned businesses and non-Hispanic white-owned businesses, but they explained almost none of the differences between African American-owned businesses and non-Hispanic white-owned businesses.<sup>69</sup>
- Loan denial rates are higher for African American-owned businesses than for non-Hispanic white-owned businesses after accounting for several factors such as creditworthiness and other characteristics. Consistent evidence on loan denial rates and other indicators of discrimination in credit markets was not found for other minorities or for women.<sup>70</sup>
- Women-owned businesses are no less likely to apply or be approved for loans as compared with male-owned businesses.<sup>71</sup>

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<sup>66</sup> Cavalluzzo, Ken, Linda Cavalluzzo and John Wolken. 2002. "Competition, Small Business Financing and Discrimination: Evidence from a New Survey." *Journal of Business*. 75: 641-679.

<sup>67</sup> Coleman, Susan. 2002. "Characteristics and Borrowing Behavior of Small, Women-owned Firms: Evidence from the 1998 National Survey of Small Business Finances." *The Journal of Business and Entrepreneurship*. 151-166.

<sup>68</sup> Cavalluzzo, 2002. "Competition, Small Business Financing and Discrimination: Evidence from a New Survey."

<sup>69</sup> Cavalluzzo, Ken and John Wolken. 2002. "Small Business Turndowns, Personal Wealth and Discrimination." *FEDS Working Paper No. 2002-35*.

<sup>70</sup> Blanchflower, David G., Phillip B. Levine and David J. Zimmerman. 2003. "Discrimination in the Small Business Credit Market." *The Review of Economics and Statistics*. 85:930-943.

<sup>71</sup> Coleman. 2002. "Characteristics and Borrowing Behavior of Small, Women-owned Firms: Evidence from the 1998 National Survey of Small Business Finances."

- There are possible disparities in loan denial rates based on race/ethnicity and gender even after accounting for other factors. African American-owned businesses showed the highest probabilities of loan denial. Hispanic American- and Asian American-owned businesses also showed relatively high rates of loan denial.<sup>72</sup>
- A recent study using Kauffman Firm Survey data found that African- and Hispanic-owned firms had a lower probability of loan approval than non-Hispanic white-owned firms in 2007, 2008, 2009 and 2010 even after accounting for firm and owner characteristics. In 2010, Asian-owned firms were also less likely to be approved. Women-owned firms had a lower likelihood of loan approval than male-owned firms, but only for 2008.<sup>73</sup>

**Regression model for denial rates.** The Keen Independent study team conducted its own analysis of the SSBF by developing a model to explore the relationship between loan denial and the race/ethnicity and gender of business owners while statistically controlling for other factors. As discussed above, there is extensive literature on business loan denials that provides the theoretical basis for the regression models. Many studies have used probit econometric models to investigate the effects of various owner, business, and loan characteristics on the likelihood of loan denial. The standard model that the study team used includes three general categories of variables:

- The owner’s demographic characteristics (including race and gender), credit, and resources (14 variables);
- Business characteristics and credit and financial health (29 variables); and
- The environment in which the business and lender operate and characteristics of the loan (19 variables).<sup>74</sup>

Keen Independent developed two models, one for the 1998 SSBF and one for the 2003 SSBF, using those standard variables. After excluding a small number of observations where the loan outcome was imputed, the 1998 national sample included 931 businesses that had applied for a loan during the three years preceding the 1998 SSBF and the East North Central region included 116 such businesses. The 2003 national sample included 1,897 businesses that had applied for a loan during the three years preceding the 2003 SSBF and the East North Central region included 319 such businesses.

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<sup>72</sup> CRA International. 2007. “Measuring Minority- and Woman-Owned Construction and Professional Service Firm Availability and Utilization.” *Prepared for Santa Clara Valley Transportation Authority.*

<sup>73</sup> Robb, Alicia. 2012. “Access to Capital among Young firms, Minority-owned Firms, Women-owned Firms, and High-tech Firms.” U.S. Small Business Administration.

<sup>74</sup> See, for example, Blanchard, Lloyd; Zao, Bo and John Yinger. 2005. “Do Credit Barriers Exist for Minority and Women Entrepreneurs?” *Center for Policy Research, Syracuse University.*

Given the relatively small sample sizes for the East North Central region and the large number of variables in the model, the study team included all U.S. businesses in the model and estimated any East North Central region effects by including regional control variables — an approach commonly used in other studies that analyze SSBF data.<sup>75</sup> The regional variables include an indicator variable for businesses located in the East North Central region and interaction variables that represent businesses owned by minorities or women that are located in the East North Central region.<sup>76</sup>

Figure G-8 presents the marginal effects from the probit model predicting loan denials from 1998 SSBF data. The results from the model indicate that a number of race- and gender-neutral factors significantly affect the probability of loan denial. Those effects include the following:

- Being an older business owner is associated with an increased likelihood of loan denial;
- Having a four-year college degree is associated with a decreased likelihood of loan denial;
- More equity in the business owner’s home — if he or she is a homeowner — is associated with a decreased likelihood of loan denial;
- Being a business that filed for bankruptcy in the past seven years or that has been delinquent in business transactions is associated with an increased likelihood of loan denial;
- Being a business owner who filed for bankruptcy in the past seven years or has had a judgment against him or her is associated with an increased likelihood of loan denial;
- Being a family-owned business is associated with an increased likelihood of loan denial;
- Having an existing line of credit, an existing mortgage, or existing vehicle or equipment loans is associated with a decreased likelihood of loan denial;
- Having outstanding loans from stockholders is associated with a higher likelihood of loan denial;
- Being in the construction industry is associated with an increased likelihood of loan denial;
- Being in highly concentrated industry segments (as measured by the Herfindahl index) is associated with an increased likelihood of loan denial; and
- Applying for business mortgage applications, vehicle and equipment loan applications, and loans for other purposes is associated with a decreased likelihood of loan denial.

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<sup>75</sup> Blanchflower, David G.; Levine, Phillip B. and David J. Zimmerman. 2003. “Discrimination in the Small-Business Credit Market.” *The Review of Economics and Statistics*. 85(4): 930-943; NERA Economic Consulting. 2008. “Race, Sex, and Business Enterprise: Evidence from the City of Austin.” *Prepared for the City of Austin, Texas*; and CRA International. 2007. “Measuring Minority- and Woman-Owned Construction and Professional Service Firm Availability and Utilization. *Prepared for Santa Clara Valley Transportation Authority*.

<sup>76</sup> KIR also considered an interaction variable to represent businesses that are both minority- and female-owned but the term was not significant in 1998 or 2003.

Figure G-8.  
Likelihood of business loan denial (probit regression) in the U.S. in the 1998 SSBF,  
Dependent variable: loan denial

Variable	Marginal effect	Variable	Marginal effect	Variable	Marginal effect
<b>Race/ethnicity and gender</b>		<b>Firm's characteristics, credit and financial health</b>		<b>Firm and lender environment and loan characteristics</b>	
African American	0.280 **	D&B credit score = moderate risk	0.088	Partnership	0.021
Asian American	0.036	D&B credit score = average risk	0.107	S corporation	-0.019
Hispanic American	0.217 **	D&B credit score = significant risk	0.056	C corporation	-0.032
Native American	0.063	D&B credit score = high risk	0.064	Construction industry	0.107 **
Female	-0.008	Total employees	0.000	Manufacturing industry	0.020
East North Central region	-0.052	Percent of business owned by principal	0.000	Transportation, communications and utilities industry	0.075
African American in East North Central region	0.567 **	Family-owned business	0.066 **	Engineering industry	0.112
Female in East North Central region	-0.032	Firm purchased	-0.032	Other industry	0.042
		Firm inherited	0.016	Herfindahl index = .10 to .18	0.387 **
<b>Owner's characteristics, credit and resources</b>		Firm age	-0.002	Herfindahl index = .18 or above	0.378 **
Age	0.002 *	Firm has checking account	0.033	Located in MSA	0.008
Owner experience	0.001	Firm has savings account	-0.021	Sales market local only	0.017
Less than high school education	0.060	Firm has line of credit	-0.125 **	Loan amount	0.000
Some college	-0.017	Existing capital leases	-0.012	Capital lease application	-0.021
Four-year degree	-0.059 **	Existing mortgage for business	-0.045 *	Business mortgage application	-0.066 **
Advanced degree	-0.046	Existing vehicle loans	-0.069 **	Vehicle loan application	-0.097 **
Log of Home Equity	-0.009 **	Existing equipment loans	-0.053 **	Equipment loan application	-0.074 **
Bankruptcy in past 7 years	0.310 **	Existing loans from stockholders	0.106 **	Loan for other purposes	-0.041 *
Judgement against in past 3 years	0.252 **	Other existing loans	-0.019		
Log of net worth excluding home	0.001	Firm used trade credit in past year	-0.032		
Owner has negative net worth	-0.029	Log of total sales in prior year	0.001		
		Negative sales in prior year	0.085		
		Log of cost of doing business in prior year	0.000		
		Log of total assets	0.005		
		Negative total assets	-0.043		
		Log of total equity	0.013		
		Negative total equity	0.195		
		Firm bankruptcy in past 7 years	0.211 *		
		Firm delinquency in business transactions	0.243 **		

Note: \* Statistically significant at 90% confidence level.

\*\* Statistically significant at 95% confidence level.

For ease of interpretation the marginal effects of the probit coefficients are displayed in the figure. Significance is calculated using t-statistics from the probit coefficients associated with the marginal effects.

"Native American or other minority" and "Mining industry" perfectly predicted loan outcome and were excluded from the final regression.

Source: Keen Independent Research analysis of 1998 SSBF data.

After statistically controlling for race- and gender-neutral influences, the study team observed that businesses owned by African Americans and Hispanic Americans were more likely to have their loans denied than other businesses. The indicator variable for the East North Central region was not statistically significant. However, the interaction term for African Americans in the East North Central region was statistically significant. That result indicates that the probability of loan denials for African Americans within the East North Central region is significantly different from the U.S. as a whole after controlling for other factors.

The study team simulated loan approval rates for minority groups with statistically significant disparities (i.e., African American- and Hispanic American-owned businesses, and African American-owned businesses in the East North Central region) by comparing observed loan approval rates with simulated loan approval rates.<sup>77</sup> “Loan approval” means that a business owner always or at least sometimes had his or her business loan applications approved over the previous three years. “Rates” of loan approval represent the percentage of businesses that received loan approvals (always or sometimes) during that time period.

The probit modeling approach allowed for simulations of loan approval rates for those groups as if they had the same probability of loan approval as similarly situated non-Hispanic white male-owned businesses. To conduct those simulations, Keen Independent took the following steps:

1. Keen Independent performed a probit regression analysis predicting loan approval using only non-Hispanic white male-owned businesses in the dataset.<sup>78</sup>
2. The study team then used the coefficients from that model and the mean characteristics of African American- and Hispanic American-owned businesses (including the effects of a business being in the East North Central region) to estimate the probability of loan approval of such groups.

The results of those simulations yielded estimates of loan approval rates for non-Hispanic white-owned businesses who shared the same characteristics of African American- and Hispanic American-owned businesses, and African American-owned businesses in the East North Central region. Higher simulated rates indicate that, in reality, African American- and Hispanic American-owned businesses are less likely to be approved for loans than similarly-situated non-Hispanic white male-owned businesses. Figure G-9 shows those simulated loan approval rates (“benchmark”) in comparison to the actual approval rates observed in the 1998 SSBF. The disparity index was calculated by taking the actual loan approval rate for each group and dividing it by each group’s benchmark, and then multiplying the result by 100. Values less than 100 indicate that, in reality, the group is less likely to be approved for a loan than what would be expected for similarly-situated non-Hispanic white male-owned businesses — in other words that race/ethnicity affects the likelihood of those groups being approved for loans.

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<sup>77</sup> The approval rate is equal to one minus the denial rate.

<sup>78</sup> That version of the model excluded the race/ethnicity and gender indicator variables, because the value of all of those variables would be the same (i.e., 0).

Figure G-9.  
Comparison of actual loan approval rates to simulated loan approval rates, 1998

Group	Loan approval rates		Disparity index (100 = parity)
	Actual	Benchmark	
African American	46.4%	75.2%	62
Hispanic American	53.7%	75.8%	71
African American - East North Central Region	22.6%	89.9%	25

Note: Actual approval rates presented here and denial rates in Figure G-7 do not sum to 100% because some observations were excluded from the probit regression.

“Loan approval” means that a business owner always or at least sometimes had his or her business loan applications approved over the previous three years.

Source: Keen Independent Research analysis of 1998 NSSBF data.

Based on 1998 SSBF data, the actual loan approval rate for African American-owned businesses was 46 percent. Model results showed that African American-owned businesses would have an approval rate of about 75 percent if they were approved for loans at the same rate as similarly-situated non-Hispanic white male-owned businesses (disparity index of 62). Similarly, Hispanic American-owned businesses would have an approval rate of about 76 percent if they were approved for loans at the same rate as similarly-situated non-Hispanic white male-owned businesses, compared with the actual loan approval rate of 54 percent (disparity index of 71). Additionally, African American-owned businesses in the East North Central region would have an approval rate of approximately 90 percent if they were approved for loans at the same rate as similarly-situated non-Hispanic white male-owned businesses. Their approval rate of 23 percent yields a disparity index of 25.

Keen Independent also conducted a regression analysis with 2003 SSBF data.<sup>79</sup> As in the 1998 regression analysis, the dependent variable represents whether business’ loan applications over the past three years were always denied. Figure G-10 presents the marginal effects from the 2003 probit model predicting loan denial. In the 2003 model, the following race- and gender-neutral factors significantly affected the probability of loan denial:

- Being a business owner who filed for bankruptcy in the past seven years is associated with an increased likelihood of loan denial;
- Being a business with a high risk credit score is associated with an increased likelihood of loan denial;
- Being an inherited business or older business is associated with a decreased likelihood of loan denial;
- Having an existing line of credit or savings account is associated with a decreased likelihood of loan denial;

<sup>79</sup> The 2003 SSBF contains multiple implicates (five copies of each record) to better address the issue of missing values. The values of all reported variables remain constant across the five implicates, but the values of imputed variables may differ. Only 1.8 percent of all values was missing and has been imputed. Keen Independent’s regression analysis is performed on the first implicate.

- Having existing loans (other than mortgage, vehicle, equipment or stockholder loans) is associated with an increased likelihood of loan denial;
- Being an S corporation is associated with an increased likelihood of loan denial;
- Being in the transportation, communications, and utilities industry is associated with an increased likelihood of loan denial;
- Location in metropolitan areas is associated with an increased likelihood of loan denial; and
- Applying for business mortgages, vehicle loans and loans for “other” purposes is associated with a decreased likelihood of loan denial.

After statistically controlling for race- and gender-neutral influences, the study team observed that businesses owned by African Americans were more likely to have their loans denied than other businesses. Figure G-10 also indicates that although there is little or no overall influence of business owner gender on rates of business loan denial.



Figure G-10.  
Likelihood of business loan denial (probit regression) in the U.S. in the 2003 SSBF,  
Dependent variable: loan denial

Variable	Marginal effect	Variable	Marginal effect	Variable	Marginal effect
<b>Race/ethnicity and gender</b>		<b>Firm's characteristics, credit and financial health</b>		<b>Firm and lender environment and loan characteristics</b>	
African American	0.224 **	D&B credit score = moderate risk	-0.022	Partnership	0.006
Asian American	-0.009	D&B credit score = average risk	0.027	S corporation	0.027 *
Hispanic American	0.001	D&B credit score = significant risk	0.012	C corporation	0.032
Native American	0.034	D&B credit score = high risk	0.048 **	Construction industry	0.031
Other minority	0.051	Total employees	0.000	Manufacturing industry	0.027
Female	0.009	Percent of business owned by principal	0.000	Transportation, communications and utilities	0.211 **
East North Central region	0.007	Family-owned business	-0.019	Finance, insurance and real estate industries	0.000
African American in East North Central region	-0.035	Firm purchased	0.000	Engineering industry	0.012
<b>Owner's characteristics, credit and resources</b>		Firm inherited	-0.039 **	Other industry	0.011
Age	0.000	Firm age	-0.001 *	Herfindahl index = .10 to .18	0.006
Owner experience	0.001	Firm has checking account	-0.042	Herfindahl index = .18 or above	0.031
Some college	-0.002	Firm has savings account	-0.023 **	Located in MSA	0.023 *
Four-year degree	-0.001	Firm has line of credit	-0.095 **	Sales market local only	0.015
Advanced degree	-0.022	Existing capital leases	-0.002	Loan amount	0.000
Log of Home Equity	0.001	Existing mortgage for business	0.011	Capital lease application	-0.013
Bankruptcy in past 7 years	0.094 *	Existing vehicle loans	0.014	Business mortgage application	-0.034 **
Judgement against in past 3 years	0.016	Existing equipment loans	-0.011	Vehicle loan application	-0.056 **
Log of net worth excluding home	0.000	Existing loans from stockholders	0.018	Equipment loan application	-0.021
		Other existing loans	0.028 *	Loan for other purposes	-0.023 *
		Firm used trade credit in past year	-0.010		
		Log of total sales in prior year	0.004		
		Log of cost of doing business in prior year	-0.008		
		Log of total assets	-0.001		
		Log of total equity	0.000		
		Negative total equity	0.018		
		Firm bankruptcy in past 7 years	-0.025		
		Firm delinquency in business transactions	0.020		

Note: \* Statistically significant at 90% confidence level.

\*\* Statistically significant at 95% confidence level.

For ease of interpretation the marginal effects of the probit coefficients are displayed in the figure. Significance is calculated using t-statistics from the probit coefficients associated with the marginal effects.

"Less than high school education," "Negative sales in prior year" and "Mining industry" perfectly predicted loan outcome and were excluded from the final regression; "Owner has negative net worth" and "Negative total assets" dropped because of colinearity.

Source: Keen Independent Research analysis of 2003 SSBF data.

The study team also simulated approval rates from the 2003 SSBF results using the same approach as it used for the 1998 results. Figure G-11 presents actual and simulated (“benchmark”) approval rates for African American-owned businesses, the sole minority group with statistically significant disparities in loan approval in the 2003 data. Simulated approval rates indicated that African American-owned businesses are approved at 72 percent of the rate observed for similarly-situated non-Hispanic white male-owned businesses (i.e., non-Hispanic white male-owned businesses with the same demographic, credit, and financial health; lender environment; and loan characteristics of African American-owned businesses).

Figure G-11.  
Comparison of actual loan approval rates to simulated loan approval rates, 2003

Group	Loan approval rates		Disparity index (100 = parity)
	Actual	Benchmark	
African American	49.1%	68.4%	72

Note: Actual approval rates presented here and denial rates in Figure G-7 do not sum to 100% because some observations were excluded from the probit regression.

“Loan approval” means that a business owner always or at least sometimes had his or her business loan applications approved over the previous three years.

Source: Keen Independent Research analysis of 2003 NSSBF data.

**Applying for loans.** Fear of loan denial can be a barrier to business credit in the same way that actual loan denial presents a barrier. The SSBF includes a question that gauges whether a business owner did not apply for a loan due to fear of loan denial. Figure G-12 presents the percentage of businesses that reported needing credit but did not apply for loans because of fears of denial based on data from the 1998 and 2003 SSBF.

In 1998 and 2003, African American- and Hispanic-owned businesses were more likely than non-Hispanic white male-owned businesses to forgo applying for loans due to a fear of denial. Non-Hispanic white women-owned businesses were also more likely to forgo applying for loans due to a fear of denial. In the East North Central region in both 1998 and 2003, fear of denial was greater for minority- and women-owned businesses than for non-Hispanic white male-owned businesses. This difference was statistically significant in 2003 but not in 1998, potentially due to smaller sample sizes in 1998.

**Other researchers’ regression analyses of fear of denial.** Other studies have identified factors that influence the decision to apply for a loan, such as business size, business age, owner age, and educational attainment. Accounting for those factors can help in determining whether race/ethnicity or gender of the business owner explain whether the owner did not apply for a loan due to fear of loan denial.

Results indicate that African American and Hispanic American business owners are significantly less likely to apply for loans due to fear of denial.<sup>80</sup>

<sup>80</sup> Cavalluzzo, 2002. “Competition, Small Business Financing and Discrimination: Evidence from a New Survey.”

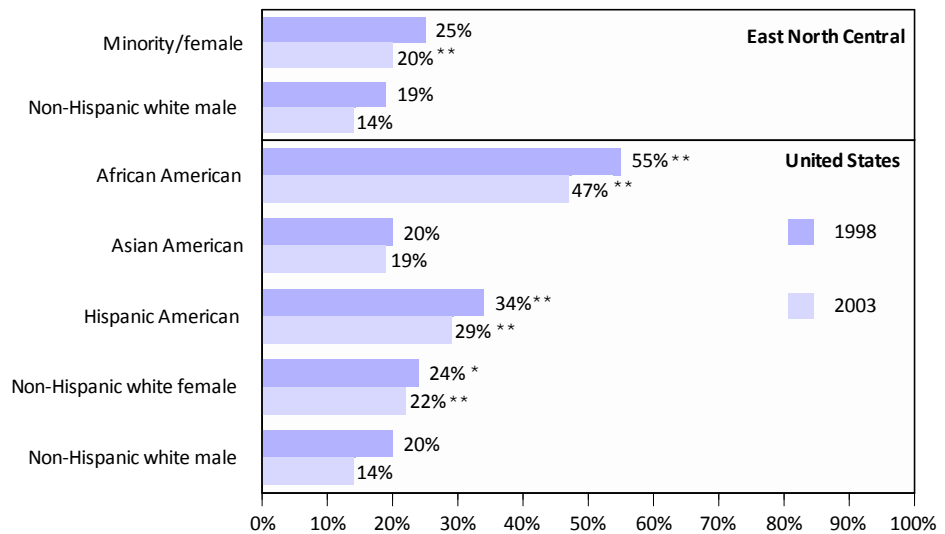
Figure G-12.  
Businesses that  
needed loans but did  
not apply due to fear  
of denial, 1998 and  
2003

Note:

\*\* Denotes that the  
difference in proportions  
from non-Hispanic white  
male-owned businesses is  
statistically significant at  
the 95% confidence level.

Source:

Ken Independent Research  
from 1998 and 2003 Survey  
of Small Business Finances.



- After statistically controlling for educational attainment, there were no differences in loan application rates between non-Hispanic white, African American, Hispanic American, and Asian American male business owners.<sup>81</sup>
- African American-owned businesses were more likely than other businesses to report being seriously concerned with credit markets and were less likely to apply for credit in fear of loan denial.<sup>82</sup>
- A Small Business Administration study found that African American- and Hispanic American-owned firms were less likely to apply for credit when needed for fear of having the loan application denied than non-Hispanic white-owned firms in 2007, 2008, 2009 and 2010 after accounting for firm and owner characteristics. Women-owned firms were less likely than male-owned firms to apply for loans for fear of denial in 2008, 2009 and 2010.<sup>83</sup>
- A study that used a probit econometric model to investigate businesses that did not apply for loans for fear of denial revealed possible race-based differences in not applying for loans for fear of denial. Results indicated that African American- and Hispanic American-owned businesses are more likely to not apply for loans out of fear of being denied. In addition, results for businesses located in the East North Central region did not differ significantly from national results.<sup>84</sup>

**Regression model for fear of denial.** The Keen Independent study team conducted its own econometric analysis of fear of denial by developing a model to explore the relationships between fear of denial and the race/ethnicity and gender of business owners while statistically controlling for other factors, based on SSBF data. The model was similar to the probit regression for likelihood of

<sup>81</sup> Coleman, Susan. 2004. "Access to Debt Capital for Small Women- and Minority-Owned Firms: Does Educational Attainment Have an Impact?" *Journal of Developmental Entrepreneurship*. 9:127-144.

<sup>82</sup> Blanchflower et al., 2003. Discrimination in the Small Business Credit Market.

<sup>83</sup> Robb, Alicia. 2012. "Access to Capital among Young firms, Minority-owned Firms, Women-owned Firms, and High-tech Firms." U.S. Small Business Administration.

<sup>84</sup> CRA International. 2007. "Measuring Minority- and Woman-Owned Construction and Professional Service Firm Availability and Utilization. Prepared for Santa Clara Valley Transportation Authority.

denial except that the fear of denial regression includes business owners who did not apply for a loan and excludes loan characteristics. After excluding a small number of observations where fear of denial was imputed, the 1998 national sample included 3,523 businesses and the East North Central region included 485 such businesses. The 2003 national sample included 4,169 businesses and the East North Central region included 650 such businesses. In both 1998 and 2003, East North Central region effects are modeled using regional control variables in the national model.<sup>85</sup>

Figure G-13 presents the marginal effects from the 1998 probit regression model predicting the likelihood that a business needs credit but will not apply due to fear of loan denial. The results from the model indicate that a number of race- and gender-neutral factors significantly affect the probability of forgoing application for a loan due to fear of denial. Factors that are associated with an increased likelihood of not applying for a loan due to fear of loan denial include:

- The owner filing for bankruptcy in the past seven years or having had a judgment against the business;
- Having an average, significant, or high risk credit score;
- Having an existing mortgage, existing vehicle loans, existing loans from stockholders, or other existing loans;
- Higher total assets; and
- Having delinquency in business transactions or filing for bankruptcy in the past seven years.

Factors that are associated with a decreased likelihood of not applying for a loan due to fear of loan denial include:

- More equity in the business owner's home — if he or she is a homeowner — and more business owner net worth;
- If the business owner has negative net worth;
- If the business was acquired through a purchase;
- Having an older business;
- Having a savings account or a line of credit; and
- More sales in the prior year (but also negative sales in the prior year).

After statistically controlling for race- and gender-neutral influences, the study team observed that African American-owned businesses were more likely to forgo applying for a loan due to fear of denial.

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<sup>85</sup> Again, the study team considered an interaction variable to represent businesses that are both minority and female, but the term was not significant in 1998 or 2003.

Figure G-13.

Likelihood of forgoing a loan application due to fear of denial (probit regression) in the U.S. in the 1998 SSBF,  
 Dependent variable: needed a loan but did not apply due to fear of denial

Variable	Marginal effect	Variable	Marginal effect	Variable	Marginal effect
<b>Race/ethnicity and gender</b>		<b>Firm's characteristics, credit and financial health</b>		<b>Firm and lender environment and loan characteristics</b>	
African American	0.262 **	D&B credit score = moderate risk	0.081	Partnership	-0.006
Asian American	0.004	D&B credit score = average risk	0.105 **	S corporation	-0.009
Hispanic American	0.034	D&B credit score = significant risk	0.169 **	C corporation	0.031
Native American	0.064	D&B credit score = high risk	0.208 **	Mining industry	-0.087
Female	0.026	Total employees	0.000	Construction industry	-0.033
East North Central region	-0.029	Percent of business owned by principal	0.000	Manufacturing industry	0.001
African American in East North Central region	-0.057	Family-owned business	0.017	Transportation, communications and utilities	0.052
Asian American in East North Central region	0.019	Firm purchased	-0.069 **	Finance, insurance and real estate industries	-0.035
Hispanic American in East North Central region	0.139	Firm inherited	0.006	Engineering industry	0.000
Female in East North Central region	-0.025	Firm age	-0.002 *	Other industry	-0.033
<b>Owner's characteristics, credit and resources</b>		Firm has checking account	0.048	Herfindahl index = .10 to .18	0.000
Age	-0.001	Firm has savings account	-0.047 **	Herfindahl index = .18 or above	0.016
Owner experience	0.001	Firm has line of credit	-0.062 **	Located in MSA	0.043 **
Less than high school education	0.073	Existing capital leases	0.036	Sales market local only	-0.018
Some college	-0.004	Existing mortgage for business	0.107 **		
Four-year degree	-0.015	Existing vehicle loans	0.047 **		
Advanced degree	-0.032	Existing equipment loans	0.031		
Log of home equity	-0.007 **	Existing loans from stockholders	0.099 **		
Bankruptcy in past 7 years	0.331 **	Other existing loans	0.068 **		
Judgement against in past 3 years	0.099 **	Firm used trade credit in past year	0.015		
Log of net worth excluding home	-0.033 **	Log of total sales in prior year	-0.022 **		
Owner has negative net worth	-0.167 **	Negative sales in prior year	-0.164 **		
		Log of cost of doing business in prior year	-0.002		
		Log of total assets	0.020 **		
		Negative total assets	0.110		
		Log of total equity	-0.010		
		Negative total equity	-0.005		
		Firm bankruptcy in past 7 years	0.574 **		
		Firm delinquency in business transactions	0.236 **		

Note: \* Statistically significant at 90% confidence level.  
 \*\* Statistically significant at 95% confidence level.

For ease of interpretation the marginal effects of the probit coefficients are displayed in the figure. Significance is calculated using t-statistics from the probit coefficients associated with the marginal effects.

Source: Keen Independent Research analysis of 1998 SSBF data.

Figure G-14 presents the marginal effects from the 2003 probit model predicting the likelihood that a business needs credit but will not apply for a loan due to fear of denial. The results from the model indicate that a number of race- and gender-neutral factors significantly affect the probability of forgoing application for a loan due to fear of denial. Factors that are associated with an increased likelihood of not applying for a loan due to fear of loan denial include:

- The owner filing for bankruptcy or having had a judgment against them;
- Having a significant or high risk credit score;
- A larger percentage of business owned by the principal owner;
- Having an existing mortgage; existing vehicle or equipment loans; existing loans from stockholders; or other existing loans;
- Higher cost of doing business in the prior year;
- Having been delinquent in business transactions or filing for bankruptcy in the past seven years; and
- Location in a metropolitan area.

Factors that are associated with a decreased likelihood of not applying for a loan due to fear of loan denial include:

- Being older and having a four-year college degree;
- More equity in the business owner's home — if he or she is a homeowner — and more business owner net worth;
- Having an older business;
- More sales in the prior year (but also negative sales in the prior year); and
- Having a local (as opposed to regional, national or international) sales market.

After statistically controlling for race- and gender-neutral influences, the study team observed that African American- and Hispanic American-owned businesses were more likely to forgo applying for a loan due to fear of denial. In the East North Central region, Asian American- and Hispanic American-owned businesses were less likely to fear denial than other businesses.

Figure G-14.

Likelihood of forgoing a loan application due to fear of denial (probit regression) in the U.S. in the 2003 SSBF,  
 Dependent variable: needed a loan but did not apply due to fear of denial

Variable	Marginal effect	Variable	Marginal effect	Variable	Marginal effect
<b>Race/ethnicity and gender</b>		<b>Firm's characteristics, credit and financial health</b>		<b>Firm and lender environment and loan characteristics</b>	
African American	0.198 **	D&B credit score = moderate risk	-0.007	Partnership	-0.002
Asian American	0.060	D&B credit score = average risk	0.042	S corporation	0.011
Hispanic American	0.073 *	D&B credit score = significant risk	0.050 *	C corporation	0.014
Native American	0.012	D&B credit score = high risk	0.108 **	Construction industry	0.037
Other minority	0.142	Total employees	0.000	Manufacturing industry	-0.011
Female	0.030	Percent of business owned by principal	0.001 **	Transportation, communications and utilities	-0.046
East North Central region	-0.009	Family-owned business	-0.010	Finance, insurance and real estate industries	0.049
African American in East North Central region	-0.070	Firm purchased	-0.009	Engineering industry	-0.024
African American in East North Central region	-0.091 **	Firm inherited	-0.034	Other industry	0.013
Hispanic American in East North Central region	-0.100 **	Firm age	-0.003 **	Herfindahl index = .10 to .18	-0.014
Native American in East North Central region	0.028	Firm has checking account	0.008	Herfindahl index = .18 or above	0.016
Female in East North Central region	0.034	Firm has savings account	0.015	Located in MSA	0.049 **
		Firm has line of credit	-0.004	Sales market local only	-0.059 **
<b>Owner's characteristics, credit and resources</b>		Existing capital leases	0.033		
Age	-0.002 **	Existing mortgage for business	0.050 **		
Owner experience	0.001	Existing vehicle loans	0.029 *		
Less than high school education	0.046	Existing equipment loans	0.041 *		
Some college	0.001	Existing loans from stockholders	0.074 **		
Four-year degree	-0.038 **	Other existing loans	0.107 **		
Advanced degree	-0.022	Firm used trade credit in past year	0.016		
Log of home equity	-0.005 **	Log of total sales in prior year	-0.021 **		
Bankruptcy in past 7 years	0.224 **	Negative sales in prior year	-0.091 *		
Judgement against in past 3 years	0.271 **	Log of cost of doing business in prior year	0.012 *		
Log of net worth excluding home	-0.024 **	Log of total assets	0.005		
		Log of total equity	-0.007		
		Negative total equity	-0.033		
		Firm bankruptcy in past 7 years	0.200 *		
		Firm delinquency in business transactions	0.145 **		

Note: \* Statistically significant at 90% confidence level.

\*\* Statistically significant at 95% confidence level.

For ease of interpretation the marginal effects of the probit coefficients are displayed in the figure. Significance is calculated using t-statistics from the probit coefficients associated with the marginal effects.

"Mining industry" perfectly predicted loan outcome and was excluded from the regression; "Owner has negative net worth" and "Negative total assets" dropped because of colinearity.

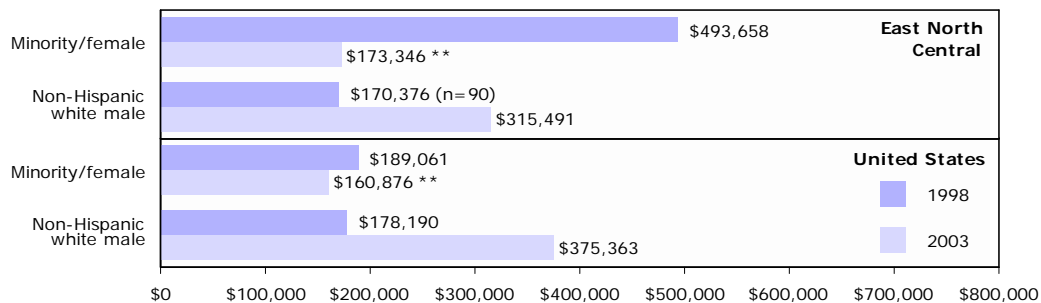
Source: Keen Independent Research analysis of 2003 SSBF data.

**Loan values.** The study team also considered average loan values for businesses that received loans. Results from the 1998 and 2003 SSBFs for mean loan values issued to different racial/ethnic and gender groups are presented in Figure G-15.

Comparisons of loan amounts between non-Hispanic white male-owned businesses and minority- and women-owned businesses indicated the following:

- In 1998, minority- and women-owned businesses in the East North Central region were issued loans worth more, on average, than loans issued to non-Hispanic white male-owned businesses although this difference was not significant. In 2003, minority- and women-owned businesses in the East North Central region were issued loans worth significantly less, on average, than loans issued to non-Hispanic white male-owned businesses.
- In 2003, national results showed that minority- and women-owned businesses were issued loans that were worth, on average, less than half the loan amount issued to non-Hispanic white male-owned businesses. However, national 1998 data suggest that minority- and women-owned businesses were issued loans that were worth slightly more, on average, than loans issued to non-Hispanic white male-owned businesses.

**Figure G-15.**  
Mean value of approved business loans, 1998 and 2003



Note: \*, \*\* Denote that the difference in proportions from non-Hispanic white male-owned businesses is statistically significant at the 90% or 95% confidence level, respectively.

Source: Keen Independent Research from 1998 and 2003 Survey of Small Business Finances.

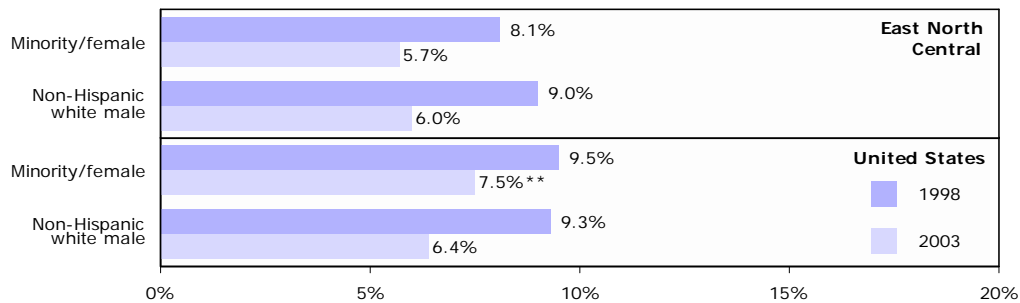
Previous national studies have found that African American-owned businesses are issued loans that are worth less than loans issued to non-Hispanic white-owned businesses with similar characteristics. Examinations of construction companies in the United States have also revealed that African American-owned businesses are issued loans that are worth less than loans issued to businesses with otherwise identical characteristics.<sup>86</sup>

<sup>86</sup> Grown. 1991. "Commercial Bank Lending Practices and the Development of Black-Owned Construction Companies."



**Interest rates.** Based on 1998 and 2003 SSBF data, Figure G-16 presents the average interest rates on commercial loans by the race/ethnicity of business owners. In 1998 and 2003, on average, minority- and women-owned businesses in the East North Central region were issued loans with similar interest rates to loans issued to non-Hispanic white male-owned businesses. The overall pattern in the East North Central region for loan interest rates was similar to that found in the United States in 1998. In 2003, however, minority and women-owned businesses were issued loans with significantly higher interest rates than non-Hispanic white male-owned businesses in the United States as a whole.

**Figure G-16.**  
**Mean interest rate for business loans, 1998 and 2003**



Note: \*, \*\* Denote that the difference in proportions from non-Hispanic white male-owned businesses is statistically significant at the 90% or 95% confidence level, respectively.

Source: Keen Independent Research from 1998 and 2003 Survey of Small Business Finances.

**Other researchers’ regression analyses of interest rates.** Previous studies have investigated differences in interest rates across race/ethnicity and gender while statistically controlling for factors such as individual credit history, business credit history, and Dun & Bradstreet credit scores. Findings from those studies include the following:

- Hispanic American-owned businesses had significantly higher interest rates for lines of credit in places with less credit market competition. However, the study found no evidence that African American- or female-owned businesses received higher rates.<sup>87</sup>
- Among a sample of businesses with no past credit problems, African American-owned businesses had significantly higher interest rates on approved loans than other groups.<sup>88</sup>
- On a national level, African American- and Hispanic American-owned businesses pay a higher interest rate for loans than non-Hispanic white-owned businesses after statistically controlling for other factors. The study did not find any additional differences between minority- and non-minority-owned businesses located in the East North Central region.<sup>89</sup>

**Regression model for interest rates in the SSBF.** The Keen Independent study team conducted a regression analysis of interest rates using data from both the 1998 and the 2003 SSBF’s in order to explore the relationships between interest rates and the race/ethnicity and gender of business owners while statistically controlling for other factors. Keen Independent developed a linear regression

<sup>87</sup> Cavalluzzo. 2002. “Competition, Small Business Financing and Discrimination: Evidence from a New Survey.”

<sup>88</sup> Blanchflower. 2003. “Discrimination in the Small Business Credit Market.”

<sup>89</sup> CRA International. 2007. “Measuring Minority- and Woman-Owned Construction and Professional Service Firm Availability and Utilization. Prepared for Santa Clara Valley Transportation Authority.”

model using the same control variables as the likelihood of denial model along with additional characteristics of the loan received, such as whether the loan was guaranteed, if collateral was required, the length of the loan, and whether the interest rate was fixed or variable.

After excluding a small number of observations where the interest rate was imputed, the 1998 national sample included 796 businesses that received a loan in the past three years, and the East North Central region included 105 such businesses. The 2003 national sample included 1,739 businesses that received a loan in the past three years, and the East North Central region included 301 such businesses. Again, East North Central region effects are modeled using regional control variables.<sup>90</sup>

Figure G-17 presents the coefficients from the 1998 linear model. The results from the regression model indicate that a number of race- and gender-neutral factors are significantly associated with the interest rates that businesses received, including the following factors:

- Location in the East North Central region is associated with lower interest rates;
- Being a business owner with less than a high school education is associated with higher interest rates;
- Having existing loans (other than vehicle or equipment loans or loans from stockholders) is associated with higher interest rates;
- Negative sales in the prior year are associated with lower interest rates;
- An increase in a business' total equity is associated with lower interest rates as is having negative equity;
- Having a line of credit is associated with lower interest rates;
- Being a firm that has been delinquent in business transactions is associated with an increased likelihood of loan denial;
- Capital leases are associated with higher interest rates; and
- Collateral requirements are associated with lower interest rates.

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<sup>90</sup> Keen Independent considered an interaction variable to represent businesses that are both minority and female but the term was not significant in 1998 or 2003.

Figure G-17.  
Interest rate (linear regression) in the U.S. in the 1998 SSBF,  
Dependent variable: interest rate on most recent approved loan

Variable	Coefficient	Variable	Coefficient
<b>Race/ethnicity and gender</b>		<b>Firm's characteristics, credit and financial health</b>	
Constant	15.253 **	D&B credit score = moderate risk	-0.351
African American	1.261	D&B credit score = average risk	-0.237
Asian American	0.232	D&B credit score = significant risk	-0.235
Hispanic American	-0.373	D&B credit score = high risk	0.416
Native American	-0.736	Total employees	0.002
Female	-0.316	Percent of business owned by principal	0.004
East North Central region	-0.738 **	Family-owned business	0.351
African American in East North Central region	-1.467	Firm purchased	-0.306
Asian American in East North Central region	0.127	Firm inherited	-0.016
Hispanic American in East North Central region	1.173	Firm age	0.001
Female in East North Central region	0.261	Firm has checking account	0.013
<b>Owner's characteristics, credit and resources</b>		Firm has savings account	0.336
Age	0.000	Firm has line of credit	-0.386 *
Owner experience	-0.018	Existing capital leases	0.027
Less than high school education	1.217 **	Existing mortgage for business	0.115
Some college	-0.247	Existing vehicle loans	-0.203
Four-year degree	0.081	Existing equipment loans	-0.087
Advanced degree	0.029	Existing loans from stockholders	0.258
Log of home equity	-0.051	Other existing loans	0.561 **
Bankruptcy in past 7 years	1.047	Firm used trade credit in past year	-0.202
Judgement against in past 3 years	0.153	Log of total sales in prior year	-0.198
Log of net worth excluding home	-0.051	Negative sales in prior year	-3.074 *
Owner has negative net worth	-0.103	Log of cost of doing business in prior year	0.022
		Log of total assets	0.043
		Negative total assets	2.044
		Log of total equity	-0.186 **
		Negative total equity	-2.387 **
		Firm bankruptcy in past 7 years	-0.610
		Firm delinquency in business transactions	0.500 *
		Partnership	0.063
		S corporation	0.267
		C corporation	0.264
		Mining industry	-0.253
		Construction industry	-0.095
		Manufacturing industry	0.043
		Transportation, communications and utilities indus	0.149
		Finance, insurance and real estate industries	-0.458
		Engineering industry	-0.222
		Other industry	-0.423
		Herfindahl index = .10 to .18	-0.462
		Herfindahl index = .18 or above	-0.148
		Located in MSA	-0.085
		Sales market local only	-0.166
		Approved Loan amount	0.000
		Capital lease application	1.202 **
		Business mortgage application	-0.325
		Vehicle loan application	-0.470
		Equipment loan application	-0.072
		Loan for other purposes	-0.497
		Loan guaranteed	0.102
		Collateral required	-0.402 *
		Length of loan (months)	-0.002
		Fixed rate	0.054

Note: \* Statistically significant at 90% confidence level.

\*\* Statistically significant at 95% confidence level.

Coefficients are presented in percentage form.

Source: Keen Independent Research analysis of 1998 SSBF data.

After statistically controlling for race- and gender-neutral influences, the study team did not observe any differences between minority- and female-owned businesses and non-Hispanic white-owned businesses in loan interest rates.

Figure G-18 presents the coefficients from the 2003 model. The results from the regression model indicate that a number of race- and gender-neutral factors are significantly associated with interest rates, including the following factors:

- Location in the East North Central region is associated with lower interest rates;
- Increased net worth for the owner — excluding the owner’s home — is associated with a lower interest rate;
- High risk credit scores are associated with higher interest rates;
- An increase in a business’ total equity is associated with higher interest rates as is having negative equity;
- Being in the transportation, communications, and utilities industry is associated with higher interest rates;
- Being in highly concentrated industry segments (as measured by the Herfindahl index) is associated with higher interest rates;
- Higher costs of doing business in the previous year are associated with lower interest rates;
- Vehicle loans are associated with lower interest rates;
- Collateral requirements and guarantee loans are associated with lower interest rates;
- Longer loans are associated with lower interest rates; and
- Fixed-rate loans are associated with higher interest rates.

After statistically controlling for race- and gender-neutral influences, the study team observed that African American-owned businesses received substantially higher interest rates than non-Hispanic white-owned businesses (about 3.5 percentage points higher). However, being an African American-owned business in the East North Central region was associated with substantially lower interest rates (about 4.0 percentage points lower). Hispanic American-owned businesses received higher interest rates than non-Hispanic white-owned businesses (about 1.3 percentage point higher).

Figure G-18.  
Interest rate (linear regression) in the U.S. in the 2003 SSBF,  
Dependent variable: interest rate on most recent approved loan

Variable	Coefficient	Variable	Coefficient
<b>Race/ethnicity and gender</b>		<b>Firm's characteristics, credit and financial health</b>	
Constant	10.591 **	D&B credit score = moderate risk	0.086
African American	3.525 **	D&B credit score = average risk	-0.035
Asian American	0.494	D&B credit score = significant risk	0.048
Hispanic American	1.262 **	D&B credit score = high risk	0.640 *
Native American	-0.607	Total employees	-0.002
Other minority	-1.049	Percent of business owned by principal	0.001
Female	-0.016	Family-owned business	-0.560
East North Central region	-0.769 **	Firm purchased	-0.048
African American in East North Central region	-3.998 **	Firm inherited	0.080
Asian American in East North Central region	-0.579	Firm age	-0.011
Hispanic American in East North Central region	-1.092	Firm has checking account	0.742
Female in East North Central region	-0.561	Firm has savings account	0.022
		Firm has line of credit	-0.006
<b>Owner's characteristics, credit and resources</b>		Existing capital leases	0.221
Age	-0.010	Existing mortgage for business	0.100
Owner experience	0.006	Existing vehicle loans	0.314
Less than high school education	0.483	Existing equipment loans	0.467
Some college	0.416	Existing loans from stockholders	0.256
Four-year degree	-0.248	Other existing loans	0.411
Advanced degree	-0.461	Firm used trade credit in past year	0.212
Log of home equity	0.006	Log of total sales in prior year	-0.124
Bankruptcy in past 7 years	0.194	Negative sales in prior year	-1.623
Judgement against in past 3 years	0.015	Log of cost of doing business in prior year	-0.156 *
Log of net worth excluding home	-0.124 *	Log of total assets	-0.144
		Log of total equity	0.199 **
		Negative total equity	2.312 **
		Firm bankruptcy in past 7 years	-0.192
		Firm delinquency in business transactions	-0.102
		<b>Firm and lender environment and loan characteristics</b>	
		Partnership	-0.498
		S corporation	-0.218
		C corporation	-0.151
		Mining industry	0.089
		Construction industry	-0.491
		Manufacturing industry	-0.069
		Transportation, communications and utilities indus	1.483 **
		Finance, insurance and real estate industries	0.020
		Engineering industry	0.486
		Other industry	0.549 *
		Herfindahl index = .10 to .18	0.283
		Herfindahl index = .18 or above	0.549 *
		Located in MSA	0.160
		Sales market local only	-0.120
		Approved Loan amount	0.000
		Capital lease application	0.904
		Business mortgage application	0.356
		Vehicle loan application	-1.242 **
		Equipment loan application	-0.241
		Loan for other purposes	-0.239
		Loan guaranteed	-0.387 *
		Collateral required	-0.902 **
		Length of loan (months)	-0.004 **
		Fixed rate	1.223 **

Note: \* Statistically significant at 90% confidence level.

\*\* Statistically significant at 95% confidence level.

"Owner has negative net worth" and "Negative total assets" dropped out of the regression because of colinearity.

Source: Keen Independent Research analysis of 2003 SSBF data.

**Small business lending after the Great Recession.** The financial landscape has changed substantially since the beginning of the Great Recession. Bank lending fell significantly from the end of 2008 through 2010. Data from the Federal Reserve show commercial and industrial loans and leases peaked at \$1.6 trillion at the end of 2008 and fell to \$1.2 trillion by the end of 2010, a decline of about 25 percent.<sup>91</sup> Similar analyses show commercial and industrial loans and leases of less than \$1 million fell about 22 percent at the end of 2012 relative to second quarter of 2007.<sup>92</sup>

Bank tightening of lending standards has been greater for small businesses in recent years. While net tightening (percentage of banks tightening standards minus the percentage loosening standards) was positive for small and large loans in 2008 through 2010, in 2011 and 2012 positive net tightening existed only for small business loans. This tightening of the lending markets may have several effects on small businesses, including fewer startups as well as slower economic and employment growth for those already in existence. Longer term trends in small business financing may exacerbate recent economic disturbances. Data from the Federal Deposit Insurance Corporation (FDIC) show the share of all nonfarm, nonresidential loans of less than \$1 million has been declining since 1995.<sup>93</sup>

**Characteristics of small businesses loans after the Great Recession.** Research shows characteristics of small business loans have changed. The average small business loan has more than doubled since 2005, to about \$425,000. Qualitative research suggests this trend toward larger loans may be due to a greater push for profit maximization in the banking industry.<sup>94</sup> This may affect some minority business owners, particularly African American business owners. About 80 percent of African Americans that apply for SBA loans seek \$150,000 or less.<sup>95</sup>

**Characteristics of small businesses after the Great Recession.** Characteristics of small businesses have also changed considerably since 2007. Significantly fewer small businesses reported “good” cash flow in 2013 compared to 2007 (48 and 65 percent, respectively). Small business delinquencies have risen and consequently, more lending requires collateral. About 90 percent of small business lending in 2013 required some collateral, up from 84 percent in 2007. During this same period, the decline in housing prices nationwide has weakened owner net equity and made collateral requirements more difficult to meet.<sup>85</sup>

**Small business lending by race/ethnicity.** In fiscal year 2013, the U.S. Small Business Administration (SBA) administered about 23 billion in loans. Loans to African American business owners represented 382 million or 1.7 percent of the total, a substantial decline from 2008, when SBA allocated about 8 percent of total loan value to African American business owners. Hispanic American business owners received 4.7 percent of the loan total in 2013, relatively unchanged from 4.5 percent of the loan total in 2009.<sup>88</sup>

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<sup>91</sup> U.S. Board of Governors of the Federal Reserve System. 2014. “H.8 Assets and Liabilities of Commercial Banks in the United States.” Accessed Jun 15, 2014 from FRASER, <http://fraser.stlouisfed.org/publication/>.

<sup>92</sup> Ann Marie Wiersch and Scott Shane. 2013. “Why Small Business Lending Isn’t What It Used to Be.” Economic Commentary. Federal Reserve Bank of Cleveland.

<sup>93</sup> Ibid.

<sup>94</sup> CIT Group, once SBA’s top lender, no longer administers SBA loans. Other banks, including Bank of America, have significantly reduced SBA lending.

<sup>95</sup> Ruth Simon and Tom McGinty. 2014. “Loan Rebound Misses Black Businesses.” *The Wall Street Journal*. 14 March 2014.

**Results from Keen Independent 2014 availability interviews with firms in the Dane County construction industry.** At the close of the 2014 availability interviews conducted as part of the disparity study, the study team asked questions regarding potential barriers or difficulties the firm might have experienced in the Madison marketplace. The series of questions was introduced with the following statement: “Finally, we’re interested in whether your company has experienced barriers or difficulties associated with starting or expanding a business in your industry or with obtaining work. Think about your experiences within the past seven years as you answer these questions.” Respondents were then asked about specific potential barriers or difficulties.

For each potential barrier, the study team examined whether responses differed between minority- or women-owned firms and majority-owned firms. Figure G-19 on the following page presents results for questions related to access to capital, bonding and insurance.

**Access to lines of credit and loans.** The first question was, “Has your company experienced any difficulties in obtaining lines of credit or loans?” As shown in Figure G-19, only 7 percent of MBEs and WBEs reported difficulties in obtaining lines of credit or loans. Only 6 percent of majority-owned firms reported similar difficulties.

**Receiving timely payment.** The need for business credit is, in part, linked to whether firms are paid for their work in a timely manner. In the availability interviews, Keen Independent asked, “Has your company experienced any difficulties receiving payment in a timely manner?” Figure G-19 shows that, regardless of ownership, about four out of ten firms have experienced difficulties receiving payment in a timely manner.

### **C. Bonding and Insurance**

Bonding is closely related to access to capital. Some national studies have identified barriers regarding MBE/WBEs and access to surety bonds for public construction projects.<sup>96</sup>

High insurance requirements on public sector projects may also represent a barrier for certain construction and engineering-related firms attempting to do business with government agencies. Keen Independent examined this issue as well.

**Bonding.** To research whether bonding represented a barrier for Dane County businesses, Keen Independent asked firms completing availability interviews:

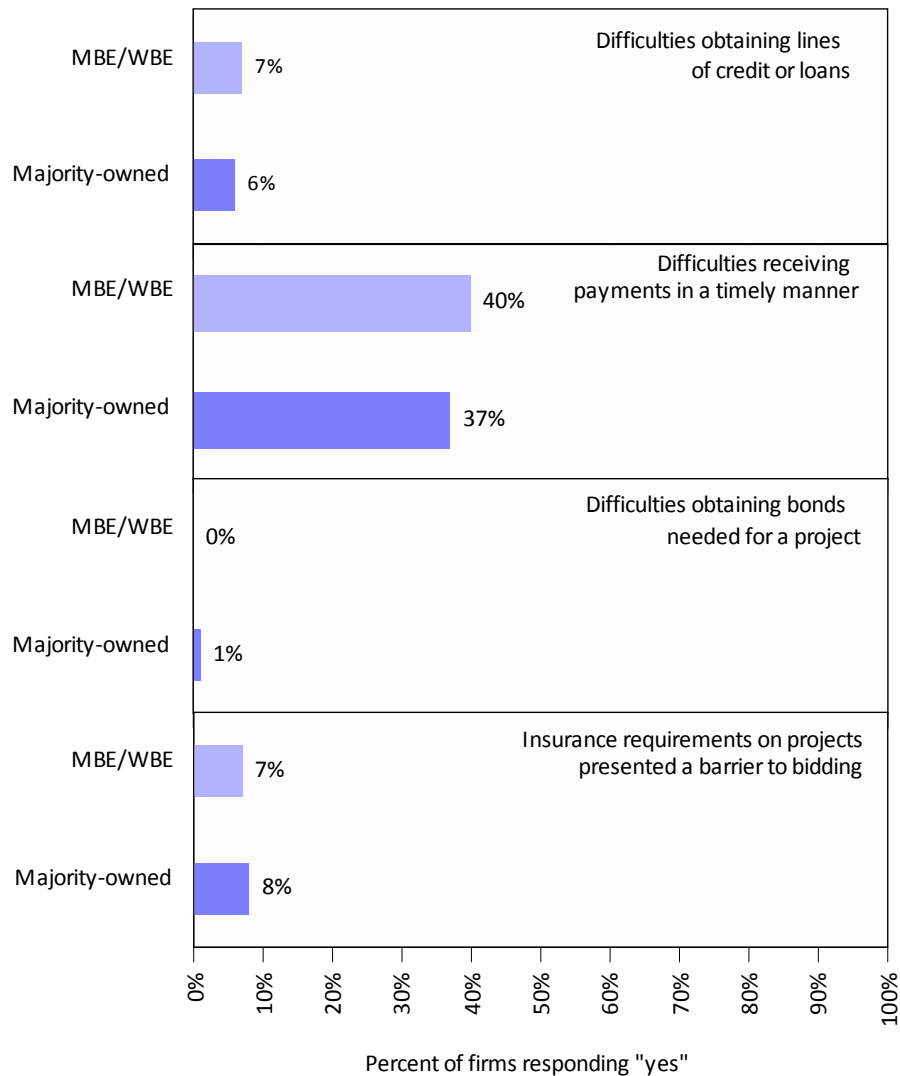
- “Has your company obtained or tried to obtain a bond for a project?”
- [and if so] “Has your company had any difficulties obtaining bonds needed for a project?”

Figure G-19 presents these results from the 2014 availability interviews. About 57 percent of MBEs and WBEs and 54 percent of majority-owned firms had obtained or tried to obtain a bond for a project. Among those firms, it was nearly unanimous that none had reported experiencing difficulties obtaining bonds needed for a project, regardless of ownership.

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<sup>96</sup> For example, Enchautegui, Maria E. et al. 1997. “Do Minority-Owned Businesses Get a Fair Share of Government Contracts?” *The Urban Institute*: 1-117, p. 56.

Figure G-19.  
 Responses to 2014 availability interview questions concerning loans, timely payments, bonding and insurance, Dane County MBE/WBE and majority-owned firms



Note: “WBE” represents white women-owned firms, “MBE” represents minority-owned firms and “Majority-owned” represents non-Hispanic white male-owned firms.

Source: Keen Independent Research from 2014 Availability Interviews.

**Insurance.** The study team also examined whether minority- and women-owned firms were more likely than majority-owned firms within the study area to report that “insurance requirements represented a barrier to bidding” (see Figure G-19).

About 7 percent of MBEs and WBEs and 8 percent majority-owned firms indicated that insurance requirements on projects have presented a barrier to bidding.



## D. Summary

There is evidence that minorities and women continue to face certain disadvantages in accessing capital that is necessary to start, operate, and expand businesses. Capital is required to start companies, so barriers accessing capital can affect the number of minorities and women who are able to start businesses. In addition, minorities and women start business with less capital (based on national data). A number of studies have demonstrated that low levels of wealth among African Americans and Hispanics contribute to lower business creation rates relative to their representation in the U.S. population. The amount of startup capital is a strong predictor of business success.<sup>97</sup> Key results include the following:

- Home equity is an important source of funds for business start-up and growth. Fewer African Americans, Hispanic Americans, and Native Americans in Dane County own homes compared with non-Hispanic whites. Those African Americans, Hispanic Americans, and Native Americans who do own homes tend to have lower home values than non-Hispanic whites.
- Asian-Pacific Americans and Subcontinent Asian Americans are also less likely to own homes in Dane County compared with non-Hispanic whites. However, those who do own homes tend to have similar or higher home values.
- High income Asian Americans and Hispanic Americans applying for home mortgages in Dane County have been more likely than non-Hispanic whites to have their applications denied.
- African American, Hispanic American, and Native American mortgage borrowers in Dane County have been more likely than non-Hispanic whites to be issued subprime loans.
- There is evidence that African American and Hispanic American business owners were more likely to have been denied business loan applications than similarly situated non-minorities. Results for the East North Central region appear consistent with national results.
- Among business owners who reported needing business loans, there is evidence that African Americans and Hispanic Americans are more likely to forgo applying for loans due to fear of denial than similarly-situated non-minorities. In the East North Central region in 2003, Asian American and Hispanic American business owners were also more likely to forgo applying for loans due to fear of denial than other business owners.
- There is evidence from 2003 that African American and Hispanic American business owners receiving business loans paid higher interests rates than similarly-situated non-minorities. In the East North Central region, it appeared that African American-owned businesses paid lower interest rates than other businesses.

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<sup>97</sup> Robb, Alicia. 2012. "Access to Capital among Young Firms, Minority-owned Firms, Women-owned firms and High-Tech Firms." Small Business Administration

## APPENDIX H.

### Success of Businesses in the Dane County Construction Industry

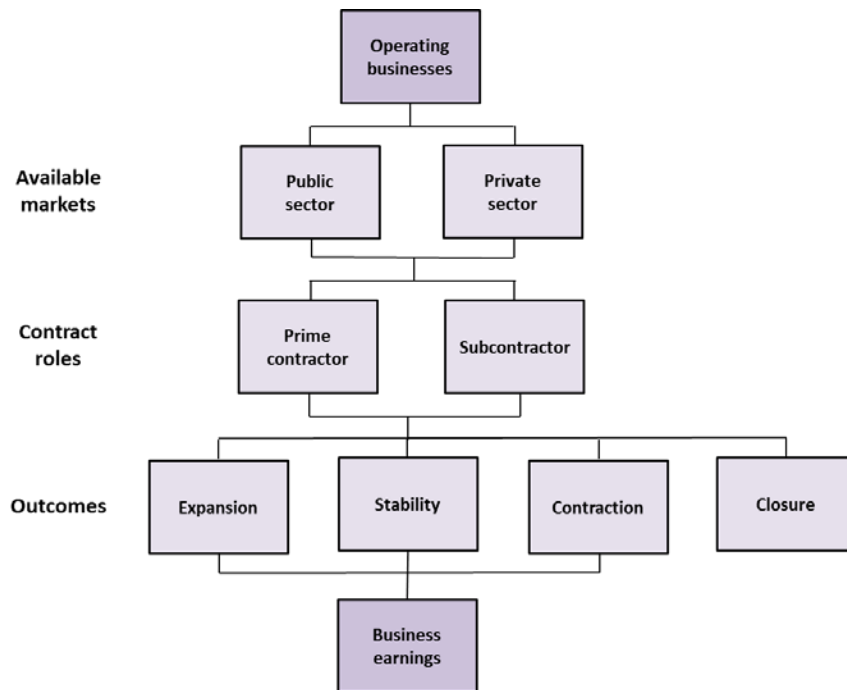
Keen Independent examined the success of MBE/WBEs in the Dane County construction industry. The study team assessed whether business outcomes for those firms differ from those of non-Hispanic white male-owned firms.<sup>1</sup> Keen Independent researched outcomes for MBE/WBEs and non-Hispanic white male-owned businesses in terms of:

- Participation in public and private sector markets;
- Relative bid capacity;
- Business closures, expansions and contractions;
- Business receipts and earnings; and
- Availability interview results concerning potential barriers.

Figure H-1 provides a framework for Keen Independent’s analyses.

Figure H-1.  
Business outcomes

Source:  
Keen Independent  
Research.



<sup>1</sup> Keen Independent uses the terms “MBEs” and “WBEs” to refer to businesses that are owned and controlled by minorities or women (definitions listed in Appendix A), regardless of whether they are certified or meet the revenue and net worth requirements for DBE certification and regardless of whether they are certified as MBEs or WBEs.

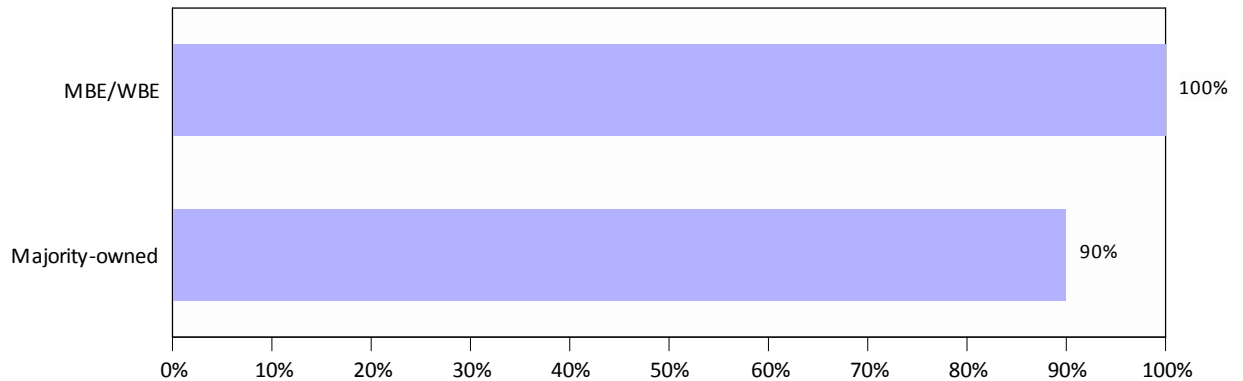
## A. Participation in Public and Private Sector Markets

Keen Independent used information collected as part of the availability analysis to examine whether construction businesses bid on public sector and private sector work, and the extent to which firms work as prime contractors and subcontractors.

**Bidding on public sector and private sector projects.** In the availability interviews, the study team asked firms that reported that they performed work related to public works contracts whether they had bid on or worked on any part of a public sector project in the past seven years. Nearly all of the firms reported that they had bid on or worked on public sector projects.

Keen Independent also asked businesses involved in construction work if they had bid on or worked on private sector work in the past seven years (any part of a project). Again, almost all of the firms indicated that they had bid or worked on private sector work in the past seven years.

Figure H-2.  
Percent of public works-related businesses that reported bidding or working on a private sector project in the past seven years (any part of a project)



Note: "MBE/WBE" represents minority-owned firms and white women-owned firms and "majority-owned" represents non-Hispanic white male-owned firms.

Source: Keen Independent Research from 2014 Availability Interviews.

The above results confirm that most public works-related firms in Dane County pursue both public and private sector work. As discussed in Chapter 3, the study team also conducted in-depth, personal interviews with businesses and trade associations in Dane County. Interviewees confirmed that companies performing construction contracts in Dane County usually pursue both public and private sector work.

**Bidding as a prime contractor.** The study team also asked firms involved in public works-related work whether they had bid as a prime contractor or prime consultant in the past seven years. About half of the firms reported bidding as a prime contractor, regardless of ownership. Most of those also bid as a subcontractor or supplier. About 7 percent of firms indicated they only bid as prime contractors.

In-depth interviews with business owners confirmed that firms working as prime contractors often also function as subcontractors (and vice versa).

## B. Relative Bid Capacity

Some legal cases regarding race- and gender-conscious contracting programs have considered the importance of the “relative capacity” of businesses included in an availability analysis.<sup>2</sup> One approach to account for differing capacities among different types of businesses is to examine relatively small contracts, a technique noted in *Rothe Development Corp. v. U.S. Department of Defense*. In addition to examining size of contracts, Keen Independent directly measured bid capacity in its availability analysis.<sup>3</sup>

Through this analysis, Keen Independent was able to distinguish firms based on the largest contracts or subcontracts they had performed or bid on (i.e., “bid capacity” as used in this study). Although additional measures of capacity might be theoretically possible, the bid capacity concept can be articulated and quantified for individual firms for specific time periods.

**Measurement of bid capacity.** The availability analysis produced a database of more than 140 businesses potentially available for City of Madison work. “Relative capacity” for a business is measured as the largest contract or subcontract that the business performed or reported that they had bid on within the seven years preceding the interview date by Keen Independent.

General public building construction tends to involve relatively large projects. Other subindustries, such as landscaping, typically involve smaller projects. Figure H-3 reports the median relative bid capacity among Dane County public works-related businesses in 13 subindustries. Results categorized companies according to their primary line of business (e.g., results for a firm that primarily performs excavation that also does trucking and hauling are included under excavation, grading and drainage).<sup>4</sup>

Figure H-3.  
Median bid capacity for public works-related firms, by subindustry

Subindustry	Median bid capacity
General public building construction	\$2 million to \$5 million
Plumbing and HVAC	\$1 million to \$2 million
Carpentry and floor work	\$1 million
Construction materials supply	\$500,000 to \$1 million
Electrical work	\$500,000 to \$1 million
Excavation, demolition and other site prep	\$500,000 to \$1 million
Other building construction	\$500,000 to \$1 million
Roofing, siding and sheet metal work	\$500,000 to \$1 million
Drywall and insulation	\$100,000 to \$500,000
Masonry, stonework, tile setting and plastering	\$100,000 to \$500,000
Water and sewer lines	\$100,000 to \$500,000
Landscaping and related work	\$100,000 or less
Trucking and hauling	\$100,000 or less

Source: Keen Independent Research from 2014 Availability Interviews.

<sup>2</sup> For example, see the decision of the United States Court of appeals for the Federal Circuit in *Rothe Development Corp. v. U.S. Department of Defense*, 545 F.3d 1023 (Fed. Cir. 2008).

<sup>3</sup> See Appendix D for details about the availability interview process.

<sup>4</sup> Only subindustries with a minimum of three respondents in the availability interviews were analyzed.

### Comparison of MBE/WBE and majority-owned bid capacity for construction contracts.

Keen Independent examined whether there were differences in the size of the largest contracts for MBEs, WBEs and majority-owned firms within the same subindustries.

- First, the study team determined for each company whether its largest contract or subcontract (awarded or bid on) was higher than the median for its primary line of business. For example, if the median bid capacity category for a subindustry was \$1-2 million, and a firm’s largest contract was more than \$2 million, it was classified as having “above median bid capacity.”
- Keen Independent then examined the ownership of firms that had above-median bid capacity for their subindustry. Figure H-4 reports the distribution of these firms by ownership.

About two-fifths of majority-owned firms have above-median bid capacity for their respective industry, twice the proportion of minority- and women-owned firms (20%).

Figure H-4.  
Proportion of firms with above-median bid capacity by ownership

Source:  
Keen Independent Research from 2014 Availability Interviews.

Firm	Construction
MBE/WBE	20 %
Majority-owned	40

**Further analysis.** The study team considered whether race- and gender-neutral factors could account for the disparities in bid capacity identified for MBEs and WBEs in construction. There were several variables from the availability interviews that may be related to relative bid capacity, such as annual revenue, number of employees and whether a business has multiple establishments.

After considering business characteristics from the availability interviews, Keen Independent determined that age of business was the race- and gender-neutral neutral factor that might best explain differences in relative capacity within a subindustry while also being external to capacity measures. Theoretically, the longer that companies are in business, the larger the contracts or subcontracts that they might pursue.

To test that hypothesis, the study team developed a logistic regression model to determine whether relative bid capacity could be at least partly explained by the age of businesses. The regression results are shown in Figure H-5. The analysis indicated the following:

- Business age was a statistically significant predictor of having above-median bid capacity. The older a business, the more likely it was to show above-median bid capacity; and
- MBE and WBE ownership had a negative, though not statistically significant, relationship to bid capacity after controlling for subindustry and age of firm.

The regression model indicates that age of the business can account for the differences in bid capacity between MBEs and WBEs and majority-owned firms in the same subindustries.

Figure H-5.  
City of Madison public works contracting industry bid capacity regression model

Variable	Coefficient	Chi-square statistic
Age of firm	0.03	21.62 **
MBE/WBE	-0.02	0.00

Note:

\*,\*\* Denote statistical significance at the 90% or 95% confidence level, respectively.

Source:

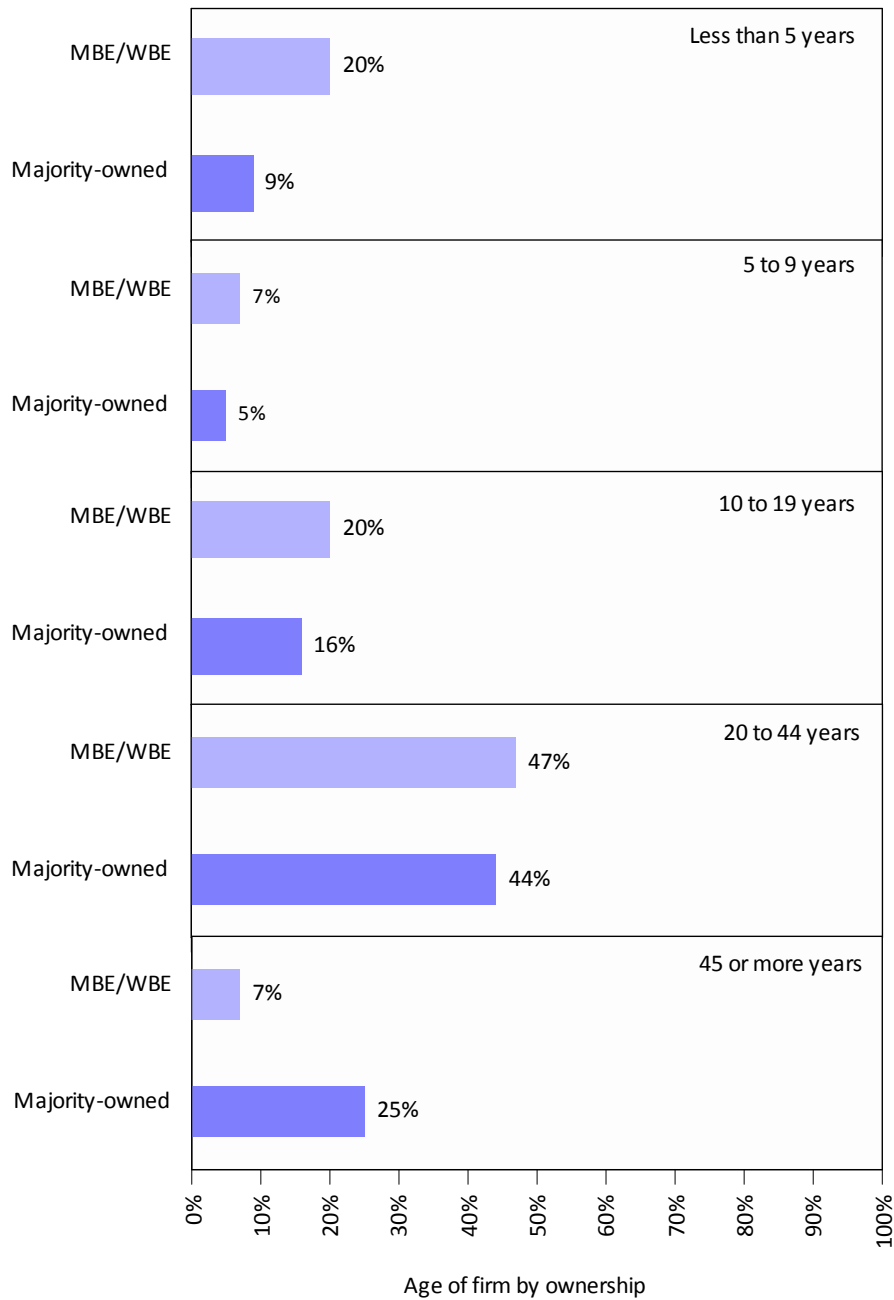
Keen Independent Research from 2014 Availability Interviews.

Additional analyses of the available firms show that minority- and women-owned firms tend to be younger than majority-owned firms. One-in-five of the minority- and women-owned firms are less than 5 years old. Only 9 percent of majority-owned firms are less than 5 years old. On the other end of the spectrum, about 25 percent of majority-owned firms have been in business for 45 years or more compared to 7 percent of minority- and women-owned firms. Figure H-6 presents these results.

**Summary of markets, contracting roles and bid capacity.** Availability interview results show that most firms in the contracting industry pursue both public and private sector work, regardless of ownership. About one-half of minority- and women-owned firms report pursuing work as a prime contractor and most of those firms also report working as a subcontractor or supplier.

Analysis of bid capacity indicated that most of the firms with the greatest bid capacity are majority-owned firms. The fact that majority-owned firms tend to be older than MBEs and WBEs explains most of these differences.

Figure H-6.  
Years in business by ownership of firm



Note: “WBE” represents white women-owned firms, “MBE” represents minority-owned firms and “majority-owned” represents non-Hispanic white male-owned firms.

Source: Keen Independent Research from 2014 Availability Interviews.

### C. Business Closures, Expansions and Contractions

A 2010 SBA report investigated business dynamics for the 2002 through 2006 time period for minority-owned and white-owned businesses. By matching data from business owners who responded to the 2002 U.S. Census Bureau Survey of Business Owners (SBO) to data from the Census Bureau’s 1989-2006 Business Information Tracking Series, the SBA reported on business

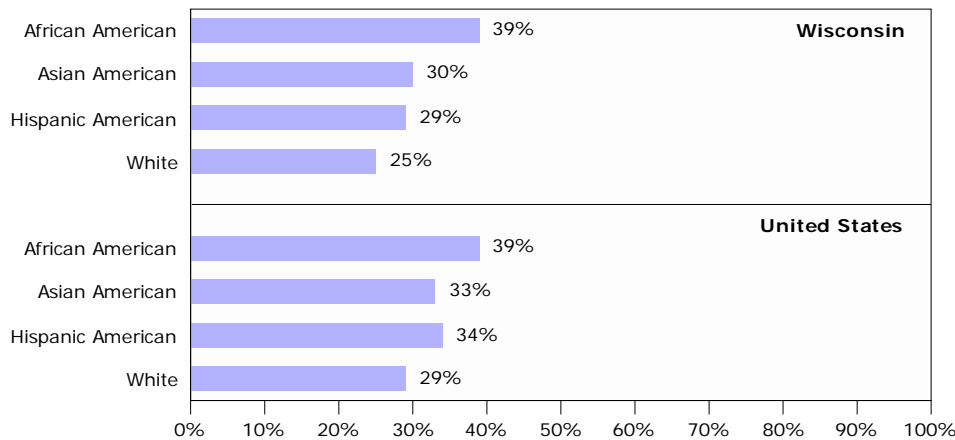
closures, expansions and contractions between 2002 and 2006 across different sectors of the economy.<sup>5,6</sup> The SBA examined differences in outcomes by race and ethnicity.

**Business closures.** High rates of business closures may reflect adverse business conditions for minority business owners.

**Overall rates of business closures in Wisconsin.** The 2010 SBA report analyzed business closure rates between 2002 and 2006 for minority- and non-Hispanic white-owned firms in Wisconsin. Figure H-7 presents those data for African American-, Asian American-, and Hispanic American-owned firms as well as for non-Hispanic white-owned firms.

As shown in Figure H-7, 39 percent of African American-owned firms that were operating in Wisconsin in 2002 had closed by the end of 2006, a higher rate than those of other groups, including non-Hispanic white-owned firms (25%). Hispanic American- (29%) and Asian American-owned firms (30%) also had closure rates that were higher than that of non-Hispanic white-owned firms. Differences in closure rates between minority-owned firms and non-Hispanic white-owned firms were similar in Wisconsin and in the United States during that time period.

Figure H-7.  
Rates of business closure, 2002-2006, Wisconsin and the U.S.



Note: Data refer only to non-publicly held businesses only. As sample sizes are not reported, statistical significance of these results cannot be determined; however, statistics are consistent with SBA data quality guidelines.

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

**Rates of business closures by industry.** Data for the construction and professional services industries were not available by state. The SBA analysis only reported industry-specific results for the nation as a whole. Based on national results, 43 percent of African American-owned construction businesses that were operating in 2002 had closed by 2006, higher than the rate for white-owned construction companies. Hispanic American-owned businesses and Asian American-owned construction

<sup>5</sup> Lowrey, Ying. 2010. "Race/Ethnicity and Establishment Dynamics, 2002-2006." U.S. Small Business Administration Office of Advocacy. Washington D.C.

<sup>6</sup> Businesses classifiable by race/ethnicity exclude publicly-traded companies. Keen Independent did not categorize racial groups by ethnicity. As a result, some Hispanic Americans may also be included in statistics for African Americans, Asian Americans and whites.



businesses that were operating in 2002 were also more likely than white-owned companies to have closed by 2006.

**Unsuccessful closures.** Not all firm closures can be interpreted as “unsuccessful closures.” Firms may close when an owner retires or a more profitable business alternative emerges, both of which represent “successful closures.” The 1992 Characteristics of Business Owners (CBO) Survey is one of the few Census Bureau sources to classify firm closures into successful and unsuccessful subsets.<sup>7</sup> The 1996 CBO survey asked owners of businesses that had closed between 1992 and 1995, “Which item below describes the status of this business at the time the decision was made to cease operations?” Only the responses “successful” and “unsuccessful” were permitted. A firm that reported being unsuccessful at the time of closure was understood to have failed.

Keen Independent examined CBO data on the proportion of firms that closed due to failure between 1992 and 1995 in construction and all industries.<sup>8,9</sup> According to CBO data, African American-owned firms were the most likely to report being “unsuccessful” at the time at which their businesses closed. About 77 percent of African American-owned firms in all industries reported an unsuccessful business closure in the 1996 CBO, compared with only 61 percent of non-Hispanic white male-owned firms. Unsuccessful closure rates were also relatively high for Hispanic American-owned firms (71%) and for firms owned by “other minority groups” (73%). The rate of unsuccessful closures for women-owned firms (61%) was similar to that of non-Hispanic white male-owned firms.

In the construction industry, minority- and women-owned firms were more likely to report unsuccessful business closures than non-Hispanic white male-owned firms (58%). Those trends were similar in all industries with one exception — women-owned businesses (61%) were equally as likely to report unsuccessful closures as non-Hispanic white male-owned firms (61%).

**Reasons for differences in unsuccessful closure rates.** Several researchers have offered explanations for higher rates of unsuccessful closure rates among minority- and women-owned firms compared with non-Hispanic white-owned firms:

- Unsuccessful business failures of minority-owned firms are largely due to barriers in access to capital. Regression analyses have identified initial capitalization as the most significant factor in determining firm viability. Because minority-owned firms secure smaller amounts of debt equity in the form of loans, they are more liable to fail.

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<sup>7</sup> CBO data from the 1997 and 2002 Economic Censuses do not include statistics on successful and unsuccessful business closures. To date, the 1992 CBO is the only U.S. Census dataset that includes such statistics.

<sup>8</sup> All CBO data should be interpreted with caution as firms that did not respond to the survey cannot be assumed to have the same characteristics of ones that did. Holmes, Thomas J. and James Schmitz. 1996. “Nonresponse Bias and Business Turnover Rates: The Case of the Characteristics of Business Owners Survey.” *Journal of Business & Economic Statistics*. 14(2): 231-241. This report does not include CBO data on overall firm closure rates because firms not responding to the survey were found to be much more likely to have closed than ones that did.

<sup>9</sup> This study includes CBO data on firm success because there is no compelling reason to believe that closed firms responding to the survey would have reported different rates of success/failure than those closed firms that did not respond to the survey. Headd, Brian. U.S. Small Business Administration, Office of Advocacy. 2000. *Business Success: Factors leading to surviving and closing successfully*. Washington D.C.: 12.

Difficulty in accessing capital is found to be particularly acute for minority-owned firms in the construction industry.<sup>10</sup>

- Prior work experience in a family member’s business or similar experiences are found to be strong determinants of business viability. Because minority business owners are much less likely to have such experience, their firms are less likely to survive.<sup>11</sup> Similar research has been conducted for women-owned businesses that found similar gender gaps in the likelihood of business survival.<sup>12</sup>
- Level of education is found to be a strong determinant of business survival. Educational attainment explains a significant portion of the gap in firm closure rates between African American-owned and non-minority-owned firms.<sup>13</sup>
- Non-minority business owners have the opportunity to pursue a wider array of business activities, which increases their likelihood of closing successful businesses to pursue more profitable business alternatives. Minority business owners, especially those who do not speak English, have limited employment options and are less likely to close a successful business.<sup>14</sup>
- The possession of greater initial capital and generally higher levels of education among Asian Americans determine the high rate of survival of Asian American-owned firms compared to other minority-owned firms.<sup>15</sup>

In sum, data suggest that closure rates for African American- and Hispanic American-owned firms in Wisconsin are higher than for other firms. Based on national results for the construction industry, African American-owned firms had higher rates of closure in that industry than other firms. National data indicate that African Americans, Hispanic Americans, and other minorities who owned and closed firms are more likely than non-Hispanic white-owned firms to have done so because the firm was unsuccessful. Several studies have examined why business failure rates are higher for firms owned by certain minority groups at the national level.

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<sup>10</sup> Bates, Timothy and Caren Grown. 1991. “Commercial Lending Practices and the Development of Black-Owned Construction Companies.” Center for Economic Studies, U.S. Census Bureau.

<sup>11</sup> Robb, A. and Fairlie, R. 2005. “Why are Black-Owned Businesses Less Successful than White-Owned Businesses? The Role of Families, Inheritances, and Business Human Capital.” University of California, Santa Cruz.

<sup>12</sup> Fairlie, R. and A. Robb. 2009. “Gender Differences in Business Performance: Evidence from the Characteristics of Business Owners Survey.” University of California, Santa Cruz.

<sup>13</sup> Ibid. 24.

<sup>14</sup> Bates, Timothy. 2002. “Analysis of Young Small Firms That Have Closed: Delineating Successful from Unsuccessful Closures.” Center for Economic Studies, U.S. Census Bureau.

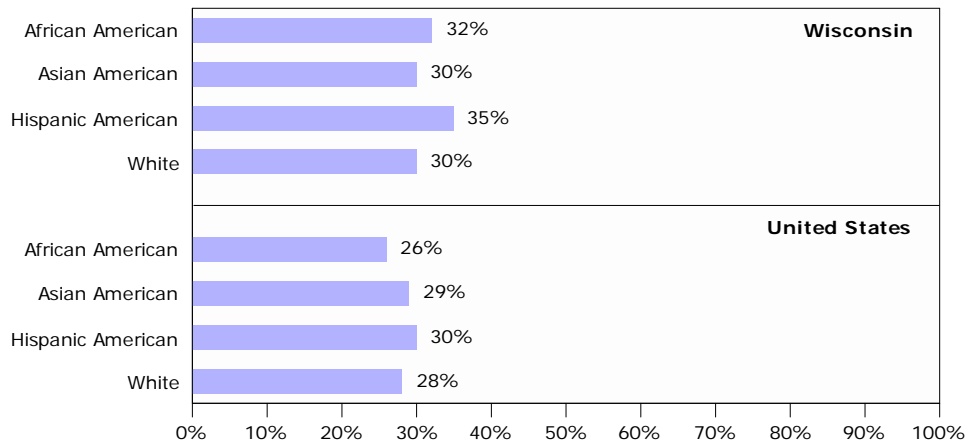
<sup>15</sup> Bates, Timothy. 1993. “Determinants of Survival and Profitability Among Asian Immigrant-Owned Small Businesses.” Center for Economic Studies, U.S. Census Bureau.

**Expansions and contractions.** Comparing rates of expansion and contraction between minority-owned and non-Hispanic white male-owned businesses is also useful in assessing the relative success of minority-owned businesses. As with closure data, only some of the data on expansions and contractions that were available for the nation were also available at the state level.

**Expansions.** The 2010 SBA study of minority business dynamics from 2002-2006 examined the number of non-publicly-held Wisconsin businesses that expanded and contracted between 2002 and 2006. Figure H-8 presents the percentage of all businesses, by race/ethnicity of ownership, that increased their total employment between 2002 and 2006.

According to the SBA study, approximately 30 percent of non-Hispanic white-owned Wisconsin businesses expanded between 2002 and 2006, compared to 32 percent of African American-owned businesses, 30 percent of Asian American-owned businesses, and 35 percent of Hispanic American-owned businesses. Expansion results were similar for the nation as a whole.<sup>16</sup>

**Figure H-8.**  
Percentage of firms that expanded, 2002-2006



Note: Data refer only to non-publicly held businesses. As sample sizes are not reported, statistical significance of these results cannot be determined; however, statistics are consistent with SBA data quality guidelines.

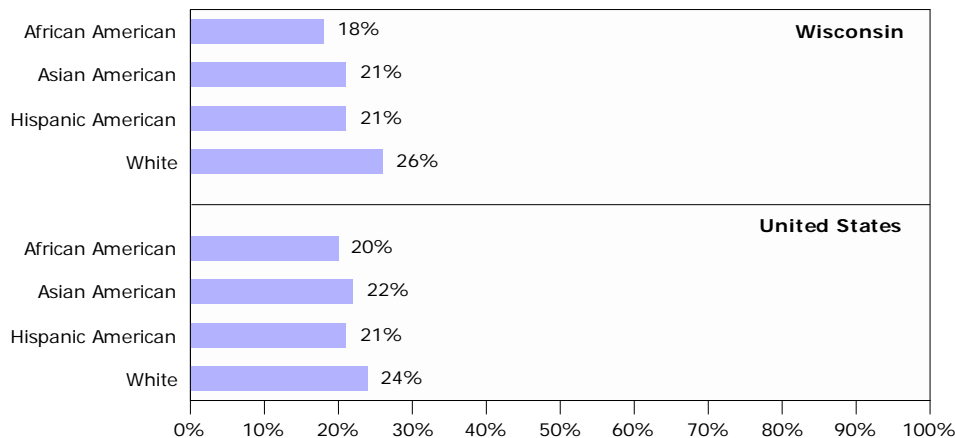
Source: Lowrey, Ying. 2010. "Race/Ethnicity and Establishment Dynamics, 2002-2006." U.S. Small Business Administration Office of Advocacy. Washington D.C.

The 2010 SBA study did not report state-level results for individual industries. For the nation, African American-owned construction businesses were less likely than white-owned businesses to have expanded between 2002 and 2006. Hispanic American- and Asian American-owned construction companies were slightly more likely than white-owned businesses to have expanded between 2002 and 2006.

**Contractions.** Figure H-9 shows the percentage of non-publicly held businesses operating in 2002 that reduced their employment (contracted) between 2002 and 2006 in Wisconsin and in the nation as a whole. At both the state level and the national level, African American, Asian American, and Hispanic American-owned businesses were slightly less likely to have contracted between 2002 and 2006 than non-Hispanic white-owned businesses.

<sup>16</sup> Lowrey, Ying. 2010. "Race/Ethnicity and Establishment Dynamics, 2002-2006." U.S. Small Business Administration Office of Advocacy. Washington D.C.

Figure H-9.  
Percentage of firms that contracted, 2002-2006



Note: Data refer only to non-publicly held businesses. As sample sizes are not reported, statistical significance of these results cannot be determined; however, statistics are consistent with SBA data quality guidelines.

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

The SBA study did not report state-specific results relating to contractions in individual industries. Based on national data, a slightly smaller percentage of African American-, Hispanic American- and Asian American-owned construction businesses contracted between 2002 and 2006 compared to white-owned businesses.

#### D. Business Receipts and Earnings

Annual business receipts and earning for business owners are also indicators of the success of businesses. The study team examined:

- Business receipts data from the U.S. Census Bureau 2007 Survey of Business Owners (SBO);
- Business earnings data for business owners from the 2000 Census and 2008-2012 American Community Survey (ACS)<sup>17</sup>; and
- Annual revenue data for Dane County construction firms that the study team collected as part of availability interviews.

**Business receipts.** Keen Independent examined receipts for firms in the Madison metropolitan area and Wisconsin using data from the 2007 SBO, conducted by the U.S. Census Bureau. Keen Independent also analyzed receipts for firms in individual industries. The SBO reports business receipts separately for employer firms (i.e., those with paid employees other than the business owner and family members) and for all firms.<sup>18</sup>

<sup>17</sup> It should be noted that the 2008-2012 ACS data were collected during the economic recession which began in late 2007.

<sup>18</sup> We use "all firms" to denote SBO data used in this analysis; the data include incorporated and unincorporated firms, but not publicly-traded companies or other firms not classifiable by race/ethnicity and gender.

Figure H-10 presents 2007 mean annual receipts for employer and non-employer businesses by race, ethnicity and gender. Racial categories are not available by both race and ethnicity. As such, the racial categories shown may include Hispanic Americans. The SBO data for businesses across all industries in Madison indicate that average receipts for minority- and women-owned businesses were lower than that for non-Hispanic-owned, white-owned, or male-owned businesses:

- Average receipts of African-American-owned businesses (\$83,000) were only 15 percent of the average for white-owned businesses (\$542,000).
- Asian American-owned businesses had average receipts (\$301,000) that were 56 percent of the average for white-owned businesses.
- Hispanic American-owned businesses had average receipts (\$415,000) that were 78 percent of the average of non-Hispanic-owned businesses (\$529,000).
- Average receipts for women-owned businesses (\$160,000) were 24 percent of the average of male-owned businesses (\$665,000).

Data on mean annual receipts for American Indian and Alaska Native and Native Hawaiian and Other Pacific Islander business owners were not available for the Madison area, due to small sample sizes.

Disparities in business receipts for minority-owned businesses compared to non-Hispanic white-owned businesses in Madison are consistent with those seen in Wisconsin. A 2007 SBA study identified differences similar to those presented in Figure H-10 when examining firms in all industries across the U.S.<sup>19</sup>

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<sup>19</sup> Lowrey, Ying. 2007. *Minorities in Business: A Demographic Review of Minority Business Ownership*. Office of Economic Research, Office of Advocacy, U.S. Small Business Administration.

**Figure H-10.**  
**Mean annual receipts**  
**(thousands) for all firms, by**  
**race/ethnicity and gender of**  
**owners, 2007**

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

**Source:**  
 2007 Survey of Business Owners, part of the U.S. Census Bureau's 2007 Economic Census.

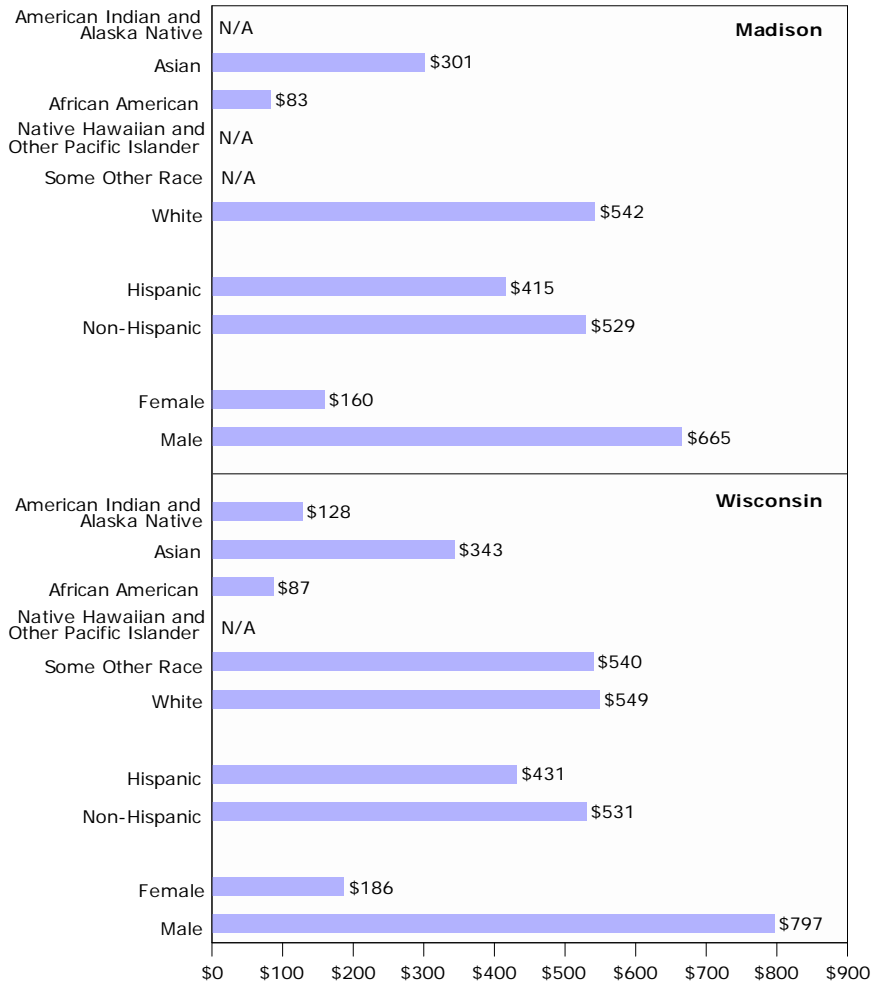


Figure H-11 presents average annual receipts in 2007 for only employer firms in Madison and in Wisconsin. (Employer businesses are those with paid employees.) Minority- and women-owned businesses had lower average business receipts than white- and male-owned employer businesses in Madison:

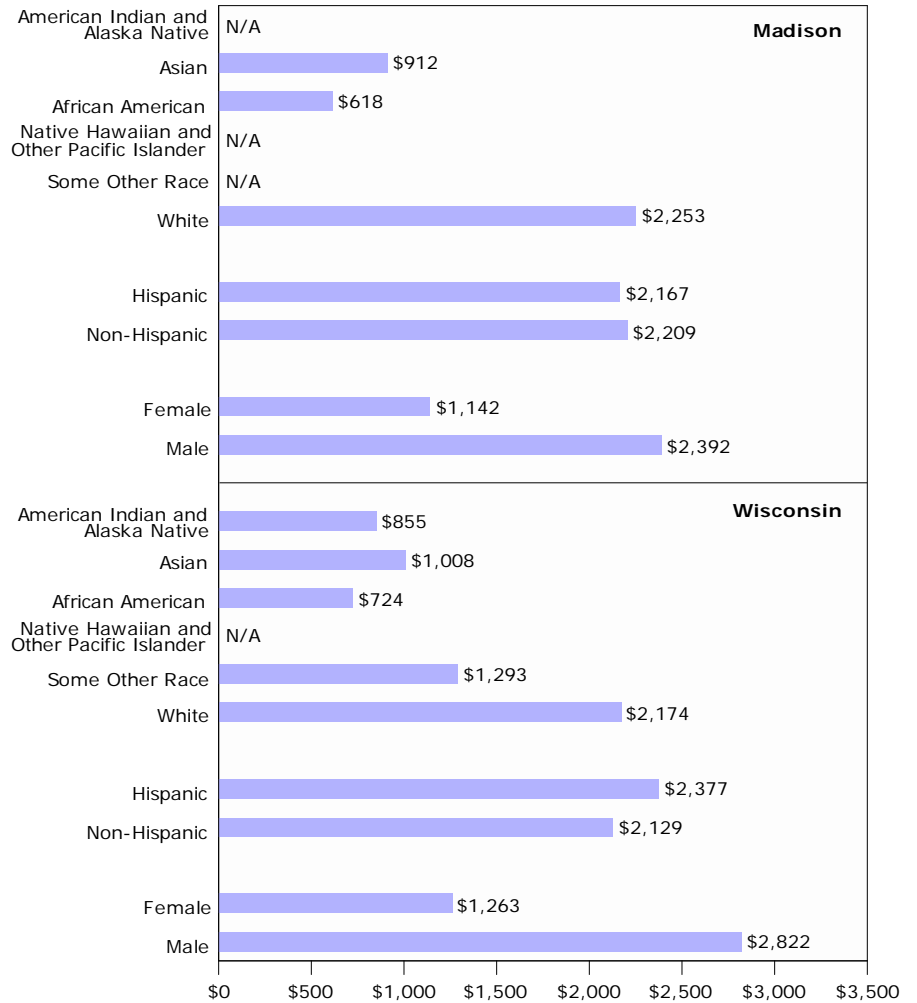
- Average receipts of African-American-owned businesses (\$618,000) were only 27 percent of the average for white-owned businesses (\$2.3 million).
- Asian American-owned businesses had average receipts (\$912,000) that were 40 percent of the average of white-owned businesses.
- Average receipts for women-owned businesses (\$1.1 million) were about half (48%) the average of male-owned businesses (\$2.4 million).

Data on mean annual receipts for American Indian and Alaska Native and Native Hawaiian and Other Pacific Islander business owners were not available for the Madison area, due to small sample sizes. Average receipts of Hispanic American-owned businesses (\$2.2 million) were equal to the average for non-Hispanic-owned businesses (\$2.2 million).

**Figure H-11.**  
**Mean annual receipts**  
**(thousands) for**  
**employer firms, by**  
**race/ethnicity and**  
**gender of owners, 2007**

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

**Source:**  
 2007 Survey of Business  
 Owners, part of the U.S. Census  
 Bureau's 2007 Economic  
 Census.



**Construction.** The study team also analyzed SBO receipts data separately for firms in construction. Figure H-12 presents mean annual receipts in 2007 for all (i.e., employer and non-employer firms combined) construction firms and for just employer firms by racial/ethnic and gender group. Results are presented for the Madison metropolitan area and the state of Wisconsin.

Figure H-12.  
Mean annual receipts  
(thousands) for firms in the  
construction industry, by  
race/ethnicity and gender of  
owners, 2007

Note:  
Does not include publicly-traded  
companies or other firms not  
classifiable by race/ethnicity and  
gender.  
"NA" denotes that data were not  
available at the time of publication and  
are subject to revision.

Source:  
2007 Survey of Business Owners, part  
of the U.S. Census Bureau's 2007  
Economic Census.

Madison	All firms	Employer firms
<b>Race</b>		
Minority	\$ 453	n/a
White	\$ 814	\$ 2,356
<b>Ethnicity</b>		
Hispanic	n/a	n/a
Non-Hispanic	\$ 811	\$ 2,373
<b>Gender</b>		
Female	\$ 496	n/a
Male	\$ 826	\$ 2,336
Wisconsin	All firms	Employer firms
<b>Race</b>		
American Indian and Alaska Native	\$ 220	\$ 768
Asian	n/a	n/a
African American	\$ 174	\$ 1,022
Native Hawaiian and Other Pacific Islander	n/a	n/a
Some other race	n/a	n/a
White	\$ 496	\$ 1,646
<b>Ethnicity</b>		
Hispanic	\$ 246	\$ 1,264
Non-Hispanic	\$ 489	\$ 1,643
<b>Gender</b>		
Female	\$ 404	\$ 1,772
Male	\$ 539	\$ 1,970

In the Madison construction industry, average 2007 receipts for minority- and women-owned firms were lower than the average for non-Hispanic, white- and male-owned businesses. Results for all businesses (i.e., employer and non-employer businesses combined) indicate that average receipts for minority-owned construction firms (\$453,000) were about 56 percent that of white-owned construction firms. Average receipts for women-owned construction firms (\$496,000) were about 60 percent that of male-owned construction firms. Data for the Madison area were not available for Hispanic-owned firms or by race due to small sample sizes. Average receipts for non-Hispanic-owned construction firms were \$811,000.

SBO data indicate that average receipts were higher for construction employer businesses than for all construction businesses (i.e., employer and non-employer businesses combined). Data were not available by race/ethnicity for Madison area construction employer businesses due to small sample sizes. Data for the state of Wisconsin show average receipts for American Indian and Alaska Native-owned construction employer businesses were less than half that of white-owned construction employer businesses and receipts for African American-owned businesses were about two-thirds that of white-owned businesses. Average receipts for Hispanic American-owned business were about three-fourths that of non-Hispanic-owned businesses. Average receipts for women-owned construction employer businesses (\$1.8 million) were about 90 percent that of male-owned construction employer businesses (\$2.0 million).

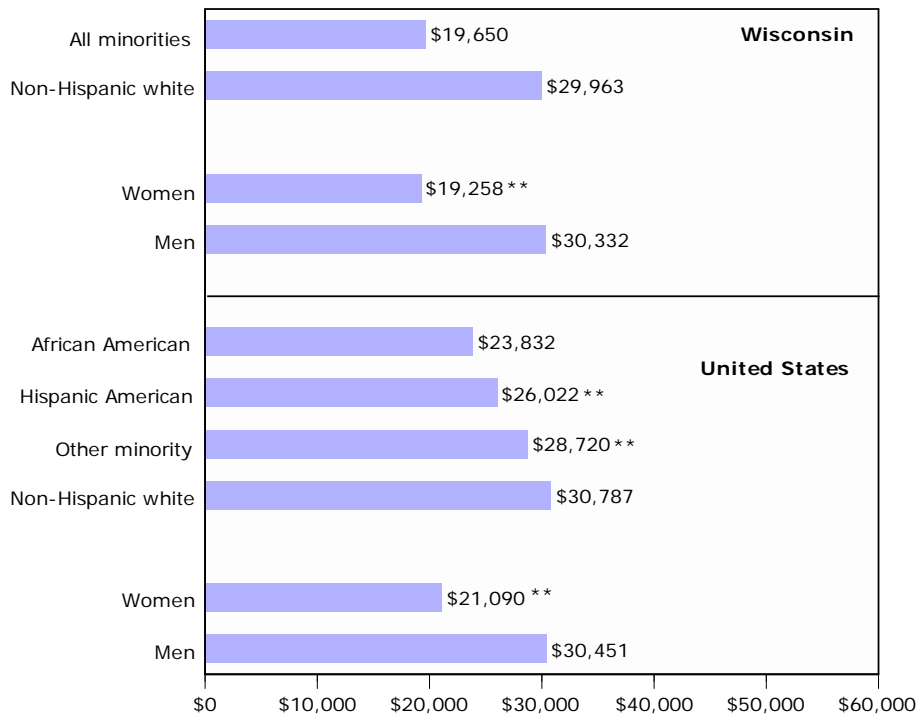


**Business earnings.** In order to assess the success of self-employed minorities and women in the construction industry, Keen Independent examined earnings of business owners using the Public Use Microdata Series (PUMS) from the 2000 U.S. Census and 2008-2012 ACS. Keen Independent analyzed earnings of incorporated and unincorporated business owners age 16 and over who reported positive business earnings.

**Construction business owner earnings, 1999.** Figure H-13 shows average earnings in 1999 for business owners in the construction industry in Wisconsin and in the United States. Due to small sample sizes for individual racial/ethnic groups, Keen Independent examined all minorities as a single category. Business earning results for 1999 were based on the 2000 Census, in which individuals were asked to give their business income for the previous year:

- On average, minority business owners in Wisconsin (\$19,650) earned about two-thirds that of Non-Hispanic white construction business owners (\$29,963), although this difference was not statistically significant.
- Female construction business owners in Wisconsin (\$19,258) earned less, on average, than male construction business owners (\$30,332). This difference was statistically significant.

**Figure H-13.**  
**Mean annual business owner earnings in the construction industry, 1999**

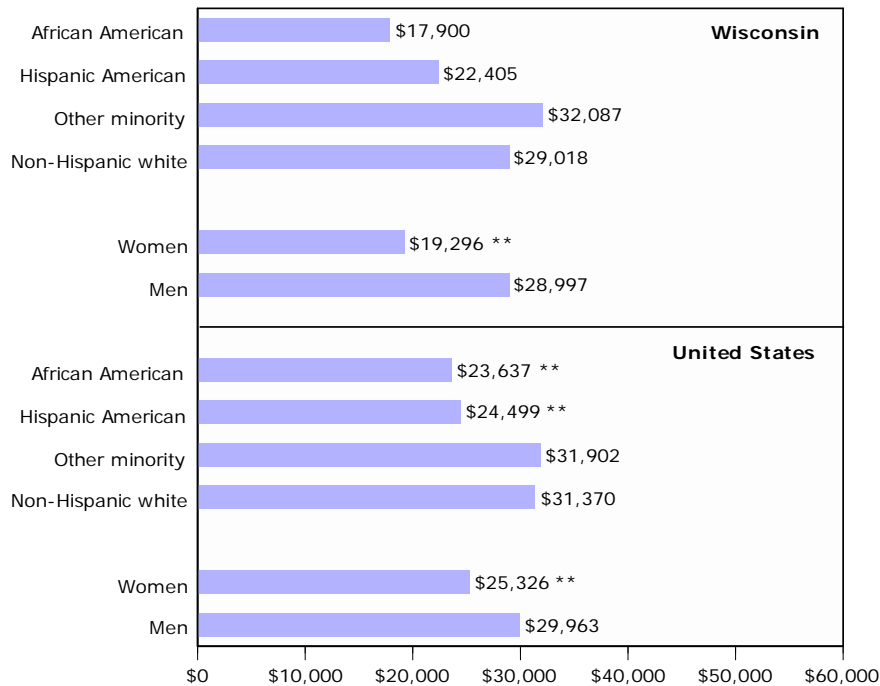


Note: The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 1999 dollars. \*,\*\* Denotes statistically significant differences from non-Hispanic whites (for minority groups) or from men (for women) at the 90% and 95% confidence level, respectively.

Source: Keen Independent Research from 2000 U.S. Census 5% sample. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

**Construction business owner earnings, 2007-2012.** The 2008-2012 ACS also reports business owner earnings. Because of the way that the U.S. Census Bureau conducts each year's ACS, earnings for business owners reported in the 2008-2012 sample were for the previous 12 months between 2007 and 2012.<sup>20</sup> However, all dollar amounts are presented in 2012 dollars. Figure H-14 shows earnings in 2007-2012 for business owners in the construction industry in Wisconsin and the nation as a whole.

**Figure H-14.**  
**Mean annual business owner earnings in the construction industry, 2007-2012**



Note: The sample universe is business owners age 16 and over who reported positive earnings. All amounts in 2012 dollars.  
 \*,\*\* Denotes statistically significant differences from non-Hispanic whites (for minority groups) or from men (for women) at the 90% and 95% confidence level, respectively.

Source: Keen Independent Research from 2008-2012 ACS. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

From 2007 through 2012, there were large differences in earnings between African American business owners and non-Hispanic white business owners, both in Wisconsin and nationally. The difference was not statistically significant in Wisconsin, likely due to small sample sizes; the difference was statistically significant at the national level. Additionally, Hispanic American-owned businesses reported lower earnings than non-Hispanic white businesses owners. This difference was significant for the nation as a whole, but not in Wisconsin; it is also likely due to small sample sizes. The earnings difference between female and male business owners lessened from 2007-2012 relative to 1999 but remained statistically significant.

<sup>20</sup> For example, if a business owner completed the survey on January 1, 2008, the figures for the previous 12 months would reference January 1, 2007 to December 31, 2007. Similarly, a business owner completing the survey December 31, 2012 would reference amounts since January 1, 2012.

**Regression analyses of business earnings.** Differences in business earnings among different racial/ethnic and gender groups may be at least partially attributable to race- and gender-neutral factors such as age, marital status, and educational attainment. Keen Independent performed regression analyses using 2000 Census data and 2008-2012 ACS data to examine whether there were differences in 1999 and 2007-2012 business earnings between minorities and non-Hispanic whites and between women and men after statistically controlling for certain race- and gender-neutral factors.

Keen Independent applied an ordinary least squares (OLS) regression model to the data that was very similar to models reviewed by courts after other disparity studies.<sup>21</sup> The dependent variable in the model was the natural logarithm of business earnings. Business owners that reported zero or negative business earnings were excluded, as were observations for which the U.S. Census Bureau had imputed values of business earnings. Along with variables for the race/ethnicity and gender of business owners, the model also included available measures from the data considered likely to affect earnings potential, including age, age-squared, marital status, ability to speak English well, and educational attainment.

Due to small sample sizes for the Dane County construction industry, Keen Independent applied an OLS regression model for business earnings in the construction industry in Wisconsin. Business owners with positive business earnings are included in the model and any Dane County effects are estimated by using county-level control variables. All minorities were analyzed as a single, combined group due to small sample sizes.

Figure H-15 presents the results of the regression model for 1999 business earnings in the Wisconsin construction industry. The model indicated that several race- and gender-neutral factors significantly predicted earnings of business owners in the Wisconsin construction industry:

- Older business owners tended to have greater business earnings than younger business owners (age had less of an effect for the oldest individuals);
- Married business owners tended to have greater business earnings than unmarried business owners;
- Business owners that indicated fluent English tended to have lower earnings; and
- Disabled business owners tended to have lower earnings than non-disabled business owners.

After statistically controlling for race- and gender-neutral factors, there were still statistically significant effects of race and gender. Specifically, being a minority in Dane County or female was associated with lower business earnings.

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<sup>21</sup> For example, National Economic Research Associates, Inc. 2000. *Disadvantaged Business Enterprise Availability Study*. Prepared for the Minnesota Department of Transportation; and National Economic Research Associates, Inc. 2004. *Disadvantaged Business Enterprise Availability Study*. Prepared for the Illinois Department of Transportation.

Figure H-15.  
Wisconsin construction business owner  
earnings model, 1999

Note:

\*,\*\* Denotes statistical significance at the 90% and 95%  
confidence level, respectively.

Source:

Keen Independent Research from 2000 Census. The raw  
data extract was obtained through the IPUMS program of  
the MN Population Center: <http://usa.ipums.org/usa/>.

Variable	Coefficient
Constant	8.115 **
Age	0.119 **
Age-squared	-0.001 **
Married	0.404 **
Speaks English well	-1.043 **
Disabled	-0.310 **
Less than high school	-0.260
Some college	-0.167
Four-year degree	0.038
Advanced degree	0.118
Female	-0.592 **
Female in Dane County	-0.225
All minorities	-0.408
All minorities in Dane County	-1.953 **
Dane County	0.393 **

Figure H-16 presents the results of the regression model for 2007-2012 business earnings in the Wisconsin construction industry. The model indicated that several race- and gender-neutral factors significantly predicted earnings of business owners in the Wisconsin construction industry:

- Older business owners tended to have greater business earnings than younger business owners (age had less of an effect for the oldest individuals); and
- Married business owners tended to have greater business earnings than unmarried business owners.

After statistically controlling for race- and gender-neutral factors, there were still statistically significant effects of race and gender. Specifically, being a minority or female was associated with lower business earnings.

Figure H-16.  
Wisconsin construction business owner  
earnings model, 2007-2012

Note:

\*,\*\* Denotes statistical significance at the 90% and 95% confidence level, respectively.

Source:

Keen Independent Research from 2008-2012 ACS. The raw data extract was obtained through the IPUMS program of the MN Population Center: <http://usa.ipums.org/usa/>.

Variable	Coefficient
Constant	7.245 **
Age	0.123 **
Age-squared	-0.001 **
Married	0.432 **
Speaks English well	-0.168
Disabled	-0.220
Less than high school	-0.171
Some college	-0.049
Four-year degree	0.253
Advanced degree	0.471
Female	-0.479 **
Female in Dane County	1.158
All minorities	-0.642 **
All minorities in Dane County	0.917
Dane County	-0.069

**Summary of business receipts and earnings.** Keen Independent examined several different datasets to examine business receipts and earnings for firms in Madison and at the state level.

- Analysis of 1999 and 2007 through 2012 data indicated that, in Madison, average receipts for minority- and women-owned firms were lower compared to those of non-Hispanic white- and male-owned firms in the construction industry.
- Regression analyses using Census data for business owner earnings indicated that there were statistically significant effects of race/ethnicity and gender on business earnings, after statistically controlling for certain race- and gender-neutral factors.

### E. Availability Interview Results Concerning Potential Barriers

As part of the availability interviews conducted with Dane County businesses, the study team asked firm owners and managers if they had experienced barriers or difficulties associated with starting or expanding a business or with obtaining work. Appendix D explains the interview process and provides the interview questions. Appendix G presents results for questions concerning access to capital, bonding and insurance.

Results for other interview questions are examined here, including whether the firm had experienced difficulties learning about:

- Bid opportunities with City of Madison;
- Bid opportunities with other public agencies in the Madison area;
- Bid opportunities in the private sector; and
- Subcontracting opportunities from Madison area prime contractors.

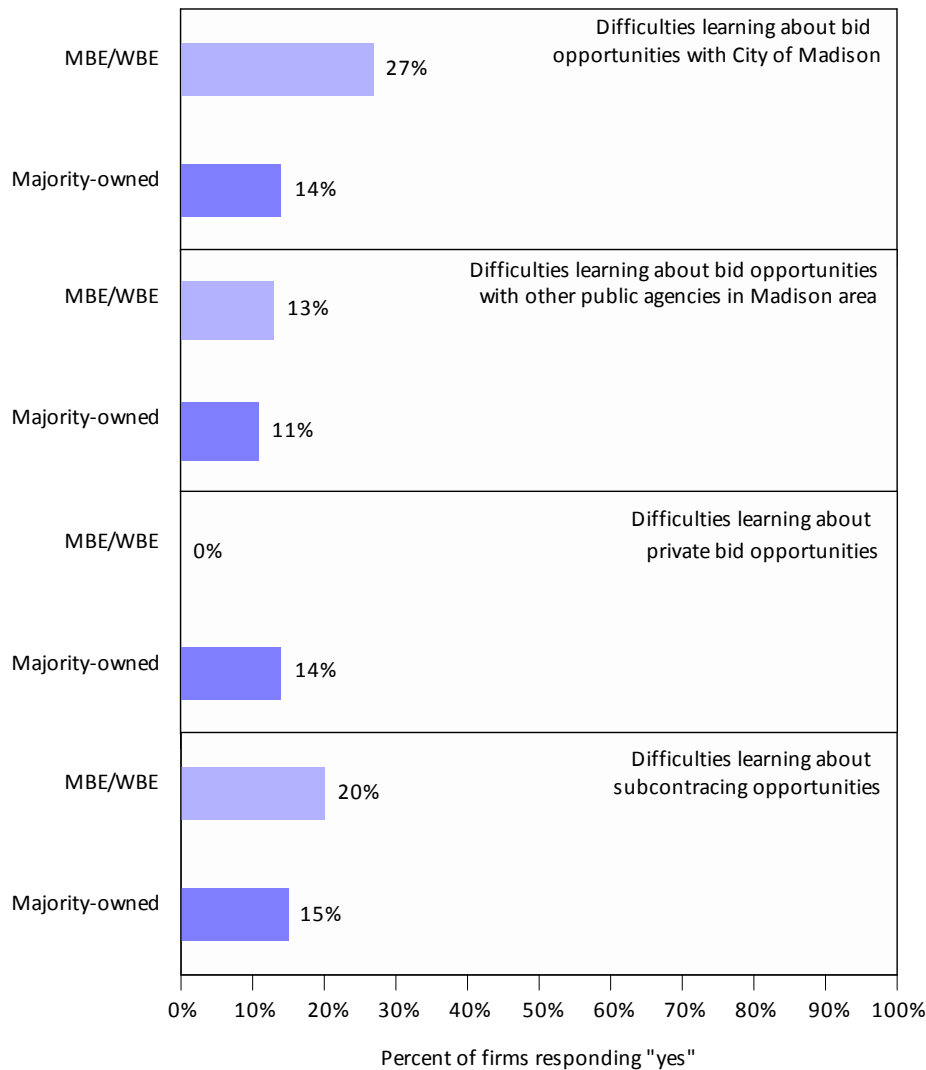
**Learning about City of Madison bid opportunities.** As shown in Figure H-17 on the following page, a greater percentage of minority- and women-owned firms (27%) indicated difficulties learning about bid opportunities with the City of Madison compared with majority-owned businesses (14%).

**Learning about other public agency bid opportunities.** Fewer firms reported difficulties learning about bid opportunities from other public agencies in the Madison area. About 13 percent of minority-and women-owned firms and 11 percent of majority-owned firms indicated they had experienced difficulties learning of bid opportunities from other local public agencies.

**Learning about private sector bid opportunities.** No minority- and women-owned firms and only 14 percent of majority-owned firms reported any difficulties learning about private sector opportunities.

**Learning about subcontracting opportunities.** Minority- and women-owned firms were more likely than majority-owned firms to report difficulties learning about subcontracting opportunities. Twenty percent of minority- and women-owned firms and 15 percent of majority-owned firms indicated difficulties learning of subcontracting opportunities from Madison area prime contractors.

Figure H-17.  
 Responses to 2014 availability interview questions concerning learning about work,  
 Dane County MBE, WBE and majority-owned firms



Note: “WBE” represents white women-owned firms, “MBE” represents minority-owned firms and “majority-owned” represents non-Hispanic white male-owned firms.

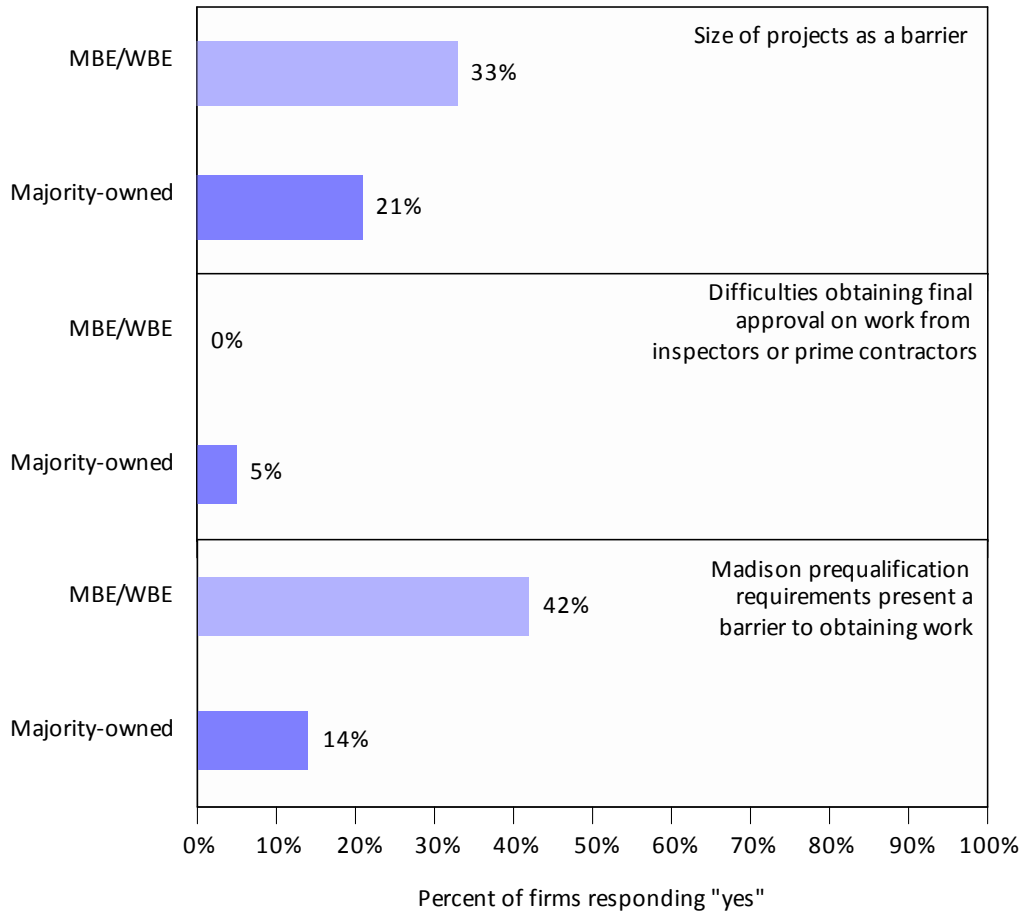
Source: Keen Independent Research from 2014 Availability Interviews.

**Size of projects.** Interviewers also asked business owners and managers whether size of projects presented a barrier to bidding. About one-fifth of majority-owned firms reported that size of projects was a barrier. A greater percentage of MBEs and WBEs (33%) reported that size was a barrier to bidding. Figure H-18 shows these results.

**Obtaining final approval on work from inspectors or prime contractors.** Few firms indicated difficulties regarding inspections or approval of work, regardless of ownership (see Figure H-18).

**Prequalification for work in City of Madison.** Few majority-owned firms (14%) reported City of Madison prequalification requirements present a barrier to obtaining work, while about 42 percent of minority-and women-owned firms indicated the requirements present a barrier to obtaining work with the City of Madison.

Figure H-18.  
Responses to 2014 availability interview questions concerning size of projects, approval of work, and licensing and prequalification, Dane County MBE, WBE and majority-owned firms



Note: "WBE" represents white women-owned firms, "MBE" represents minority-owned firms and "majority-owned" represents non-Hispanic white male-owned firms.

Source: Keen Independent Research from 2014 Availability Interviews.

**Summary of analysis of availability interview questions concerning barriers.** The availability interviews suggest that relatively more minority- and women-owned firms have difficulty learning about bid opportunities with the City of Madison.

Relatively more minority- and women-owned firms than majority-owned firms reported that size of projects was a barrier to bidding and that the City of Madison prequalification requirements present a barrier to obtaining work.



## APPENDIX I.

### Description of Data Sources for Marketplace Analyses

To perform the marketplace analyses presented in Appendices E through H, Keen Independent used data from the following secondary data sources:

- Integrated Public Use Microdata Series (IPUMS) from the 1990 Decennial Census;
- Integrated Public Use Microdata Series (IPUMS) from the 2000 Decennial Census;
- Integrated Public Use Microdata Series (IPUMS) data from the 2008-2012 (five-year) American Community Survey (ACS);
- Federal Reserve Board's 1998 Survey of Small Business Finances (SSBF);
- Federal Reserve Board's 2003 Survey of Small Business Finances (SSBF);
- 2007 Survey of Business Owners (SBO) conducted by the U.S. Census Bureau;
- 2006 Home Mortgage Disclosure Act (HMDA) data provided by the Federal Financial Institutions Examination Council (FFIEC);
- 2009 Home Mortgage Disclosure Act (HMDA) data provided by the Federal Financial Institutions Examination Council (FFIEC); and
- 2012 Home Mortgage Disclosure Act (HMDA) data provided by the Federal Financial Institutions Examination Council (FFIEC).

The following sections provide further detail on each data source, including how the study team used it in its quantitative marketplace analyses.

#### A. Integrated Public Use Microdata Series (IPUMS) Data

The Minnesota Population Center is home to the Integrated Public Use Microdata Series (IPUMS), the largest repository of national and international Census microdata for social and economic research. Researchers may access the IPUMS program and retrieve customized, accurate datasets.<sup>1</sup> The IPUMS-USA data consist of more than 50 samples of the American population. These samples are drawn from censuses (1850 to 2000) and from the ACS (2000-2012).

IPUMS data offer several features ideal for the analyses reported in this study, including historical cross-sectional data, stratified national and state-level samples, and large sample sizes that enable analysis with a high level of statistical confidence, even for subsets of the population

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<sup>1</sup> Steven Ruggles, J. Trent Alexander, Katie Genadek, Ronald Goeken, Matthew B. Schroeder, and Matthew Sobek. *Integrated Public Use Microdata Series: Version 5.0* [Machine-readable database]. Minneapolis: University of Minnesota, 2011.

(e.g., racial/ethnic and occupational groups). Because the design of these surveys has changed over time, they have a wide range of record layouts and coding schemes. The IPUMS data files are specifically formulated to standardize the U.S. Census Bureau Public Use Microdata Sample (PUMS) data from year to year. Variables that cannot be compared across years are removed from the dataset. In multiyear files, IPUMS inflates dollar values to the most recent year in the sample. IPUMS also provides some additional geographic and family interrelationship variables. Most importantly, IPUMS provides strata and cluster variables for survey samples prior to 2005, as well as replicate weights for survey samples since 2005, to account for the complexity of the sample design in the measurement of standard errors.

The study team obtained selected Decennial Census and ACS IPUMS data from the University of Minnesota Population Center.

Focusing on the construction and engineering industries, the Keen Independent study team used IPUMS data to analyze workers and households in Dane County by examining:

- Demographic characteristics;
- Measures of financial resources;
- Educational attainment; and
- Self-employment (business ownership).

For the analyses contained in this report, the study team used the 1990 and 2000 Census 5 percent samples and 2008-2012 ACS samples.

**2000 Census data.** The 2000 U.S. Census sample contains 14,081,466 individual observations, weighted to represent 281,421,906 people. The Wisconsin sub-sample contains 272,879 observations weighted to represent 5,357,182 people and the sample for Dane County includes 15,683 observations weighted to represent 429,839 people.

**Categorizing individual race/ethnicity.** To define race/ethnicity for the 2000 Census dataset, the study team used the IPUMS race/ethnicity variables — RACED and HISPAN — to categorize individuals into one of seven groups:

- Non-Hispanic white;
- Hispanic American;
- African American;
- Asian-Pacific American;
- Subcontinent Asian American;
- Native American; and
- Other minority (unspecified).

An individual was considered “non-Hispanic white” if they did not report Hispanic ethnicity and indicated being white only — not in combination with any other race group. All self-identified Hispanics (based on the HISPAN variable) were considered Hispanic American, regardless of any other race or ethnicity identification. For the five other racial groups, an individual’s race/ethnicity was categorized by the first (or only) race group identified in each possible race-type combination. The study team used a rank ordering methodology similar to that used in the 2000 Census data dictionary. An individual who identified multiple races was placed in the reported race category with the highest ranking in the study team’s ordering. African American is first, followed by Native American, Asian-Pacific American, and then Subcontinent Asian American. For example, if an individual identified himself or herself as “Korean,” that person was placed in the Asian-Pacific American category. If the individual identified himself or herself as “Korean” in combination with “Black,” the individual was considered African American.

- The Asian-Pacific American category included the following race/ethnicity groups: Bhutanese, Burmese, Cambodian, Chamorro, Chinese, Filipino, Guamanian, Hmong, Indonesian, Japanese, Korean, Laotian, Malaysian, Mongolian, Nepalese, Okinawan, Samoan, Tahitian, Taiwanese, Thai, Tongan, and Vietnamese. This category also included other Polynesian, Melanesian, and Micronesian races, as well as individuals identified as Pacific Islanders.
- The Subcontinent Asian American category included these race groups: Asian Indian (Hindu), Bangladeshi, Pakistani, and Sri Lankan. Individuals who identified themselves as “Asian,” but were not clearly categorized as Subcontinent Asian were placed in the Asian-Pacific American group.
- American Indian, Alaska Native, Native Hawaiian and Latin American Indian groups were considered Native American.
- If an individual was identified with any of the above groups and an “other race” group, the individual was categorized into the known category. Individuals identified as “other race” or “white and other race” were categorized as “other minority.”

For some analyses — those in which sample sizes were small — the study team combined minority groups.

**Business ownership.** Keen Independent used the Census “labor force status” variable (LABFORCE) and the detailed “class of worker” variable (CLASSWKD) to determine self-employment.<sup>2</sup> Individuals were classified into the following categories.

- Self-employed for a non-incorporated business;
- Self-employed for an incorporated business;

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<sup>2</sup> The labor force consists of the civilian labor force (employed and unemployed) as well as active duty members of the U.S. Armed Forces. Civilians 16 years and older who are not classified in the labor force include students, homemakers, retired workers, seasonal workers interviewed in an off season who were not seeking work, persons doing incidental unpaid family work of less than 15 hours and the institutionalized population (see [http://www.census.gov/acs/www/Downloads/data\\_documentation/SubjectDefinitions/2010\\_ACSSubjectDefinitions.pdf](http://www.census.gov/acs/www/Downloads/data_documentation/SubjectDefinitions/2010_ACSSubjectDefinitions.pdf) for more information).

- Wage or salary employee for a private firm;
- Wage or salary employee for a non-profit organization;
- Employee of the Federal government;
- Employee of a State government;
- Employee of a local government; or
- Unpaid family worker.

The study team counted individuals who reported being self-employed — either for an incorporated or a non-incorporated business — as business owners.<sup>3</sup>

**Study industries.** The marketplace analyses focus on two study industries: construction and engineering-related services. Keen Independent used the IND variable to identify individuals as working in one or the other industry. The variable reports the industry in which a person performed an occupation and includes several hundred industry and subindustry categories. Figure I-1 identifies the IND codes used to define each study area for the 2000 Census and 2008-2012 ACS analyses.

**Figure I-1.**  
**2000 Census and 2008-2012 ACS industry codes used for construction**

Study industry	2000 Census/ 2008-2012 ACS IND codes	Description
Construction	77/770	Construction industry

Source: Keen Independent Research from the IPUMS program: <http://usa.ipums.org/usa/>.

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<sup>3</sup> For the analysis of business ownership, the study team excluded active duty members of the U.S. Armed Forces and all other wage/salary workers.

**Industry occupations.** The study team also examined workers by occupation within the construction industry using the PUMS variable OCC. Figure I-2 summarizes the 2000 Census and 2008-2012 ACS OCC codes used in the study team’s analyses.

**Figure I-2.**  
**2000 Census and 2008-2012 ACS occupation codes used to examine workers in construction**

<b>Census 2000/ 2008-2012 ACS occupational title and code</b>	<b>Job description</b>
Construction managers 22/220	Plan, direct, coordinate, or budget, usually through subordinate supervisory personnel, activities concerned with the construction and maintenance of structures, facilities, and systems. Participate in the conceptual development of a construction project and oversee its organization, scheduling, and implementation. Include specialized construction fields, such as carpentry or plumbing. Include general superintendents, project managers, and constructors who manage, coordinate, and supervise the construction process.
First-line supervisors/managers of construction trades and extraction workers 620/6200	Directly supervise and coordinate the activities of construction or extraction workers.
Brickmasons, blockmasons and stonemasons 622/6220	Lay and bind building materials, such as brick, structural tile, concrete block, cinder block, glass block, and terra-cotta block, construct or repair walls, partitions, arches, sewers, and other structures. Build stone structures, such as piers, walls, and abutments and lay walks, curbstones, or special types of masonry for vats, tanks, and floors.
Carpenters 623/6230	Construct, erect, install, or repair structures and fixtures made of wood, such as concrete forms, building frameworks including partitions, joists, studding, rafters, wood stairways, window and door frames, and hardwood floors.
Carpet, floor, and tile installers and finishers 624/6240	Apply shock-absorbing, sound-deadening, or decorative coverings to floors. Lay carpet on floors and install padding and trim flooring materials. Scrape and sand wooden floors to smooth surfaces, apply coats of finish. Apply hard tile, marble, wood tile, walls, floors, ceilings, and roof decks.

**Figure I-2 (continued).**  
**2000 Census and 2008-2012 ACS occupation codes used to examine workers in construction**

<b>Census 2000 and 2008-2012 ACS occupational title and code</b>	<b>Job description</b>
Cement masons, concrete finishers and terrazzo workers 625/6250	Smooth and finish surfaces of poured concrete, such as floors, walks, sidewalks, or curbs using a variety of hand and power tools. Align forms for sidewalks, curbs or gutters; patch voids; use saws to cut expansion joints. Terrazzo workers apply a mixture of cement, sand, pigment or marble chips to floors, stairways, and cabinet fixtures.
Construction laborers 626/6260	Perform tasks involving physical labor at building, highway, and heavy construction projects, tunnel and shaft excavations, and demolition sites. May operate hand and power tools of all types: air hammers, earth tampers, cement mixers, small mechanical hoists, surveying and measuring equipment, and a variety of other equipment and instruments. May clean and prepare sites, dig trenches, set braces to support the sides of excavations, erect scaffolding, clean up rubble and debris, and remove asbestos, lead, and other hazardous waste materials. May assist other craft workers. Exclude construction laborers who primarily assist a particular craft worker, and classify them under "Helpers, Construction Trades."
Paving, surfacing and tamping equipment operators 630/6300	Operate equipment used for applying concrete, asphalt, or other materials to road beds, parking lots, or airport runways and taxiways, or equipment used for tamping gravel, dirt, or other materials. Include concrete and asphalt paving machine operators, form tampers, tamping machine operators, and stone spreader operators.
Miscellaneous construction equipment operators, including pile-driver operators 632/6320	Operate one or several types of power construction equipment, such as motor graders, bulldozers, scrapers, compressors, pumps, derricks, shovels, tractors, or front-end loaders to excavate, move, and grade earth, erect structures, or pour concrete or other hard surface pavement. Operate pile drivers mounted on skids, barges, crawler treads, or locomotive cranes to drive pilings for retaining walls, bulkheads, and foundations of structures, such as buildings, bridges, and piers.
Drywall installers, ceiling tile installers and tapers 633/6330	Apply plasterboard or other wallboard to ceilings or interior walls of buildings, mount acoustical tiles or blocks, strips, or sheets of shock-absorbing materials to ceilings and walls of buildings to reduce or reflect sound.
Electricians 635/6350,6355	Install, maintain, and repair electrical wiring, equipment, and fixtures. Ensure that work is in accordance with relevant codes. May install or service street lights, intercom systems, or electrical control systems. Exclude "Security and Fire Alarm Systems Installers." The 2000 category includes electrician apprentices.

**Figure I-2 (continued).**  
**2000 Census and 2008-2012 ACS occupation codes used to examine workers in construction**

Census 2000 and 2008-2012 ACS occupational title and code	Job description
Glaziers 636/6360	Install glass in windows, skylights, store fronts, display cases, building fronts, interior walls, ceilings, and tabletops.
Painters, construction and maintenance 642/6420	Paint walls, equipment, buildings, bridges, and other structural surfaces using brushes, rollers, and spray guns. Remove old paint to prepare surfaces prior to painting and mix colors or oils to obtain desired color or consistency.
Pipelayers, plumbers, pipefitters and steamfitters 644/6440	Lay pipe for storm or sanitation sewers, drains, and water mains. Perform any combination of the following tasks: grade trenches or culverts, position pipe, or seal joints. Excludes "Welders, Cutters, Solderers, and Brazers." Assemble, install, alter, and repair pipelines or pipe systems that carry water, steam, air, or other liquids or gases. May install heating and cooling equipment and mechanical control systems. Includes sprinklerfitters.
Plasterers and stucco masons 646/6460	Apply interior or exterior plaster, cement, stucco, or similar materials and set ornamental plaster.
Roofers 651/6510,6515	Cover roofs of structures with shingles, slate, asphalt, aluminum, and wood. Spray roofs, sidings, and walls with material to bind, seal, insulate, or soundproof sections of structures.
Iron and steel workers, including reinforcing iron and rebar workers 653/6530	<i>Iron and steel workers</i> raise, place, and unite iron or steel girders, columns, and other structural members to form completed structures or structural frameworks. May erect metal storage tanks and assemble prefabricated metal buildings. <i>Reinforcing iron and rebar workers</i> position and secure steel bars or mesh in concrete forms in order to reinforce concrete. Use a variety of fasteners, rod-bending machines, blowtorches, and hand tools. Include rod busters.
Helpers, construction trades 660/6600	All construction trades helpers not listed separately.

**Figure I-2 (continued).**  
**2000 Census and 2008-2012 ACS occupation codes used to examine workers in construction**

Census 2000 and 2008-2012 ACS occupational title and code	Job description
Driver/sales workers and truck drivers 913/9130	<i>Driver/sales workers</i> drive trucks or other vehicles over established routes or within an established territory and sell goods, such as food products, including restaurant take-out items, or pick up and deliver items, such as laundry. May also take orders and collect payments. Include newspaper delivery drivers. <i>Truck drivers (heavy)</i> drive a tractor-trailer combination or a truck with a capacity of at least 26,000 GVW, to transport and deliver goods, livestock, or materials in liquid, loose, or packaged form. May be required to unload truck. May require use of automated routing equipment. Requires commercial drivers' license. <i>Truck drivers (light)</i> drive a truck or van with a capacity of under 26,000 GVW, primarily to deliver or pick up merchandise or to deliver packages within a specified area. May require use of automatic routing or location software. May load and unload truck. Exclude "Couriers and Messengers."
Crane and tower operators 951/9510	Operate mechanical boom and cable or tower and cable equipment to lift and move materials, machines, or products in many directions. Exclude "Excavating and Loading Machine and Dragline Operators."
Dredge, excavating and loading machine operators 952/9520	<i>Dredge operators</i> operate dredge to remove sand, gravel, or other materials from lakes, rivers, or streams; and to excavate and maintain navigable channels in waterways. <i>Excavating and loading machine and dragline operators</i> Operate or tend machinery equipped with scoops, shovels, or buckets, to excavate and load loose materials. <i>Loading machine operators, underground mining,</i> Operate underground loading machine to load coal, ore, or rock into shuttle or mine car or onto conveyors. Loading equipment may include power shovels, hoisting engines equipped with cable-drawn scraper or scoop, or machines equipped with gathering arms and conveyor.

Source: 2000 Census occupational titles and codes at <http://usa.ipums.org/usa/volii/00occup.shtml>. 2008-2012 ACS occupational titles and codes at <https://usa.ipums.org/usa/volii/c2soccup.shtml>.

**Education variables.** Keen Independent used the variable indicating respondents' highest level of educational attainment (EDUCD) to classify individuals into six categories:

- Less than high school;
- High school diploma or equivalent;
- Some college but no degree;
- Associate's degree;
- Bachelor's degree; and
- Advanced degree.



**Definition of workers.** The universe for the class of worker, industry, and occupation variables includes workers 16 years of age or older who are “gainfully employed” and those who are unemployed but seeking work. “Gainfully employed” means that the worker reported an occupation as defined by the Census code OCC.

**1990 Census data.** The study team compared 2000 Census data with data for the 1990 Census to analyze changes in worker demographics, educational attainment and business ownership over time. The 1990 Census five percent sample includes 12,501,046 observations weighted to represent 248,107,628 people. At the state level, the sample includes 245,498 observations in Wisconsin weighted to represent 4,881,441 people. For Dane County, the sample includes 15,692 observations weighted to represent 364,684 individuals.

**2008-2012 American Community Survey (ACS) data.** The study team also examined 2008-2012 ACS data from IPUMS. The U.S. Census Bureau conducts the ACS which uses monthly samples to produce annually updated data for the same small areas as the 2000 Census long-form.<sup>4</sup> Since 2005, the ACS has expanded to a roughly 1 percent sample of the population, based on a random sample of housing units in every county in the United States (including District of Columbia and Puerto Rico). The 2008-2012 ACS estimates represent the average characteristics over the five-year period of time.

There were 3,063,887 observations included in the U.S. sample, weighted to represent 309,376,285 people.<sup>5</sup> The Wisconsin sub-sample contains 293,331 observations weighted to represent 5,687,219 people; the Dane County sample includes 18,289 observations weighted to represent 490,233 people.

**Changes in race/ethnicity categories between censuses.** The 2000 Census 5 percent sample and the 2008-2012 ACS IPUMS data use essentially the same categories for the detailed race variable (RACED). However, in some cases, the numerical code assignment is different and the study team accounted for those differences. Categories for the Hispanic variable (HISPAN) remained consistent between the two datasets. Comparison to the 1990 data was not as straightforward. In 2000, the Census Bureau introduced categories representing a combination of race types to allow individuals to select multiple races when responding to the questionnaire. For example, an individual who is primarily white with Native American ancestry could choose the “white and American Indian/Alaska Native” race group in 2000. However, if the same individual received the 1990 Census questionnaire, he/she would need to choose a single race group – either “white” or “American Indian/Alaska Native.” Such a choice would ultimately depend on unknowable factors including how strongly the individual identifies with her Native American heritage. The variability introduced by allowing multiple race selection complicates direct comparisons between race data from the 2000 Census and previous censuses. Even so, 98 percent of survey respondents in 2000 indicated a single race.<sup>6</sup>

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<sup>4</sup> U.S. Census Bureau. *Design and Methodology: American Community Survey*. Washington D.C.: U.S. Government Printing 2009. Available at [http://www.census.gov/acs/www/SBasics/desgn\\_meth.htm](http://www.census.gov/acs/www/SBasics/desgn_meth.htm).

<sup>5</sup> Analyses of the 2008-2012 American Community Survey PUMS data at the national level were based on the one percent sample; at the state and county level, analyses were based on the five percent sample.

<sup>6</sup> Grieco, Elizabeth M. and Rachel C. Cassidy. “Overview of Race and Hispanic Origin.” Census 2000 Brief, March 2001.

## **B. Survey of Small Business Finances (SSBF)**

The study team used the SSBF to analyze the availability and characteristics of small business loans. The Federal Reserve Board conducted the SSBG every five years through 2003, but stopped after that year.

The SSBF collects financial data from non-governmental for-profit firms with fewer than 500 employees. The survey uses a nationally representative sample, structured to allow for analysis of specific geographic regions, industry sectors, and racial and gender groups. The SSBF is unique as it provides detailed data on both firm and owner financial characteristics. For the purposes of this report, Keen Independent used the surveys from 1998 and 2003, which are available at the Federal Reserve Board website.<sup>7</sup>

**Categorizing owner race/ethnicity and gender.** In the SSBF, businesses were able to give responses on owner characteristics for up to three different owners. The data also included a fourth variable that is a weighted average of other answers provided for each question. In order to define race/ethnicity and gender variables, the study team used the final weighted average for variables on owner characteristics. Definition of race and ethnic groups in the SSBF are slightly different than the classifications used in the Decennial Censuses and 2008-2012 ACS.

The SSBF classified race and ethnicity of businesses according to the following five groups:

- Non-Hispanic white;
- Hispanic American;
- African American;
- Asian American;
- Native American; and
- Other (unspecified).

A business was considered Hispanic American-owned if more than 50 percent of the business was owned by Hispanic Americans, regardless of race. All businesses that reported 50 percent or less Hispanic American ownership were included in the racial group that owned more than half of the company. No firms reported the race/ethnicity of their owners as “other.”

Similar to race, firms were classified as female-owned if more than 50 percent of the firm was owned by women. Firms owned half by women and half by men were classified as male-owned.

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<sup>7</sup> The Federal Reserve Board. *Survey of Small Business Finances, 2003*. Available online at <http://www.federalreserve.gov/pubs/>.

**Defining selected industry sectors.** In the 2003 SSBF, each business was classified according to Standard Industrial Classification (SIC) code and placed into one of seven industry categories:

- Construction;
- Mining;
- Transportation, communications, and utilities;
- Finance, insurance, and real estate;
- Trade;
- Engineering; or
- Services (excluding engineering).

In 1998, the SSBF allowed an additional industry category of Agriculture, forestry and fishing.

**Region variables.** The SSBF divides the United States into nine Census Divisions. Along with, Illinois, Indiana, Michigan and Ohio, Wisconsin is in the East North Central Census Division.

**Loan denial variables.** In the survey, firm owners were asked if they have applied for a loan in the last three years and whether loan applications were always approved, always denied, or sometimes approved and sometimes denied. For the purposes of this study, only firms that were always denied were considered when analyzing loan denial.

**Data reporting.** Due to missing responses to survey questions in SSBF datasets, data were imputed to fill in missing values. The missing values in the 2003 dataset were imputed using a different method than in previous SSBF studies. In the 1998 survey data, the number of observations in the dataset matches the number of firms surveyed. However, the 2003 data includes five implicates, each with imputed values that have been filled in using a randomized regression model.<sup>8</sup> Thus, there are 21,200 observations in the 2003 data, five for each of the 4,240 firms surveyed. Across the five implicates, all non-missing values are identical, whereas imputed values may differ.

As discussed in a recent paper about the 2003 imputations by the Finance and Economics Discussion Series, missing survey values can lead to biased estimates and inaccurate variances and confidence intervals.<sup>9</sup> Those problems can be corrected through the use of multiple implicates. For summary statistics using 2003 SSBF data, Keen Independent utilized all five implicates and included observations with missing values in the analyses. For the probit regression models presented in

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<sup>8</sup> For a more detailed explanation of imputation methods, see the “Technical Codebook” for the *2003 Survey of Small Business Finances*.

<sup>9</sup> Lieu N. Hazelwood, Traci L. Mach and John D. Wolken. *Alternative Methods of Unit Nonresponse Weight Adjustments: An Application from the 2003 Survey of Small Businesses*. Finance and Economics Discussion Series Divisions of Research and Statistics and Monetary Affairs, Federal Reserve Board. Washington, D.C., 2007. <http://www.federalreserve.gov/pubs/feds/2007/200710/200710pap.pdf>.

Appendix G, the study team used the first implicate and did not include observations with imputed values for the dependent variables.

### **C. Survey of Business Owners (SBO)**

Keen Independent used data from the 2007 SBO to analyze mean annual firm receipts. The SBO is conducted every five years by the U.S. Census Bureau. Data for the most recent publication of the SBO were collected in 2007. (In early 2015, the Census Bureau was still conducting research for the 2012 SBO.)

Response to the survey is mandatory, which ensures comprehensive economic and demographic information for business and business owners in the U.S. All tax-filing businesses and nonprofits were eligible to be surveyed, including firms with and without paid employees. In 2007, almost 8 million firms were surveyed. The study team examined SBO data relating to the number of firms, number of firms with paid employees, and total receipts. That information is available by geographic location, industry, gender and race/ethnicity.

The SBO uses the 2002 North American Industry Classification System (NAICS) to classify industries. The study team analyzed data for firms in all industries and for firms in selected industries that corresponded closely to construction and engineering-related services.

To categorize the business ownership of firms reported in the SBO, the Census Bureau uses standard definitions for women-owned and minority-owned businesses. A business is defined as female-owned if more than half of the ownership and control is by women. Firms with joint male-/female-ownership were tabulated as an independent gender category. A business is defined as minority-owned if more than half of the ownership and control is by African Americans, Asian Americans, Hispanic Americans, Native Americans, or by another minority group. Respondents had the option of selecting one or more racial groups when reporting business ownership.

The study team reported business receipts for the following race/ethnicity and gender groups:

- African Americans;
- Asian Americans;
- Hispanic Americans;
- Native Americans;
- Non-Hispanic whites;
- Men; and
- Women.

## **D. Home Mortgage Disclosure Act (HMDA) Data**

Keen Independent analyzed mortgage lending in Wisconsin and nationwide using HMDA data that the Federal Financial Institutions Examination Council (FFIEC) provides. HMDA data provide information on mortgage loan applications that financial institutions, savings banks, credit unions and some mortgage companies receive. Those data include information about the location, dollar amount and types of loans made, as well as race/ethnicity, income and credit characteristics of loan applicants. Data are available for home purchase, home improvement, and refinance loans.

Financial institutions were required to report 2012 HMDA data if they had assets of more than \$41 million (\$35 million for 2007), had a branch office in a metropolitan area and originated at least one home purchase or refinance loan in the reporting calendar year. Mortgage companies were required to report HMDA if they are for-profit institutions, had home purchase loan originations exceeding 10 percent of all loan obligations in the past year, were located in an MSA (or originated five or more home purchase loans in an MSA), and either had more than \$10 million in assets or made at least 100 home purchase or refinance loans in the calendar year.

The study team used those data to examine loan denial rates and subprime lending rates for different racial and ethnic groups in 2006, 2009 and 2012. Note that the HMDA data represent the entirety of home mortgage loan applications reported by participating financial institutions in each year examined. Those data are not a sample. Appendix G provides a detailed explanation of the methodology that the study team used for measuring loan denial and subprime lending rates.

## **APPENDIX J.**

# **QUALITATIVE INFORMATION FROM IN-DEPTH PERSONAL INTERVIEWS, TELEPHONE INTERVIEWS AND PUBLIC MEETINGS**

Appendix J presents qualitative information collected as part of in-depth personal interviews and availability interviews that the study team conducted as part of the disparity study. It closes with input provided as part of a public comment process concerning the draft report.

Appendix J is presented in 12 parts:

- A. Introduction and Background describes the process for gathering and analyzing the information summarized in Appendix J. (page 2)
- B. Background on the Public Works Contracting Industry in the City of Madison summarizes information about how businesses become established and how companies change over time. Part B also presents information about the effects of the economic downturn and business owners' experiences pursuing public and private sector work. (page 3)
- C. Doing Business as a Prime Contractor or Subcontractor summarizes information about the mix of businesses' prime contract and subcontract work and how they obtain that work. (page 21)
- D. Keys to Business Success summarizes information about certain barriers to doing business and keys to success, including access to financing, bonding, and insurance (page 28)
- E. Potential Barriers to Doing Business with Public Agencies presents information about potential barriers to doing work for public agencies, including City of Madison. (page 41)
- F. Other Allegations of Unfair Treatment presents information about any experiences with unfair treatment such as bid shopping, unfair treatment during performance of work, and allegations of unfavorable work environment for minorities and women. (page 59)
- G. Additional Information Regarding any Racial/Ethnic- or Gender-based Discrimination includes topics such as stereotypical attitudes about minorities and women and allegations of a "good ol' boy" network that adversely affects opportunities for MBE/WBEs. (page 67)
- H. Insights Regarding Business Assistance Programs, Changes in Contracting Processes or Any Other Neutral Measures presents information about business assistance programs, efforts to open contracting processes and other steps to remove barriers to all businesses or small business. (page 71)

- I. Insights Regarding Racial-/Ethnic- or Gender-based Measures presents information about general comments about the Federal DBE Program, effects of discontinuing DBE contract goals in 2005, and any impacts of DBE contract goals on other businesses. (page 86)
- J. SBE Certification presents information about the SBE certification process. It also presents information about advantages and disadvantages that subcontractors experience because of their certification as a DBE or MBE/WBE/SBE. (page 89)
- K. Any Other Insights and Recommendations for City of Madison Public Works offers insights on a myriad of suggestions for improvements. (page 91)
- L. Input from Public Meetings and Written Comments reviews testimony provided at the two public meetings as well as the written comments received by the study team after release of the draft report. (page 94)

## **A. Introduction and Background**

The Keen Independent study team conducted in-depth personal interviews and availability interviews in July through December 2014. In both the in-depth personal interviews and the availability interviews, business owners and managers had the opportunity to discuss their experiences working in the local public works contracting industry; experiences working with the City of Madison and other public agencies; perceptions of the city's SBE Program and other topics important to them.

**In-depth personal interviews.** The study team conducted in-depth personal interviews with 40 Madison area businesses and trade associations. The interviews included discussions about interviewees' perceptions and anecdotes regarding the local public works contracting industry; the city's SBE Program; and the contracting and procurement policies, practices, and procedures of the City of Madison. Lauber Consulting, a Madison-based woman-owned consulting firm, and The Davis Group, an African American-owned law firm, conducted in-depth interviews.

Interviewees included individuals representing construction businesses and trade associations. The study team identified interview participants primarily from a random sample of businesses that was stratified by business type, location, and the race/ethnicity and gender of business owner. The study team conducted most of the interviews with the owner, president, chief executive officer, or other officer of the business or association. Of the businesses that the study team interviewed, some work exclusively or primarily as prime contractors or subcontractors, and some work as both. All of the businesses conducted work in the Madison area. All interviewees are identified in Appendix J by random interviewee numbers (i.e., #1, #2, #3, etc.).

Interviewees were often quite specific in their comments. As a result, in many cases, the study team has reported them in more general form to minimize the chance that readers could identify interviewees or other individuals or businesses that were mentioned in the interviews. The study

team reports whether each interviewee represents a SBE-certified business and also reports the race/ethnicity and gender of the business owner.<sup>1</sup>

**Availability interviews.** The study team also asked firm owners and managers to provide comments at the end of the online or telephone interview. Businesses were asked, “When it comes to winning work as a prime or subcontractor with the City of Madison or others, are there any other barriers that come to mind? Do you have any general thoughts or insights on starting and expanding a business in your field? Twenty-five respondents entered responses. (Respondents are identified by random numbers #T1, #T2 and so on.)

**Public meetings.** The City of Madison held two public meetings to receive input about the study in March 2015. Keen Independent also received written comments made during the public comment period for the draft report. Keen Independent uses “PMP” to note comments from public meeting participants and “PWC” for public written comments.

**Written testimony and phone calls commenting.** Public comments can also be received via phone, e-mail and letter as part of the February 2015 public comment period. These comments will be analyzed by the study team and provided in Appendix J.

## **B. Background on the Public Works Contracting Industry in the City of Madison**

Part B summarizes information related to:

- How businesses become established;
- Challenges starting, operating and growing a business;
- Changes in types of work that businesses perform;
- Fluid employment size of businesses;
- Flexibility of businesses to perform different types and sizes of contracts;
- Typical geographic territory and reach of business;
- Local effects of the economic downturn;
- Current economic conditions; and
- Business owners’ experiences pursuing public and private sector work.

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<sup>1</sup> Note that “male” or “white” are sometimes not included as identifiers to simplify the written descriptions of business owners.



**How businesses become established.** Most interviewees representing construction businesses reported that their companies were started (or purchased) by individuals with connections in their respective industries.

Many firm owners worked in the industry before starting their own businesses. Some reported that working in a related industry helped ensure success. Examples from the in-depth interviews include the following:

- A trade association president and lobbyist indicated that contractors that have been most successful come out of the trades. For example, he added that working as a carpenter provides one with a better understanding of the industry before they grow into a general contractor. [#5]
- The president of a WBE-certified construction company stated that her parents owned the same type of business and she was raised in the industry. After college and working for some time, she reported missing the industry and wanting to do work on her own, so she launched her business. [#11]
- The female co-owner of a non-certified specialty contracting business reported that her husband started the firm after working in the industry for over two decades. [#8a]
- The male president of a majority-owned construction contracting firm reported being the firm's owner for 35 years, and working at the firm for 22 years before taking ownership. The firm was first established by his father. [#4]
- The owner of an MBE- and SBE-certified contracting company reported that he worked in the industry for 14 years before deciding to start his own business. [#17]
- Before purchasing his business, the white male owner of a contracting firm said that he and his brother worked for a Madison area contracting business for ten years, where he learned the trade. The brothers were joined at startup by some workers who had left the trade. [#25]
- The Hispanic owner of an MBE-certified specialty contracting firm reported that he began his career as a technician many years ago working his way up the ladder with another company. He became a project manager responsible for major network accounts. When he and other employees moved to other companies, this business owner started his own business. [#24]
- A woman president of a specialty contracting firm (SBE-, WBE- and DBE-certified) reported that she worked for a woman-owned specialty contracting firm before offering to purchase the business. "... I worked for [the previous woman owner] for a year and knew that this was what I loved and this was my dream job." [#31]

**Challenges in starting, operating and growing a business.** Interviewees had wide-ranging comments about the challenges in starting a business.

A few interviewees indicated that due to their previous experiences and contacts, there were few challenges in starting or growing their business. One example includes the white male owner of a specialty contracting firm who reported to have few challenges in starting the business because it was “turnkey” when he bought it. [#36]

Many reported that lack of knowledge and business training presents a barrier for some startups and impacts capacity for growth. Examples include:

- A representative of a Wisconsin economic development association stated, “[Minority-owned businesses are] a complex question without an easy answer. It comes down to what experience, education [skills training], etc. does the owner [have]?” He added, “It requires basic skills.” [#26]

When commenting on minority business start-ups, this economic development specialist indicated that adequate training and experience are necessary for minority-owned start-up businesses to be successful. [#26]

He added that his association encourages potential business owners to be realistic and to get training or related experience before starting a business. “You just don’t say, ‘I like to drink beer, so I want to start a brewery.’” [#26]

- The representative of a minority training and supplier association indicated that lack of training is a barrier for minority business owners. He added that the City is taking the wrong approach by making policy and expecting contractors to follow and perform without the necessary business training. He stated that small minority-owned businesses do not have the capacity, including management training, to do the work the City announces. [#20]

For example, he indicated that in addition to time, revenue flow and resources limitations, many minority businesses lack knowledge of management, recordkeeping and finances to build and grow their businesses. [#20]

- Regarding start-up challenges, the African-American owner of an MBE-certified contracting company reported that prior to starting up his business he did not have any formal business management experiences; and instead, only knew the trade side of the business. [#23]
- With a goal of getting more women and minorities into the trades, the program manager for a college business education and assistance program reported that the college polls local businesses and trades to identify any gaps in training. Although students graduate technically prepared, recent feedback to the college demonstrates that graduates lack needed communications skills. [#39]

He added, “[From] the college’s perspective, the goal is to serve the community; and, we have a great interest in what we [the college] can do for multi-cultural business programs.” [#39]

- Although many businesses know their trade, the representative of a women’s business initiative reported the need for business technical assistance. “It’s not lack of knowing the trade, however, sometimes the business acumen is lacking.” [#40]

**Some reported limited access to information or misinformation as a barrier, particularly for minority-owned businesses. Examples follow:**

- The representative of a minority chamber reported lack of dissemination of information to minority communities as a barrier for some small businesses, particularly minority-owned businesses. [#22]

For example he reported, “You cannot only have everything in order; you must go to the next point and be better. You must be recognized, something we [people of color] have dealt with all of our lives . . . . We don’t always get the information we need; you have to know the right people to get that information in order to get the opportunities we need.” He added that sometimes there are deadlines that cannot be met because information is lacking in the minority business community. [#22]

This minority chamber representative emphasized, “Information sharing is a huge problem; that is one reason the [minority chamber] exists.” [#22]

- An advocate for disadvantaged businesses reported the danger of misinformation as a barrier for potential new businesses. “If the climate negates or infers there is no opportunity that is probably the most dangerous principle that will decimate anyone being in business. If they [potential business owners] don’t think they can make any money and there is no hope then [they] won’t do it [own a business] and [will] go get a job [instead of starting a business].” [#27]

**A number of interviewees reported that minority-owned and other small businesses need extended intervention to build and grow businesses. Some examples follow:**

- The representative of a minority training and supplier association indicated that minority-owned small businesses need preparation to get into the industry followed by assistance and extended intervention for business success. [#20]
- An advocate for disadvantaged businesses reported that small businesses need support from public agencies to sustain their businesses. He reported that key issues include, “Sustainability, can a firm do well enough to sustain itself?” He added, “No one [in the public sector] looks back in a few years to see how diverse dollars were spent. Are businesses still around after five years? That’s sustainability.” [#27]
- A woman representative of a non-profit financing agency reported that business assistance programs in the City of Madison “are very good at helping [start-up

companies] write a business plan” and get initial funds; however, they “can do a far better job ... making sure [the business] stays successful” once the business is up and running. [#29]

Many mentioned limited access to financing as a primary challenge to starting, operating and growing a business. For example:

- When asked what challenges the members face in starting or growing a business, the manager of a statewide trade association stated, “Having the financial capabilities to take on a risk.” [#3]
- The president of a WBE-certified construction company stated that financing was a major challenge for her. She reported that she was lucky because there were a lot of opportunities for business but she did not have the financial backing to grow at the rate she could have. [#11]
- A representative of a Wisconsin economic development association, who identified financing as a key business requirement, indicated that income and education present barriers to securing financing for some businesses. “If you are lower income & less educated, the financing is going to be a challenge.” [#26]
- The representative of a women’s business initiative reported that the agency “...continue[s] to see barriers of access to fair and equitable capital, but that is not specific to any location.” [#40]

She described that that entrée to fair and equitable access to capital runs hand in hand with access to fair and equitable education, and with poverty, “It’s an integrated cycle.” [#40]

Some reported upfront and operating costs, or delayed payments make business startup and ownership a challenge: Several examples follow:

- Reported as a barrier, the representative of a minority chamber indicated that upfront costs associated with securing contracts and doing business challenge small businesses. [#22]
- The female co-owner of a non-certified specialty contracting company reported that timely payments have been an issue during the recent startup of her business. She said that there have been times (several months) when her partner has not been able to pay himself a salary because of delayed payments. [#28]
- The owner of an MBE- and SBE-certified contracting company reported that starting a new business in his industry is “very tough, mainly because of the price of materials and equipment rental.” [#17]

A number of small businesses, and minority- and women-owned businesses reported building time and resources for networking and name recognition as a challenge.

Examples include:

- The female co-owner of a non-certified specialty contracting business reported that the main challenge she faced when starting the firm was building name recognition and establishing a solid reputation. [#8a]
- A representative of a minority chamber indicated that networking is the key to business growth. However, small businesses face the barrier of not having sufficient time or resources to network. [#6]

Some identified other challenges when starting or growing a business. Examples are:

- An advocate for disadvantaged businesses indicated that it is more difficult for minority businesses to start. If the city does not have continued interests in supporting minority businesses, then the interest in starting them is reduced. [#27]
- “The hard part is having [a] business and actually operating it,” stated a woman representative of a non-profit financing agency. She added that business assistance programs must focus on continued success and growth of a business as their goal, in lieu of mainly start-up focused programming. [#29]
- The Hispanic representative of an entrepreneurship program supporting women- and minority-owned businesses reported that due to the City of Madison’s relatively small size, business opportunities are limited for women and minorities. “Madison is a small community and the opportunities are small too [for women and minorities].” [#30]

However, one reported that capitalizing on being a woman led to opportunities on the jobsite. The owner of a WBE-certified specialty contracting company said, “The majority of our clients are men, but because I’m a woman I’ve been able to get in to a place that my male counterparts haven’t been able to get in such as jobsites . . . . My gender became something I could capitalize on. When you establish some credibility, we’re still different as women.” [#12]

**Changes in types of work that businesses perform.** Interviewees discussed whether and why over time firms changed the types of work that they perform.

Several interviewees indicated that their companies had changed or expanded their lines of work to respond to market conditions. For example:

- Working exclusively as a landscaping subcontractor when the firm was founded, the representative of a majority-owned construction contracting firm indicated that the business has since branched out to function as a general contractor. Now his firm prefers to hire other subcontractors to do any landscaping a project requires. [#15]

- According to the male president of a majority-owned construction contracting firm, his company started out only providing earthwork services and has slowly added other services like road building, wrecking, and sewer work. [#13]
- The owner of an MBE- and SBE-certified contracting company reported that his firm started out doing only roofing, but found that there wasn't enough work for such a narrow focus. They then diversified, adding windows, siding and gutters to their offered services. [#17]
- An advocate for disadvantaged businesses reported that construction-related businesses face the problem of limited "opportunities" with some "go[ing] off their center point [typical services] to keep the doors open." [#27]

**Fluid employment size of businesses.** The study team asked business owners about the number of people that they employed and whether their employment size fluctuated.

A number of companies reported that they expand and contract their employment size depending on work opportunities, season or market conditions. Examples include:

- The male representative of a majority-owned public works contracting company reported that employment at his firm is seasonal, with only six to eight employees during downtime but ramping up to between 35 and 50 employees during the working season. He said the typical working season begins in mid-to-late April, and extends until October or November depending on workload and weather conditions. [#14]
- For the representative of a WBE-certified specialty contracting business, high-season expansion doubles the firm's employee count each summer. [#18]
- A representative of a majority-owned construction contracting firm reported that his firm has, on average, 100 to 150 employees. However, he added that his industry is seasonal and approximately 75 employees are laid off in the winter. [#15]
- For a white male owner of a federally-certified small general contracting company, construction in Madison is seasonal, so their employee base fluctuates. He stated that out of the 85 employees they currently have they always keep 45-50 employees. They trade out the employees who are working depending on the jobs that they are working on during the winter so no individual employee is laid off the entire winter season. [#19]

Some interviewees said that they had reduced permanent staff because of poor market conditions. Several examples follow:

- A woman president of a specialty contracting firm (SBE-, WBE- and DBE-certified) reported halving her staff to accommodate poor market conditions during the economic downturn. [#31]

- Due to the economic downturn, the female representative of a majority-owned contracting company reported that the current number of employees in her firm has increased only recently from 18 to 45; however, six years ago, the business employed 140 people. [#34]
- The male owner of a federally-certified small contracting business reported that many employees were laid off during the economic downturn, reducing the workforce from 35 to 12. [#35]

However, some business owners reported maintaining a stable employee pool. Some sustaining limited employee numbers reported limitations resulting from the small number of employees their firms employed. For example:

- The owner of a WBE-certified specialty contracting company stated that her firm has grown in sales but not in staff. There have always been around six people in the firm. This does not change seasonally. She added that the size of their staff is one of her firm's limitations. With only six employees, they could not perform large projects with short timeframes. They require more lead time. [#12]
- The owner of an MBE- and SBE-certified contracting company stated that his firm's size has remained relatively stable since its incorporation. [#17]

**Flexibility of businesses to perform different types and sizes of contracts.** Interviewees discussed types, locations, and sizes of contracts that their firms perform.

Many firm owners reported flexibility in the sizes of contracts that their firms perform. Examples of comments include:

- For the white male owner of a specialty contracting firm, projects are never too small. Large projects are difficult if the firm is busy in the spring; however, with more industry competition the firm conducts some larger jobs. [#36]
- The president of a WBE-certified construction company stated that she is capable of performing different types and sizes of contracts. However, she added that the firm has grown large enough that it is not always competitive on smaller projects because of higher overhead than smaller companies. [#11]
- With no jobs too small or big, the female representative of a majority-owned contracting company reported that the firm conducts small remodels of \$1,000 to large commercial jobs of \$2.3 million. The business regular jobs are \$50,000 to \$300,000. [#34]
- The male representative of a majority-owned contracting firm said that no project is too small or too large. He commented, "We do fifty dollar doorknob replacements for some clients, and have handled contracts as large as \$42 million." [#9]
- A female co-owner of a non-certified specialty contracting business reported that her firm takes a wide range of contracts, from \$150 to \$150,000 or larger. [#8a]

Some business owners noted that their financial resources affected the size of contracts they typically bid. Examples are:

- A male representative of a majority-owned public works contracting company said that his firm has the capacity “to bid on large contracts... [but that] there’s limits to what [they] can tackle — [they] don’t bid on the big, multimillion dollar [Department of Transportation] contracts.” However, he noted that there are not many jobs from the City of Madison that are too big for his firm to handle. [#14]
- Noting that some of the WisDOT’s projects are too big for his firm, the representative of a majority-owned construction contracting firm said that bonding, manpower and workload all provide constraints to the size of contract a company can handle. He added, however, that “anything the City of Madison has, [his firm] can handle ... [their] projects are pretty small compared to what the DOT [WisDOT] bids out.” [#15]
- The white male owner of a federally-certified small general contracting company stated that the flexibility of the company to do many different types of jobs for different entities is what helped them during the economic downturn because they were able to adjust to the type of work that was available, shifting to City, State and federal work. [#19]

Other business owners reported that they typically only perform small contracts. For example, the female owner of a WBE-certified specialty contracting business reported that there are many jobs that are simply too big. She said that her firm does not have the resources to devote people to any one project for a long time because they need to be able to respond quickly to urgent calls. [#10]

**Typical geographic territory and reach of business.** Some firms limited work to local territories, some traveled farther.

Some companies said that they prefer to perform projects close or within a specified proximity or radius to their businesses. Examples include the following:

- The owner of a WBE-certified specialty contracting business reported limiting her work to a 100-mile radius of Madison (largely due to the cost of travel). This business owner also noted avoiding Illinois-based work due to the unions. [#12]
- The president of a WBE-certified construction company stated, “Truly what I am doing, I am providing a service on a lot of these things, so proximity is huge ... I have pretty good ability in terms of the work area that I am currently in. I think I have pretty good expertise and the ability to handle a lot of those projects.” [#11]



A number of other businesses strategically expanded their reach to include a wider geographic territory. With increased competition, some business owners reported traveling farther to secure work. For example:

- A woman president of a specialty contracting firm (SBE-, WBE- and DBE-certified) reported widening the target area for seeking work. Previously the business targeted local customers, but due to the economic downturn the firm looks for business in a wider geographic area. [#31]
- Originally concentrating work outside of Madison, the African-American owner of an MBE-certified contracting company reported that in 2008 his firm expanded to Madison for a project. In 2009 to 2011 the business did a lot of work for the University of Wisconsin-Madison, which expanded the firm's customer base and geographic reach. [#23]

**Local effects of the economic downturn.** Interviewees expressed many comments about the economic downturn.

One business owner indicated that market conditions since 2008 have made it difficult to stay in business. A woman president of a specialty contracting firm (SBE-, WBE- and DBE-certified) indicated that the economic downturn affected her business substantially. To survive, she indicated that she downsized her staff, reduced expenses, and moved to a smaller office in a less prime area. [#31]

Some reported on the displacement of small businesses and minority- and women-owned businesses resulting from the economic decline. For example:

- The director of a trade association serving several counties reported that due to the economic downturn, “Many small and women-owned businesses have been displaced.” [#4]
- The president of a minority trade association observed a drop in minority contractors during the recession. He stated that contractors who did not have access to financing and resources did not make it through the recession. [#7]
- When asked about any changes in current market conditions, the representative of a minority chamber responded, “Maybe negative changes.” [#22]

He explained statewide, “... there are less opportunities for people of color, more [problems] now than in the past.” [#22]

Many business owners and managers said they have seen much more competition during the economic downturn. They reported that more competitors are going after a smaller number of contracts in specific fields, with substantial downward pressure on prices. Larger firms have been bidding on work that typically went to smaller firms. Examples include:

- The representatives of a WBE-certified specialty contracting business stated that, during the economic downturn, cost became the only driving factor for getting work. [#18]
- The white male owner of a federally-certified small general contracting company stated that he noticed additional difficulties for smaller businesses because there is a lot of competition and subcontracting pricing became difficult, and when the construction industry slowed down there was not as much work available. He stated that a lot of subcontractors went out of business. [#19]

Some business owners said that they scaled back their operations in response to market conditions in order to stay in business. A number of examples follow:

- The female owner of a WBE-certified specialty contracting business stated that her firm has “downsized quite a bit since 2008” and is now approximately 50 percent smaller than it was. She noted that they are now working to improve business and are hoping to add another truck in the near future. [#10]
- The representative of a majority-owned construction contracting firm reported that, during the economic downturn, his firm “lost a lot of money and had a lot of machines just parked.” He said that some companies lowered their prices to try to keep working at full capacity, but felt that was a losing strategy that “just wears out your machines.” [#15]
- The owner of a non-certified woman-owned specialty materials supply firm reported that the firm dropped to about half its previous size during the recession. [#16]
- To survive the economic downturn, the white male owner of a specialty contracting firm said, “We cut down on our inventory. We stocked less.” [#36]

As a result of the depressed economy, some reported changes in the types of work businesses sought and the outcomes of those changes including displaced workers. For example, the director of a trade association serving several counties observed a shift from private [e.g., housing work] to public sector work during the downturn, “Firms that previously did private work have moved more to municipal work.” However, he indicated that a shortage of available projects made this trend toward municipal work a challenge for some businesses. [#4]

Some reported a displaced workforce as an effect of the economic downturn. The following provides an example:

- The director of a trade association serving several counties reported, “Decision makers don’t understand the industry. They need to show as much energy to put a project on the streets. You need projects. You need jobs to train people. It is not good enough to train apprenticeships if there are no jobs to put them on.” [#4]

He added, “Government did not do a thing for five years because of the recession. They lost the workforce and an opportunity to get things done cheaply. Trades people needing work went to Florida. Because of demographics, there are less people to train now. The average age of the construction worker is 43. We desperately need people in the construction industry. It is not enough to make demands to hire MBE, DBE, SBE if there is not a job at the end to place them. [It’s a] waste of time if [you’re] only looking at half the picture.” [#4]

Some reported observing a trend of delayed retirement for white male workers during the recession. As an example, the representative of a workforce development organization reported that during the recession, many white males delayed retirement. [#33]

After losing jobs during the economic decline, some reported that they or others turned to entrepreneurship to survive. For example, the representative of a women’s business initiative reported that during the economic downturn there was a lot of growth of entrepreneurship. She added that people who lost traditional jobs turned to entrepreneurship. [#40]

A few business owners and managers said that their companies did not see a decline in work due to the economic downturn. Examples of comments include:

- The female co-owner of a non-certified specialty contracting business stated that the economic downturn didn’t affect her firm very much because people required her firm’s services regardless of economic conditions. [#8a]
- The owner of an MBE- and SBE-certified contracting company reported that even during the Great Recession, his “business has been steady [and] hasn’t changed much at all.” [#17]
- The white male owner of a federally-certified small general contracting company stated that the economic downturn did not reduce work volume. He reported sustained profitability. He believed that this was largely due to the “ESOP factor,” stating that employees are more invested in the company in times of difficulty. [#19]
- The female owner of a WBE and SBE certified trucking firm indicated her business was not negatively affected by the economic downturn of 2008-09. They always had work during that time. [#38]

- Regarding the economic downturn, the male representative of a majority-owned contracting firm said, “It was very difficult.” He added that his firm was poised very well when the downturn occurred, with a backlog of about two years. This meant that they didn’t experience a substantial decrease in business “until about 2011 and 2012.” Interviewee #9 noted that “revenues were cut about in half” at that point, and are now at about “80 percent of what [they] were before the downturn.” [#9]

Some reported increased opportunities during the economic downturn. Some reported new opportunities during the Great Recession. Examples include:

- The director of a local industry trade association reported that during the economic downturn small businesses doing work at low cost, if qualified, were able to secure work that was designated for the lowest bidder. [#2]
- The president of a WBE-certified construction company reported that the economic downturn did not have as much of an impact of them losing work, partially due to the stimulus, and that most of the work she does is state- or federally-funded. She said, “When the stimulus was in effect, there was so much work that there was too much work to even go around ... something that I’ll never see again in my career.” [#11]

Some business owners reported other effects of the economic downturns. A number of examples follow:

- The president of a WBE-certified construction company stated that she noticed the difficulties of the economic downturn more in her employees and that they were suffering because of spousal layoffs and additional financial issues.

The same firm owner reported that she noticed that the effect was with banking and the restrictions of banking have tightened up so much that she would not have been able to get the funding that she received in 2004. She stated that her bank would not allow her to use her equipment as collateral, which made it difficult for her to get additional loans and funding. [#11]

- The African American owner of a non-certified specialty contracting company said, “What downturn? I’m black; we grew up in an economic downturn.” He added that he has been in a recession and struggling all of his life. [#32]

**Current economic conditions.** Some business owners and managers said that economic conditions were improving; however they had conservative growth expectations for their businesses. Other changes were also reported.

Some business owners and managers said that they have not yet seen an upswing in market conditions, or that the recovery has not been what they had hoped it would be. For example, the representative of a minority training and supplier association described the current marketplace as “dismal.” [#20]

Other interviewees said that they have seen an upswing in market conditions. For example:

- A director of a local industry trade association reported that current market for the members is very good with increased work and development projects. [#2]
- A manager of a statewide trade association reported the following when asked about the current marketplace, “Better than it was, for sure; the members seem to be busy.” [#3]
- The female co-owner of a non-certified specialty contracting business reported that things were going very well for her firm. Her husband and business partner concurred, saying that this would be their “best year ever.” [#8a and #8b]
- The male representative of a majority-owned contracting firm reported that current economic conditions are “improving for the construction industry.” He added that “a lot of corporate cash has not been invested long-term because of the financial crisis,” and that cash is now beginning to get invested “facilities and long-term business needs.” [#9]
- The female owner of a WBE-certified specialty contracting business said that, while business is not yet booming, the economic conditions are getting better. “It’s a slow, gradual [improvement], but it needs to be slow so it doesn’t go away so fast,” she said. [#10]
- The president and lobbyist of the state chapter of a national trade association reported, “There is a lot of work now going on that is Epic, which has ripple effects.” “The ripple effects allow the contractors who are busy to give way to some who are available.” He added, “Overall, Dane County fares better [in the marketplace] than the rest of the state.” [#5]
- The president of a minority contracting association spoke of a new contracting “boom” expected to continue for 24 to 30 months. He added, “In the last year and a half, things are starting to boom. For four years I have been looking in the desert under rocks for moisture and now it’s raining.” [#7]
- The president of a WBE-certified construction company stated that she feels the current economic conditions are good and improving. She reported that she is seeing more activity and people are less “on edge” about the economy. [#11]
- The owner of a WBE-certified specialty contracting company said that right now the economic climate is good, with a good backlog of work. The firm’s future work load looks good as well. She said that she is reserved, and does not want to say the firms is doing great because she is not sure that they will ever be where they were during the economic boom. However, new construction looks positive. [#12]
- The male president of a majority-owned construction contracting firm described the current economic conditions as “much better this year,” but added that “next year can change.” [#13]

- Regarding the current economy, the male representative of a majority-owned public works contracting company responded that things are “promising. It’s not where we’d like to see it, there’s not just an absolute glut of work around, but at the same point there’s enough to keep people busy and we’ve had a very busy summer this year because of it.” [#14]
- The representative of a majority-owned construction contracting firm said that the current economic conditions “in the Madison area [are] very promising.” [#15]
- The owner of a non-certified woman-owned specialty materials supply firm said that business had increased for two years in a row and is “looking up.” She added that she has hired four people this year. [#16]
- The white male owner of a specialty contracting firm said, “We had a really good year; it’s good and getting better.” [#36]

**Some reported changes resulting from the economic recovery including both opportunities and challenges.** Several examples are:

- For a WBE-specialty contractor, the economic recovery brought back relationship-building rather than just “cost” as an important factor for getting work. [#18]
- The manager of a statewide trade association reported that current opportunities in the private sector now drive the market, making it difficult or almost impossible to find workers. “The pool of workers is down 30 to 40 percent.” [#3]

The same manager reported workers left during the economic downturn, either retiring or seeking other types of work and not returning to the contracting industry. [#3]

- When asked if there are any barriers for small businesses that are specific to the economic downturn, the female owner of a WBE-certified specialty contracting business responded that small businesses in Dane County and “especially in the City of Madison” are being “taxed to death.” She clarified that the fees now required for certifications which used to be a part of the master plumber certification are particularly hard for small businesses to cope with, as their profit margins are already small. She reported that state unemployment insurance also became a burden after the downturn. Before the downturn her firm paid between \$300 and \$400 every quarter, but since 2008 they have had to pay \$4,000 the first quarter of every year. [#10]

- The president and lobbyist of the state chapter of a national trade association indicated that available work does not trickle down to subcontractors. “The bread and butter stuff the City [of Madison] does is the street and utility work. Those [primes] who perform that generally do most of it themselves; they don’t subcontract out a lot — it’s not like building a building where you are hiring HVAC, plumbers, etc. It is generally moving concrete, digging a hole and moving dirt. Most of the general contractors, who do that, do it themselves.” [#5]
- The president of a minority contracting association indicated that with an upward swing minority workers are seen working and earning a good living, their exposure to others has a positive effect on the community. Minority workers must have the visibility, he said, “We want what we see.” [#7]
- The representative of a workforce development organization reported that now that the economy is good in Dane County, baby boomers [white males] that had not retired in 2008 are doing so. He indicated that this change in demographics opens up opportunities for minorities. [#33]

He added that his association sees a sudden need for skilled labor in the industry. [#33]

**Business owners reported experiences pursuing public and private sector work.** Interviewees discussed differences between public and private sector work. Most interviewees indicated that their firms conduct both public sector and private sector work. [e.g., #9, #13, #14, #17, #18 and #36]

One interviewee with experience in both the private and public sectors identified advantages and disadvantages of private sector and public sector work. The representative of a majority-owned construction contracting firm said, “The profit’s higher in private work, that’s the reason you want to do more of it. But it’s the public and state that’s going to help you pay your bills ... [because] you can depend on getting paid.” He clarified that, although private work pays more because “people pay for service,” public work pays more reliably. [#15]

A few reported on whether or not union affiliations affected their ability to work on both public and private sector contracts. Examples of responses follow:

- The white male owner of a federally-certified small general contracting company stated that they currently have more public work. He stated that in Madison, “we get locked out on projects ... because they are afraid of the union. Madison is a very union oriented place ... it becomes a problem for us because we don’t get the opportunity.” He will research the owner of the project very carefully to ensure that it is a legitimate opportunity for them prior to bidding. [#19]
- “The problem with small private [sector work] is it’s nonunion ... and they have more flexibility than we [union contractors] do, and better economic conditions,” reported the male president of a majority-owned construction contracting firm. Consequently, this firm works mostly on larger public sector projects. [#13]

- The female owner of a WBE-certified specialty contracting business indicated that when seeking to be subcontractors in the public sector there is a preference for union workers. As a result, her firm usually only subcontracts for private sector jobs. [#10]
- “The fact that we’re not union is a potential barrier. People tend to not like us because of that, even though we are so big,” reported a majority-owned specialty contractor. [#T18]
- When asked about winning work as a prime or subcontractor with the City of Madison or others, a majority-owned contractor reported labor agreements as a barrier to doing some work. He reported that some agreements say, “Only union companies can work on projects.” [#T2]

**Post economic downturn, one interviewee indicated that private sector work now drives the market.** When asked how he would describe the differences between the public and private sector, the manager of a statewide trade association responded, “Emerging Wisconsin is a big driver of the public market, but the private sector is what’s really driving the market ... Edgewater, and multi-family projects downtown, and healthcare.” [#3]

**However, a number of businesses reported that private sector work presented challenges for small businesses, particularly minority-owned businesses.** Examples include:

- Representatives of a minority chamber reported that subcontracting on private [sector] jobs has challenges for small [minority] businesses; the jobs are usually small and do not amount to much money. [#6]

The same chamber added, “Latino companies are going to the private sector — usually residential — and it’s not going to pay well.” [#6]

- Regarding barriers to obtaining work in the private sector, the owner of an MBE- and SBE-certified contracting company said, “It seems like the bigger companies, they all know each other and they always end up doing the work themselves instead of giving it to the minorities.” [#17]

**Other interviewees reported that they preferred private sector work over public sector work.** Some of the comments indicated that performing private sector contracts was easier, more profitable, and more straightforward than performing public sector contracts. For example:

- The male representative of a majority-owned contracting firm reported that his firm works mostly in the private sector because they “believe in a very collaborative team approach to developing a facility.” He indicated that his firm views the bidding process as “non-collaborative,” and prefers to work with clients beginning early in the process, “sometimes even before the site is selected,” in order to build a facility “the way [the client] needs it for their business.” [#9]



- No longer pursuing public sector opportunities, the male co-owner of a non-certified specialty contracting business stated that his firm limits work to the private sector. Although he had worked in the public sector before starting his current firm, “prevailing wages issues and red tape” made public sector work undesirable. He said, “I finally have plenty of work in the private sector.” [#8b]
- A WBE-certified specialty contracting business with a preference for private sector work (about 80 percent of their workload) appreciated the easier administration and streamlined approval process. [#18]

**For some, a slowdown in private sector work meant pursuing public sector work.** Examples include the following:

- The male representative of a majority-owned public works contracting company noted that, before the economic downturn, much more of his firm’s income came from new construction in the private sector. “When the bottom dropped out of that, there wasn’t any private work and it all became municipal work.” He said that, following the economic downturn, almost 80 percent of his firm’s business was in the public sector. He estimated that 50 percent of his firm’s work over the past three years has been for the City of Madison. [#14]
- The representative of a majority-owned construction contracting firm said that when the economy doesn’t provide enough private sector work, his firm “[does] a lot of public works projects and state DOT [WisDOT] projects.” [#15]

**A number of interviewees preferred public sector contracts because they were more certain that they would be paid.** Certainty of payment on public sector projects was a frequent comment among those business owners and managers. Examples of comments include:

- The president of a WBE-certified construction company stated that her business breakdown between public and private sector work is 95 percent public work. She reported a preference for public work because, as the bulk of her business, payment remains stable in an economic downturn. She added that public projects are good with lien rights in Wisconsin; she is able to file liens on projects and collect money when necessary. [#11]
- The representative of a majority-owned construction contracting firm reported that, although private work pays more because “people pay for service,” public work pays more reliably and pays the bills. [#15]

However, the required capacity and resources prevented some businesses from pursuing public sector work. For example:

- The female co-owner of a non-certified specialty contracting company considered public sector projects but contract sizes were too large and not doable. [#28]
- “I do not want any government work; I’d rather be off the grid,” reported the African American owner of a non-certified specialty contracting company commented. He explained that he does not have the capital to work for the City of Madison. [#32]
- A majority-owned landscaping firm reported, “The City might have projects that are just too big for us.” [#T21]

Others added that prequalification or paperwork requirements on public sector work made it less attractive for their companies. Examples are:

- “Small companies, not only minority-owned, think twice about reaching out to public sector [city, state, federal] work because of that [paperwork],” stated the representative of a minority chamber stated that only a few chamber members conduct public sector work. [#6]
- The owner of an MBE- and SBE-certified contracting company reported that most of his business is residential work in the private sector. He stated that, while his firm does spend “so much time” putting together bids for public sector contracts, they “never get feedback” from the City of Madison. “Sometimes we get frustrated because we spend so much time doing the bids and never get a response from them.” [#17]

One business owner noted that public sector contracts were rare in her trade and not often advertised. The female owner of a WBE-certified specialty contracting business reported that 90 percent of her firm’s business is in the private sector. When asked why that is, she responded that getting a contract with the City of Madison is “like impossible,” adding that, while those contracts used to go through the procurement process, she hasn’t seen a request for bids “in the last five years.” [#10]

### **C. Doing Business as a Prime Contractor or as a Subcontractor**

Business owners and managers discussed:

- Mix of prime contract and subcontract work;
- Prime contractors’ decisions to subcontract work; and
- Subcontractors’ methods for obtaining work from prime contractors.

**Mix of prime contract and subcontract work.** Firms reported whether they act as prime contractors, subcontractors or both.

Many firms that the study team interviewed reported that they work as both prime contractors and as subcontractors. For example:

- The representative of a majority-owned construction contracting firm reported that the deciding factor between whether his firm is the prime or the sub is based on if his firm is doing a larger percentage of the work than the other firms that are a part of the bid. “It all depends on [which company] has the majority of [the work].” [#15]

He also indicated that geography plays a role in whether his firm acts as a prime or subcontractor for a project. “You don’t want to be managing a job out of your region because you don’t know the suppliers, you don’t know the connections and you’re going to be bidding up against somebody that’s probably a little bit smarter than you in their area,” he stated. He pointed out that having relationships with suppliers and other businesses in an area provides a competitive advantage in the bidding process, making it difficult to compete outside of your area. [#15]

- A male owner of a federally-certified small contracting business reported that his firm is most often a subcontractor. For example, when they perform City jobs, they act as a subcontractor. The firm primes about half of its non-City work. [#35]

The study team interviewed many firms that primarily work as subcontractors but on occasion also work as prime contractors. Some firms reported that they primarily work as subcontractors because doing so fits the types of work that they typically perform. Examples include:

- The president of a WBE-certified construction company stated that the majority of the work her business performs is as a subcontractor. However on occasion, she noted that the business performs projects for the State as a prime contractor. [#11]
- The Hispanic owner of an MBE-certified specialty contracting firm reported that their work is performed 65 percent as subcontractor and 35 percent of the time they perform as a prime contractor. He commented that being a sub, “Offers a layer of protection.” He added, “The prime has many responsibilities that the sub does not have; advertising and dealing with unhappy clients for example.” [#23]

Some business owners and managers said that they mostly work as subcontractors because they cannot bid on the size and scope of the entire project, or find it difficult to compete with larger firms for those prime contracts. Examples include the following:

- The African-American owner of an MBE-certified contracting company stated that his company usually does second-tiered subcontracting on larger projects. He also reported that smaller businesses have higher margins when trying to bid against bigger firms making it risky to compete with bigger firms. [#23]

- Largely due to the firm size and access to materials, the white male owner of a contracting firm reported that when working for City of Madison, they are limited to a subcontractor role. [#25]
- A representative of a minority chamber reported that nearly all members are subcontractors, “With the exception of [named contracting firm], they [members] are all subs. They do not have the financing, employees or capacity to be primes.” [#6]
- The white male owner of a federally-certified small general contracting company stated the biggest challenge for a small business to be a prime contractor is cash flow. “When you are a general contractor you have to pay ahead of time for a lot of things...payroll, materials,” he said. [#19]

Other firms reported that they usually work as prime contractors, and prefer to do so, but will also serve as subcontractors. A number of examples include:

- A female owner of a WBE-certified specialty contracting business stated that her firm works primarily as a prime contractor, but occasionally subcontracts with general contractors. [#10]
- The male president of a majority-owned construction contracting firm said that his firm mainly works as a prime contractor, “though that varies from year to year.” He said that this is largely because they have the capability to do almost all parts of the infrastructure work which makes up the majority of their business. When it comes to other types of work, they generally work as a subcontractor [#13]
- Ninety-nine percent of the time, a majority-owned contracting firm reported acting as a prime contractor. [#9]
- The male representative of a majority-owned public works contracting company said that most of his firm’s work is as a prime contractor. He acknowledged that sometimes they work as a subcontractor on more diverse projects like building sites. He estimated that 95 percent of his firm’s work is as a prime contractor. [#14]
- The white male owner of a federally-certified small general contracting company stated that their company is primarily a prime contractor but they will work as a subcontractor on government contracts. [#19]
- The white male owner of a landscaping company reported that 80 percent of the time, the firm is the prime contractor; however, they do subcontract [20%] as well. The decisions are made on the nature of the project. [#37]

**Prime contractors' decisions to subcontract work.** The study team asked business owners whether and how they subcontract out work when they are the prime contractor.

Some prime contractors say that they usually perform all of the work or subcontract very little of a project. Examples of include the following:

- A male president of a majority-owned construction contracting firm reported typically subcontracting “less than 10 percent [of a project].” [#13]
- Never hiring subcontractors, the owner of an MBE- and SBE-certified contracting company reported that only about 5 percent of his firm’s business is done as a subcontractor. [#17]
- The white male owner of a federally-certified small general contracting company reported capability to “self-perform” most of the work. “We intend to do the work ourselves,” he stated. “It depends on what is most efficient for the company.” [#19]

Many interviewees from companies that use subcontractors indicated that they use the firms with which they have an existing relationship. [e.g., #20 and #37] Both majority-owned and MBE/WBE firms that use subcontractors made such comments:

- A director of a local industry trade association reported that primes contract with subcontractors that they already know regardless of project type (e.g., public or private sector). “If the primes know the sub’s work, he hires them for all kinds of work unless there is a real specialty.” [#2]
- The female co-owner of a non-certified specialty contracting business reported that, when starting the company, it was a challenge to find reliable subcontractors. She noted, however, that this is no longer an issue because they now have good relationships with several reputable subcontractors. [#8a]
- A white male owner of a specialty contracting firm reported that to find his subs, he calls people he knows. He has a relationship with them. Occasionally, he finds subs when he sees work he likes, he contacts them. [#36]
- A trade association president and lobbyist indicated that relationships matter more in private sector, but still plays a role in public sector subcontracting. “In the private sector, if work is awarded without taking the numbers into account, then good relationships and reputation matters.” [#5]

However the same trade association president reported that relationships between primes and subcontractors are not always a high priority, but when positive, help in resolving disputes. [#5]

- A male representative of a majority-owned public works contracting company said there is “a core group [of subcontractors] in the public works industry that are available to work in the Madison market,” and his firm has built up a database of those companies, making it easy to reach out and inform them of opportunities to bid for subcontracting work. [#14]
- When asked about how businesses learn about prime contractor/subcontractor relationships, the representative of a workforce development organization indicated, “People do not find work by looking in the papers; it’s by knowing someone, networking.” [#33]
- The representative of a majority-owned construction contracting firm reported that, when selecting subcontractors, there are usually subcontractors his firm prefers to work with. “You want to get done on time — so yes price does matter, but when it comes to a very sensitive project and there’s huge fines [for not completing the project on time], then we want somebody that performs. So we’ll even want to pay a premium to a subcontractor if we know that they’ve worked for [the client] before and done a good job.” [#15]
- The white male owner of a contracting firm reported that he does sub out work and usually uses subs he has known before. The subs performed well so Interviewee#25 continues to sub work to them. [#25]

Some indicated that primes report difficulty finding subcontractors to perform work, and why that is. For example:

- The manager of a statewide trade association stated, “Right now there are challenges in the subcontractor area; they are having problems getting bids on projects from subcontractors because there is just not the capacity out there.” [#3]

The same trade association manager described the cause of this deficiency. “A lot of the subs were hurt in the recession and the market was like this for a long time and then it built up, and then it crashed. They [subcontractors] are not anxious to take on the overhead by hiring people and are being choosy on the projects they bid and who they work for; so to that extent, that’s a barrier in the market now.” [#3]

- The male representative of a majority-owned public works contracting company stated that one of the biggest challenges they face in soliciting subcontractor bids is when a job has an SBE goal attached and his firm cannot use its typical subcontractors. In that case, they look for SBE contractors using the City of Madison’s SBE list, which “is very difficult and time-consuming and troubling to do because [the list is] not very well maintained.” He noted that often the companies they call from the list either don’t answer the phone or say that they don’t do work in Madison. [#14]

**One prime contractor described the differences between hiring a subcontractor in the private sector versus the public sector:** The representative of a majority-owned construction contracting firm indicated that in the private sector his firm can have a discussion with the client about whether to hire an unknown firm with a lower bid or to pay a premium for a well-known firm. “You can’t have those kinds of conversations with the City.” [#15]

**Others described the difference that being union versus non-union had on receiving subcontracting jobs.** For example, the white male owner of a federally-certified small general contracting company stated that when working as a subcontractor, there is discrimination against his company because it is not union. He stated that they are limited on the work they can get because they are not union contractors. He stated it depends on if the prime is a union contractor whether or not they will be able to work on the project; that does not change if it is private or public work. [#19]

**Some subcontractors felt that prime contractors only used them when there was a designated requirement on the job.** For example, when asked how primes make the decisions to sub out work, a representative of a minority chamber reported that primes subcontract out work when the bids include requirements to sub to a minority or disabled business. [#6]

**Some interviewees described similarities and differences between considering SBEs/DBEs and considering other firms as subcontractors.** Examples include:

- A male representative of a majority-owned public works contracting company noted that several of his firm’s main subcontractors are women- and minority-owned small businesses, but that their certification status isn’t important. “Those are just the contractors we’ve used for years, they’ve performed great for us, and they’re our preferred contractors to work with.” [#14]
- The representative of a majority-owned construction contracting firm said, “The problem with the small businesses, the biggest problem is...they don’t know what work volume they can handle.” He stated that this made working with new businesses and small businesses very hard because they don’t have the flexibility to meet demand if they suddenly win a number of bids in quick succession or if something happens to throw off a job’s schedule — rain for instance. He noted that this is particularly problematic with DBEs because replacing them can mean they no longer meet the required DBE goals for the project. [#15]
- The white male owner of a federally-certified small general contracting company described a negative experience with a second-tier sub not paying their employees or having the experience needed to complete the job. He said, “It [good and bad experiences] comes and goes with the territory.” He continued that they’ve had more issues with minority subcontractors than non-minority subcontractors in the past few years, but they have had issues with both minority and non-minority firms. [#19]

Some owners and managers of MBE/WBE/DBE prime contractors said they seek out other MBE/WBE/DBE firms or small businesses as subcontractors on their projects. For example, the female owner of a WBE-certified specialty contracting business reported that her firm does sometimes hire subcontractors. She said that, when choosing a subcontractor, one of her top priorities is that it be a woman-owned firm. Price and quality also play a substantial role in her decisions. [#10]

**Subcontractors' methods for obtaining work from prime contractors.** For firms seeking opportunities in construction, a program administrator at a local agency indicated that first building the firm's reputation as a subcontractor and then marketing based on that reputation would in time pay off. [#1]

Some business owners said that they actively market to prime contractors. Those businesses reported identifying prime contractors from bidders' lists, planholders' lists, at pre-bid or pre-proposal conferences, or through outreach events. For example, the owner of a WBE-certified specialty contracting company reported submitting bids to every general contractor who is bidding in the hopes that the firm will be included on each bid. She reported this as an advantage of being a subcontractor; if they submit the preferred or low bid, then their firm will be included on the job no matter which general contractor gets the award. [#12]

Other business owners and managers relied on repeat work from prime contractors. Examples include the following comments:

- The female owner of a WBE-certified specialty contracting business stated that there are certain firms she prefers to work with, and those firms will inform her when they are bidding on a project that she might subcontract with them on. [#10]
- The female owner of a WBE and SBE certified specialty contracting firm commented that she has no trouble getting work. Her firm is hired by a larger prime who keeps the business busy. [#38]

Some business owners said that they are also routinely solicited for bids from prime contractors. Examples of include:

- The president of a WBE-certified construction company reported that she is solicited by primes when they will be bidding on a project and then she provides them a bid. She stated that the primes are cognizant of the goals the public departments are trying to achieve with small business usage [#11]
- The owner of a WBE-certified specialty contracting company stated, "If we've never worked with a company, it's typically because we're highlighted as a WBE, that they'll send us requests to be engaged." [#12]
- The owner of an MBE- and SBE-certified contracting company reported that his firm learns about subcontracting opportunities when prime contractors call his firm to request a bid. [#17]



- A woman president of a specialty contracting firm (SBE-, WBE- and DBE-certified) reported that she learns of opportunities through the relationships she has built with different companies and general contractors. “Usually we are invited by the general contractor or prime ... we are invited or we ask if they would like a bid.” [#31]

Some firm owners described barriers to working with certain prime contractors. For example, the owner of an MBE- and SBE-certified contracting company said that one barrier to subcontracting work for his firm is that “most of the time” prime contractors will tell his firm the price they want to pay instead of requesting a bid. His firm is then left to work out whether the price they are given will cover the costs associated with the project. He noted that, if he asks for more money from the primes because materials tend to cost his firm more than they cost bigger firms, they will sometimes laugh at him. [#17]

#### **D. Keys to Business Success**

The study team asked firm owners and managers about barriers to doing business and about keys to business success. Topics that interviewers discussed with business owners and managers included:

- Relationship building;
- Employees;
- Equipment;
- Access to materials;
- Financing;
- Bonding;
- Insurance; and
- Other factors.

**Relationship building.** Some business owners identified relationship building as a key component to the success of their businesses. [e.g., #8b, #6, #28 and #35] Examples include:

- The representative of a majority-owned construction contracting firm stated that relationships with customers and others are very important to business success in his field. [#15]
- To build relationships and expand outreach, a woman president of a specialty contracting firm (SBE-, WBE- and DBE-certified) reported being active in the community and organizations. Relationship building opens up avenues to learning about upcoming projects. [#31]
- The white male owner of a landscaping company reported that good long term relationships with other contractors and customers are important to success. [#37]

Some businesses reported success building relationships through honesty, quality work and good communications. For example:

- “Honesty is a key to success. Your customers need to trust you,” reported the female owner of a WBE and SBE certified trucking firm.[#38]
- The male representative of a majority-owned contracting firm said, “Relationships with owners [and] relationships with key vendors are critical,” adding that the Wisconsin market is a relatively small community and maintaining good relationships with people in the community is “one of the huge keys” to being successful. [#9]
- The president of a WBE-certified construction company said, “The key to success in this industry, I think, is performing ... At the end of the day ... nothing is as important to your contractor customer as having a sub that they know they can rely on, that they know is going to do the work, that they know is going to be able to follow all of the myriad of regulations that come with public work, that are going to be in compliance, that they’re not going to have to worry about doing accounting for that firm, that they’re not going to have to worry about the firm bailing mid-job. I think that at the end of the day ... you need to be the low bid and you need to be that firm that can perform. I think that’s the key.” [#11]
- The owner of a non-certified woman-owned specialty materials supply firm stated that her firm has many repeat customers. This, she said, is because they provide good service and have a lot of knowledge about the materials they provide. She suggested that clients “are finding out that price isn’t always the best thing,” and that the knowledge and service her firm suggests can be worth the extra cost. [#16]
- The Hispanic owner of an MBE-certified specialty contracting firm reported that word of mouth is a large part of the business getting work so good relationships are key. He added that they have been accepted into the tight knit [local area] community without problems. [#23]
- The white male owner of a specialty contracting firm reported that customer service is a key to success [#36]

**One firm owner reported that relationships differ when conducting public sector and private sector work:** The male representative of a majority-owned public works contracting company said that relationships with customers and others are “much more important [to success] on the private side than on the public side. Unfortunately, [on the public side] whoever’s a preapproved contractor who has a low number is who the city is going to go with, whether we’re a better contractor for them or not.” He added that, “on the private side you can parlay [those relationships] into additional work.” [#14]

**Employees.** Business owners and managers shared many comments about the importance of employees.

Many interviewees indicated that high quality workers are a key to business success. [e.g., #6, #7, #22, #25, #31, #37 and #38] Examples include the following:

- A WBE-certified specialty contracting business reported relying on a core group of trusted and reliable workers. [#18]
- The male president of a majority-owned construction contracting firm reported that employees are very important for business success. He noted however that, because his business varies both seasonally and from year-to-year, employment at his firm changes frequently and said that finding new employees is “very challenging.” When asked what he looks for in a new employee, he said that he prefers employees who work hard with a willingness to learn. [#13]
- “In order to be competitive, businesses need a good, well organized workforce,” reported the director of a local industry trade association. [#2]

For example he added, “Contractors need an estimator that is sharp and knows the market and what materials cost ... to make sure the firm makes money.” [#2]

- A president of a WBE-certified construction company stated that to best perform the required work, a company needs great employees. She reported challenges finding people who are able to do the type of work her firm does and concerns about finding employees moving forward. [#11]
- The representative of a majority-owned construction contracting firm said “You’re only as good as your ‘guys’ ... you’ve got to treat them well because they’re a lot smarter than you are at doing what they do.” He added that “employees are the biggest [key to success].” [#15]
- For the owner of an MBE- and SBE-certified contracting company, having respectful, responsible, disciplined employees is the key to a successful business. [#17]
- The white male owner of a federally-certified small general contracting company stated that having employees who are able and willing to be cross-trained are the key to success for his company. They firm would not be able to do the work that they do or the success that they have had without great employees. [#19]
- A female representative of a majority-owned contracting company reported that employees are the key to business success. The business can hire carpenters easily, but finisher/taper employees are hard to find. [#34]

Many business owners and managers said that developing and maintaining relationships with their employees was important. Examples include the following:

- The male representative of a majority-owned public works contracting company said, “Without our employees we’re not able to do what we do, plain and simple.” He continued, saying that his firm tries to maintain long-term relationships with everyone they hire. “We want them to be happy working for us, we want them to want to work for us, come back to us year-in, year-out. It’s very important to us that we’re able to maintain that kind of continuity.” [#14]
- The male representative of a majority-owned contracting firm stated that his firm has “a relatively small group of really dedicated employees,” and tries to manage the workflow to keep all employees working at a steady pace. He noted that good employees are a “huge key” to a business’ success. [#9]

Some owners and managers used or occasionally looked to unions to help them find workers, others avoided using union labor. For example:

- The male owner of a federally-certified small contracting business said he is trying to hire minorities. He turns away non-minorities. His employees are union and come on the recommendation other employees. [#35]
- Preferring to build a core group of reliable workers, a WBE-certified specialty contractor reported challenges when relying on unions to supply capable and reliable workers. [#18]
- A representative of a minority training and supplier association reported that unions have a negative influence on the workforce. “The unions have been a road block for people to gain knowledge and get into the trades.” [#20]

As he indicated that most union workers are in their 50s, he added, “Selfishness of the unions is preventing younger workers from entering the union. Younger members will keep the union going.” [#20]

Some firm owners and managers reported difficulty hiring and retaining employees, especially when business slows. A number of examples follow:

- The representative of a minority training and supplier association indicated that small minority businesses face difficulty when hiring skilled workers. [#20]
- An advocate for disadvantaged businesses stated, “Diverse business owners tend to hire from within their own communities, which is desirable, however, skilled workers in the communities are difficult to find [for a myriad of reasons].” [#27]
- When asked about employees, the representative of a minority chamber reported finding adequate and reliable workforce as a challenge for small businesses. [#22]

- The African-American owner of an MBE-certified contracting company reported not having long track record keeping employees because of layoffs when work is slow. He stated, “It is a challenge to keep a nice work force.” [#23]
- “Finding good employees is a huge challenge in starting a business,” said the Hispanic owner of an MBE-certified specialty contracting firm. “Keeping everyone busy and never having to lay anyone off is a challenge.” [#24]
- The white male owner of a specialty contracting firm said that good employees are getting hard to find and they are a key to business success. [#36]

Some business owners reported that economic conditions have reduced the pool of potential employees, as many are reported to have left the state. For example:

- A trade association president and lobbyist indicated that his members find it difficult to locate skilled workers; during the downturn many people left the industry and getting them back presents a challenge. He indicated a difference from three years ago when the members didn’t have work to support the pool of skilled workers. [#5]
- “Because of demographics, there are less people to train now. The average age of the construction worker is 43. We desperately need people in the construction industry,” reported the director of a trade association serving several counties. He identified an immediate need for an expanded pool of potential employees. [#4]
- The representative of a minority chamber reported, “In the private sector it is known that there is a lot of work and not a lot of manpower, if you will. We [minority subcontractors] are getting invites from generals all over.” [#6]
- “[There’s] a shortage of labor at this point,” reported a majority-owned specialty contractor. [#T8]
- The president of a minority trade association identified a need for a pipeline of employees from the trades. [#7]
- As noted by the manager of a community organization serving mostly majority contractors, finding skilled, industry-experienced and ready workforce is a challenge to small business. [#21]
- A representative of a minority training and supplier association discussed the limited supply of skilled workers ready and willing to work for minority-owned businesses. He stated that having manpower is a challenge to small minority-owned businesses because skilled workers are lacking in the industry. [#20]
- The African American owner of a non-certified specialty contracting company said that young people, whites and minorities, are not interested in working in the trades. He commented that is going to be very difficult to hire skilled workers. [#32]

**Equipment.** Business owners, managers and industry specialists discussed the importance of having the right equipment for operating their businesses.

Many emphasized the need for well-maintained equipment combined with speedy mobilization.

Examples include the following comments:

- The director of a local trade association reported, “A company needs to be able to get the right equipment; without it, they won’t get the job.” [#2]
- Another trade association director said, “You have to perform on time with the right equipment. If you are in trucking you need to have the right number and type of trucks at the site on time. You cannot be ten minutes late and have people getting paid waiting for you.” [#4]
- Regarding equipment, the president of a minority trade association said, “Own as little [equipment] as possible and take good care of it.”

This same minority trade association president explained that well-maintained equipment is part of having the proper resources to do the jobs. He also indicated that having equipment break down on the job makes the contractor look unprofessional. [#7]

- The male representative of a majority-owned public works contracting company reported that “it’s critical that you have equipment you can count on to keep working.” He illustrated this with the example of a five-man crew, each earning \$50 an hour, unable to keep working if the backhoe the crew needs breaks down. “You’re talking \$250 an hour that you’re shelling out [for nothing] while that backhoe’s not able to work. [#14]
- “Most of my challenges have been in equipment,” said the white male owner of a contracting firm. He commented that starting a new business with used equipment poses a challenge. Purchasing the right equipment, knowing how to operate and maintain the equipment poses another challenge, but is the key to success. [#25]

**Some businesses reported to own all of their equipment.** As an example, the white male owner of a federally-certified small general contracting company stated that the firm owns most of its equipment due to the diversity of the work they do and the amount of travel they have. It is vital for the company to own the equipment to save time and allow them to complete the small jobs quicker and more efficiently. [#19]

**Some businesses reported that they own certain equipment and then rent pieces of equipment that they may infrequently need.** For example, the male representative of a majority-owned contracting firm said that his firm owns “quite a bit of equipment” necessary for the services they provide, but rent cranes and large material handling equipment on an as-needed basis. [#9]

A number of businesses rely almost entirely on leased equipment with both positive and negative outcomes. For example:

- The African-American owner of an MBE-certified contracting company stated that there aren't any challenges in getting equipment because he could rent any equipment he may need. [#23]
- The owner of an MBE- and SBE-certified contracting company reported that his firm doesn't get large enough contracts to afford to own much equipment, and as a result are forced to rent it on an as-needed basis. [#17]

He added that rental prices are significantly higher for small businesses. [#17]

One prime contractor reported no need to acquire equipment, because his firm relies on subcontractors to supply their own equipment. The male co-owner of a non-certified specialty contracting business indicated that his firm owns very little equipment, saying "it's the subcontractor's responsibility" to have the necessary equipment for a job. [#8b]

However, some business owners reported that obtaining expensive equipment, or not having the equipment needed for their operation is a barrier. Some reported not having the cash to purchase equipment outright and that financing can be a barrier. For example:

- The manager of a community organization serving mostly majority contractors indicated that acquiring and maintaining equipment is a financial challenge for small minority businesses. [#21]
- A owner of an MBE- and SBE-certified contracting company noted that rental equipment is "a lot more expensive to the minorities because [they] are not consistent customers [of the rental companies]." He added that larger companies who frequently rent equipment "seem to get much better prices." "Sometimes it's hard to bid against [the bigger companies] because they always get better prices on either the materials or the equipment." [#17]

**Access to materials.** As with other potential barriers, interviewees reported a range of experiences securing materials.

Some business owners and managers said that small, new or diverse businesses are at a price disadvantage when purchasing supplies. For example:

- "When you're a new business, it's hard to get credit," reported the female owner of a WBE-certified specialty contracting business. She gave an example of a young man she knew with a four-month-old business that had "to be C.O.D. [cash on delivery] with all the suppliers because he's brand new." She added that maintaining a good relationship with suppliers is important. [#10]
- An advocate for disadvantaged businesses reported that new, diverse small businesses do not have the size to access good pricing. [#27]

- The owner of an MBE- and SBE-certified contracting company reported being disadvantaged by unfair materials pricing. He noted that larger companies “always get a better price” because they purchase materials in greater volume. [#17]
- A president of a WBE-certified construction company stated having issues with pricing and credit regarding materials but thought gender did not play a part. [#11]

**Obtaining inventory or other materials or supplies was not seen as a barrier to success by some interviewees.** Examples follow:

- The male representative of a majority-owned public works contracting company worked with his vendors to facilitate quick access to spare parts and extra materials, instead of having to order them and have them shipped. [#14]

He added that having this benefit means much less downtime when the business needs a new part. “That’s been a key thing for us, and it’s something we don’t intend to change.” [#14]

- The owner of an MBE- and SBE-certified contracting company said that gaining credit to purchase materials “is not a problem” for his firm. [#17]

**Many interviewees noted relationships with their suppliers as being important to the success of their business.** Examples include the following comments:

- The white male owner of a contracting firm explained that good pricing is mandatory to business success. He went on to say that his firm gets good pricing because he has a good reputation with industry suppliers. [#25]

However, if his firm does work for companies he does not know well, then pricing can be a challenge. In these cases, he gets higher prices and poor information, such as the incorrect operating hours of the plant. Some asphalt plants have a monopoly making it difficult to work with them on pricing. [#25]

- When asked about the importance of supplies to the success of her business, the female co-owner of a non-certified specialty contracting company reported that they have a good relationship with their suppliers.[#28]
- A male representative of a majority-owned public works contracting company reported establishing relationships with local vendors to ensure access to readily available inventory. [#14]



**Financing.** As with other issues, interviewees' perceptions of financing as a barrier depended on their experiences. To some it was a barrier, and to others it was not.

Many firm owners reported that obtaining financing was important in establishing and growing their businesses (including financing for working capital and for materials and equipment), and surviving poor market conditions. [e.g., #6, #24, #33 and #37] For example:

- The manager of a statewide trade association identified a need for financing when starting and growing a business, “Having the financial capabilities to take on a risk.” [#3]

The same trade association manager stated, “Starting or growing a business requires capital for buying equipment or training a workforce or office staff. Getting from point A to point B requires resources.” [#3]

This manager of a statewide trade association added, “I think the biggest barriers are financial. This is an industry that requires a lot of start-up and resources, going from a small handyman type of contractor to a contractor who can get city work.” [#3]

- A president of a WBE-certified construction company stated that a business must have access to money or be able to borrow money to finance a startup in the construction business. [#11]
- For the owner of a WBE-certified specialty contracting company, confidence that her bank is looking at what they can do to make banking better for her business is a desirable asset. The firm has a line of credit that was fully utilized during the down years. [#12]
- The white male owner of a federally-certified small general contracting company stated that financing is a must because you have to do the work prior to getting paid. You have to have a relationship with the bank to get the money needed to finance the materials and employees needed to complete the job. [#19]

A number of business owners and managers said that obtaining financing was and continues to be a barrier for their companies. Examples include the following:

- The female owner of a WBE-certified specialty contracting business said, “As a small business, it’s hard to get a loan. It’s hard to get a bank to work with you.” She added that banks don’t like doing SBA loans because of the paperwork involved. [#10]
- Representatives of a minority chamber reported that particularly for minorities financing is a challenge, even when a firm has a long-term relationship with a bank they are not assured of financing. [#6]

- The manager of a community organization of majority contractors indicated that breaking into a new industry for minority-owned businesses is a financial barrier. He added that there is a need for sources of capital for small minority owned businesses. [#7]
- The representative of a minority training and supplier association reported financing as a problem for minority- and women-owned businesses. He stated that, as small businesses, their resources are limited and having limited large exposure results in low or no lines of credit. [#20]
- A woman representative of a non-profit financing agency reported that, if a minority-owned business is going to fail, it tends to fail “relatively quickly in its lifecycle” because minority business owners either do not “know who to go to when they [have] problems” or are hesitant to return to those who assist them for help with financing “because that would be admitting failure.” [#29]
- The African American owner of a non-certified specialty contracting company said, “Capital is an issue for everyone, especially minorities.” He added, “Banks lend enough to keep a small business owner from drowning, but never enough to get ahead.” “They keep you from doing anything new, just allowing you to subsist at that level.” [#32]

**A number reported failed attempts to secure financing, or tapped personal resources to finance their business operations. For example:**

- The representative of a minority chamber reported knowing of a minority- and women-owned business that closed after not successfully securing financing needed to stay afloat. [#22]
- A woman president of a specialty contracting firm (SBE-, WBE- and DBE-certified) reported reaching out to five banks before securing financing. “I reached out to five banks and one said yes.” [#31]
- When seeking financing for capital, the president of a minority contracting association stated that sizable assets or collateral are required for minority-owned businesses. “Even now I have to write personal guarantees on everything.” He added, “It is difficult dealing with banks, period.” [#7]
- The white male owner of a contracting firm said that the firm was able to secure private funding; without it, they would most likely not have started up. The private funding was through family. [#25]

**Some businesses reported tapping supplemental income to keep their businesses operational. For example, the partner in an Asian-Pacific American-owned DBE specialty contracting firm reported that she kept her specialty contracting business running by cleaning houses on the side. [#25]**

Another firm owner described the risk associated with obtaining financing: The owner of an MBE- and SBE-certified contracting company said that he is hesitant to finance large purchases that might allow them to compete with larger firms, saying “it’s scary for us to finance something not knowing if we are going to always stay busy with the big companies.” [#17]

**Bonding.** Public agencies in Wisconsin typically require firms working as prime contractors to provide bid, payment and performance bonds on public construction contracts.

Some interviewees reported little or no problem obtaining bonds, or that bonding was not an issue because of their type of company. Examples of comments include:

- The female owner of a WBE-certified specialty contracting business reported that regular bonding requirements, but said that the firm had not had any difficulties acquiring bonding. [#10]
- As reported by its male representative, a majority-owned contracting firm reported no problem with bonding. [#9]
- A male president of a majority-owned construction contracting firm reported good relationships with all of the businesses that provide financing and bonding. [#13]
- The white male owner of a federally-certified small general contracting company said that bonding is not a requirement for his subcontractors most of the time. However as the prime, he has not had any issues with bonding. [#19]

Some reported that small and disadvantaged businesses face added barriers when seeking bonding. For example:

- A director of a local industry trade association reported that small businesses can face barriers when seeking bonding. “This is very important. Some bonding companies may think a business is too small and the small business will have trouble getting bonded. It is all intertwined.” [#2]
- One advocate for disadvantaged businesses reported that securing bonding is a challenge for new, start-up businesses. [#27]
- An African-American owner of an MBE-certified contracting company stated that bonding is crucial for business success, yet it is a challenge to attain. He added that the firm has slowly been able to develop some bonding capacity. He also reported that having good relationships with other firms is helpful. He said, “You complete a project and have good projects on your resume and the bonding company is comfortable letting you have more [bonds].” [#23]
- When asked about bonding, the representative of a minority training and supplier association indicated that for small minority-owned businesses bonding is a major challenge to working for the City of Madison. He added that bonding is difficult to secure without good financials and credit history. [#20]

- The manager of a statewide trade association explained that when doing city work, bonding results in a “cost increase.” [#3]
- A representative of a minority chamber reported that the challenges bonding (and financing and experience) make it very difficult for its members to find contracts to bid. [#6]
- The president of a minority contracting association reported bonding (including paperwork and restrictions) as a barrier for small minority businesses to secure. He explained that bonding companies want sizable assets which many small minority businesses do not have. He also explained that in large government jobs, the prime is bonded and deducts a percentage of money from the sub. [#7]

The same minority chamber representative reported, “Bonding is huge. Until I have a large bonding capacity, I cannot be a prime. If you do not have the bonding, you might not as well step out of the game.” [#6]

- The African American owner of a non-certified specialty contracting company commented that his bonding rate was always higher because he lacked assets. He has only needed bonding when he was performing public sector work as a prime in a school district. [#32]

**Some business owners indicated that bonding requirements on City of Madison contracts adversely affected a firm’s growth and opportunities to bid.** For example, the white male owner of a landscaping company reported that his firm can get bonding, but it costs money. The cost prevents the firm from bidding Madison jobs because they cannot afford to financially float City projects. [#37]

**Insurance.** The study team asked business owners and managers whether insurance requirements and obtaining insurance presented barriers to business success.

**A few businesses reported no instances in which insurance requirements or obtaining insurance were barriers.** Examples of comments include:

- The female owner of a WBE-certified specialty contracting business said, “Insurance is pretty easy to get.” [#10]
- The Hispanic owner of an MBE-certified specialty contracting firm indicated that insurance is expensive, but never a barrier to their business. [#24]

**However, a number of interviewees said that they could obtain insurance, but that the cost of obtaining it, especially for small businesses, was a barrier to bidding on work.** For example:

- An owner of a non-certified woman-owned specialty materials supply firm reported that insurance has become more of an issue in recent years. She reported that, after the economic downturn, general contractors started getting stuck paying for projects out of their own pockets because subcontractors and clients were going bankrupt or

weren't paying their bills." As a result, general contractors now require large amounts of insurance from their subcontractors — some demand an umbrella policy (\$5 million). "[That costs] tens of thousands of dollars. I don't make that kind of money ... I never did." [#16]

- The owner of an MBE- and SBE-certified contracting company said that obtaining insurance was not difficult, though he noted that it could be very expensive. [#17]
- "We are currently experiencing trouble with the City [of Madison] telling residences who they recommend for [specialty contracting services]. If you don't buy into the [industry-specified] insurance program, you are not a preferred contractor .... I think [this] is overstepping the bounds of what a city program should be doing," indicated a woman-owned specialty contractor. [#19]
- Although a large expense, the white male owner of a federally-certified small general contracting company stated that insurance is a necessity. He said that workers compensation for construction is needed due to changing environments and different employees daily. The firm factors in the cost of insurance when bidding. [#19]
- The female representative of a majority-owned contracting company reported high workers compensation rates due to habitual claims from workers. She stated, "Workers compensation is how some people live. I was told never fight claims because the courts always side with the employee." [#34]

**Other factors.** A number of interviewees identified additional factors that impacted business success.

**One reported price point as a major factor driving business success.** When asked what it takes for a company to be competitive in the local marketplace, the manager of a statewide trade association responded, "Price will be the driver in the public market; history means something in the private market, relationship means something, but if you are not at the right 'price point,' you'd better get there." [#3]

**Some reported value (good product/on-time delivery) as a key indicator of success.** For example, an advocate for disadvantaged businesses reported, "Total value is a key to success. You do not have to be the lowest bid, but you must be really good." He added that buyers often will go with 'total value' if they are getting a superior product that is delivered on time. [#27]

**A few business owners specifically mentioned "reputation" and delivery as factors for success.** Examples included:

- When asked what the keys to success in his business are, the male co-owner of a non-certified specialty contracting business said, "Reputation is the number one thing." [#8b]

- The director of a local industry trade association reported that newer businesses face competition from older, well-established firms. “First, a new business does not have a reputation; new businesses bid against well-known businesses.” [#2]
- The male representative of a majority-owned contracting firm commented that avoiding overpromising is “one of the key things for emerging businesses.” He said that if a firm promises something and doesn’t deliver it, “everyone hears about it.” [#9]
- The owner of a WBE-certified specialty contracting company reported that the keys to business success are good communication, responsiveness and delivering what they sell, none of which is gender specific. [#12]

**One business owner cited marketing as a key factor:** The female owner of a WBE-certified specialty contracting business said, “You have to have a good marketing strategy.” [#10]

### **E. Potential Barriers to Doing Business with Public Agencies**

The study team asked interviewees about potential barriers to doing work for public agencies, including the City of Madison. Topics included:

- Learning about prime contract and subcontract opportunities;
- Opportunities to market the firm;
- Bonding requirements and obtaining bonds;
- Insurance requirements and obtaining insurance;
- Prevailing wage requirements;
- Prequalification requirements;
- Licenses and permits;
- Other unnecessarily restrictive contract specifications;
- Bidding processes;
- Non-price factors public agencies or others use to make contract awards;
- Timely payment by the customer or prime; and
- Experiences with City of Madison regarding any barriers and recommendations for improving public procurement processes.

**Learning about prime contract and subcontract opportunities.** Interviewees discussed opportunities for firm owners and managers to identify public sector work and other contract opportunities, and to market themselves.

Many interviewees reported using multiple information streams for learning about public sector work. Examples follow:

- A white male owner of a contracting firm indicated that he received an email from the City of Madison to bid on a small job. He believes the outreach came from his prequalification with the City. [#25]
- The director of a local industry trade association stated, “In some parts of the State there are ‘builder’s exchanges’ and newspapers like *The Daily Reporter* and ‘bidtool’ [bidtool.net] where there are announcements and plans for jobs.” [#2]
- When asked how the members [primes] learn about work, the manager of a statewide trade association reported, “Industry newspapers, internet, advertising, and invitations to bid.” [#3]
- The president of a minority contracting association stated for public sector work, “Most large contractors send out notices of intent or contact businesses directly for campus or state work.” [#7]

This same minority contracting association president reported the Internet as a source of published City and other public agency work for primes. [#7]

- The white male owner of a federally-certified small general contracting company stated that he looks at the online sites that have upcoming projects. The City of Madison utilizes a relatively inexpensive online system called Bid Express. BidPlus (about \$250) managed by AGC (Associated General Contractors) provides both private and public sector projects and allows viewing of project descriptions. The owner also named, iSqFt, which is approximately \$1,500.00 per year. He stated knowledge of free websites provided by the State and County. [#19]
- An African-American owner of an MBE-certified contracting company stated that there are portals on websites and emails which provide notification of potential opportunities. [#23]
- The male owner of a federally-certified small contracting business reported that he learns about contracting opportunities via I Square Foot subscription, that provides listings, or General Contractors call him. [#35]

Some were less positive, and reported difficulty finding out about or securing public sector contracting opportunities, including contracting work with the City of Madison. Examples are:

- The representative of a WBE-certified specialty contracting firm stated, “I question if we are privy to all of the projects that are available ... we get emails ... [but] it’s not that often ... we see stuff we get sent, but we don’t know if that’s all.” Instead, this firm relies mostly on a bid management subscription to keep on top of bidding opportunities. [#18]
- A male representative of a majority-owned contracting firm reported that each agency advertises available contracts in their own way, and that can make it hard to track all of the opportunities. [#9]

He added that the City of Madison recently changed how they communicate upcoming projects, making it more difficult to learn about those projects. In particular, he said that the DemandStar platform has made it more difficult for his firm to learn details about a project as it goes into the bidding process. Preceding the adoption of the DemandStar platform, he indicated that all necessary information was available on the City of Madison website. [#9]

- The manager of a statewide trade association reported delayed bid notices as a barrier. “They [City of Madison] are notorious for putting out bids late, saying ‘we’re bidding this in a week.’” [#3]

This same trade association manager added, “This could be a problem for some small contractors if they don’t have the capability to manage their current work and bid a project in seven to ten days, sometimes less time.” [#3]

- For the female owner of a WBE-certified specialty contracting business, her firm never hears about bidding opportunities from the City of Madison. [#10]
- The white male owner of a contracting firm said, “Finding work was always a hurdle in the beginning.” [#25]
- The owner of an MBE- and SBE-certified contracting company said that the City usually calls or sends a fax to inform his firm of potential bidding opportunities. He noted, however, that many times he doesn’t even hear about projects until they have already been bid upon. This is especially true about larger projects. Interviewee #17 said that it would “make a big difference” to learn about all available projects and then decide on their own which opportunities to pursue. [#17]
- A president of a minority contracting association identified subcontractors as being disadvantaged when seeking public sector work. He reported that, for example, subcontracting opportunities are not announced by the City of Madison as the City does not do business directly with subs. Therefore, in order to learn about subcontracting opportunities a sub must learn about the primes’ opportunities. [#7]



- “Government contracts in construction ... are difficult for small businesses because they [government] have people they work with all of the time,” reported the representative of a minority chamber. This translates to barriers for businesses seeking public sector “government” work. [#22]

He added, “They [public sector] have lists they go off of, and if you are not on that list, then you don’t even have an opportunity to compete.”[#22]

- The owner of a non-certified woman-owned specialty materials supply firm reported not learning about opportunities in the public sector. “A lot of the younger people there today don’t even know who we are.” [#16]

**For some subcontractors, it is more difficult to find out about private sector opportunities.** For example, the president of a minority contracting association reported, “If it’s private work, you [subcontractors] just won’t hear from them [prime contractors] at all [about private sector opportunities].” [#7]

**Opportunities to market the firm.** Firm owners and managers felt that marketing was something that took time and effort that small companies often did not have the time, financial resources or manpower to do.

**Some businesses reported challenges with marketing.** For example:

- The female owner of a WBE-certified specialty contracting business pointed out that the cost of marketing can be too high for many small businesses. She pointed out, for example, that advertising on a billboard can cost several thousand dollars a month, resources small businesses and new businesses just don’t have. [#10]
- A woman president of a specialty contracting firm (SBE-, WBE- and DBE-certified) reported wanting to market to the City of Madison, but not knowing how. “I find no way to advertise [to the City where lists do not relate to the firm’s services].” [#31]
- The owner of a non-certified woman-owned specialty materials supply firm reported that she doesn’t know about any opportunities to market her firm to the City of Madison. [#16]
- The owner of an MBE- and SBE-certified contracting company stated that there are not opportunities to market his firm to public entities or to show them what his firm is capable of. [#17]

On the other hand, larger companies or those that have been in business for a long time either do not have to market or have a networking advantage. Examples include:

- When asked about marketing the firm, the representative of a majority-owned construction contracting firm said “we try not to.” The owner of the same firm elaborated that they generally seek out and bid on work that interests them rather than having clients come to them with potential projects. He pointed out that his firm doesn’t even have a website. [#13]
- The manager of a community association serving mostly majority contractors reported that there are very few minority-owned firms in the community now. Those that do exist are small and trying to get a footing in a marketplace where they must compete against much larger firms. “The larger firms have better capital, networking, have connections to get contracts.” [#21]

**Bonding requirements and obtaining bonds.** Public agencies in Wisconsin typically require firms bidding as prime contractors on public works contracts to provide bid, payment and performance bonds. This can present a barrier for newer, smaller and poorly capitalized businesses.

Some small firms described barriers they faced in obtaining bonds. Many similar barriers to bonding are reported earlier in this appendix. Additional discussions included difficulty securing and paying the high cost of bonding required by many public agencies. Examples follow:

- An advocate for disadvantaged businesses reported that securing required bonding is particularly difficult for new startups to secure limited participation in public sector work. [#27]
- A white male owner of a contracting firm reported that bonding requirements have kept the firm from bidding larger Madison jobs. He reported that without proper bonding, a business cannot bid jobs as bonds are difficult for small businesses to secure. Often there are time restrictions making securing bonds impossible. [#25]
- The female owner of a WBE-certified specialty contracting business said that, while the requirement has recently been eliminated, for a number of years her firm was required to obtain bonding before being able to do specialized contracting work. This requirement posed a barrier to conducting work for public (and private) sector work. She noted that obtaining the bond was not difficult, but objected to the additional cost and paperwork. [#10]

**Insurance requirements and obtaining insurance.** The study team asked business owners and managers whether insurance requirements on public sector projects presented barriers to business success. As discussed above, some said that the cost of obtaining the levels of insurance required by government agencies can be prohibitive for some firms. Additional comments include:

- The female owner of a WBE-certified specialty contracting business reported that State unemployment insurance became a burden after the downturn. Before the downturn her firm paid between \$300 and \$400 every quarter, but since 2008 they have had to pay \$4,000 the first quarter of every year. [#10]
- The president of a WBE-certified construction business described being required to provide a plan which appeared to her to be the City's responsibility. She reported that City engineers would not "stamp" her plan, because they did not want to accept responsibility. She said, "[By the City of Madison not stamping the plan] it puts a huge amount of liability in our lap to the point where this year, because the City is so adamant about not changing that practice, I have to get a professional liability insurance policy to cover my liability. That policy has a \$25,000 deductible and a \$30,000 premium .... I'm talking to [my staff] to see if it is even [financially] worth it ... We're discussing that right now...because you don't want to not do work with ... the City that you're located out of, but at some point it's not financially viable." [#11]

**Prevailing wage requirements.** Contractors and administrators of public agencies discussed prevailing wage requirements that government agencies place on certain public contracts.

Many interviewees said that prevailing wage requirements presented a barrier to working on public contracts; and in some cases, have driven business owners to do only private sector work. For example:

- The male co-owner of a non-certified specialty contracting business stated that his firm only works in the private sector. Although he had worked in the public sector before starting his current firm, "prevailing wage issues and red tape" made public sector work undesirable. [#8b]
- A public administrator at a public agency reported that although he supports prevailing wage requirements they increase costs for small businesses, "It's a factor; some people know [that] if you have to meet the wage requirement it's going to be more costly." [#1]
- When meeting prevailing wage requirements, a trade association president and lobbyist reported barriers for small businesses. He reported that some companies do not pursue government work to avoid prevailing wage requirements. For example in the Dictionary of Classifications, he stated that there is a "Metal Building Erector" classification [one who assembles pre-engineered metal buildings] with 150 accompanying wage rates, and depending on the county for Wisconsin, there are 60 different wage rates. Therefore, he indicated that for some contractors prevailing

wage rates are too much trouble, and risky; a contractor who errs can be debarred for up to three years and penalized with triple wage fines. [#5]

- When asked about prevailing wage requirements, the owner of an MBE- and SBE-certified contracting company said that prevailing wage requirements could be problematic because are often not offered enough money to pay employees the required wages. “After we do that, there is no profit whatsoever.”[#17]
- The president of a minority contracting association indicated that, for non-union contractors, prevailing wage requirements could be complicated. For example, he indicated that a problem could exist if prevailing wages are paid to a retirement pension fund and an employee cannot get access to the funds because of employment time-limit requirements. [#7]

Additionally for contractors, who do public and private projects, difficulties can arise when employee pay fluctuates between a regularly paid wage and higher prevailing wage. [#7]

- The representative of a minority training and supplier association indicated that prevailing wages are largely misunderstood. [#20]
- The African American owner of a non-certified specialty contracting company reported that prevailing wage jobs [high salary, benefit requirements and taxes] are a challenge for a small business especially if the business is getting late payments from the agency. [#32]
- “I wouldn’t want to start a business at this time because of the prevailing wage requirements and the way that’s followed and regulated — I think that’s unfair,” responded a representative of a majority-owned landscape contracting business. [#T10]
- The white male owner of a specialty contracting firm commented that prevailing wage requirements presented a challenge. His firm experienced confusion as part of a project required prevailing wages and another part did not. The firm did not properly pay the prevailing wage causing problems. He said that had the company known about the prevailing wage requirement more clearly, they would have bid the job higher priced. He added that he is happy to pay his employees more, but not out of his pocket. The firm was only made aware of the mistake after the fact and, “It hurt us.” Employee complaint filings are how the firm learned of their mistake. [#36]

**On the contrary, a number of firms said that complying with prevailing wage requirements was not a barrier when working on public projects. Comments include:**

- The male representative of a majority-owned contracting firm stated that, while the City of Madison does have prevailing wage requirements, they are not a problem for his firm because it is a union contractor. [#9]

- A female owner of a WBE-certified specialty contracting business stated that there are prevailing wage requirements for any work with the City of Madison, but said, “All of the [specialty contractors] in this area do prevailing wage anyway ... if you have a good employee, you pay them well.” [#10]
- A male president of a majority-owned construction contracting firm reported that because his firm is a union contractor, prevailing wage requirements are not an issue. [#13]
- The representative of a WBE-certified specialty contracting firm reported no barriers because the firm had software that calculated prevailing wages. [#18]
- As reported by the president of a minority contracting association, for union contractors, prevailing wages pose no problems. [#7]
- The president of a WBE-certified construction company stated that the prevailing wage requirements do not impact her because most of the work she handles has prevailing wage requirements. [#11]
- An owner of a WBE-certified specialty contracting company stated that any time that they work on a government contract, whether or not the City is paying directly, they have to consider prevailing wage. She also said that that she does not feel that prevailing wages have been a barrier to the success of her business. [#12]
- The Hispanic owner of an MBE-certified specialty contracting firm reported he is proficient in prevailing wage requirements which involves a lot of red tape. He reported that his firm could pay the rates if required by a project and it would not be a barrier. [#24]
- A program administrator for a public agency stated, “As government, we always need to support the prevailing wages.” He indicated that when prevailing wages are not paid, “Small business operators cannot provide for their families and maintain their businesses.” [#1]

**One interviewee elaborated on enforcement of prevailing wages.** A male representative of a majority-owned public works contracting company reported that, although prevailing wages are generally a requirement for bids to the City of Madison, he has never had anyone actually check to ensure that employees are actually paid the prevailing wage. [#14]

**Prequalification requirements.** Public agencies, including City of Madison, sometimes require construction contractors to prequalify in order to bid or propose on government contracts.

**Many interviewees were critical of prequalification processes in the public sector.** Some specifically mentioned barriers posed by City of Madison’s process.

- The director of a local industry trade association indicated that he has heard about problems with prequalification of contractors. He said, “Yes, we need to sit down

with [Madison] and find out how our contractors can meet the prequalification so we can get in there and help get their work done.” [#2]

- A president of a WBE-certified construction company said, “[The City of Madison] prequalification process is comprehensive and time consuming and rigorous, which I understand, because they want people that can perform on the projects. But I would say it is atypical of other municipalities and even the State’s prequalification process.” [#11]
- “We could spend four-and-a-half hours talking about [prequalification requirements] and all it would do is get me enraged. It is a terrible process,” reported the male representative of a majority-owned public works contracting company. [#14]
- The owner of a WBE-certified specialty contracting company reported that the current job they are working on requires that they are prequalified by the Public Works Department. She said that it wasn’t insurmountable, but it was not anything they had done before. They provided all of the required documents but explained that it was some work to gather it all together. [#12]
- A representative of a majority-owned construction contracting firm said that prequalification requirements are too long. [#13]
- The white male owner of a contracting firm commented that the most paperwork he has ever had to do was to be prequalified for the City of Madison. [#25]
- A trade association president and lobbyist indicated that in the public sector agencies award projects through a combination of prequalification and bid price with the lowest prequalified bidder getting the work. However, he added that if a contractor is the lowest bidder, that contractor risks not making money, or worse,
- The male representative of a majority-owned public works contracting company reported that companies with fewer than 15 employees are exempt from the prequalification requirements, and that some firm’s will either manipulate the system or falsely report the number of employees they have in order to be deemed exempt from prequalification requirements. [#14]

He also reported that one person in particular in the prequalification department “has more power than she should have. She works autonomously; there are no checks or balances... [and] she’s very condescending.” He added that many other contractors he had spoken with felt the same. [#14]

- The white male owner of a federally-certified small general contracting company stated prequalification was more difficult this year. “Unfortunately the City of Madison gets dictated to a lot by the unions... They put this best value contracting into [effect]. It’s good to have controls and have good contractors working on projects but they have made it at times very unrealistic and very difficult to do and in fact going well beyond the intent of the laws and ordinances that were there. It is

a difficult, difficult hurdle and frustrating hurdle to go through every year or every two years for the City of Madison. We don't have that problem with the state; we don't have that problem with the county, but the City of Madison is just difficult," he said. [#19]

Some said that prequalification requirements presented a barrier to bidding on work. Examples of those barriers follow:

- The male representative of a majority-owned public works contracting company said that prequalification requirements are the largest barrier to working with the City of Madison. He stated that he had heard several contractors decide to stop working with the City of Madison specifically because of their prequalification requirements. [#14]
- A representative of a minority chamber indicated that contract requirements [and prequalification] present a barrier for small businesses unable to comply with expectations. He added that the long approval process eliminates some good businesses that are screened out too quickly without proper consideration. [#22]
- The female co-owner of a non-certified specialty contracting company reported that there is a requirement that you need four similar projects to qualify for public projects and that is holding her company back. She said, "We can do the work and know how to but don't have the experience on four similar projects." [#28]
- For a female owner of a WBE and SBE certified specialty contracting firm prequalification was a barrier to doing business with the City. She reported a challenge getting required information from the bank and insurance company for the City. Due to the mobile nature of her industry, if she has questions, she cannot reach the City because they are closed by the time she gets off work. [#38]

Other factors included dissatisfaction with having to meeting Affirmative Action Plan requirements. Examples of comments include:

- For a WBE-certified specialty contracting business, prequalification combined with a required Affirmative Action Plan presented barriers to doing work with the City of Madison. For example, this business representative indicated that having to work with the Affirmative Action office when hiring disrupts the firm's need to quickly hire. "The hassle for Affirmative Action Plan is when you are going to be hiring ... you have to let the Affirmative Action office know before you do anything else that you are going to have this position open." [#18]

This same business also reported limited industry availability of minority and women workers as a barrier to complying with an Affirmative Action Plan. "Part of the problem with Affirmative Action that we've seen is there are very few minority and women in the local [specialty contracting industry]. There's very little we can do about that, because we have to go to the union first, when we are looking." [#18]

- “The industry as a whole has difficulty meeting Affirmative Action requirements [for] mostly the City of Madison ...,” according to a majority-owned specialty contractor. [#T15]
- The president of a WBE-certified construction company said, “The extensive Affirmative Action [Plan] requirements for even for the prequal[ification] are challenging for a company like mine to make sure that I’m in full compliance with. I devote a lot of time to making sure that my firm is in compliance with those.” She cited an example of how, previously, the City of Madison required notification of any job solicitation for her firm two weeks prior to her advertising it publically. She reported that being a real challenge for her firm. Although better now, it is still challenge to have to wait one week. [#11]
- A trade association president and lobbyist reported little success in meeting Affirmative Action Plan goals both internally and industrywide. He explained, “Are we meeting them [Affirmative Action goals]? ‘No.’” He added, “Is the industry meeting them [Affirmative Action goals]? ‘No.’” “Have we tried a whole host of things? ‘Yes.’” [#5]
- The white male owner of a federally-certified small general contracting company stated that one difficulty is with the City’s Affirmative Action Office. He reported that the City was counting the number of previously employed workers the firm was rehiring against them, because they were not hiring outside racially-diverse employees. [#19]

He reported, “They [the City] decided that we shouldn’t be hiring back employees ... that I call our employees, we pay the insurance for them all winter long, they’re my employees ... they’ve been working for me for 20 years and I’m supposed to be hiring somebody new? That’s what [the City] was trying to push on me. That we weren’t aggressively going out and getting more employees, but I don’t need anymore. When I did do it I put a Hispanic and a black in an apprenticeship program .... I’m investing in them. I’m not in a union situation where I get reimbursed for that.” [#19]

- A male owner of a federally-certified small contracting business reported that the prequalification process is not difficult except for preparing an Affirmative Action Plan every year. He indicated that the Affirmative Action Plan is difficult to get approved by the City of Madison. Two years ago, the firm’s plan was rejected because they did not show evidence of hiring minorities. The interviewee commented that he was not hiring anyone. However, the City required that he show a good faith effort. He reapplied showing a good faith effort. He said, “It’s a hoop you have to jump through; they don’t care if we discriminate or not, they just want the numbers.” [#35]



- The male representative of a majority-owned contracting firm said that his firm has an agreement with the unions — if the workforce requirements for a job vary throughout the work week, they “have the opportunity to shed some ... of those workers because they’re not needed.” [#9]

However, he gave the example of a talented carpenter that is needed for the first three days of the work week, with other things needing to be completed before they need that carpenter’s services again. In that situation, they would not bring him in for the last two days of that workweek, but might need him again the following Monday. The interviewee reported that the City of Madison views this as a termination of employment and a new hire. Because of equal opportunity employment guidelines, his firm is notified that it is “not involving enough diversity in [their] workforce” given the amount of hiring they do. He pointed out that his firm is essentially being penalized for not bringing in different workers every week, saying “We’re always looking for diversity in the workforce, we’re working with the unions to provide that diversity, but once we engage the workers ... it’s easy to bring them back. But it counts against us.” [#9]

**Only a few interviewees indicated that prequalification was not a barrier to pursuing public sector work.** Examples include the following:

- Regarding prequalification requirements, the representative of a majority-owned construction contracting firm said, “It’s a necessary evil in a way.” He acknowledged that “it’s kind of a catch 22” in that prequalification requires prior experience with the type of jobs which would require prequalification, but added, “At the same time, we don’t want to have somebody that doesn’t know what they’re doing when they’re out there.” He concluded that the City does “a pretty good job with prequalification.” [#15]
- The female representative of a majority-owned contracting company reported that her firm files qualification applications every year with the City of Madison and Dane County. She indicated that the paperwork is general information and no challenge to the business. The forms are already updated with prior year information making the process simple. [#34]

**Licenses and permits.** The study team discussed whether licenses, permits and certifications presented barriers to doing business.

**Some business owners said that obtaining licensing or permits can be a barrier.** Interviewees explained barriers presented by different types of licensing and permitting. Examples are:

- The male representative of a majority-owned public works contracting company noted that sometimes jobs were delayed due to permitting which “could take place farther ahead of the game.” For example, his firm might have to wait for the Wisconsin Historical Society to evaluate job site as a potential Native American burial ground — something that could be done long before his firm is ready to start work. [#14]

- “Our permitting process is slowing us down,” responded one majority-owned specialty contractor. [#T5]
- The representative of a majority-owned construction contracting firm reported that, when working for public entities, the public entities are responsible for obtaining the necessary permits. He said that it’s harder in the private sector because then your firm has to work with various agencies to obtain required permits. Interviewee #15 added that this can get very confusing, and “the only way you figure out that you didn’t do something is when someone yells at you.” [#15]
- When asked about permitting and licensing, the representative of a woman’s business initiative indicated that the City of Madison’s bureaucratic systems make licensure difficult to navigate. “It’s navigating between organizations and knowing where to start.” [#40]

She reported more extreme barriers for non-English preferred speakers in the trades. [#40]

For some other business owners and managers, obtaining licenses and permits was not a barrier to doing business, or not required in the industry. Examples include the following:

- For the male representative of a majority-owned contracting firm, the permitting process was fairly smooth. [#9]
- The owner of an MBE- and SBE-certified contracting company reported that his firm has been able to get all of its required licensing and permits without difficulty. [#17]
- For the white male owner of a specialty contracting firm, obtaining permits was not a challenge. He said that he can get the permits he needs for a project. [#36]
- A white male owner of a federally-certified small general contracting company stated licensing and permits are not an issue. [#19]
- The Hispanic owner of an MBE-certified specialty contracting firm commented that licensing and permits do not impact his industry. He said, “It is not a regulated industry like electricians or plumbers.” [#24]

**Other unnecessarily restrictive contract specifications.** The study team asked business owners and managers if contract specifications, particularly on public sector contracts, restrict opportunities to obtaining work.

Some owners and managers indicated that some specifications are overly restrictive and present barriers. It appears that some businesses choose not to bid or are precluded from bidding due to what business owners and managers perceive to be overly-restrictive contract requirements. Examples of those comments include the following:

- A female owner of a WBE-certified specialty contracting business highlighted the importance of knowing about all the relevant laws and requirements regarding your field, and of making sure to act in a timely manner regarding them. She noted, for example, that a company has to provide notice of intent within 30 days of starting a job or else they lose all lien rights on that job and as a result have no way to ensure payment. The Interviewee said that, even knowing about this requirement, small businesses can easily be so involved in getting the work completed that they fail to provide notice within the requisite time frame. [#10]
- The owner of a WBE-certified specialty contracting company stated that it seemed to her that the specs were written with a particular sign company in mind. She said that she feels that sometimes it seems that not everybody has an equal shot due to how the specs are written. She does not believe that it is necessarily the City as much as the architect or the interior designer that is writing the specs in this manner. [#12]

**Bidding processes.** Interviewees shared a number of comments about difficulties navigating the bidding processes, specific to public procurement.

Some discussed inexperience as a barrier to bidding public sector and other work. For example:

- A director of an industry trade association indicated that inexperienced or new firms can find the bidding process for public agencies difficult. He added that lack of bidding experience often results in costly errors and business closures. [#2]
- “The bidding process has not been favorable to people of color,” reported a minority chamber representative. He explained, “Help does not exist to help small Latino businesses navigate through the process.” [#6]
- The owner of an MBE- and SBE-certified contracting company expressed frustration with his firm’s inability to win public projects, saying “sometimes I don’t even want to bid on those big projects because I just feel like it’s a big waste of time. Because we never get it, we don’t even get feedback from them at all.” [#17]

Many reported that the lengthy bidding process, particularly for prime contractors, presents barriers to small businesses that cannot afford the time and cost required by bidding. Comments include the following:

- When asked about the challenge that he sees small businesses face when working as primes, the director of an industry trade association serving many counties reported, “Time to put the bid together. It takes a lot of time to put a bid together and then if you don’t get it you still have to pay for the time.” [#4]
- The female owner of a WBE-certified specialty contracting business reported that there is a lot of funding available from the state, but noted that getting together all the necessary paperwork and putting it through the system “takes a half-time

employee,” something a small business actually in need of that funding often can’t afford. [#10]

- “The [City of Madison] paperwork involved doesn’t allow for quick work options,” responded one majority-owned specialty contractor. [#T11]
- The white male owner of a contracting firm said that he considers time restrictions a barrier. It is difficult for small businesses to complete all requirements of a bid in a timely fashion. When a small business is busy, it is difficult to invest more time into learning the bidding process and submitting the bid in a timely manner. [#25]
- A WBE-certified specialty contracting business that conducts mostly private sector work, reported easier administration when doing private sector projects including less paperwork, no certified payroll and a typically streamlined approval process. [#18]
- “When bidding on projects in the University, the amount of paperwork was a barrier...the paperwork is definitely not worth it,” reported the white male owner of a specialty contracting firm. [#36]
- An African-American owner of an MBE-certified contracting company recommended, “Make sure that they pay people on time and that they don’t get overboard with people and red tape. They will give you a lot of paper work and if one little thing is misspelled then they will take it out and find a reason to restrict you.” [#23]

**Some interviewees reported confusion about or lack of feedback as a barrier to bidding projects for public agencies. For example:**

- The owner of a non-certified woman-owned specialty materials supply firm stated that getting involved in the bidding process with a public agency is difficult because “you don’t get phone calls back, you don’t get responses from emails .... You get to the point where you can’t concentrate on it anymore so we just let it go.” [#16]
- The owner of an MBE- and SBE-certified contracting company stated that the public sector bidding process is frustrating because the firm “spend[s] so much time” developing bids but never receives any feedback. [#17]

**One indicated that the primes, bidding with a public agency, must be the lowest bidder to secure work and that this requirement trickles down to subcontractors, as well. A manager of a statewide trade association stated, “On the public side, price is the greater driver; in order to get the work; the prime must be the low bidder.” [#3]**

**One contractor reported being suspicious of non-price factors public agencies use to make contract awards. The owner of an MBE- and SBE-certified contracting company indicated that “[sometimes agencies evaluating bids] only care about the relationship” between themselves and potential bidders. [#17]**

However, several interviewees reported no problems with navigating the public sector bidding processes, and appreciate the faster online bidding. Specific comments include:

- The president of a WBE-certified construction company stated that the bidding process is very straight-forward. [#11]
- A representative of a majority-owned construction contracting firm reported that the bidding process is all electronic and works well. [#13]
- The male representative of a majority-owned public works contracting company was positive about the move to an online bidding process. “I think the bidding process has gotten significantly better.” He highlighted improved turnaround time as particularly important, saying that it used to take a week to hear results from a bid, but now they hear in a matter of hours. [#14]

**Timely payment by the customer or prime.** Slow payment or non-payment by the public agency or prime contractor was often mentioned by interviewees as a barrier to success in public sector work.

Many interviewees said that slow payment by the customer or a prime contractor is an issue and can be damaging to companies in the public works contracting industry. Interviewees reported that payment issues may have a greater effect on small or poorly-capitalized businesses. Comments include:

- The African-American owner of an MBE-certified contracting company reported that the payment cycle on public contracts can be a challenge. [#23]
- An owner of a non-certified woman-owned specialty materials supply firm said that receiving timely payment from a prime contractor can be an issue. She said that her firm frequently has to go at least 90 days before getting paid. [#16]
- The owner of an MBE- and SBE-certified contracting company noted that it can be difficult to get timely payment from public agencies and prime contractors, and that this can sometimes prevent his firm from working for them. “They make us wait as long as they want to.” [#17]
- For a representative of a woman’s business initiative, more payment challenges occur at the State level and in Milwaukee rather than in the City of Madison. However, she added that at the City of Madison “it’s bureaucratic.” [#40]

This representative also reported knowing of a business that completed construction work on the I-94 Interchange project, with no payment 18 months later (and now in litigation). [#40]

- The African American owner of a non-certified specialty contracting company reported that he had experience with the public sector where change orders were not done in a timely basis causing him financial hardship. He commented that subs are not expected to finance the project and do not get interest when payments are

late. He added, the banks charge him 12 to 18 percent, but he does not get interest if his payments are untimely from the government (City, State, County) or a prime. He also commented that small minority businesses can go out of business waiting to be paid by a public sector agency. [#32]

- For the white male owner of a specialty contracting firm, “Public projects take a lot more time to pay than private work.” [#36]

**Business owners and managers mentioned excessive retainage and delayed final payments on contracts as concerns.** Examples include the following:

- A representative of a minority chamber reported issues with late payments, “When they are late, they are really late.” [#6]
- “City of Madison is very slow to pay,” responded the vice president of a woman-owned specialty contracting firm. [#13]
- The representative of a majority-owned construction contracting firm stated that there are “sometimes” problems with timely payment from the City of Madison. She added that the amount of money the City of Madison withholds until a project is closed also poses a problem. [#13]
- The male representative of a majority-owned public works contracting company noted that the City of Madison is currently working on improving their closeout procedures, saying “it’s better than it used to be. It still needs to improve.” [#14]
- A female representative of a majority-owned contracting company reported that in some cases with the City of Madison, the business has waited for over a year for retain age work [work the City added after the contract]. This is a challenge to the business as they must pay their bills; supplies, employees and health insurance. [#34]

**Some interviewees specifically mentioned “dishonesty” or unethical practices of prime contractors when discussing difficulty of being paid as a subcontractor.** A number of interviewees pointed out how prime contractors could unfairly take advantage of subcontractors. For example, the female owner of a WBE-certified specialty contracting business pointed out that small businesses need to be careful when subcontracting with larger firms, as large general contractors have a reputation for being very slow to provide payment. [#10]

**Some interviewees specifically mentioned slow payment on City of Madison projects to be a problem.** They reported that primes had been paid, but then unfairly held payments from subcontractors. For example:

- The white male owner of a landscaping company commented that they do not bid City Madison jobs because the city takes the lowest bidder and they expect contractors to float too much money for too long. He indicated that the City pays the contractor late and that extends the time the sub has to float the money to pay

their vendors and employees. This is a challenge to them therefore; they do not bid Madison jobs. [#37]

- When asked if the City of Madison makes timely payments, the male representative of a majority-owned contracting firm said “generally speaking, no.” He related one instance where it took two-and-a-half years to receive final payment for a project. He added that his firm is often hesitant to pursue new opportunities with the City of Madison because of that experience. [#9]
- A woman president of a specialty contracting firm (SBE-, WBE- and DBE-certified) reported that timely payment as a challenge, particularly for a small business needing cash flow to pay employees during a project. She stated that contracts with the City of Madison are paid on completion — that can be several months after the job has started. This poses challenges for small businesses because they do not have the same “financial standing” as larger businesses. [#31]

However, some interviewees said that they typically do not have difficulty getting paid on City of Madison contracts. Those reported typically timely payments. For example:

- The owner of a WBE-certified specialty contracting company stated she has never had any issues regarding timely payment. [#12]
- The representative of a majority-owned construction contracting firm said that the City of Madison is “very good” about making payments in a timely fashion. [#15]
- The white male owner of a contracting firm reported he has not experienced problems with untimely payments and municipalities have paid him promptly. [#25]

**Experiences with City of Madison regarding any barriers and recommendations for improving procurement processes.** In addition to factors common to contracting among public agencies in the City of Madison, interviewees had many comments specific to City processes.

Some interviewees commented that size of contracts at City of Madison presented a barrier to bidding, or that it was difficult for smaller firms to get work with the City. For example:

- A program administrator for a public agency reported, “Yes, I think we should always be conscionable of where we can break the contracts down smaller, to provide more opportunities for small businesses; that’s always something we should look at, “to spread the wealth.” [#1]

The same program administrator added, “It’s really about spreading the taxpayers’ wealth to everyone; and that is equity, but easier said than done.” He added, “We have not nearly met our challenge.” [#1]

- The female owner of a WBE-certified specialty contracting business said that, because the City of Madison only asks for bids on contracts worth more than \$5,000 they never have the opportunity to bid on work the City needs done. [#10]

- The female co-owner of a non-certified specialty contracting company reported that the size of contracts is an issue. She said, “If [contracts] were smaller, we could bid on them.” [#28]

A number of interviewees reported paperwork as a barrier to doing business with City of Madison. The excessive paperwork, required by public agencies created barriers for some businesses seeking work with the City of Madison. For example, a representative of the minority chamber that worked on a project for the City of Madison indicated that had he known about the amount of paperwork, he would not have done the job. “Public works deals with paperwork throughout the entire project [including] progress reports, payroll reports [and] prevailing wages [create barriers to doing business with the City of Madison]. In the private sector you don’t deal with that. You read your contract and go to work.” [#6]

Some interviewees recommended changes in City of Madison procurement and payment processes. Several examples follow:

- The male representative of a majority-owned contracting firm recommended that the City of Madison communicate information about opportunities to the construction community as early as when the City is in the design phase of a project. He also stated that they City should publish “notifications of when they expect the bid documents to be released,” saying that not knowing when a bidding opportunity will occur can be difficult. [#9]
- Regarding the City of Madison bidding processes, the Hispanic male owner of an MBE- and SBE-certified contracting company said, “If they could just be fair to everybody equally, then it would be a totally different story.”
- The male owner of a federally-certified small contracting business shared an experience on a City of Madison project where the prime went bankrupt and he never got paid as the sub. He contacted Madison who reportedly did not care that he was not paid. The interviewee recommended that the City develop a mechanism where subs are assured payment [immediately upon completion of their work]. He reported that the WisDOT has a process where they verify on-line that subs are being paid by the prime and recommended that the City should do the same. [#35]

## **F. Other Allegations of Unfair Treatment**

Interviewees discussed potential areas of unfair treatment, including:

- Denial of opportunities to bid;
- Bid shopping;
- Bid manipulation;
- Treatment by prime contractors and customers during bidding or performance of work;



- Unfavorable work environment for minorities or women; and
- Approval of work by prime contractors and customers.

**Denial of opportunity to bid.** The interview team asked business owners and managers if they had ever been denied the opportunity to bid.

Some interviewees claimed that they had been denied the opportunity to bid on projects, or when submitted, their bids are not considered. Examples include:

- A representative of a majority-owned construction contracting firm said that every firm, minority-owned or not, has had an experience where the prime or agency they are submitting a bid to doesn't believe they can handle the job. "You can talk as much as you want, but if they don't want to work with you they're not going to work with you." [#15]
- The African-American owner of an MBE-certified contracting company stated that if a project has a participation goal, some primes will try to get out of hiring him by stating to their customers that a project is a premium [has higher costs] with minority-owned firm participation. He recommended that projects should have a requirement, rather than a goal to hire minority-owned firm. [#23]

This African-American owner reported, "On [one public] project, we were set up with one particular company and they had us [confirm] early on before the final bid. They told us, 'We are going to commit to 50 percent MBE' ... all of the sudden. once we got to the contract, that was not implemented. It is called 'bait and switch.' That is a classic thing that [primes] do. They try to get us the job and go all 'amnesia' and forget the goal they originally said they were going to do. I took a lot of notes and documented everything. I went to the guy from the State and he made a phone call to the general contractor." [#23]

He also described the difference between work as a minority in Madison and in Milwaukee. He said, "... in Madison, if a company does not like having SBEs or MBEs working with them, then they do not bid the work." He added that not a lot of minorities are working in Madison and that some who are working in Madison are from Milwaukee. [#23]

**Some claimed they had been denied the opportunity to bid based on their union or non-union status.** For example, the white male owner of a federally-certified small general contracting company stated they are denied access to bidding on projects because they are non-union. "Is it fair? No. Is it just? No. Is it a level playing field? No. But can I change it? No...I try to work around it and not waste time," he said. [#19]

Some indicated that they had not ever been denied the opportunity to bid. Examples include the following:

- A female owner of a WBE-certified specialty contracting business said that she is unaware of ever having been refused subcontracting work by a prime contractor because her firm is woman-owned. [#10]
- The owner of a WBE-certified specialty contracting company stated that she has never been denied an opportunity bid. [#12]

Some reported that small businesses face the stigma that small size translates to residential-only. They reported being stereotyped as “residential-only businesses” because of small size. For example, the director of a local industry trade association reported that, based on workscope and timeframe, primes may decide that a small business is better-suited for residential work and not consider their bids for public sector projects. [#2]

**Bid shopping.** Business owners and managers often reported being concerned about bid shopping and the opportunity for unfair denial of contracts and subcontracts through that practice.

Many interviewees indicated that bid shopping was prevalent in the local public works contracting industry. Others reported knowing of occasional instances of bid shopping. Examples of comments include:

- The manager of a statewide trade association reported being privy to, on occasion, accusations of bid shopping. [#3]
- Regarding bid shopping, the female owner of a WBE-certified specialty contracting business said, “There’s some of that going on,” but did not feel that it was done out of a desire to discriminate. [#10]
- The male representative of a majority-owned public works contracting company said, “I know [bid shopping is] something that our subcontractors worry about.” He added that, when his firm hears about bid shopping “it really infuriates us, and it does make our job a lot more difficult because, if subcontractors are worried about it, they won’t send their bid to us until a half-hour before the bids are due and then we have to scramble to get it entered and go.” He reported that, although his firm doesn’t engage in bid shopping, other firms lead subcontractors not to “trust primes in general.” [#14]
- The African American owner of a non-certified specialty contracting company said, “The only way to get around the reality [bid shopping] is good relationships.” [#32]
- When asked about bid shopping, the owner of a non-certified woman-owned specialty materials supply firm responded, “It’s happening.” [#16]

- Regarding bid shopping, the white male owner of a federally-certified small general contracting company indicated that bid shopping is a very frustrating part of the business. He said that it happens on State and City jobs and happens in the buyout process. It is a very prominent part of the process. [#19]
- He also reported that the biggest problem with the bidding process is getting the subcontractors' bids in a timely manner. Subcontractors are worried that there will be bid shopping so they will send them in last minute. [#19]

**Bid manipulation.** Beyond bid shopping, a number of interviewees discussed bid manipulation.

Some interviewees said that bid manipulation affected their industry, and that it was common.

Examples of bid manipulation were reported by some:

- The president of a minority contracting association commented on bid manipulation. He reported that no one is going to not take a bid. "It's what they do with it afterwards [that] is the issue." [#7]

He added being aware of bid manipulation where after a bid is received, price reductions are demanded. [#7]

- When asked if he was aware of any bid manipulation, the owner of an MBE- and SBE-certified contracting company said, "Yes." He explained experiences where after submitting his bid, an agency offering a job sets the price they want to pay, and if his firm doesn't agree to that price it isn't hired. [#17]

However, a few interviewees reported no experiences with bid-manipulation. Some business owners and managers said that they were not affected by bid manipulation:

- When asked whether bid manipulation occurs, the male president of a majority-owned construction contracting firm said, "No." [#13]
- The female owner of a WBE-certified specialty contracting business reported no knowledge of bid manipulation occurring. [#10]

**Treatment by prime contractors and customers during bidding or performance of the work.**

Many business owners and managers discussed unfair treatment by prime contractors or customers.

Some reported firm longevity and business experience as key factors disadvantaging small businesses or newer firms seeking or performing work. Examples include the following:

- The director of an industry association serving several counties indicated that lack of experience presents a significant challenge for small businesses performing as subcontractors. [#4]
- He added, when asked about additional difficulties or barriers for small businesses or minority- or woman-owned firms, "Experience ... if you don't have experience,

you can't get bonds, insurance, etc. [to be taken seriously by primes and customers]." [#4]

- An advocate for disadvantaged businesses reported, "Diverse businesses tend to be the new kid on the block, therefore, fighting an uphill battle." [#27]

**Potential for "hidden" discrimination based on race/ethnicity or gender.** Minority and women business owners reported a culture of bias in the City of Madison. For example:

- The representative of a workforce development organization reported, over the years, ongoing "subtle" discrimination. [#33]
- The representative of a minority chamber discussed evidence of "unconscious bias." He reported being told, "Hi, I'm white, but I will shake your hand anyway." [#22]

He added, "I know that look" of racial discrimination. "It's unconscious bias." He indicated, "These things [discriminatory behavior] are not changing as people expect that they are." [#22]

- A woman representative of a non-profit financing agency reported that the City of Madison is "unintentionally exclusive" and "has not worked to be intentionally inclusive." For example, the City's promotional materials are "overwhelming ... white males."

She added, "The Chamber of Commerce is definitely packed with white males," saying that if she were a young woman or minority looking at the promotional materials, she would feel that the City of Madison was not a place where she belonged. [#29]

**Some interviewees indicated that unfair treatment was connected with their race/ethnicity or gender, or that evidence of discrimination and double standards persist.** Examples of comments included the following:

- An owner of a non-certified woman-owned specialty materials supply firm said, "One of the biggest challenges [I've] ever had [was working on a State project]." She reported that the state representative "treated [her] like a 'piece of dirt' .... He acted like he was so much better than [me]." [#16]

She added that, although the State project experience was particularly bad, double standards are generally true that "to go out to jobs as a woman and try to have a man think you know [something] is hard; and, it shouldn't be." [#16]

- The president of a minority contracting association reported, "One of the reasons is so many of these businesses are dominated by white females. Every contractor has a sister, a daughter, a wife, that is put in business so the business owner can take advantage of the programs." He added, when this happens, it pushes other minorities out of the industry. [#7]

When asked about any double-standards for minority- or woman-owned firms when performing work, he responded, “It’s all about benefit of the doubt and social capital. It happens all the time; double standards, no cooperation.” [#7]

- The president of a WBE-certified construction company stated that the main double standard is the difficulty she has as a woman in the industry trying to build business relationships. [#11]

This woman reported extra scrutiny with regard to motive or agenda when trying to establish deeper business relationships, particularly with male contractors. She added, “The fact that I’m single, it really prevents me from being able to call up an ex contractor [colleague] and say, ‘Can we have lunch?’” [#11]

She also reported other challenges being female. She said, “What it [being female] prevents me from doing is making relationships or developing relationships with folks [in the industry]. There’re not a lot of things we have in common.” [#11]

- The Hispanic owner of an MBE-certified specialty contracting firm commented that construction sites are not nice places and behavior may be racist. [#24]
- A representative of a minority chamber reported frustration, “You have to prove yourself time after time.” [#6]
- A woman president of a specialty contracting firm (SBE-, WBE- and DBE-certified) reported, “Being a woman in the construction industry is always challenging ... I’m not the first thing that pops into their head when they think about projects .... I do get challenged a lot when I’m on the construction project.” [#31]

She added needing to provide her qualifications due to the nature of her business and the fact that she is a woman. [#31]

- The president of a minority contracting association reported, “It can be crude and rude on site. I’ve heard black [industry] workers called [‘n’ word].” [#7]

He added, “There is straight out discrimination. I have seen it many times. Discrimination happens in subtle ways.” For example as evidence of a double standard, he reported having knowledge of an instance when a minority apprentice was disciplined while a non-minority apprentice was not for the same infraction. [#7]

This minority contracting association president also indicated that when minority apprentices get on an eligible applicant list, revisions have been made to lower them on the list. [#7]

- The African American owner of a non-certified specialty contracting company shared an experience on a project where his change orders were not processed by a project manager he believes was racist. [#32]

He also shared an experience when he had two white apprentices who worked for him while he was in the union. They were asked why they work so hard for that n--- --? Ultimately the two white apprentices dropped out of the union program and the industry because they were unhappy with the racism. [#32]

Some interviewees did not think that treatment by prime contractors was a barrier to getting or conducting business. Several reported no evidence of unfair by primes. Examples follow:

- The manager of a statewide trade association indicated not being aware of any instances where a prime refused work to a women- or minority-owned business. [#3]
- A female owner of a WBE-certified specialty contracting business noted that “every now and then you have two personalities that don’t get along,” but said that generally prime contractors and customers treat her and her employees well. [#10]
- The owner of an MBE- and SBE-certified contracting company stated that his firm is not treated unfairly by prime contractors or clients while working on a project. [#17]

**Unfavorable work environment for minorities or women.** The study team asked business owners if there was an unfavorable work environment for minorities or women, such as any harassment on jobsites. Some interviewees, including white men, said that they had heard of it but not experienced it first-hand. Examples include:

- The owner of an MBE- and SBE-certified contracting company reported that the work environment can be unfair or unfavorable to minorities. As an example, he spoke about working on a project with several majority-owned firms. There was a crane on the site to move materials and the majority-owned firms shared the crane freely between them, but were often reluctant to allow his firm to use it. This left his firm having to carry materials by hand. [#17]
- A manager of a community association serving mostly majority contractors reported that worksites have a tone of racism and bias; the construction industry stands out as “not being a welcoming industry.” He added that his organization is involved in a project to do training with contractors to create more welcoming inclusive and supportive environments in the construction industry. [#21]
- The representative of a workforce development organization reported that discrimination made minorities and women less likely to take on the risk of business ownership. “Over the years there has been subtleness [discrimination] that had made it unlikely for women and minorities to take the risk.” [#33]

- The president of a minority contracting association reported, “There is straight out discrimination. I have seen it many times. Discrimination happens in subtle ways.” For example, he reported having knowledge of an instance when a minority apprentice was disciplined while a non-minority apprentice was not. [#7]

Some interviewees cited physical work environment for woman as being dangerous or unfavorable. For example:

- An advocate for disadvantaged businesses indicated that he knew women business owners in contracting who feared they were in danger from heavy equipment operators who felt they did not belong on the construction site. [#27]
- The female owner of a WBE-certified specialty contracting business reported that the availability of clean restrooms on construction sites can be difficult for women. She noted that port-a-potties are cleaned “maybe every 30 days,” which is not much of a problem for men who can urinate relatively discreetly in a field or other secluded area, but results in all of the women having to use an unsanitary toilet every time they need to use the restroom. [#10]

A few reported barriers based on his firm’s nonunion status, or not being welcomed into unions based on race or ethnicity. Examples include the following:

- The white male owner of a federally-certified small general contracting company stated they have had issues where they were forced to work onsite at hours different than the union workers, often overnight. [#19]
- The Hispanic owner of an MBE-certified specialty contracting firm believes the business is discriminated against, not for race/ethnicity, but for not being a union shop with job sites being picketed. [#24]
- A president of a minority contracting association reported minorities as unwelcome in unions. [#7]

A few reported that they had not seen or experienced unfavorable work environments. [e.g., #8b, #19] For example, the owner of a WBE-certified specialty contracting company stated that she has never experienced unfavorable work environment for minorities or women. [#12]

**Approval of work by prime contractors and customers.** Interviewees discussed whether approval of work by prime contractors or customers presented a barrier for businesses.

Some interviewees identified difficulty with approval of work by prime contractors or customers, while others did not. Examples are:

- The owner of a non-certified woman-owned specialty materials supply firm said she has experienced some issues with approval of work by prime contractors. [#16]
- Regarding approval of work, the female owner of a WBE-certified specialty contracting business complimented the City of Madison’s Inspection Department,

highlighting the Water Department in particular as “the best department [she] has ever worked with.” She attributed this to a great manager, good staff, and a work environment that is pleasant for its employees. [#10]

- The owner of an MBE- and SBE-certified contracting company reported that his firm has never had trouble having their work approved by clients or prime contractors. [#17]

## **G. Additional Information Regarding any Racial/Ethnic- or Gender-based Discrimination**

Interviewees discussed additional potential areas of any racial/ethnic- or gender-based discrimination, including:

- Underrepresentation of minorities and women in contracting;
- Stereotypical attitudes about minorities and women (or MBEs, WBEs, and DBEs) (page 81); and
- Any “good ol’ boy” network or other closed networks.

**Underrepresentation of minorities and women in contracting.** Some discussed evidence of underrepresentation of minorities and women in construction industries.

A number of interviewees reported underrepresentation of women or minorities in the trades and among business owners and business start-ups. Also reported was lack of knowledge among primes about how to work with minority- and women-owned businesses. Examples follow:

- The program administrator at a local agency reported “historically and disparately” low numbers of minority- and women-owned businesses in the construction arena. [#1]
- A trade association president and lobbyist indicated, “Woman and minorities are underrepresented in the trades generally. A shortage on the front end, not surprisingly, means a shortage on the backend.” [#5]
- The representative of a Wisconsin economic development association indicated that minority- and women-owned businesses face the challenge of other businesses not knowing how to do business with them. “No matter what your background is, you need to do business with everybody.” She added, “Working with minority- and women-owned businesses in the mainstream is a goal and provides better opportunities for all.” [#26]

**Stereotypical attitudes about minorities and women (or MBE/WBE/DBEs).** Many interviewees indicated that minorities, women, MBE/WBE/DBEs and even service providers at public agencies experience stereotypical attitudes and behaviors.



**Many reported awareness of stereotyping.** Comments about stereotyping in the trades include the following:

- The male representative of a majority-owned public works contracting company said, “I think there’s some underlying ‘stereotyping and attitude shifting’ that needs to take place in our industry.” He added, “It’s not something that can be corrected or fixed overnight; it takes time.” [#14]
- The manager of a community association serving mostly majority contractors reported, “To be perfectly frank, I think there continues to be issues of race and racism that work against minority-owned firms as they try to grow, expand and develop. It’s a challenge.” [#21]
- The owner of an MBE- and SBE-certified contracting company said that stereotypical attitudes about minorities and women have always been there and are “always ‘gonna’ be there. They probably don’t say it, but you can always feel that you are treated different[ly], the way they talk to you or the way they explain things to you. They just want to give you a hard time when you are confused about something.” [#17]
- When people call her to complain about equipment being on the road they make “awful gender-related comments,” reported the president of a WBE-certified construction company. These stereotypical attitudes typically come from the general public, not the contractors. [#11]
- A female co-owner of a non-certified specialty contracting company reported that when she calls to make appointments with vendors or does direct marketing calls to prime contractors, she feels that she is not taken seriously because she is female. She said, “They do not think a woman knows that she is talking about in the [contracting] business.” [#28]
- The African American owner of a non-certified specialty contracting company commented, “The building trades are racist.” He reported “being told that you took the ‘black test’ is racist.” [#32]

**Other evidence of stereotyping.** Overt evidence of stereotyping includes comments such as:

- A male owner of a federally-certified small contracting business commented that he would tolerate more laziness from a minority employee, “It’s just the reality.” He added, “A female minority would have a longer leash; you’re not going to kick her off the job. Otherwise, you could be accused of doing so because they are a minority.” [#35]
- The director of a trade association serving multiple counties stereotyped public service providers. “Take a look at the DBE staff. What do they do all day long? Just because they are [minority] doesn’t make them qualified. That money can be used for pipe in the ground and to create jobs.” [#4]

Several interviewees did not think there were negative stereotypes in the contracting industry, or that conditions were changing. For example:

- The male representative of a majority-owned contracting firm reported no stereotypical attitude about minorities or women, saying that if a subcontractor does good work and delivers on their promises, his firm will continue to “engage those subcontractors.” [#9]
- The owner of a WBE-certified specialty contracting company stated that she has only experienced stereotypical attitudes years ago in the private sector, but has not recently had any issues. [#12]
- The white male owner of a federally-certified small general contracting company stated that he does not believe that there are any issues with discrimination other than the “unknown” but it could be because they are new to the business not necessarily because they are MBE or WBE. [#19]

**Any “good ol’ boy” network or other closed networks.** Many interviewees had comments concerning the existence of a “good ol’ boy” network that affects business opportunities.

Those who reported the existence of a good ol’ boy network included minority, female, and white male interviewees. A number of interviewees thought that the “good ol’ boy” network negatively affected women- and minority-owned firms. For example:

- When asked about the existence of a good ol’ boy network, the director of a local industry association indicated that for some, “Sometimes there is a need for the culture to be changed, everybody understands that culture must change, but there are still some that do not understand it.” [#2]
- The woman representative of a non-profit financing agency reported, “The glass ceiling for women [and minorities] is alive and well in Madison.” She added that the problem isn’t that the system is broken, but rather that the people in charge don’t want things to change. She concluded by saying, “The system is working exactly the way people want it to work.” [#29]
- A representative of a minority chamber reported receiving calls from the city after meeting the Mayor of the City of Madison. This representative reported, “Does being recognized by the Mayor result in work; it might ....” [#6]
- The owner of a non-certified woman-owned specialty materials supply firm noted that at industry gatherings there might be one-hundred men but only one or two women. “You find that men will look at you, judge you, ‘opinionate’ you.... It’s definitely a closed door. It’s hard to get to those guys unless you ‘show a little cleavage or wear a little skirt.’ I’ve never done that...but it’s out there.” She stated that “you have to learn to hold your head up high and act like you know what you’re doing.” [#16]

- A white male owner of a federally-certified small general contracting company stated there are many closed networks and this will affect MBE and WBE firms. People will hire the contractors that they have a relationship with and developing these relationships can be difficult due to the union relationships in the area. [#19]
  - When asked about any evidence of a good ol' boy network, the representative of a woman's business initiative reported knowledge of a State contract currently in litigation where a more qualified minority-owned firm presenting a competitive bid lost a state contract to a less qualified white male-owned firm. [#40]
  - The owner of an MBE- and SBE-certified contracting company said that there are closed networks, and that contractors typically prefer to do work with a small group of other firms that they have close relationships with already. [#17]
  - A woman president of a specialty contracting firm (SBE-, WBE- and DBE-certified) reported being sure these networks exist but difficulty knowing if closed networks have impacted her business. She said that building relationships is difficult, "Conversations are different ... you bond with people who are similar to you." [#31]
- She added that she rarely bids against anyone, the general contractor either decides to do the work in-house or they subcontract it out to her. She cannot discern if they choose not to work with her due to the fact that she is a woman or that her company is a small business. [#31]
- When asked about a good ol' boy network, the president of a minority contracting association indicated that when minority apprentices get on an eligible applicant list, the list is sometimes revised to lower them on the list. [#7]

Some reported not being aware of a "good ol' boy" network per se, but rather acknowledged subjectivity in selection of contractors and subcontractors. Examples include the following:

- A male representative of a majority-owned contracting firm said that, although there is "a perception out there that the construction community is a good ol' boy network, it's really not. It may be a small community, but [it's] highly competitive." [#9]
- The male representative of a majority-owned public works contracting company reported that there are not closed networks, but noted that a firm is more likely to hire a known company than an unknown one. [#14]

Some interviewees reported they were not affected by any good ol' boy network or other closed networks or that the good ol' boy network is dying or no longer exists. For example:

- An owner of a WBE-certified specialty contracting company stated that she personally has never experienced any "good ol' boy" network or closed networks. [#12]

- The representative of a majority-owned construction contracting firm indicated that there were no closed networks in Madison. [#15]
- A female owner of a WBE-certified specialty contracting business reported that there “used to be good ol’ boy networks,” but they are slowly dying out. [#10]

## **H. Insights Regarding Business Assistance Programs, Changes in Contracting Processes or Any Other Neutral Measures**

The study team asked business owners and managers about their views of potential race- and gender-neutral measures that might help all small businesses, or all businesses, obtain work in the public works contracting industry. Interviewees discussed various types of potential measures and, in many cases, made recommendations for specific programs and program topics. The following pages of this Appendix review comments pertaining to:

- Technical assistance and support services;
- On-the-job training programs;
- Mentor-protégé relationships;
- Joint venture relationships;
- Financing assistance;
- Bonding assistance;
- Assistance in obtaining business insurance;
- Assistance in using emerging technology;
- Other small business start-up assistance;
- Information on public agency contracting procedures and bidding opportunities;
- On-line registration with a public agency as a potential bidder;
- Pre-bid conferences where subs can meet primes;
- Other agency outreach such as vendor fairs and events;
- Streamlining or simplification of bidding procedures;
- Breaking up large contracts into smaller pieces;
- Price or evaluation preferences for small businesses;
- Small business set-asides;

- Mandatory subcontracting minimums;
- Small business subcontracting goals;
- Formal complaint and grievance procedures; and
- Other measures.

**Technical assistance and support services.** The study team discussed different types of technical assistance and other business support programs. For example, a director of a trade association serving multiple counties reported that minority-owned businesses would benefit from government subsidy of trade association dues. He reported, “The minority community should not be paranoid. They [minority contractors] should join associations and the government should pay for the first year’s membership.” [#4]

The majority of business owners, whether aware or not aware of technical assistance and support services, reported that most services named in the bullet list above would be helpful, if offered with few exceptions. [e.g., #5, #21, #23, #40, #31, #37 and #38] For example:

- The male representative of a majority-owned contracting firm said that “the more the State, the County and the City get together and have a standardized process” on paperwork, insurance and other requirements, and then provide opportunities to educate young companies on those processes, the better things will be. He remarked that, currently, general contractors are tasked with educating their subcontractors, which is difficult and not really their job. [#9]
- A male president of a majority-owned construction contracting firm was in favor of the City of Madison providing technical assistance and support services to small businesses. [#13]
- The owner of an MBE- and SBE-certified contracting company said it would be helpful “to have better information available to minorities,” and was generally positive about receiving technical assistance and support services. #17]

Some business owners and managers reported being aware of technical assistance and support services programs and having used them. Examples of comments are:

- The woman president of a specialty contracting firm (SBE-, WBE- and DBE-certified) said, “I still have a business counselor over [at a free business supportive services center] and she has been so helpful.” [#31]
- The female owner of a WBE-certified specialty contracting business said that the City of Madison plumbing department does a good job walking new businesses through permitting and the plan approval process. [#10]

Some business owners reported that although some technical assistance and support services programs appear on the surface to be helpful, as currently implemented they are not. For

example, the president of a minority contracting association indicated that apprenticeship programs are good; however, remedial assistance should be added for those who are rejected. [#7]

**One interviewee preferred college scholarships over technical assistance and support services for business owners.** A president of a minority contracting business indicated that scholarships should be developed for business owners to go to University of Wisconsin classes in lieu of [agency run] technical seminars. [#7]

**One recommended against such programs because they thought that small businesses should access any assistance on their own.** The male representative of a majority-owned public works contracting company stated that, because his company is so large, it doesn't qualify for any sort of assistance. Further, he felt that such programs would provide a "huge competitive advantage," for the small businesses eligible to receive them. [#14]

**On-the-job training programs.** Nearly all business owners and managers interviewed were supportive of on-the-job training programs. For example:

- The male representative of a majority-owned contracting firm said that his firm strongly supports on-the-job training programs. [#9]
- A representative of a majority-owned construction contracting firm reported that the City of Madison used to promote on-the-job training programs by paying a part of a new-hire's wages while that person learns. He said that subsidizing on-the-job training led employers to be more patient and understanding with new workers as they are training. He recommended that they restore that program. [#15]
- The owner of an MBE- and SBE-certified contracting company said that on-the-job training programs would be helpful "even though [they] know the regulations." [#17]
- A white male owner of a federally-certified small general contracting company stated that on-the-job training programs are important and cross-training is vital. He stated that an employee is more useful and valuable if they are cross-trained. [#19]
- The owner of a non-certified woman-owned specialty materials supply firm stated that on-the-job training programs would be helpful. [#16]

**Mentor-protégé relationships.** Many interviewees commented on mentor-protégé programs. A number of business owners said that they had informal mentor relationships.

**There were many comments from interviewees in support of mentor-protégé programs.** A number of interviewees knew of mentor-protégé relationships and had favorable comments including:

- The manager of a statewide trade association indicated that some of the members have mentored emerging contractors. [#3]

- A male representative of a majority-owned contracting firm remarked that the construction industry as a whole supports mentor-protégé relationships and thinks they are very good. [#9]
- When asked whether mentor-protégé relationships would be helpful, the female owner of a WBE-certified specialty contracting business responded. “Definitely!” [#10]
- An owner of a non-certified woman-owned specialty materials supply firm said she thought that mentor-protégé relationships would be a huge benefit for businesses just starting out. [#16]
- The owner of an MBE- and SBE-certified contracting company reported that mentor-protégé relationships would be very helpful. [#17]
- An African-American owner of an MBE-certified contracting company reported that he likes mentor-protégé programs. He stated, “Sometimes [primes] feel like if they show us everything, we would be their competitor. In the City or State, they like that. That is why I like a lot of those contracts; they have the goals and they have the mentor-protégé programs.” [#23]

**Other business owners and managers were more skeptical that a mentor-protégé program could be successfully implemented.** Some interviewees said that mentor-protégé programs, in theory, could be useful, but were riddled with challenges. Some doubted that the challenges to creating a successful program could be overcome. For example, when commenting on mentoring opportunities, a program administrator at a local agency reported challenges. “A very tough area is how you encourage business mentoring from those primes; their attitude is why you would train someone to take your piece of the pie.” This program administrator added, “I think in those big projects there are opportunities [for mentoring] in areas of expertise, and consultants are needed who know how to leverage the right people to make sure the opportunities are successful.” [#1]

**Joint venture relationships.** Interviewees also discussed joint venture relationships.

**Some of the business owners and managers interviewed had favorable comments about joint venture programs.** [e.g., #1, #2, #12, #23, #25, #28, #37 and #38] For example, the owner of an MBE- and SBE-certified contracting company stated that minority-owned businesses often form joint venture relationships to take on bigger tasks. “That’s the only way to compete with the bigger companies.” [#17]

**Financing assistance.** Many business owners and managers had comments about assistance obtaining business financing.

**Many business owners and managers indicated that financing assistance would be helpful.** [e.g., #3, #16, #17, #24, #25, #28, #35 and #37] Comments in favor of financing assistance programs included the following:

- The male co-owner of a non-certified specialty contracting business said, “Financing assistance might be important.” He explained that, because materials are quite expensive and need to be purchased in advance of a job, companies in his industry “need a pretty extensive credit line.” [#8b]
- A male representative of a majority-owned contracting firm commented that understanding financing, bonding and insurance requirements, and engaging those resources, is very important for small businesses. Often, however, they simply don’t know much about those resources. [#9]

Some business owners reported that their companies did not need financing assistance. For example, the female owner of a WBE-certified specialty contracting business stated that financing assistance is not a big deal in her industry. [#10]

**Bonding assistance.** The study team asked business owners and managers about bonding assistance.

Many business owners and managers indicated that bonding assistance would be helpful. [e.g., #16, #17, #24, #25, #28 and #37] Examples include the following:

- A director of an industry trade association serving many counties emphasized the need for bonding assistance for small, minority- and women-owned businesses indicating, “Government used to provide the bonds, now only with great reluctance.” [#4]
- The president of a minority contracting association suggested that municipalities develop a “bond fund” for small businesses to get bonding assistance backed by some collateral. He added that there should be bonding companies identified that want to work with City projects and assist small businesses in obtaining bonding. [#7]

**Assistance in obtaining business insurance.** Some business owners and managers interviewed said that assistance obtaining business insurance was a need for some new or small businesses. For example, the owner of an MBE- and SBE-certified contracting company said that assistance in obtaining business insurance would “definitely” be helpful to newer companies. [#17]

**Assistance in using emerging technology.** Interviewees discussed the need for assistance in emerging technologies.

Some business owners said that assistance using emerging technology would be helpful. [e.g., #16, #17, #35, #37 and #38] Comments include the following:

- A representative of a majority-owned construction contracting firm reported, “Some subcontractors and SBE’s in particular need some help [with technology]” and that computers are an essential tool for any successful business. The contractor indicated that many landscape subcontractors “don’t even have computers.” [#13]



- The representative of a majority-owned construction contracting firm said, “If you’re going to do work for the City of Madison or do work for these agencies, you need to have a computer and you need to be somewhat savvy [with it].” He noted that small trucking companies, especially, are resistant to using computers and other modern technology. [#15]

**Other small business start-up assistance.** When asked about other small business start-up assistance, some businesses were in favor of such assistance.

**Some reported the benefit of offering startup assistance.** For example, the owner of a non-certified woman-owned specialty materials supply firm said that small business start-up assistance “would be wonderful.” [#16]

**In response to the question concerning start-up assistance, some business owners pointed to services that are now offered.** For example, the female co-owner of a non-certified specialty contracting company reported that she took a tax class through the Small Business Development Center. She said that she was sent information on it likely because of her registration with the City as a contractor. She reported that the class was very helpful and that she would consider taking more classes through the Center. [#29]

**Information on public agency contracting procedures and bidding opportunities.** Most interviewees indicated that more information on public agency contracting procedures and bidding opportunities would be helpful. [e.g., #16, #17, #24, #25, #28 and #37]

**Some business owners and managers reported that they were already receiving information on bidding opportunities or knew how to search for them.** For example, the representative of a majority-owned construction contracting firm stated that it is important to have information on public agency contracting procedures and bidding opportunities available, but felt that the City of Madison already does a good job of that. [#15]

**However, a number of interviewees suggested that public agencies better coordinate how they provide information about contract opportunities, including improved outreach to women and minority contractors. Some also recommended merging and disseminating potential subcontractor directories and keeping them current. Examples included:**

- A male representative of a majority-owned contracting firm recommended that the City of Madison tie their prequalification process to a message center or alert system to keep potential bidders updated on the status of upcoming projects. [#9]
- The female owner of a WBE-certified specialty contracting business reported that she never receives information about bidding opportunities from the City of Madison, but would benefit from notice of upcoming request for bids. [#10]
- A WBE-certified specialty contracting firm reported a need for increased outreach by the City. “... if the City wants these programs to succeed, they need to reach out more as to what they’re looking for and how they’re looking for it ... It’s like us throwing a dart at a dartboard blind folded. We might hit one now and then but it’s going to be way too much of a time killer to actually go out and reach out. We tried

that for the first six months or so where we would try to really take an extra step ... and seek out the projects that were WBE ... if the City wants it to succeed it feels like they need to do more for the companies that have the certifications ... is it [for example, the goal of 15 percent WBE] just trying to check off the requirement that you have to have a goal in here or is it actually happening, you just never know if it did or not.” [#18]

- The male owner of a non-certified electrical contracting company stated that it is important to have information on public agency contracting procedures and bidding opportunities available, but felt that the City of Madison already does a good job of that. [#15]
- A representative of a majority-owned construction contracting firm reported a need for dissemination of information to help primes find potential subcontractors, saying “I don’t know if it’s super easy to know who the subcontractors are.” [#15]
- The male representative of a majority-owned contracting firm reported that each agency has its own list of potential subcontractors, and said that if they could bring those lists together into one document “it would be wonderful.” [#9]
- A male representative of a majority-owned public works contracting company said, “It would be really nice if [the City of Madison] could actually segment [the firms in the subcontractor directory] by what they do so you don’t have to comb through the whole document.” [#14]

**Some supported distribution of planholders lists.** Examples of comments include the following:

- Regarding the distribution of lists of planholders, the male representative of a majority-owned contracting firm said that “it’s nice to know” but it isn’t key. He added that the State of Wisconsin already does this, and does it well. [#9]
- A president of a minority contracting association reported, “Absolutely, it is helpful to know what primes are bidding a job.” [#7]
- The owner of a WBE-certified specialty contracting company said that she believes that a distribution list of planholders and prime bidders to potential subcontractors is always good. [#12]
- The owner of an MBE- and SBE-certified contracting company reported that distribution of lists of planholders or other lists of possible prime bidders to potential subcontractors would be helpful for his firm. He said that, to the best of his knowledge, such distribution of lists does not currently occur. [#17]

**However, the president of one majority-owned firm reported issues of accessibility of online planholders lists.** The male president of a majority-owned construction contracting firm said that, while lists of planholders and lists of possible prime bidders are “more accessible” online, the move to electronic mediums may not have helped “the group of people that needed it” because that group

may not have easy access to computers and the internet. “Now that they have taken away the hard copy [lists], a little landscaper can’t drive into the city and pick them up anymore.” [#13]

**On-line registration with a public agency as a potential bidder.** Some owners and managers of construction companies reported online registration with public agencies as helpful. For example, the male owner of a non-certified electrical contracting company reported that online registration with public agencies for potential bidding currently exists and is very helpful and that the City of Madison already does a good job of that. [#15]

**Pre-bid conferences where subs can meet primes.** Many business owners and managers supported holding pre-bid conferences. [e.g., #7, #15, #24, #25, #28, #36 and #37] Comments on pre-bid conferences included:

- The president of a minority contracting association indicated that pre-bid conferences that allows a sub to meet the prime is helpful. [#7]
- A female owner of a WBE-certified specialty contracting business stated that pre-bid conferences where subcontractors can meet prime contractors “would be nice.” [#10]
- Although pre-bid conferences are not necessarily to meet the primes but to better define the project scope, the owner of a WBE-certified specialty contracting company reported pre-bid conferences, where subcontractors can meet prime contractors, as helpful. [#12]
- The owner of a non-certified woman-owned specialty materials supply firm was in favor of pre-bid conferences where subcontractors can meet prime contractors. She reported opportunities for meeting and getting to know project decision makers as helpful. [#16]
- The owner of an MBE- and SBE-certified contracting company reported that pre-bid conferences where subcontractors can meet prime contractors would be useful. On the contrary, he indicated that “most of the time, it’s all either online or by fax,” providing no real opportunity to interact with prime contractors. “It would be nice to get to meet the person that’s hiring. Most of the time, we just get to meet whoever is in charge of making sure the job is done.” [#17]

**A few interviewees did not think that pre-bid meetings were useful.** Online bidding and other reasons make pre-bids unnecessary, for some. For example:

- The male representative of a majority-owned contracting firm said that pre-bid conferences would probably be helpful for subcontractors if they would actually go to them, but the online bidding process is so good at this point that pre-bid conferences are unnecessary for the entity offering the project. [#9]

- The male president of a majority-owned construction contracting firm said that pre-bid conferences where subcontractors can meet prime contractors would not be helpful. [#13]

**Other agency outreach such as vendor fairs and events.** Some business owners and managers reported that outreach such as vendor fairs and events were useful. However, finding the time to attend was difficult for some.

**Some made positive comments about agency outreach events.** Several comments were made including the following:

- The male representative of a majority-owned contracting firm said, “Any time you can bring the community together to talk is good.” He added, “Events where you have hundreds of people talking about the same thing, or about how to do work with the State ... or the City would be very good.” [#9]
- A female owner of a WBE-certified specialty contracting business said that vendor fairs and events “would be really helpful.” She added that she had recently gone to a small business conference where a number of different small business programs were represented, and had learned useful things from it — including that there is grant money available to train an apprentice. [#10]
- The owner of a WBE-certified specialty contracting company said she believes that that agency outreach such as vendor fairs and events are a good idea. [#12]
- An owner of a non-certified woman-owned specialty materials supply firm said that agency outreach through vendor fairs and other events is good, but noted that that “it’s hard to find the time to go [to them].” [#16]

**A number of business owners and managers indicated that vendor fairs were not useful.** Examples include the following:

- The president of a minority contracting association that in absence of “goals,” vendor fairs are “a waste of time.” [#7]
- The male president of a majority-owned construction contracting firm reported that vendor fairs and events are not worthwhile. [#13]

**Streamlining or simplification of procurement and bidding procedures.** Many wanted streamlined or simplified procurement procedures. For example, a program administrator at a local agency identified a need for an improved contract compliance and affirmative action data system that could be shared across public agencies. He reported, “So far this has not happened, but there are opportunities where we could assist each other because we know how complex and costly these data systems are.” [#1]

Some business owners and administrators at public agencies made specific comments about desired streamlined reporting requirements or reduced paperwork. For example:

- When asked about barriers to doing business with public agencies, a program administrator at a local agency indicated, “It’s the paperwork and the processes.” He identified a need for “one-stop-shopping” offering reciprocal certifications across city, county, state and federal programs. He explained, “Until that happens, I will hear a lot of complaints; that’s the big complaint about government.” [#1]
- The director of an industry trade association serving multiple counties reported paperwork as a barrier to doing work with public agencies. He stated, “There are no similar paperwork requirements for private work.” [#4]
- The male representative of a majority-owned contracting firm said, “It’s a paper world out there when it comes to bids.” He perceived that the City of Madison requires that bids be submitted in hardcopy, which leads to a lot of last minute rushing as they struggle to get things in on time. He suggested that electronic submissions would be much preferred. [#9]
- The owner of an MBE- and SBE-certified contracting company stated that simplifying and streamlining the bidding procedures “would be so much easier for [his firm].” In particular, he said that if — as is often the case— they have already decided upon the amount of money they are willing to pay, the City of Madison should simply give them that number and ask if it is acceptable rather than requiring his firm to put together a bid first. [#17]

Some interviewees indicated that they thought that bidding procedures were already streamlined, or that further streamlining was not needed. Examples include:

- A president of a minority contracting association indicated that bidding procedures, as currently administered, prevent fraud. He reported, “Procedures are there to prevent fraud.” [#7]
- The representative of a majority-owned construction contracting firm said that his firm is used to the procedures and so they already seem simple. He noted that the recent switch to an online process is easier for them, but acknowledged that it poses a problem for people without computers. However, he indicated, “if [a firm] can’t figure out how to do electronic bidding then [that firm is] not going to be able to do all the other requirements. [#15]

**Breaking up large contracts into smaller pieces.** The size of contracts and unbundling of contracts were topics of interest to many interviewees.

Most interviewed indicated that breaking up large contracts into smaller components would be helpful. In support, examples of comments include:

- A program administrator at a local agency stated, “Yes, I think we should always be conscionable of where we can break the contracts down smaller, to provide more opportunities for small businesses; that’s always something we should look at, “to spread the wealth.” [#1]

The same public agency administrator elaborated, “It’s really about spreading the taxpayers’ wealth to everyone; and that is equity, but easier said than done . . . . We have not nearly met our challenge.” [#1]

- When asked about unbundling of projects, the president of a minority contracting association stated that it helps bring DBE’s into the industry. [#7]
- An owner of a non-certified woman-owned specialty materials supply firm said that breaking large contracts into small pieces would make a difference. She added that even though “it’s still the same paperwork, [she thought] there would be more opportunities [for small businesses to get work].” [#16]
- A vice president of a woman-owned construction supply firm wanted opportunity to “... bid on only one item.” [#17]
- The Hispanic owner of an MBE-certified specialty contracting firm commented that smaller contracts make it easier to bid. It is easier to plan resources, timing and budgeting when a job is broken into smaller pieces. [#24]
- “As a smaller contractor, it’s hard to find smaller work with the City of Madison. They primarily put out larger projects,” commented one woman-owned specialty contractor. [#125]
- An advocate for disadvantaged businesses reported that project scale is a concern and businesses of all sizes should be able to bid. [#27]
- A woman president of a specialty contracting firm (SBE-, WBE- and DBE-certified) reported capacity for up to \$300,000 projects with unbundling being a positive for her business. [#31]

A few business owners saw both positive and negative aspects of unbundling contracts. A number of examples follow:

- The male co-owner of a non-certified specialty contracting business said that unbundling could make it easier for small businesses, but could also make it more difficult. He pointed out that breaking contracts into small pieces would mean that each small piece would require bonding and all the issues that go with being a prime contractor to the city. As a subcontractor, he said, “All [a firm needs] is a relationship with the prime contractor.” [#8b]
- Although the director of an industry trade association recognized that small businesses could benefit from unbundled contracts, he reported, “If you do break up contracts into say three smaller jobs, you then require triple the inspections and increase those costs.” [#4]
- The female owner of a WBE-certified specialty contracting business reported that breaking up large contracts into smaller pieces would “probably not” be useful because all of the companies would have to work together regardless of whether they got the contracts individually or not. “It’s probably better to have one chief and have [everyone else] follow along.” [#10]
- An owner of a WBE-certified specialty contracting company stated that breaking up large contracts into smaller pieces is not practical for the type of business she has due to owners wanting all of the design to be consistent. [#12]
- The male president of a majority-owned construction contracting firm explained that breaking contracts into smaller pieces would allow small businesses to bid for them directly as prime contractors. However, to do so the small business would have to obtain bonds that, because they are relatively new and relatively small, they would have a lot of difficulty obtaining. Acting as a prime contractor also involves additional paperwork and regulations. “Unbundling sounds good, but in reality ... [small businesses are] better off working for a general contractor and getting some help.” [#13]

**Price or evaluation preferences for small businesses.** Interviewees also discussed bid preferences for small businesses.

Many interviewees said that price or evaluation preferences for small business would be helpful. For example, the owner of an MBE- and SBE-certified contracting company responded very positively to the idea of price or evaluation preferences for small businesses. [#17]

Some interviewees identified advantages and disadvantages with preferences for small businesses. For example, regarding price or evaluation preferences for small business, the male representative of a majority-owned contracting firm responded that it depends on how serious the City is about spending the money necessary to encourage that development. “It’s one thing to say it, it’s another to do it,” he said. [#9]

A few business owners did not support price or evaluation preferences for small business. Examples include:

- A representative of a majority-owned construction contracting firm said that, for programs like price or evaluation preferences to be embraced and employed by prime contractors, they primes need to have very clear protections in place for times when the small businesses fail to deliver on their promises so that the prime contractors aren't damaged by that failure. Overall, he was concerned that making it easier for small businesses to win bids would result in more small businesses taking contracts they can't complete. [#15]
- The white male owner of a specialty contracting firm reported that he does not believe there should be price preferences for small businesses. [#36]

**Small business set-asides.** The study team discussed the concept of small business set-asides with business owners and managers. This program would limit bidding for certain contracts to firms qualifying as small businesses.

A number of business owners and managers supported small business set-asides. Examples include the following:

- An owner of a non-certified woman-owned specialty materials supply firm reported that small business set-asides would be helpful for her company. [#16]
- The owner of an MBE- and SBE-certified contracting company said that setting aside certain jobs for small businesses “would be very, very helpful.” [#17]
- A woman president of a specialty contracting firm (SBE-, WBE- and DBE-certified) supported small business set-asides if they were selected based on quality of work. [#31]

Some expressed some reservations about the concept. For example, the female owner of a WBE-certified specialty contracting business reported that small business set-asides would force the hiring of certain, sometimes not preferred, firms. [#10]

**Mandatory subcontracting minimums.** Some business owners and managers supported requiring a minimum level of subcontracting on projects. Others wanted fewer approved industries to meet subcontracting minimums. For example:

- The owner of an MBE- and SBE-certified contracting company reported that he was in favor of mandatory subcontracting minimums. [#17]
- “I would exclude some of [what] they call subcontracting — delivery of products to City jobs, transportation products and material, delivery of concrete .... [#T14]



**Small business subcontracting goals.** Interviewees discussed the concept of setting contract goals for small business participation.

Many business owners and managers indicated that small business subcontracting goals are helpful. [e.g., #11, #16, #20 and #37] For example, a woman president of a specialty contracting firm (SBE-, WBE- and DBE-certified) indicated, “Having the minimums gets me invited to be a part of the team, whereas I might not get invited. So those do help.” [#31]

Some business owners had concerns about the effectiveness of a small business goals program. For example, the president of a minority contracting association indicated his association’s membership prefers race-based subcontracting goals over small business subcontracting goals. [#7]

**Formal complaint and grievance procedures.** Interviewees discussed procedures for making complaints or outlining grievances. For example, a program administrator at a local agency stated, “The good thing about the public sector is that we can address those issues if they [primes] are not meeting contract requirement, we can withhold resources to the prime.” [#1]

Many business owners and managers said the formal complaint and grievance procedures would be a benefit. Examples include the following:

- The president of a minority contracting association said, “Absolutely [beneficial], providing someone looks into the complaint.” [#7]
- An owner of a non-certified woman-owned specialty materials supply firm said that formal complaint and grievance procedures were “probably a good thing.” [#16]
- The owner of an MBE- and SBE-certified contracting company said that it would be very helpful to have “a place where we can talk about [issues] and everybody can be [treated as an] equal.” [#17]

Some wanted more consistent complaint or grievance processes. For example:

- The director of a local industry association reported having sat on an appeal. He reported on an apparent contractor determined to be non-responsive, “But after we heard all the evidence, he had records that he did try to contact the entire minority-owned businesses. The contractor has emails, faxes, etc. that he tried to contact them [minority owned businesses].” [#2]
- A male representative of a majority-owned contracting firm reported that his firm had gone through the federal complaint process and found it to be “a waste of time.” [#9]

**Other measures.** Some business owners identified other neutral measures for consideration. A number of examples follow:

- A trade association president and lobbyist stated, “There is one requirement with [the City of] Madison that is unique. It is well intentioned, but misapplied. It is called, ‘Best Value Contracting,’ where a contractor must have an apprentice in each trade [brick layer, cement mason, carpenter, electrician, etc.] the contractor is performing. A better way is to require apprentices, but not specific to each trade.” [#5]

The same trade association president explained that once the project is done, the apprentice is done working. He reported that it is not good to employ workers for a short time on a public works job and then let them go. [#5]

- The female owner of a WBE-certified specialty contracting business recommended that the City of Madison not be required to accept the lowest bid for a contract, saying, “The lowest bid isn’t always the best bid.” To illustrate her point, she brought up plumbing installation for a recently constructed building. The piping for that building could be made out of PVC or it could be made out of copper; PVC is cheaper, but much less environmentally friendly. She said that if the City wanted to hold to its commitment to be more environmentally responsible, it should choose to install copper piping. However, the requirement to choose the lowest bid requires them to go with PVC piping. [#10]
- A president of a WBE-certified construction company said, “There are a lot of programs out there for people starting up businesses but you don’t run into as much of assistance at the local level, in Madison in general, that’s targeted toward existing contractors, small businesses, to help them with business processes, [for example] dispute resolution. You don’t find those types of programs as much as you find help for startups.” She added that ongoing training and education would be very beneficial. [#11]
- The male president of a majority-owned construction contracting firm said that he has “heard on and on that [new businesses and small businesses] get frustrated with the system at city hall.” He recommended that the City of Madison help small businesses with their paperwork saying, “Let’s keep it simple and get [small businesses] started, don’t get them discouraged before they start.” [#13]

He also recommended that the City of Madison go visit and help small businesses in their own environment rather than waiting for the small businesses to come to them and suggested that the City of Madison “spend the dollars to educate the people that want to do the work.” [#13]

## **I. Insights Regarding SBE Program or any other Racial-/Ethnic- or Gender-based Measures**

Interviewees, participants in public hearings, and other individuals made a number of comments about race- and gender-based measures that public agencies use, including SBE contract goals, including comments regarding:

- City of Madison SBE or subcontracting goals programs; and
- City of Madison monitoring and enforcement of its programs, including any false SBE reporting or abuse of “good faith efforts” processes;

**City of Madison SBE or subcontracting goals programs.** There were many comments in favor of the City of Madison’s Small Business Enterprise Program including SBE contract goals.

Some individuals had positive comments about SBE/DBE contract goals, the City of Madison’s SBE program and the federal DBE Program overall. For example, the male representative of a majority-owned contracting firm stated that the more local governments work with the SBE/DBE programs and “encourage those business enterprises to succeed, the better off we are.” [#9]

Some reported uncertainty of the success of SBE/DBE and other race/ethnicity- and gender-based programs. For example:

- A trade associate president and lobbyist stated, “My gut tells me it [the SBE program] is not having its intended purpose to have women and minorities get more business with the City of Madison. Maybe it is working; and, if it is we should duplicate it all over the state.” [#5]
- The president of a minority contracting association commented that the SBE program in the City of Madison may or may not be helpful depending on how the City defines small. He said that the SBE program can be helpful, if bringing new people into the industry. However, he added, “White females are dominating the whole thing. It happens all the time.” [#7]
- A female representative of a majority-owned construction contracting firm reported that her firm has “such a limited number of [project types] that [they] have the same [subcontractors] over and over again. The president of the same firm pointed out that street construction involves far more limited selection of trades than building contracts. She said that subcontractors in street construction are mostly limited to landscaping and trucking, which makes it very difficult for street construction prime contractors to meet SBE subcontracting goals. “They’ve got to recognize the difference between the two different industries,” he said. [#13]
- The owner of a non-certified woman-owned specialty materials supply firm expressed discomfort with the idea of benefitting from her firm being woman-owned, saying “I shouldn’t have to prove to somebody that I’m a woman-owned business, and to take advantage of that — I sometimes don’t think that’s right.” She added that “businesses should be treated the same [regardless of ownership].” [#16]

- A male owner of a federally-certified small contracting business reported that keeping small businesses in business, which should not be in business, or cannot be successful, is counterproductive. He reported that the City of Madison's dollars should be spent on philanthropic initiatives, instead. [#35]
- The representative of a majority-owned construction contracting firm noted that the requirement for women in the workforce is "very inconvenient and is just sometimes not practical" because of how few women are in the workforce. He said, "There's not enough women in the workforce to be asking these requirements to be done [the way currently are]." [#15]

He added that with the limited number of available MBE/WBEs filling WisDOT goals that typically pay more, it is difficult for prime contractors to meet City of Madison SBE goals. [#15]

**City of Madison monitoring and enforcement of its programs.** Some interviewees had comments regarding the implementation of the SBE program and other race/ethnicity- and gender-based programs.

Some interviewees were critical about key aspects of the implementation of the SBE program, and other race/ethnicity- and gender-based programs. Examples are:

- When asked about City of Madison programs, a trade association president and lobbyist reported that there are not negatives to the program, "but contractors go through 'hoops post-bid, pre-award'" to comply. He added that sometimes there is no clear decision whether a contractor has complied or not. [#5]
- The male representative of a majority-owned public works contracting company reported that proving a 'good faith effort' is unreasonably difficult. "We actually committed to hiring somebody... and that was not deemed enough of a good faith effort to demonstrate that we were working to improve our hiring practices.... There was more documentation needed for good faith efforts." [#14]
- An advocate for disadvantaged businesses reported, "There are ways to look like you have subs [minority], but not have them. It is called, 'pass-through.' It is disingenuous." [#27]

Several interviewees reported knowledge of examples of fronts or fraud. Some gave first-person accounts of instances they witnessed, whereas others spoke of less-specific instances or those of which they had no first-hand knowledge. For example:

- The owner of a non-certified woman-owned specialty materials supply firm said, "There are so many companies out there that are just becoming [certified women- and minority-owned small businesses] to get projects, but who really are not [women- or minority-owned businesses]." [#16]

- A white male owner of a federally-certified small general contracting company said, “If we want to help minorities and minority businesses then make them real businesses not just pass-through businesses. ‘Pass-throughs to me are nothing more than a sham ....’” [#19]
- The African-American owner of an MBE-certified contracting company reported that the City and/or State need to look out for fronts. “For example, if there is this firm that only has a fax machine and he takes paper and pushes it that is not serving anybody. The City needs to have a language, in terms of not getting full credit for that. I know a few competitors who are minority-owned firms, but do not look like they should be.” [#23]
- A male owner of a federally-certified small contracting business said he knows of a women- and minority-owned business that a non-minority owned until he married a woman minority. At that time he put the business in her name to get certified. He said, “Everyone knows it’s a joke [minority owned businesses].” [#35]

**Some business owners and administrators of public programs reported widespread abuse of the SBE/DBE Program through false reporting of SBE/DBE participation or falsifying good faith efforts.** For example:

- The representative of a majority-owned construction contracting firm said that “false reporting [of status and prevailing wage compliance] sometimes happens with truck drivers.” He recommended greater enforcement and stronger discipline for false reports. [#15]
- A woman president of a specialty contracting firm (SBE-, WBE- and DBE-certified) reported being asked for bids by prime contractors to fulfill good faith efforts with no intention of hiring her company. [#31]

**A number reported the effects of SBE/DBE contract goals on other businesses.** Some business owners and managers provided insights on the impact of SBE/DBE project goals on non-certified firms. Examples include the following:

- Regarding DBE contract goals, the female owner of a WBE-certified specialty contracting business said, “The negative effect would be that you force somebody to take a bid just because it’s a woman-owned or minority-owned company.” [#10]
- The representative of a majority-owned construction contracting firm indicated that SBE/DBE goals are unnecessarily restrictive. In particular, she opposed being forced to subcontract out work that her company could perform simply to meet a goal. [#13]
- The female representative of a majority-owned construction contracting firm noted that there are very few SBEs available for subcontracting in her firm’s industry, and that because of this it is very hard for the business to meet the City of Madison’s SBE subcontracting goals. [#13]

- The male representative of a majority-owned public works contracting company reported the requirement of 7 percent female participation as unnecessarily restrictive. “It’s not achievable in our industry.” He also spoke to SBE goals saying, “For the most part [the SBE goals] are achievable.” However, he noted that “For some contracts the SBE goals are way too high. They seem to be kind of randomly chosen, I don’t know how they arrive at those goals.” [#14]

## J. SBE Certification

Business owners and managers discussed the process for SBE certification and other certifications, including comments related to:

- Knowledge of certification opportunities;
- Challenges in becoming certified; and
- Advantages and disadvantages of SBE certification.

**Knowledge of certification opportunities.** Some reported understanding certification opportunities. For example, the owner of an MBE- and SBE-certified contracting company reported feeling knowledgeable about certification opportunities. [#17]

**Other firms were not aware of certification opportunities, or were confused by differing certifications (City, State and federal).** Examples are:

- An owner of a non-certified woman-owned specialty materials supply firm noted that she is unclear about what programs were available in the City of Madison, what programs were available from the State of Wisconsin, and the difference between those programs. [#16]
- The Hispanic owner of an MBE-certified specialty contracting firm was not aware that Madison has a SBE Program and would like to know how to go about finding information. [#24]
- The female owner of a WBE-certified specialty contracting business stated that she does not know what the City of Madison’s SBE program is or what it does. [#10]

**Challenges in becoming certified.** Many interviewees commented on their or others’ experiences securing certification.

**Many interviewees reported difficulties with the SBE/DBE certification process.** Several reported being challenged by the certification processes. For example:

- The owner of an MBE- and SBE-certified contracting company said that “it wasn’t that hard to become certified [as an MBE and SBE]. [#17].

- The manager of a statewide trade association stated, “I know there are some [difficulties]. It is fairly measured so you do not get rubber stamped. I know about one, last year, who subjected himself to an audit of the factors the City looks at in order to get certified.” [#3]
- The owner of a non-certified woman-owned specialty materials supply firm reported that her firm is not certified as a woman-owned business because the process to gain certification was too onerous. She said she first looked into certification when she became president, but did not pursue it — despite acknowledging that “it would have really benefitted [the firm]” — because of the amount of paperwork involved. “I just didn’t have the time, and I didn’t want to give my whole life story to someone to judge me.” She added that she did begin to pursue it again several years ago, but didn’t have some of the required documentation because, as a small, family-owned business they simply didn’t produce those documents. [#16]
- The white male owner of a contracting firm reported that he started the SBE application and never finished it because it was too long and cumbersome. [#25]

Several majority-owned firm owners commented on how their subcontractors are not certified, although eligible, due to the lengthy certification process. For example:

- The female representative of a majority-owned construction contracting firm stated that small businesses her firm works with never become certified as SBEs “because of the amount of paperwork it takes.” [#13]
- The male representative of a majority-owned public works contracting company said, “The process of becoming an SBE is ridiculous. The amount of information that you have to provide ... it’s incredibly cumbersome.” He added, “Every single trucker that we put on our jobs sites would qualify as an SBE — they’re all individually driver-owned entities. I’d say a very small percentage of them actually go through the process because of what it entails.” He added that the problem isn’t just the amount of paperwork, but also the documents that are required. “You have to provide financial statements going back five years. You have to list out your company officers and you have to have shareholder meetings.” He indicated that many SBEs don’t have the time, energy, or capacity to produce the necessary documentation. [#14]

**Advantages and disadvantages of certifications.** Interviews included broad discussion of whether and how SBE or other certifications helped subcontractors obtain work from prime contractors.

Many interviewed indicated that MBE/WBE/SBE certification helped their business get an initial opportunity to work with a prime contractor. Examples include:

- An African-American owner of an MBE-certified contracting company reported, “I believe that the MBE certificate is not a handout, I still need to get up and go to work. I use the certificate as an opportunity so I could make a strong link with

another firm. I am also going to learn from the firm on how to do the work that is what the mentor-protégé is all about.” [#23]

- The female owner of a WBE and SBE certified trucking firm indicated that the SBE program has been positive and helpful to her business. [#38]

Some interviewees indicated that there are limited advantages, or even disadvantages, to being certified. A number of examples follow:

- A president of a minority contracting association indicated that some consider certification a disadvantage. Stereotyped as “Affirmative Action,” others “treat them with contempt.” [#7]
- Regarding the SBE program, the African American owner of a non-certified specialty contracting company said, “Probably good for white guys with assets.” He added that he believes minorities go out of business [no assets and funding] too often to make certification an advantage. [#32]
- The owner of an MBE- and SBE-certified contracting company said that the only advantage of having an MBE or SBE certification is to get more work. He noted, however, that his firm’s MBE and SBE certifications had been only moderately helpful. [#17]

He added that the disadvantage to MBE and SBE certification is that the bidding process is more time-consuming. [#17]

- A white male owner of a contracting firm did not think SBE certification would make a difference in his business success. [#25]
- The Hispanic owner of an MBE-certified specialty contracting firm reported that they do not advertise they are minority-owned business to prevent the business from discrimination. [#24]

#### **K. Any other Insights and Recommendations for City of Madison Public Works**

Business owners and managers had additional insights for City of Madison Public Works:

- Marketing and implementation of City programs and initiatives; and
- Serving small businesses in the City of Madison.

**Marketing and implementation of City programs and initiatives.** A number of businesses and associations made comments regarding City of Madison and others’ programs and the implementation of those programs.



Interviewees had a myriad of recommendations ranging from marketing to implementation of the SBE program to streamlining contracting and administration protocols. Many examples follow:

- Highlighting the need for the City to more actively promote their SBE program, the female owner of a WBE-certified specialty contracting business reported not knowing what the SBE program is or what it does. She indicated that despite having actively sought help and advice from a number of sources, no one had ever mentioned to her that the City had any resources available to her. [#10]
- The president of a WBE-certified construction company concluded, “I think that it is really good that the City is going through this [disparity study] process and looking at it from an open perspective and going to take the data, with what it tells them, and have the data drive whatever they decide to do. I think that, at least as a taxpayer, as someone who lives in the city, I’m glad that they’re doing that .... I want to continue to work with Madison.” She continued, “I think that their challenge [is to] balance the need to ensure diversity on their projects, not just with the firms that they work with but in terms of the labor on the project, balance that with not being so overly restrictive or so overly difficult to work with that women- and minority-owned or small business firms don’t want to go through the hassle of dealing with it. They [the City of Madison] have a lot of excessive requirements that other municipalities or even the State doesn’t have.” [#11]
- The female owner of a WBE and SBE certified trucking firm said, “Madison should check their non-minority contractors to make sure they are paying prevailing wages. Only minority business’ payrolls are checked regularly.” [#38]
- A woman representative of a non-profit financing agency recommended that any program designed to promote women- or minority-owned businesses be as specific as possible in its goals and methods. She reported as an example, the LISC [Local Initiatives Support Corporation] ACRE training program in Milwaukee, designed specifically to increase minority participation in construction project management. [#29]
- The African American owner of a non-certified specialty contracting company believes in order to diversify the industry, businesses should be given credit for the percent of minorities [who can do the job] they have on the job. This would help a business develop a good track record. If then, they have a job that the minorities are not trained or skilled to do the work, the business is not penalized for not hiring minorities. [#32]

One minority contractor specifically discussed the City of Madison’s implementation of TIF projects. The president of a minority contracting association said, “Madison makes huge TIF projects happen within the City where developers pitch to the City competing for the people’s money.” He added, “The City could make the TIF projects involve minority contractors as part of the proposal from the developers.” [#7]

**Serving small business in the City of Madison.** A number reported on customer service at the City and how it could be improved.

Some reported that the City of Madison take a more active role in identifying and encouraging small businesses, and improve communications and overall customer service. For example:

- The representative of a workforce development organization suggested that government agencies identify potential business owners from the pool of successful women and minorities in the trades. “This would be a gigantic leap and the percentage of failures is high and has financial risk, but it is a place to start.” [#33]

He added that focusing on people who already do the job is a good way to develop small businesses for women and minorities. [#33]

- A female owner of a WBE-certified specialty contracting business reported that the State of Wisconsin “has a fantastic marketing program” that helps small businesses. She added that “all the City has to do is follow along with that and get the word out. They don’t necessarily have to financially support small businesses, but they should definitely help spread the word [about small businesses and women-owned businesses].” [#10]
- “Too many departments want their say in things, and that makes it difficult to overcome the hurdle [of working with the City]. The City of Madison is not as user-friendly as the private sector,” responded one majority-owned specialty contractor [#T17].
- The owner of a WBE-certified specialty contracting company said that she feels the biggest recommendation she can offer is that when a person’s name is on the application for “contact with questions” to make certain they are knowledgeable, that they are helpful, and that they are customer service oriented. She had an experience when they did their last certification with Public Works that this wasn’t the case. [#12]
- A male representative of a majority-owned contracting firm recommended that the City staff should be more empowered to make decisions rather than having to bring all of their questions to a committee. Sometimes work on a project has to stop until a particular decision is made, which means that parts of a project can grind to a halt if the City representatives a firm is working with can’t make a decision on their own. [#9]
- A majority-owned contractor recommended the need for improved “City of Madison close out procedure.” [#T1]

## **L. Input from City of Madison 2015 Public Meetings and Written Comments**

The public meetings were attended by City of Madison representatives, Keen Independent consultants and interested parties from the business, trades, and association community:

- Lucia Nunez, Director, Department of Civil Rights, City of Madison
- Norm Davis, Affirmative Action Division Manager, City of Madison
- Kate McCarthy, City Clerk, City of Madison
- Dave Keen, Principal, Keen Independent Research LLC
- Renee Lauber, Lauber Consulting
- Stan Davis, Davis Group
- Steve Breitlow, Plumbers 75
- Tim De Master, Iron Workers 383
- Brad Huston, R.G. Huston
- Godwin Amagashe, 100 Black Men
- DeAngelo Jackson, Urban Construction
- Juan Jose Lopez, Latino Chamber of Commerce
- Dave Branson, Building Trades
- Scott Watson, NCSRCC
- Charles Vandergriff, NCSRCC
- Spencer Stats, Plumbers 75
- Jim Vick, Brick Layers Local 63
- Jeff Crocker, IBEW 159
- Bill Clingan, WRTP/Big Stop
- Rachel Krinsky, YWCA
- Paul Jasenski, Common Wealth
- Joe Daniels, Daniels Construction
- Kevin Radcliffe, Attorney, Construction Training

Dave Keen made the presentation of the background, scope, findings, action items, and recommendations of the disparity study. The floor was opened for discussion, questions, comments and suggestions.

**Overall scope of the study.** Several public meeting participants said that would have preferred for the disparity study to examine a broader set of construction activity.

- PMP#1 a black male, representing supplier diversity organization, commented that the study was “narrow” because the study was limited to “construction activities; not construction-related activities.”

PMP#1 went on to say, “The trucking industry is not a construction activity, but a construction-related activity.” He added, “Post-construction cleaning activities are construction-related activities, not construction activities.” PMP#1 said that the scope was too narrow and should be expanded to “ancillary businesses “in the City.

- PMP#1 went on to add that City of Madison should define “construction trades” to include ancillary businesses such as window washers, post-construction cleaning services, etc. (Norm Davis from the City responded that ancillary businesses were addressed in the study and PMP#1’s comments were appreciated.)
- PMP#4, a Hispanic business trade leader and minority construction business owner, offered thanks for the disparity study and added that he wished the scope had been “larger and more extensive.”
- PMP#4 commented that, “he prefers anecdotal information to data.” He added that he was surprised by the data and also, not surprised by the data.
- PMP#5 commented that the time in which the study was done is interesting since some companies were challenged during the economic downturn for many reasons; lack of jobs, financing, staffing, etc. He commented the timing of the study was “unfortunate.”

**PMPs and PWCs discussed challenges they or others have faced as small business owners.**

There were a number of comments from public meeting participants about barriers to minorities and women in the construction industry.

- PMP#4 commented that Latino business owners find too many obstacles or the process is too laborious to [try to get City work].
- PMP#2 indicated that many business owners do not like to perform business functions like certified payrolls. He commented that he must use an accountant to do his payroll.
- PMP#5 commented a big challenge for the trades is the impression that if a young person does not go to college, he/she cannot be successful in life.

- PMP#3 indicated he had attended a meeting where contractors had said they were no longer bidding Madison jobs because the pre-qualification requirements are too cumbersome. He added, “A majority intended to walk away from all Madison projects.”
- PMP#5 commented that horizontal projects [roads, sewers] do not put many tradespeople [sheet metal workers, electricians, etc.] to work.
- PMP#6, a white woman representative of a national organization, remarked in favor of the findings of the study, “Rules other than regulatory are very important”.
- PMP#7, a white male small non-profit housing developer, commented that being “a contractor is one of the most difficult jobs you can imagine.” Contractors must have a trade, be bookkeepers, estimators, file taxes, and market their businesses.
- PMP#10, a white male business representative commented that since Madison is more than 50 percent minority, projects should set goals for residency requirements. Projects go to non-residents and the employment and profits do not stay in the City.
- PWC#3, a majority-owned electrical contractor in business for 25 years said, “I have received bid solicitations from contractors to bid on various public work projects regardless of my business’ capacity to perform and complete the project.” He said, “I’ve complained that there were many contractors that only contacted me because they were required to for public works projects, and that they continuously contact me for public works jobs that I can’t do, while at the same they’re doing significant amounts of private sector work that I can do, that they don’t alert me to.”
- PWC#3 said, “It does not make sense to beat up the larger general contractor for not being able to find a MBE firm that can handle a \$250,000 public work subcontract when there are very few, if any, MBE firms that exist in this region with capacity to perform a \$250,000.00 contract.”
- PWC#3 also discussed the need to establish relationships with prime contractors. He reported, “The smaller, private sector work in the \$10,000-\$100,000 range affords MBEs the opportunity to grow its company without the risks and cost associated with government work. It allows the business relationships to grow, and it puts the MBE contractor into a better position to bid on the public works projects.”
- PWC#4, a majority-owned general contractor, discussed the importance of self-performance. He wrote, “It is of the utmost importance that any new or revised S/M/WBE program does not limit a contractor’s ability to self-perform any work they are qualified to do. It is also of equal importance that the agency overseeing the S/M/WBE program understands the value and impact self-performance has on contractors.”

- PWC#4 discussed the use of a 5 percent advantage as a part of good faith efforts. He said, “The City of Madison cannot force the [subcontractors] to bid all contractors the same amount. Therefore, if the prime contractor does not receive a bid, or receives a bid higher than the 5 percent, that contractor is not obligated to utilize the S/M/WBE firm and thus avoiding the 5 percent that would have to be added to a contractor’s bid in order to comply with the ‘good faith efforts.’ Sometimes the bids between contractors are very close and that extra amount added could make a difference in obtaining the low bid and then construct the project. It would be very frustrating to lose a bid just because we treated an S/M/WBE fairly when they bid us, but a ‘bad character’ prime bidder previously took advantage of an S/M/WBE and the subcontractor would not bid them, or bid them at a price that was outside the 5%.”
- PWC#4 also expressed concern over bid shopping. He said, “There are instances in which large contractors apply downward pressure on subcontractors to reduce their price in order to receive a subcontract agreement and/or stay on a job after it has been awarded. The City of Madison needs to ensure that there is legitimate business reason and documentation for altering subcontractors on projects, especially when that subcontractor is of S/M/WBE status.” He went on to describe an instance when he lost a project due to bid shopping in January of 2014. “We were only a few thousand dollars above the awarded contractor. While finalizing our bid we were able to take the bid of an electrical SBE contractor who we work with on many projects. The electrical SBE bid other contractors as well, including the contractor who was awarded the project. However, the awarded contractor applied downward pressure on the SBE electrical contractor to lower his price. Desperate for work, he complied and the amount of his subcontract was reduced.”
- PWC#4 expressed concern over the use of flow through shams. He said, “Businesses that simply flow through work in order to allow firms to reach certain target percentage utilization should be under strict scrutiny of the City of Madison . . . . In order to receive credit for utilizing an S/M/WBE business, the full percent of work should be completed by employees of that company and not simply passed through to another entity. This type of flow through sham businesses should receive a maximum 60% credit (similar to suppliers).”

**PMPs expressed barriers with access to capital and timely payments for small business owners.** Several public meeting participants pointed out the barriers related to access to capital.

- PMP#4 commented that for Latino contractors and women owned businesses the biggest challenge is “financing, financing, financing.”
- PMP#2 is an African American male business owner who has worked with City of Madison on projects. He commented that working capital is very hard to obtain. He has put his personal finances into his business “to survive.”
- PMP#2 said he has experienced difficulty getting paid for the work he performs; he waits “30 days and sometimes as long as 90 days.”

- PMP#2 commented that when he began his business, if he held a City or residential contract, he could have a mobilization clause from his bank. The financial funds draw would be beneficial in operating the business until the first funds were available. This service from the banks ended with the economic downturn and hurt small businesses with their cash flow.
- PMP#2 said he would like the “banks doing business on a City project would incorporate a bank mobilization service to the contractors to help small businesses in the minority communities with working capital.”
- PMP#2 added that he experiences difficulty with meeting payroll and expenses. He indicated delays could put a business owner out of business.
- PMP#2 expressed concerns that some general contractors receive their funds from the City and State and “sit on the money” before paying the subcontractors. PMP#2 added that the idea from the study of improving cash flow would help small businesses “tremendously.”
- PMP#1 added that Milwaukee DOT has a state bank where contractors have gotten loan mobilization clauses for doing business. He suggested that Madison review the possibility of a similar program.
- PMP#4 added that Latino business owners do not have the capital to “compete” to get City projects.

**Value and need of business assistance programs.** Several public meeting participants commented on the need for business assistance programs.

- PMP#2 said that other ideas from the study such as “mentoring small businesses” with a City coach are a good idea and would be helpful. PMP#2 added that he is involved in getting more minorities involved in business via an Urban League effort at the Boys & Girls Club. PMP#2 indicated that he had been mentored by another business owner and it was very helpful.
- PMP#6 commented that training and technical assistance is important. She expressed concern that no one should “work in silos” but join together to meet goals.

**Workforce challenges were discussed by PMPs and PWCs.** There was a wide range of discussion around opportunities for minorities and women in construction trades.

- PMP#3, a white male, commented that the ironworker industry is a “performance based group.” He reported that they operate in extreme conditions and it takes a “special person” to do the work. He added, “It is difficult to recruit anyone, let alone minorities.”

- PMP#1 commented that the unions are being selfish. He indicated that union ironworkers cannot be in their 50's and 60's and perform ironwork. He went on to say that the unions need younger workers who can pay dues for many years to come.
- Responding to PMP#3, PMP#1 commented, "I think everyone comes to the table with a short-sighted mentality." "Union workers a generation ago did not come with skill sets other than 'Uncle John was there.'" PMP#1 added, "In the minority community we never had an Uncle John." "There is a need to find creative ways to get people [minorities] into unions and apprenticeship programs."
- PMP#1 commented, "I am baffled that unions cannot get women and minorities in their ranks...why? I don't understand that unions cannot tell people to take a look at this [get women & minorities interested in the union work]." PMP#1 said, "I think the people in the construction industry have done a dismal job in trying to recruit people [minorities and women]."
- PMP#1 added, "Madison cannot do it alone [find opportunities for minorities and women] and it needs to be a collaborative effort by all in the community."
- PMP#4 said that some business owners do not invest enough in their workforce or challenge the City or State to make the investments in apprenticeship programs.
- PWC#4 discussed non-union discrimination. He said, "Racial and gender discrimination has no place in society nor our industry, yet it still exists. Compounding on this discrimination for most S/M/WBE firms is the additional discrimination based on union status. Most of the S/M/WBE subcontractors also fight non-union discrimination, especially on non-City of Madison projects. This type of discrimination is vibrant around the state, especially around the Madison area. We have conducted business in the Madison area for several decades and, therefore, can speak to the discrimination experienced by all non-union contractors."
- PWC#2 mentioned that contractors were complaining about the availability of women in the trades. He brought attention to the "Southwest Area Construction Apprentice Snapshot," a monthly report produced by the Department of Workforce Development for the Wisconsin Department of Transportation. The report includes the number of female and minority apprentices in each trade, by county. He said, "The minority composition of the apprentice work force matches the disparity study numbers well but the percent women is way off."
- PMP#5, a white male member of a trade union, commented that children are not entering the trade unions, but going to college instead. He added, children are no longer taught wood shop, "nothing is being done to expose children to the trades."
- PMP#5 added that children going into the trades cannot pass a 7th grade reading or math test.



- PMP#5 expressed frustration at not only having to recruit young people into the trades, but to tutor them once they join a trade. He does not feel tutoring should be the job of a union, though they are now doing it, something not needed 30 years ago.
- PMP#6 commented that the City taking a leadership role in creating technical assistance is very important.
- PMP#7 stated that the mentoring suggestions are good and “heartwarming”. He is familiar with Fresh Start where at risk youths are mentored, trained, and assisted with GED completion. He said skills that are learned for futures in construction are math, engineering, and business, the critical skills needed in the industry.
- When asked if there are benefits other than “heartwarming?” PMP#7 responded, “Yes, tangible outcomes. They get into apprenticeship programs and get hired.”
- PMP#8, a representative from a non-profit construction training organization believes apprenticeship programs are key to success in the industry. This organization works with a grant from Chicago Women in the Trades to recruit and retain more women in the trades.
- PMP#8 is in favor of expanding the strength that exists in the City and continue to work in that capacity with regards to the trades, adding, “Support and money can strengthen what already is in place.”
- PMP#8 added there is a need for training space. Physical large locations are needed where tools, space and supplies can be shared for training programs.
- PMP#8 commented that programs for driver’s license recovery are needed so people can get to work; not lose their job if they lose their driver’s license.
- PMP#9, a white male member of a trade’s council, indicated that his group attempts to get women and minorities into the trades apprenticeships. When asked by Lucia Nunez whether he knows about any school district involvement in such programs, PMP#9 said “high schools push kids to college.”
- PMP#8 added that schools are participating in apprenticeship programs in the trades. PMP#9 said that his council invites trades to demonstrations for schools and the schools are getting more receptive to exposing children to trades careers.
- PMP#10 said that contractors who get projects from the City should be required to hire, train, and keep employees. They should not be “dropped” once the job is done. Contractors who “play by the rules” should gain benefits for their efforts.
- PWC#1 discussed the expansion of the Madison College Construction & Remodeling (C&R) Program, including opportunities for the City of Madison to provide scholarships to low income, minority, and women students.